THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through the Legislative Session of 1969

Prepared under the Supervision of the Department of Justice of the State of North Carolina

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

Under the Direction of

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Volume 1B

1969 Replacement Volume

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Scope of Volume

Statutes:

Full text of Chapters 2 through 14 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1969 heretofore contained in 1953 Recompiled Volume 1B of the General Statutes of North Carolina and the 1969 Cumulative Supplement thereto.

Annotations:

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

North Carolina Reports volumes 1-275 (p. 341).
North Carolina Court of Appeals Reports volumes 1-5 (p. 227).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-410 (p. 448).
Federal Supplement volumes 1-298 (p. 1200).
United States Reports volumes 1-394 (p. 575).
Supreme Court Reporter volumes 1-89 (p. 2151).
North Carolina Law Review volumes 1-47 (p. 731).
Wake Forest Intramural Law Review volumes 2-5.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R. ..... Potter's Revisal (1821, 1827)
R. S. ..... Revised Statutes (1837)
R. C. ..... Revised Code (1854)
C. C. P. ..... Code of Civil Procedure (1868)
Code ..... Code (1883)
Rev. ..... Revisal of 1905
C. S. ..... Consolidated Statutes (1919, 1924)

Preface

Volume 1B, previously recompiled in 1953, accumulated a substantial supplement including complete revision of the provisions on the courts. The volume is being reissued to incorporate the amendments in the main text.

Since all but seventeen counties are currently governed by the provisions of Chapter 7A and the District Court system and since the other seventeen counties will go under the new system on the first Monday in December, 1970, statutes applicable only to the old court system or expressly for a limited time, such as G. S. 7-44 and 7-45, were moved from the Permanent Volume to an Interim Supplement. The reference "See Supplement" will direct the reader to the text of the section or, after the 1971 Supplement is issued, to a citation of the section's repeal or expiration.

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

Responsibility for the final editorial decisions rests with this Office. We welcome your criticism and suggestions and request that you send them to the Attorney General.

ROBERT MORGAN
Attorney General

December 15, 1969.

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The Office.

§ 2-1. Judge of probate abolished; clerk acts as judge.—The office of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be performed by the clerks of the superior court as clerks of said court.

In the exercise of his duties in matters relating to his probate jurisdiction, any

clerk of the superior court may sign his name as "Clerk Superior Court, Ex Officio Judge of Probate." (Code, s. 102; Rev., s. 889; C. S., s. 925; 1951, c. 158.)

Cross Reference. — As to powers and jurisdiction generally, see §§ 1-7, 1-13, 1-393, 1-406, and 2-16.

History of Clerk's Authority as Judge of Probate. — See In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Jurisdiction. — Under this section the duties of the probate judge devolve upon the clerk of the superior court, and in such case he has a special jurisdiction which is distinct and separate from his general duties as clerk. Brittain v. Mull, 91 N.C. 498 (1884); Helms v. Austin, 116 N.C. 751, 21 S.E. 556 (1895).

The clerk acts not as the servant or ministerial officer of the superior court or as and for the court, but as an independent tribunal of original jurisdiction. Edwards v. Cobb, 95 N.C. 5 (1886).

The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. Britain v. Mull, 91 N.C. 498 (1884).

The clerk has jurisdiction of a proceeding by a ward against his guardian for an account. McNeill v. Hodges, 105 N.C. 52, 11 S.E. 265 (1890). See also Rowland v. Thompson, 65 N.C. 110 (1871).

The clerks of superior courts have jurisdiction of proceedings for the removal of executors and administrators. Edwards v. Cobb, 95 N.C. 5 (1886).

Although the clerks of the superior courts have no equity jurisdiction, they are given probate jurisdiction by this section, and in the exercise of their probate jurisdiction they may hear and rule on petition of an executor for authorization to operate the estate's farms to preserve the property pending the determination of caveat proceedings. Hardy & Co. v. Turnage, 204 N.C. 538, 168 S.E. 823 (1933).

The jurisdiction of clerks of court with reference to the administration of estates of deceased persons is altogether statutory, and the clerk's special probate jurisdiction is separate and distinct from his general duties and jurisdiction as clerk. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

§ 2-2. Election; term of office.—A clerk of the superior court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general assembly. Clerks of the superior court shall hold office for four years. (Const., art. 4, ss. 16, 17; Rev., s. 890; C. S., s. 926.)

Appointee. — When there is a vacancy and the judge appoints one to fill that vacancy, such appointee holds office only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 137 N.C. 617, 50 S.E. 319 (1905), overruling Deloatch v. Rogers, 86 N.C. 358 (1882).

§§ **2-3, 2-4**: See Supplement.

§ 2-5. Oath of office.—The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county. (C. C. P., s. 139; Code, s. 74; Rev., s. 891; C. S., s. 930.)

Cross References. — As to oath, see §§ 11-6, 11-7, 11-11. See also, §§ 2-5, 14-229. As to oath of deputy, see § 2-13.

§ 2-6. Vacancy; judge of district fills.—(a) Otherwise than by Expiration.—In case the office of clerk of a superior court for a county becomes vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

(b) Failure to Qualify.—In case any clerk fails to give bond and qualify as required by law, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify.

(c) Resignations.—Any clerk of the superior court may resign his office to the judge of the superior court residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy. (Const., art. 4, s. 29; C. C. P., s. 140; Code, ss. 76, 78; Rev., ss. 892, 893, 895; C. S., s. 931.)

Cross References.—As to failure to give satisfactory bond, see § 109-8. As to bond of successor, see § 109-9. As to wilfully failing to discharge duties as ground for removal, see § 14-230.

Commissioners' Duty.—A failure on the part of the clerk to give bond must be ascertained by the commissioners before the judge is authorized to declare a vacancy. And in accepting or rejecting the bond tendered, the court cannot interfere in the exercise of their discretion. Buckman v. Commissioners of Beaufort, 80 N.C. 121 (1879).

Conflicting Claimants.—Where there are conflicting claimants for a vacant office a court must act upon the prima facie evidence of right and admit the one posessing it, leaving the other to pursue the proper legal remedy for the recovery of possession. Clark v. Carpenter, 81 N.C. 309 (1879).

§ **2-7. Removal for cause.**—Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this State. (1868-9, c. 201, s. 53; Code, s. 123; Rev., s. 894; C. S., s. 932.)

Cross References. — See Constitution, Art. VI, § 8; Art. XIV, § 7. As to restoration of citizenship, see § 13-1.

§ **2-8. Office and equipment furnished.**—The requisite stationery, records, furniture and filing cases and devices for official use must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book, unless there is a cross-index of such book required by law to be kept. These books must, at all proper times, be open to the inspection of any person. (C. C. P., s. 428; Code, ss. 82, 84, 113; Rev., s. 896; C. S., s. 933.)

§ **2-9. Solicitor to examine and report on office.**—The solicitor of the judicial district shall inspect the office of the clerk as often as he shall deem it necessary, and shall make written report of his inspection to the court. (C. C. P., s. 147; Code, s. 88; Rev., s. 897; 1917, c. 81, s. 1; C. S., s. 934; 1935, c. 423.)

ARTICLE 2.

Assistant Clerks.

§§ **2-10 to 2-12**: See Supplement.

ARTICLE 3.

Deputies.

§§ **2-13 to 2-15**: See Supplement.

ARTICLE 4.

Powers and Duties.

§ **2-16. Powers enumerated.**—Every clerk has power—

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

(2) To administer any and all oaths, including oaths of office to any and all

public officers of this State, and to take acknowledgment of the execution of all instruments or writings.

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

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

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

(6) To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the State.

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

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

(9) To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

(10) To enter judgment in any suit pending in his court in the following instances: judgment of voluntary nonsuit in any case where judgment is permitted by law; and judgment in any suit by consent of parties.

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

(12) See Supplement.

(13) To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

(14) To take proof of wills and grant letters testamentary and of administration.

(15) To revoke letters testamentary and of administration.

(16) To appoint and remove guardians of infants, idiots, inebriates and lunatics.

(17) To audit the accounts of executors, administrators, collectors, receivers, commissioners, guardians, and attorneys in fact when required by G.S. 47-115.1 (h).

(18) To exercise jurisdiction conferred on him in every other case prescribed by law. (C. C. P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C. S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1; 1961, c. 341, s. 2.)

Cross References. — As to acknowledgments, see § 47-1. As to depositions, see §§ 8-74 through 8-84. As to process, see §§ 1-303, 1-305, 1-307, 1-313. As to use of copies of court papers in evidence, see § 8-34. As to probate, see §§ 28-1, 28-2, 31-17, 47-1, 47-14, 47-37. As to revocation of letters testamentary and of administration, see §§ 28-31, 28-32, 28-46. As to guardians, see §§ 33-1 through 33-55. As to accounts of executors, etc., see §§ 1-406, 28-117, 28-121, 28-135, 28-136, 33-41. As to reports to Commissioner of Revenue, see § 105-22. As to power of clerk to discharge insolvent debtors when convicted in justice of peace court, see § 23-25. As to fixing compensation of commissioners for division of lands, see § 46-7.1. As to clerk acting as temporary guardian of children of certain service men, see § 33-67. As to duty of clerk to name successor to trustee in a deed of assignment for benefit of creditors, see § 23-4. As to requirement of being present at the opening of lock boxes of decedents, see § 105-24. For "color of his office" construed, see note to § 2-3. As to clerks acting as notaries, see § 10-3.

Legislature May Take Away or Modify Powers.—The powers and duties of clerks enumerated in this section are given and fixed by legislative enactment, and there is no constitutional barrier to the legislature's taking away, adding to, or modifying them; or authorizing them to be exercised and performed by another. In re Barker, 210 N.C. 617, 188 S.E. 205 (1936).

Jurisdiction—Limited.—The clerk of the superior court is a court of very limited jurisdiction. Russ v. Woodard, 232 N.C.

36, 59 S.E.2d 351 (1950). Such court has only such jurisdiction as is given by statute. It has no common-law or equitable jurisdiction. McCauley v. McCauley, 122 N.C. 288, 30 S.E. 344 (1898).

Same—Corrections. — The clerk has the jurisdiction to correct a mistake in a partition proceeding. Wahab v. Smith, 82 N.C. 232 (1880); Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

Or in a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, he has the right to set aside the sale and order a resale by showing proper cause. Lovinier v. Pearce, 70 N.C. 168 (1874).

Same—Administrators. — The clerk has the power, for good and sufficient cause, to remove an administrator; or for like cause, as necessarily equivalent, to permit him to resign his trust. Murrill v. Sandlin, 86 N.C. 54 (1882); Tulburt v. Hollar, 102 N.C. 406, 9 S.E. 430 (1889).

It is thus incumbent on the probate judge (now the clerk) to make inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer is to be exercised. Murrill v. Sandlin, 86 N.C. 54 (1882).

Same—Accounts. — The jurisdiction for auditing accounts of executors, administrators, etc., conferred upon the clerk is an ex parte jurisdiction of examining the accounts and vouchers of such persons, allowing them commissions, etc., as formerly practiced, and does not conclude legatees, etc., or affect suits inter partes upon the same matters. Heilig v. Foard, 64 N.C. 710 (1870).

The words, "audit the account of executors, administrators and guardians," have reference to the duty of examining accounts filed by executors, etc., to see that the account of charges corresponds with the inventories, passing upon the vouchers and striking a balance, after allowing commissions, as under the existing laws. Heilig v. Foard, 64 N.C. 710 (1870).

Vacating, etc., Decrees or Orders—Fixing Time for Hearings. — Within his jurisdiction the clerk of the superior court has the same power as courts of general jurisdiction to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, and to fix time for hearings. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Customary Use of Subpoena Duces Tecum.—Attorneys have customarily used the subpoena duces tecum only for the purpose for which it was intended, i.e., to require the production of a specific document or items patently material to the inquiry, or as a notice to produce the original of a document. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Issuance of Subpoena Duces Tecum.—It is the long-established practice of clerks of court to issue subpoenas duces tecum as a matter of course upon the oral request of counsel. The issuance of the subpoena is treated merely as a ministerial act which initiates proceedings to have the documents or other items described in the subpoena brought before the court. At the trial, the court will pass upon the competency of the evidence unless the subpoena has been quashed prior thereto. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

The law will not permit a fishing or ransacking expedition either by subpoena duces tecum or a bill of discovery. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

For comprehensive treatment of subpoena duces tecum, see Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Probate of Wills.—This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. Brissie v. Craig, 232 N.C. 701, 62 S.E.2d 330 (1950); Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

The power of a court upon a proper showing to correct its records and supply an inadvertent omission cannot be doubted. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

Appeals.—In appeals from the clerk, in that class of cases of which he has jurisdiction in his capacity as clerk, as given under this section, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex parte Spencer, 95 N.C. 271 (1886).

Applied in In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966); Braddy v. Pfaff, 210 N.C. 248, 186 S.E. 340 (1936).

Cited in Edwards v. McLawhorn, 218 N.C. 543, 11 S.E.2d 562 (1940).

§ 2-16.1. Validation of oaths administered by clerks.—The act of any clerk of the superior court in administering any oath prior to the ratification of this section, when such was not necessary in the exercise of the powers and duties

of his office, is hereby ratified and validated; provided, however, that nothing herein contained shall affect pending litigation. (1949, c. 57, s. 2.)

§ **2-16.2. Validation of oaths administered to public officers.** — All official oaths heretofore administered to public officers by the clerks of the superior courts of this State are hereby, in all respects, ratified, confirmed and validated. (1951, c. 28, s. 2.)

§ **2-17. Disqualification to act.**—No clerk can act as such in relation to any estate, proceeding or civil action—

(1) If he has, or claims to have, an interest by distribution, by will, or as creditor, or otherwise.

(2) If he is so related to any person having or claiming such interest that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him.

(3) If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or noncupative will; but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

(4) If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court.

(5) If he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate. (C. C. P., s. 419; 1871-2, c. 196; Code, s. 104; Rev., s. 902; C. S., s. 939; 1935, c. 110, s. 1.)

Cross References. — As to clerk's disqualification to be appointed to sell real estate, see § 46-31. As to probate where clerk is a party, see § 47-7. As to probate of will when clerk interested in property disposed of, see § 31-12. As to validation of orders of registration, see § 47-61.

Clerk Interested.—The clerk is disqualified, both by common-law rules and by this section, to act in any cause wherein he is interested. Gregory v. Ellis, 82 N.C. 225 (1880); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890); Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

The probate of a deed by a clerk interested therein is a nullity. Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

And where he is personally interested in the commissions to be allowed the executors, he is excluded from jurisdiction. Barlow v. Norfleet, 72 N.C. 535 (1875).

Same—Judicial and Ministerial Acts.—The act of "admitting to probate" is a judicial act, and a clerk is prohibited from acting on a deed or deed of trust in which he is grantor or grantee. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890); Freeman v. Person, 106 N.C. 251, 10 S.E. 1037 (1890); Piland v. Taylor, 113 N.C. 1, 18 S.E. 70 (1893); Norman v. Ausbon, 193 N.C. 791, 138 S.E. 162 (1927).

But the issuing of a warrant in attachment, or an order for seizure of property in claim and delivery, are ministerial acts, and can be performed by a deputy, or even by the clerk, in a case to which he is a party. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

Nor is a clerk incompetent to take acknowledgment of the execution of a deed because he is a subscribing witness to the document. He cannot take proof of a deed of which he is the subscribing witness, because he cannot administer oath to himself. Trenwith v. Smallwood, 111 N.C. 132, 15 S.E. 1030 (1892).

And it has been the practice in this State for clerks to issue process either for or against themselves. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

Clerk Related to Party.—A clerk is prohibited from acting as such in relation to any estate or proceeding if he is so related to any person having, or claiming to have, such interest that he would by reason of such relationship be disquali-

fied as a juror. Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

But probate and private examination taken before an officer are not invalid simply because he is related to the parties. McAllister v. Purcell, 124 N.C. 264, 32 S.E. 715 (1899).

§ 2-18. Prior orders and judgments validated.—In all cases where the clerk was disqualified to act in relation to a civil action, in which the procedure as prescribed and set out by §§ 2-19, 2-20 and 2-21 was followed, all orders and judgments rendered in such civil actions by the judge or other clerk are hereby validated as fully and to the same extent as if this section had at such time been in force; provided, this section shall not apply in such cases if an action has prior to March 20, 1935, been instituted attacking such order or judgment. (1935, c. 110, s. 3.)

§ 2-19. Waiver of disqualification.—The parties may waive the disqualification specified in subdivisions (1), (2), (3) and (5) of § 2-17 and upon filing in the office such waiver in writing, the clerk shall act as in other cases. (C. C. P., s. 420; Code, s. 105; Rev., s. 903; C. S., s. 940.)

Written Waiver. — The waiver must be in writing and made when the opposing parties are present and capable of objecting. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

Probate a Nullity. — When the probate of a deed is a nullity because the clerk was disqualified to act the defect is not cured by the approval of the final decree, under which it is made, by the judge of the superior court. Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

§ 2-20. Disqualification unwaived; cause removed or judge acts.—When any of the disqualifications specified in this chapter exist, and there is no waiver thereof, or when the disqualification does not permit of waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district; or may apply to the judge to make and render either in vacation or term time all necessary orders and judgments in any proceeding where the clerk is disqualified, and the judge in such cases is hereby authorized and empowered to make and render any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceeding. (C. C. P., s. 421; Code, s. 106; Rev., s. 904; 1913, c. 70, s. 1; C. S., s. 941.)

Cited in In re Estate of Smith, 226 N.C. 169, 37 S.E.2d 127 (1946).

§ 2-21. Disqualification at time of election; judge acts.—In all cases where the clerk of the superior court is executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section [§ 2-20] is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it is his duty to order the proper record to be made by the clerk, and the accounts to be filed in court. (1871-2, c. 197; Code, s. 107; Rev., s. 905; C. S., s. 942.)

Action.—The proper practice, in a proceeding against an administrator who at the time was elected clerk, seems to be to make the summons returnable before him, and then transfer the whole proceeding before the district judge, who will make the necessary orders in the premises. Wilson v. Abrams, 70 N.C. 324 (1874).

§ 2-22. Custody of records and property of office.—(a) Receipt from Predecessor.—Immediately after he has given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk

refuses or fails within a reasonable time after demand to deliver such records, books, papers, moneys and property, he is liable on his official bond for the value thereof.

(b) Transfer to Successor; Penalty.—Upon going out of office for any reason, any clerk of the superior, inferior, or criminal court shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate) all records, documents, papers, and money belonging to the office. And the judge appointing any clerk to a vacancy in the clerkship of the superior court may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. In case any clerk going out of office as aforesaid, or other person having the custody of such records, documents, papers, and money as aforesaid, fails to transfer and deliver them as herein directed, he shall forfeit and pay to the State one thousand dollars, which shall be sued for by the prosecuting officer of that court. (R. C., c. 19, s. 14; C. C. P., s. 142; Code, ss. 81, 124; Rev., ss. 906, 907; C. S., s. 943.)

Cross Reference. — As to failure to deliver as a misdemeanor, see § 14-231.

Order and Demand. — A person, duly elected clerk of the superior court by the people, needs no order from any person or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring superior court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the officer. Peebles v. Boone, 116 N.C. 58, 21 S.E. 187 (1895).

But where the judge places some person temporarily in charge of the office until the regular appointment is made, it is then necessary for the new clerk to have an order from the judge, directing the person temporarily in charge, to deliver the possession of his office to such clerk. Peebles v. Boone, 116 N.C. 58, 21 S.E. 187 (1895).

Right of Action.—The right of clerk of a superior court to bring an action against his predecessor on the latter's official bond to recover the records, money, etc., in his hands, does not rest on any injury done to the plaintiff, but on the ground that the law requires that each successive clerk shall receive from his predecessor all the records, money and property of his office. Peebles v. Boone, 116 N.C. 58, 21 S.E. 187 (1895).

Remedy.—When an outgoing clerk fails to deliver the property of his office, as herein provided, the successor's remedy is by attachment and suit for the penalty. O'Leary v. Harrison, 51 N.C. 338 (1859).

Two Distinct Remedies Provided.—Our statutes provide two separate and distinct remedies—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the clerk, as provided for in § 109-34, and one in behalf of the clerk against his predecessor in office to recover possession of records, books, papers, and money in the hands of the outgoing clerk by virtue or under color of his office, as provided for in this section. State ex rel. Underwood v. Watson, 223 N.C. 437, 27 S.E.2d 144 (1943); State ex rel. Underwood v. Watson, 224 N.C. 502, 31 S.E.2d 465 (1944).

Where Clerk Sought to Be Removed Made Affirmative Allegations.—In an action by the clerk of the superior court against his predecessor in office, for possession of records, books and funds, under this section, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegation to like effect, there was error in allowing a motion to strike such affirmative allegations. State ex rel. Underwood v. Watson, 223 N.C. 437, 27 S.E.2d 144 (1943).

When Liability Ceases.—When a former clerk delivers to his successors all the proceeds, etc., of his office, his official duties, powers, and liabilities cease. Gregory v. Morisey, 79 N.C. 559 (1878).

§ **2-23. Unperformed duties of outgoing clerk.**—(a) Performance Secured.—When, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk has failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk.

(b) Liability on Outgoing Clerk's Bond.—Such portion thereof as may be paid by the county may be recovered by the county, by suit on the official bond of the defaulting clerk, to be brought on the relation of the board of commissioners of the county. (1844, c. 5, s. 6; R. C., c. 19, s. 19; Code, s. 87; Rev., s. 908; C. S., s. 944.)

Proceeding Recorded. — Where an outgoing clerk has failed to record a proceeding, the court has the power, and it is its duty, on the application of an interested party, to have such proceeding recorded as of its proper date. Foster v. Woodfin, 65 N.C. 29 (1871).

§ 2-24. Location of and attendance at office.—The clerk shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, Sundays and holidays excepted, from nine o'clock A.M. to three o'clock P.M., and longer when necessary for the dispatch of business; and personally every Monday for the transaction of probate business, and on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit an amount not exceeding two hundred dollars, said amount to be fixed and determined by the resident judge of his district or the judge presiding in said district upon the complaint of any citizen. Provided, that the clerk's office in the respective counties may observe such office hours and holidays as authorized and prescribed by the board of county commissioners for all county offices. (C. C. P., s. 141; 1871-2, c. 136; Code, ss. 80, 114, 115; Rev., s. 909; C. S., s. 945; 1939, c. 82; 1941, c. 329; 1949, c. 122, s. 1.)

Local Modification.—Brunswick: 1955, c. 1259; Currituck, Moore, Richmond: 1939, c. 82, s. 3; Gates: 1959, c. 254; Wake: 1955, c. 1168.

Forfeiture of Office.—A single failure on the part of a clerk to keep his office open on Monday from 9 A.M. to 4 P.M., for the transaction of probate business (unless such failure is caused by sickness), is a distinct and complete cause for forfeiture of his office. People ex rel. Att'y Gen. v. Heaton, 77 N.C. 18 (1877).

Quo Warranto.—The forfeiture of office incurred by a superior court clerk as herein provided by failing to keep open his office on Monday, can only be enforced by proceedings in the nature of quo warranto. People ex rel. Att'y Gen. v. Heaton, 77 N.C. 18 (1877); State v. Norman, 82 N.C. 687 (1880).

Closing Office on Easter Monday. — When §§ 1-593, 103-4, 103-5 and this section are construed together, the closing of a county clerk's office on Easter Monday, pursuant to resolution by the board of county commissioners in which Easter Monday was designated a holiday, a plaintiff, if otherwise entitled to commence an action on Easter Monday is entitled to commence the action on the next day the courthouse is open for business. Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962).

Cited in Asheville Showcase & Fixture Co. v. Restaurant Associates, 3 N.C. App. 74, 164 S.E.2d 63 (1968).

§ 2-25. Obtaining leave of absence from office.—Upon application of any clerk of the superior court to the judge of the superior court residing in the district in which the clerk resides, the judge of the superior court riding the district or judge of superior court presiding in the county of said clerk, showing good and sufficient reason for the clerk to absent himself from his office, the judge may issue an order allowing him to absent himself from his office for such time as the judge may deem proper. But he shall at all times leave a competent deputy in charge of his office during his absence. The order of the judge granting leave of absence shall be filed and recorded in the office of the clerk of the county in which the clerk resides. Provided, it shall not be necessary when a clerk has an assistant clerk to secure an order permitting a leave of absence; and, provided further, it shall not be necessary when a clerk has a deputy clerk, but no assistant clerk, to secure an order permitting a leave of absence unless such absence extends more than forty-eight hours. (1903, c. 467; Rev., s. 910; C. S., s. 946; 1935, c. 348; 1949, c. 122, s. 2.)

§§ **2-26, 2-27**: See Supplement.

§ **2-28**: Repealed by Session Laws 1969, c. 80, s. 6, effective July 1, 1969.

§§ **2-29 to 2-36**: See Supplement.

§ **2-37. To keep fee bill posted.**—Every clerk shall keep posted in his office in some conspicuous place the fee bill, for public inspection and reference, under a penalty of one hundred dollars for such neglect, to be paid to any person who will sue for same. (Code, s. 3740; Rev., s. 2774; C. S., s. 947.)

Local Modification. — Forsyth: 1961, c. 401.

§ **2-38**: See Supplement.

§ **2-39. To file papers in proceedings.**—The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment. All such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor. (C. C. P., ss. 146, 426; Code, ss. 86, 111; Rev., s. 912; C. S., s. 949.)

Cross Reference. — As to custody and transfer to successor, see § 2-22.

Filing Papers. — The fee allowed the clerk for "filing papers," is allowed for the single act of filing all the papers when the case is closed, as herein provided. Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

§ **2-40. To keep records of his office; obtaining originals or copies.**—He shall keep in bound volumes a complete and faithful record of all his official acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the parties; but parties may at all times have copies upon paying the clerk therefor. (C. C. P., s. 143; 1868-9, c. 159, s. 4; Code, s. 82; Rev., s. 913; C. S., s. 950.)

Clerk's Record.—Clerks are required to keep a record, in which shall be recorded all orders and decrees passed in their office, which they are required to make in writing. Gulley v. Macy, 81 N.C. 356 (1879).

§ **2-41. To endorse date of issuance on process.**—The clerk shall note on all precepts, process and executions the day on which the same shall be issued; and the sheriff or other officer receiving the same for execution shall in like manner note thereon the day on which he shall have received it, and the day of the execution; and every clerk, sheriff or other officer neglecting so to do shall forfeit and pay one hundred dollars. (Code, s. 100; Rev., s. 914; C. S., s. 951.)

Cross Reference.—As to who may sue for and recover penalties, see § 1-58.

Action in Name of State. — An action brought against a sheriff, for the penalty herein provided for neglecting to note upon process the day on which it was received, should be in the name of the State as plaintiff. Duncan v. Philpot, 64 N.C. 479 (1870).

Final Process.—This section has no reference to the final process. Wyche v. Newsom, 87 N.C. 142 (1882). See Person v. Newsom, 87 N.C. 142 (1882).

Applied in State Board of Educ. v. Gallop, 227 N.C. 599, 44 S.E.2d 44 (1947).

§ **2-42. To keep books or microfilm; enumeration.**—Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours; provided, however, where the board of county commissioners has consented to the microfilming of records, it shall not be necessary to keep books

of the records that are so microfilmed, but the microfilm of the records shall be kept and shall be open to inspection of the public during regular office hours:

(1) Summons docket, which shall contain a docket of all writs, summonses or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

(2) Judgment docket, which shall contain a note of the substance of every judgment and every proceeding subsequent thereto.

(3) Civil issue docket, which shall contain a docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

(4) Cross-index to judgments, which shall contain a direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and also of all final judgments in civil actions rendered in other courts and authorized by law to be entered on his judgment docket. Pending the docketing of judgments in the judgment docket and cross-indexing the same as herein provided for, the clerk shall keep a temporary index to all judgments entered in his said court or received in his court from any court for docketing; and he shall immediately index all judgments rendered in his court or received in his court for docketing, and index the names of all parties against whom judgments have been rendered or entered alphabetically in said temporary index, and which temporary index shall be preserved and open to the public until said judgment shall have been docketed in the judgment docket and cross-indexed in the permanent cross-index to judgments, as herein provided for.

(5) Cross-index of Parties to Actions.—The clerk shall keep an alphabetical index and cross-index of all parties to all civil actions and special proceedings. Upon the issuance of summons or commencement of an ex parte proceeding he shall forthwith index and cross-index the names of all parties to such action or proceeding. When an order is made that any new or additional party be brought into an action or proceeding his name shall forthwith be indexed and cross-indexed by the clerk. The index shall be so arranged that beside each name shall appear a reference to the book and page whereon the action or proceeding will be found upon the summons docket, civil issue docket, special proceeding docket, and judgment docket, or such of said dockets as carry reference to said action or proceeding; and immediately upon said action or proceeding being entered upon any of said dockets the clerk shall cause said index to carry reference thereto upon the index and cross-index as to every party.

(6) Record of lis pendens, which shall be cross-indexed and shall contain the name of the court in which the action has been commenced or is pending, the names of the parties to the action, the nature and purpose of the action, sufficient description of the real property to be affected to enable any person to identify and locate the same, the day and hour of entry on the cross-index, and a description of the place where such notice is filed.

(7) Criminal docket, which shall contain a note of every proceeding in each criminal action. Judgments in criminal cases shall be indexed in the names of the defendants but no cross-index in the name of the State shall be required.

(8) Minute docket of superior court, which shall contain a record of all proceedings had in the court during term, in the order in which they

occur, and such other entries as the judge may direct to be made therein.

(9) Special proceedings docket, which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

(10) Minute docket of proceedings before clerk, which shall contain a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

(11) Record of wills, which shall contain a record of all wills, with the certificate of probate thereof.

(12) Record of appointments, which shall contain a record of appointments of executors, administrators, guardians, collectors, and attorneys in fact appointed pursuant to G.S. 47-115.1, with revocations of all such appointments; and on which shall be noted all subsequent proceedings relating thereto.

(13) Record of orders and decrees, which shall contain a record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book.

(14) Record of accounts, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of executors, administrators, collectors, trustees under assignments for creditors, guardians, and attorneys in fact when required by G.S. 47-115.1 (h), as audited by him from time to time.

(15) Record of settlements, which shall contain a record of settlements, in which must be entered the final settlements of executors, administrators, collectors, commissioners, trustees under assignments for creditors, and guardians.

(16) Record of jurors, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed.

(17), (18): See Supplement.

(19) Cross-index of wills, which shall contain a general alphabetical cross-index of all wills filed or recorded in the office of the clerk of the superior court, and devising real estate or any interest therein, whether such devise appears on the face of said will or not, showing the full name of each devisor, and all devisees as they are given in the will, together with the date of the probate of such will.

(20) Cross-index of executors and administrators, which shall contain a general alphabetical cross-index of the appointment of all executors and administrators made by the courts of their county, showing the name of the appointee, the name of the decedent, and date f appointment.

(21) Cross-index of guardians, which shall contain a general alphabetical cross-index of the appointment of all guardians made by the courts of their county, showing the name of the guardian, the names of the wards, and date of appointment.

(22) Record of fines and penalties, which shall contain an itemized and detailed statement of the respective amounts received by him in the way of fines, penalties and forfeitures, and paid over to the county treasurer.

(23) Lien docket, which shall contain a record of all notices of liens filed in his office, properly indexed, showing the names of the lienor and lienee.

(24) Record of appointment of receivers, which shall contain a record of all appointments of receivers, and all inventories, reports, and accounts filed by them; which shall be properly indexed.

(25): Repealed by Session Laws 1967, c. 823, s. 2.

(26) Accounts of indigent orphans, which shall contain a record of all receipts from persons for money paid for indigent children.

(27): Repealed by Session Laws 1967, c. 691, s. 39.

(28): Repealed by Session Laws 1967, c. 691, s. 39.

(29): Repealed by Session Laws 1967, c. 691, s. 39.

(30): Repealed by Session Laws 1967, c. 691, s. 39.

(31) Permanent roll of registered voters, which shall contain an alphabetical list by townships of all persons entitled to permanent registration, giving the name and age of each, the name of the person from whom he was descended, unless he himself was a voter on July 1, 1867, or prior thereto, the state in which he was such voter and the date he applied for registration.

(32) Lunacy docket, which shall contain a record of all the examinations of persons alleged to be insane, a brief summary of the proceedings, and his findings, and a record of all proceedings in lunacy transmitted to him by justices of the peace.

(33) Record of renunciations as required by G.S. 29-10 (f) which shall contain:

a. The name of the renouncer; or
b. The name of the person who is waiving his right to renounce;
c. The name of the estate affected by the renunciation or waiver;
d. The date of the death of the intestate and the date of the renunciation.

(34) Nol. pros. with leave record, which shall contain a record of all cases in which a nolle prosequi with leave is entered in criminal actions, with the term of court at which the order is made, and which shall be cross-indexed.

(35): Repealed by Session Laws 1959, c. 1073, s. 3. (Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; cc. 82, 110; 1901, c. 2, s. 9; c. 89, s. 13; c. 550, s. 3; 1903, c. 51; c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; c. 152; c. 197, s. 4; c. 314; C. S., s. 952; 1937, c. 93; 1953, c. 259; c. 973, s. 3; 1959, c. 1073, s. 3; c. 1163, s. 3; 1961, c. 341, ss. 3, 4; c. 960; 1965, c. 489; 1967, c. 691, s. 39; c. 823, s. 2.)

Local Modification.—Caldwell: Pub. Loc. 1927, c. 43; Durham: 1929, c. 88; Forsyth: 1949, c. 963, s. 4.

Cross Reference.—See Editor's note to § 53-5.

Editor's Note.—Session Laws 1967, c. 691, s. 39, deleted subdivisions (27), (28), (29) and (30).

Session Laws 1967, c. 823, s. 2, deleted subdivision (25).

Certain Counties Excepted from Repeal of Subdivision (35).—Subdivision (35) of this section was repealed by Session Laws 1959, c. 1073, s. 3. The subdivision provided:

"(35) Record of permits to purchase weapons, which shall contain the name, date, place of residence, age, former place of residence, etc., of each person, firm or corporation to whom or which a permit is issued to purchase deadly weapons."

Session Laws 1959, c. 1073, s. 4, as amended from time to time, excepts the following counties from the repeal of subdivision (35): Ashe, Avery, Bertie, Bladen, Cherokee, Clay (inserted in the list by Session Laws 1969, c. 276), Currituck, Davie, Duplin, Franklin, Greene, Halifax, Iredell, Jackson, Lincoln, Macon, Madison, Mitchell, Moore, Pender, Perquimans, Person, Polk, Rockingham, Sampson, Stokes, Tyrrell, Union, Warren, Washington, Watauga and Yancey.

Harnett was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Haywood was deleted by Session Laws 1969, c. 6; Herford was deleted by Session Laws 1967, c. 903; Johnston was deleted by Session Laws 1967, c. 122; Jones was deleted by Session Laws 1969, c. 109; Lee was deleted by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Mecklenburg was deleted by Session Laws 1969, c. 1305; Pamlico was deleted by Session Laws 1967, c. 6; Vance was deleted by Session Laws 1969, c. 396;

Wilson was deleted by Session Laws 1963, c. 537.

Except in the above-listed counties, records of permits to purchase weapons are now kept by the sheriff. See § 14-405.

Purpose. — The clerk's proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his orders and judgments, intelligently, and so that the same may be distinctly seen and understood. To this end, he is required to keep certain permanent records of proceedings before him. Edwards v. Cobb, 95 N.C. 4 (1886).

Notice of Judgment Docket. — The law prescribes what shall be recorded on the judgment docket, and everybody has notice that he may find there whatever ought to be there recorded, if indeed it exists. He is not required to look elsewhere for such matters. But he is required and bound to take notice in proper connections of what is there. The law charges him with such notice. Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889); Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891).

Civil Issue Docket.—Not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put upon the civil issue docket. Brown v. Rhinehart, 112 N.C. 772, 16 S.E. 840 (1893). See Brittain v. Mull, 91 N.C. 498 (1884); Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888).

Minute Docket. — The minute docket is intended to and should contain a record of all the proceedings of the court, and such other entries as the judge may direct to be therein made. Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888); Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

When Minute Docket Prevails. — While in the absence of entries on the minute docket those made on the civil issue docket should not be disregarded, yet where there is a conflict between them, nothing else appearing, those on the former must prevail. Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888).

Record of Fiats.—Clerks are required to record in general order books copies of all fiats made by them. Perry v. Bragg, 111 N.C. 159, 16 S.E. 10 (1892).

Evidence of Appointment.—The record of appointments is admissible as evidence to show a guardian's appointment. Topping v. Windley, 99 N.C. 4, 5 S.E. 14 (1888).

Sufficient Notice of Lien. — A notice of a lien filed on the lien docket should go into details sufficiently so as to give reasonable notice to all persons of the character of the claim and the property upon which the lien is attached. Fulp & Linville v. Kernersville Light & Power Co., 157 N.C. 157, 72 S.E. 867 (1911). See Cook v. Cobb, 101 N.C. 68, 7 S.E. 700 (1888); Cameron v. Consolidated Lumber Co., 118 N.C. 266, 24 S.E. 7 (1896).

Statute Construed in Pari Materia with This Section.—The recording and indexing requirements of former § 108-30.1 (now § 108-30) are less specific than those relating to deeds and judgments. They should be construed in pari materia with the recording and indexing provisions of § 161-22 and this section. Cuthrell v. Camden County, 254 N.C. 181, 118 S.E.2d 601 (1961).

This section does not require cross-indexing of liens filed in the clerk's office. The section is not to be confused with the requirements for registering liens, deeds etc., in the office of the register of deeds as provided by § 161-22, which does require cross-indexing. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

A lien for material and labor was properly filed where the clerk after delivery attached it in its original form to specified page in a book labeled "Lien Docket" where the book without question was the book intended as the lien docket contemplated by this section, though the book was also used for the filing of liens for old age assistance, since former § 108-30.1 (now § 108-30) provides that such liens shall be filed in the regular lien docket. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

The failure of the clerk to comply with the statute by neglecting to record all or a part of the proceeding does not render the proceeding void. Any interested party may, by motion, require the proceeding to be recorded and when a part of the papers has been lost without being recorded, the proceeding does not, because of that fact, lose its vitality or cease to give the protection which the complete record would afford. State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956).

Treasurer's Report as Evidence. — The record of county treasurer's report is competent evidence against the sureties upon the official bond of such officer, and is prima facie evidence of the correctness of statements therein made. Davenport v. McKee, 98 N.C. 500, 4 S.E. 545 (1887).

Recording of Verified Report Purports Verity. — Plaintiff, purchaser of the real property at execution sale of a judgment against the devisee, offered in evidence, as proof of payment and that title had vested

in the devisee, a special report, duly verified, filed by the executrix stating that the devisee had paid the estate the amount stipulated by the will. This special, verified report of the executrix was a document authorized and required to be recorded, was relevant to the issue, and was competent in evidence, its recording purporting verity and objection to its admission on the ground of hearsay in that it contained a declaration of a person not a party to the action is untenable, the recorded, verified report being more than a mere declaration by the executrix. Braddy v. Pfaff, 210 N.C. 248, 186 S.E. 340 (1936).

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Cited in Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958); State ex rel. Unemployment Compensation Comm'n v. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

§ 2-43. To notify commissioners of insolvency of surety company in which county officer bonded. — Every clerk of the superior court shall furnish the chairman of the board of county commissioners with all notifications furnished him, in accordance with § 58-117 under the article Fidelity Insurance of the chapter Insurance, by the Commissioner of Insurance, that any surety company in which any officer of the county is bonded is insolvent or in imminent danger of insolvency. (Rev., s. 295; C. S., s. 953.)

Cross Reference.—See also § 109-18.

Editor's Note. — Section 58-117 referred to in this section has been repealed.

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner."

ARTICLE 5.

Reports.

§ 2-44: See Supplement.

§ 2-45. List of attorneys at law to Commissioner of Revenue.—It shall be the duty of the clerk of the superior court in each county of the State on or before the first day of May of each year to certify to the Commissioner of Revenue of the State of North Carolina the names and addresses of all attorneys at law located within the county and engaged in the practice of law. (1931, c. 290.)

ARTICLE 6.

Money in Hand; Investments.

§§ 2-46 to 2-51: See Supplement.

§ 2-52. Payment of insurance to persons under disability.—Where a minor, incompetent or insane person is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor, or prior to the restoration of competency or sanity of such incompetent or insane person, and the total proceeds of such policy or policies do not exceed one thousand dollars ($1,000.00), such proceeds may be paid to and, if paid, shall be received by the public guardian or clerk of the superior court of the county where such beneficiary resides, to be administered by the public guardian or clerk for the benefit of such beneficiary, and the receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent of the amount of proceeds paid to such public guardian or clerk, and in no event shall such public guardian or clerk be officially responsible or accountable except to the extent of the amount of proceeds paid to such public guardian or clerk. Moneys so paid to the clerk or public guardian shall be held and disbursed in the manner and subject to the limitations provided by § 2-53. (1937, c. 201; 1945, c. 160, s. 1; 1953, c. 101; 1961, c. 377.)

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

§ 2-53. Payment of money for indigent children and persons non compos mentis.—When any moneys in the amount of one thousand dollars ($1,000.00) or less are paid into court for any minor, indigent or needy child or children for whom there is no guardian, upon satisfactory proof of the necessities of such minor, child or children, the clerk may upon his own motion or order pay out of the same in such sum or sums at such time or times as in his judgment is for the best interest of said child or children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied for the sole benefit and maintenance of such minor indigent and needy child or children. The clerk shall take a receipt from the person to whom any such sum is paid and shall require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled, Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. This section shall also apply to incompetent or insane persons, and it shall be the duty of any person or corporation having in its possession one thousand dollars ($1,000.00) or less for any minor child or indigent child, or incompetent or insane person to pay same in the office of the clerk of the superior court, and the clerk of the superior court is hereby authorized and empowered to disburse the sum thus paid into his office, upon his own motion or order, without the appointment of a guardian. (1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C. S., s. 962; Ex. Sess., 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1945, c. 160, s. 2; 1949, c. 188; 1959, c. 794, ss. 1, 2.)

Local Modification.—Cumberland: 1957, c. 1143; Wake: 1961, c. 613.

Satisfaction of Judgment in Favor of Infant. — Under the statutes of this State, only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant, and the defendant pays the judgment to the clerk of the superior court, who holds the funds until the minor becomes twenty-one or until a general guardian is appointed for him, unless the sum is $1,000.00 or less, when he may disburse it himself under the terms of this section. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

§ 2-54. Limitation on investment of funds in clerk's hands.—It shall be unlawful for the clerk of the superior court of any county in the State of North Carolina receiving any money by color of his office to apply or invest any of said money except as specifically authorized by law. (1931, c. 281, s. 1.)

Local Modification.—Cleveland: 1933, c. 110.

Editor's Note.—The act from which this and the six following sections are codified, was apparently intended to supply the need indicated in William v. Hooks, 199 N.C. 489, 154 S.E. 828 (1930), wherein the court held that "there is no mandatory requirement of law imposing upon the clerk of the superior court the express duty of investing funds in his hands belonging to minors." The act is broader than that, however, and applies to all funds held by the clerk as such or as receiver or trustee for any infant or person non compos mentis. It should be read in connection with §§ 2-46, 28-166 and 65-10. See 9 N.C.L. Rev. 399.

Cited in State ex rel. Page v. Sawyer, 223 N.C. 102, 25 S.E.2d 443 (1943).

§ 2-55. Investments prescribed; use of funds in management of lands of infants or incompetents.—The clerk of the superior court of any county in the State may in his discretion invest moneys secured by color of his office or as receiver in any of the following securities:

(1) By loaning the same upon real estate security, such loans not to exceed fifty percent (50%) of the assessed tax value; and said loans when made to be evidenced by a note, or notes, of the borrower and secured by first mortgage or deed of trust.

(2) United States government bonds.

(3) United States government postal savings certificates.

(4) North Carolina State bonds.
(5) North Carolina county or municipal bonds which are approved by the Local Government Commission.
(6) Certificates of deposit for time deposit or savings accounts with any bank or trust company where such protection is furnished as required in § 2-56.
(7) When the clerk of the superior court as receiver or trustee for any infant or non compos mentis shall come into the possession of any lands for the use of such person and it shall be necessary to make investments of the funds of such person to manage or cultivate said lands, the clerk may make such investments as are necessary for said purposes: Provided, the same is approved by the resident judge of the superior court or the judge holding the court of the district. (1931, c. 281, s. 2; 1937, c. 188; 1939, c. 110.)

Local Modification.—Cleveland: 1933, c. 110; Forsyth: 1945, c. 876, s. 4.

Cross References.—As to investment of funds in building and loan associations, see § 36-3. As to investments in bonds issued or guaranteed by the United States government, see § 53-44.

Editor's Note. — In the investment of funds of infants or persons non compos mentis used in the management or cultivation of lands held for them by the clerk as receiver or trustee, he is unlimited by the items mentioned in this section. 9 N.C.L. Rev. 399.

Cited in In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

§ 2-56. Securing bank deposits. — It shall be the duty of the clerk of the superior court of any county in the State to require of any bank or trust company, wherein he may deposit money placed with him in trust, a corporate surety bond in an amount sufficient to protect such deposits, but in lieu of such corporate surety bond, the clerk may require such bank to furnish bonds of the United States government, North Carolina State bonds, or North Carolina county or municipal bonds which have been approved by the Local Government Commission; provided, however, that to the extent of the amount which may be insured by the Federal Deposit Insurance Corporation or other federal agency insuring bank deposits the said insurance shall be deemed and considered ample security, and the clerk of the superior court shall not require corporate surety bond or any of the bonds above specified for that amount of the deposit insured by deposit insurance. (1931, c. 281, s. 3; 1939, c. 86; 1943, c. 543.)

Local Modification. — Forsyth: 1945, c. 876, s. 4.

§ 2-57. Inspection of records by Local Government Commission; report to solicitor of mismanagement.—The Local Government Commission, or its successors, is hereby authorized and empowered to inspect the records of any clerk of the superior court in the State for the purpose of ascertaining that such clerk is complying with the requirements of §§ 2-54 to 2-60 and if, in the course of such inspection, it is found that such clerk has failed to comply with the requirements of §§ 2-54 to 2-60, it shall be the duty of the Local Government Commission, or its successors, to report such findings to the solicitor of the district in which the county is located and said solicitor shall proceed to prosecute as hereinafter provided. (1931, c. 60; c. 281, s. 4.)

§ 2-58: See Supplement.

§ 2-59. Liquidation of unauthorized investments within year.—It shall be the duty of the clerk of the superior court of any county in the State, who shall have funds invested other than as provided for in §§ 2-54 to 2-60 to liquidate same within one year from the passage of §§ 2-54 to 2-60: Provided, however, that upon approval of the resident judge of his district, the clerk may extend from time to time, the time for sale or collection of any such investments; that no one

extension shall be made to cover a period of more than one year from the time the extension is made. (1931, c. 281, s. 7.)

§ 2-60. Violation of §§ 2-54 to 2-59 a misdemeanor.—The clerk of the superior court of any county in the State who shall have violated the provisions of §§ 2-54 to 2-59 shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of this court. (1931, c. 281, s. 5.)

Chapter 3.

Commissioners of Affidavits and Deeds.

§ 3-1. Appointment by Governor; term; oath. — The Governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the Governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall take and subscribe an oath before a justice of the peace or clerk of a court of record in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the Secretary of State. (Code, ss. 632, 633; Rev., ss. 926, 927; C. S., s. 963; 1945, c. 635.)

Cross Reference.—For general provisions relating to proof and acknowledgment of instruments, and the taking of affidavits in other jurisdictions, see §§ 10-4, 47-2, 47-3, 47-6, 47-44, 47-45.

§ 3-2. Record of appointments; certified copies evidence.—It is the duty of the Governor to cause to be recorded by the Secretary of State the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the Secretary of State, when the oath of the commissioner is filed in his office, shall forthwith certify the appointment to the several clerks of the superior courts of the State, who shall record the certificate of the Secretary at length. All removals of commissioners by the Governor, and the names of all commissioners whose commissions have expired by law, and which have not been renewed, shall be recorded and certified in like manner. A certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the Secretary of State, shall be sufficient evidence of the appointment or removal of such commissioner. (Code, s. 634; Rev., s. 928; C. S., s. 964.)

It is the duty of the Secretary of State forthwith upon the appointment of such commissioners, to certify the same to the several clerks of the superior courts of the State, and, in like manner, to certify to the said clerks all removals of commissioners, and of all whose commissions have expired. Evans v. Etheridge, 99 N.C. 43, 5 S.E. 386 (1888).

§ 3-3. List of appointments prepared and published by Secretary of State.—The Secretary of State shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the state, territory or district or foreign country for which such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with

the dates of such revocation, resignation, removal or death. (Code, ss. 635, 636, 637, 639; Rev., s. 929; C. S., s. 965.)

§ 3-4. Published list conclusive.—The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof. (Code, s. 638; Rev., s. 930; C. S., s. 966.)

§ 3-5. Powers of such commissioners.—The commissioners have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this State, and to take the private examination of married women, parties thereto, or any other writings to be used in this State. Such acknowledgment or proof, taken or made in the manner directed by the laws of this State, and certified by the commissioner, shall have the same force and effect for all purposes as if made or taken before any competent authority in this State. The commissioners also have full power and authority to administer an oath or affirmation to any person willing or desirous to make it before him, to take depositions, and to examine the witnesses under any commission emanating from the courts of this State, relating to any cause depending or to be brought in said courts. Every deposition, affidavit, or affirmation made before him is as valid as if taken before any proper officer in this State. (Code, ss. 632, 633; Rev., ss. 926, 927; C. S., s. 967.)

Cross Reference.—For repeal of laws requiring the private examination of married women, see § 47-14.1.

Editor's Note. — In DeCourcy LaFourcade & Co. v. Barr, 45 N.C. 181 (1853), the court construed an early statute as empowering commissioners of affidavits to take the acknowledgments of nonresidents only. The law was changed soon after that decision was rendered, and it does not seem that any serious doubt has been entertained as to the true meaning of the law now in force since Simmons v. Gholson, 50 N.C. 401 (1858), was decided. It has been considered as conferring upon a commissioner of affidavits the same authority to take the proof of executions or the acknowledgment of grantors, who may be in the state for which they were appointed (whether there temporarily or as residents), as to the execution of deeds conveying land or other property located in this State that are required or allowed by law to be registered. The clerk of the superior court of the county in which the land lies has power to adjudge that the execution has been properly proven and order the registration, while the commissioner is functus officio, as to any given deed, when he has attached to it his certificate as to proof or acknowledgment of its execution. James & Mayer Buggy Co. v. Pegram, 102 N.C. 540, 9 S.E. 412 (1889), citing Evans v. Etheridge, 99 N.C. 43, 5 S.E. 386 (1888).

Scope of Commissioner's Authority. — Under this section commissioners of affidavits have full authority to take the acknowledgment, within the states for which they are appointed, of the grantors to any deed or conveyance of lands in this State, and to take the private examination of femes covert. James & Mayer Buggy Co. v. Pegram, 102 N.C. 540, 9 S.E. 412 (1889); Maphis v. Pegram, 107 N.C. 505, 12 S.E. 235 (1890).

Commissioners of affidavits are empowered by the section to take acknowledgments of deeds in other states, by residents of both this State and that for which such commissioners are appointed. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Acknowledgments of Residents Visiting in Another State.—Where a man and his wife, being residents of this State, duly acknowledged a deed before a commissioner in Virginia, where they had gone on a visit merely, and the certificate of the commissioner, being in due form, was approved by the clerk of the superior court of the county in which the land was situated, and the deed duly recorded, the registration was valid. James & Mayer Buggy Co. v. Pegram, 102 N.C. 540, 9 S.E. 412 (1889); Maphis v. Pegram, 107 N.C. 505, 12 S.E. 235 (1890).

Seal Unnecessary.—A commissioner of deeds for this State, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this State. Johnson v. Duvall, 135 N.C. 642, 47 S.E. 611 (1904); Sluder v. Wolf Mt. Lumber Co., 181 N.C. 69, 106 S.E. 215 (1921).

Acknowledgment a Judicial Act.—In this State it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife taken before a commissioner is a judicial, or at least a

quasi judicial, act. DeCourcy, Lafourcade & Co. v. Barr, 45 N.C. 181 (1853); Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893).

Sufficient Verification.—An affidavit upon which an application for a provisional remedy is based is sufficiently verified when made before a commissioner for this State resident in another state and authenticated by his official signature and seal. Young v. Rollins, 85 N.C. 485 (1881).

§ 3-6. Fees of commissioners of affidavits. — Commissioners of affidavits, and those who are authorized by law to act as such, shall receive the following fees, and no other, namely: for an affidavit taken and certified, forty cents; affixing his official seal, twenty-five cents. (Code, s. 3741; Rev., s. 2796; C. S., s. 3924.)

Cross Reference.—As to fees of notaries, see § 10-8.

§ 3-7. Powers of clerks of courts in other states.—Every clerk of a court of record in any other state has full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this State. (Code, s. 640; Rev., s. 931; C. S., s. 968.)

Cross Reference. — As to probate and registration by officials of the United States, foreign countries, and sister states, see §§ 47-2, 47-3, 47-44, 47-45.

Authority of Clerks to Act.—The section confers upon clerks of courts of record in other states the powers both of commissioners of affidavits and of deeds and of commissioners regularly appointed by the courts, and the courts will take judicial notice of their seals. Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895); Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

§ 3-8. Clerks and notaries to take affidavits.—The clerks of the Supreme and superior courts and notaries public are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the State; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk, and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and, if by a notary, under his notarial seal. (Code, s. 631; Rev., s. 925; C. S., s. 969.)

Cross Reference.—As to attorney probating papers to be used in proceedings in which he appears as attorney, see § 47-8.

Judicial Notice of Seals.—Courts take judicial notice of the seal of the courts of other states, for the purpose of determining the validity of a verification of a pleading, just as they do of the seals of foreign courts of admiralty and notaries public. Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895).

Verification of Pleadings before Clerk.—A verification of a pleading made before the clerk of the Hustings Court of Richmond, Virginia, and authenticated by his seal, is valid. Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895).

Chapter 4.
Common Law.

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

§ 4-1. Common law declared to be in force.—All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State. (1715, c. 5, ss. 2, 3, P. R.; 1778, c. 133, P. R.; R. C., c. 22; Code, s. 641; Rev., s. 932; C. S., s. 970.)

Editor's Note.—For note on the role of the judiciary in the abrogation of the municipal tort immunity rule, see 5 Wake Forest Intra. L. Rev. 383 (1969).

Opinions of Attorney General. — Mr. J.B. Roberts, Sheriff, Cabarrus County, 7/8/69.

General Considerations.—The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. Kent, Vol. 1, p. 471; Kansas v. Colorado, 206 U.S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907).

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs, immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs. Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 21 S. Ct. 561, 45 L. Ed. 765 (1901).

The term "common law" refers to the common law of England and not of any particular state. Eidman v. Martinez, 184 U.S. 578, 22 S. Ct. 515, 46 L. Ed. 697 (1902); State ex rel. Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968).

So much of the common law as is in force by virtue of this section may be modified or repealed, but those parts of the common law which are imbedded in the Constitution are not subject to control. State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

Historical Background.—See Resort Dev. Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952).

Extent of Common Law.—So much of the common law as is not destructive of, repugnant to, or inconsistent with our form of government, and which has not been repealed or abrogated by statute or become obsolete, is in full force and effect in this jurisdiction. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936).

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State. Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946); Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949); Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432, 12 A.L.R.2d 1171 (1949); Friendly Fin. Corp. v. Quinn, 232 N.C. 407, 61 S.E.2d 192 (1950); Ionic Lodge # 72 F. & A.A.M. v. Ionic Lodge F.A. & A.M. # 72 Co., 232 N.C. 648, 62 S.E.2d 73 (1950); Cooperative Warehouse, Inc. v. Lumberton Tobacco Board of Trade, Inc., 242 N.C. 123, 87 S.E.2d 25 (1955).

A common-law rule which has not been abrogated or repealed by statute in North Carolina, is still in effect under the terms of this section. Elliott v. Elliott, 235 N.C. 153, 69 S.E.2d 224 (1952); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956). See note in 30 N.C.L. Rev. 417 (1952).

The term "common law" refers to the common law of England. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961); State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967).

Vested Rights in Common Law. — A person has no property, no vested interest, in any rule of common law. Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232 (1884).

Effect of Legislation with Respect to Subject Matter of Common-Law Rule.—Where the North Carolina General Assembly has legislated with respect to the subject matter of a common-law rule, the statute supplants the common law with

respect to the particular rule, but so much of the common law as has not been abrogated or repealed by statute is in full force and effect. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962).

Reference to Debts Due to State Abrogated.—The English common law which gave a debt due to the sovereign a preference over the debts due to others, is abrogated by this section, and is not in force as applied to a debt due to this State. This on the principle that the rule as it existed at common law is antagonistic to the spirit of our governmental institutions. Corporation Comm'n v. Citizens Bank & Trust Co., 193 N.C. 513, 137 S.E. 587 (1927).

Right of Bail in Capital Cases. — At common law bail might be granted in capital cases only by a high judicial officer upon thorough scrutiny of the facts and great caution. This right though once modified by the old Constitution against its existence in capital offenses where the proof was evident and the presumption was great, now prevails in this State as it existed at common law, since that Constitution is superseded by the present Constitution which contains no provisions which qualify the right. In England the power to bail was exercised by the King's superior courts of justice; and in this State the power is conferred upon the justices of the Supreme Court, judges of the superior and criminal courts. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

Exemption of Attorneys from Arrest.—The common law exemption of an attorney from arrest in a civil action, should, under our institutions and because of absoluteness by nonusage, not prevail, except where the attorneys are actually in attendance upon court in the due course of their employment as attorneys. Greenleaf v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

The common-law rights and disabilities of husband and wife are in force in this State except insofar as they have been abrogated or repealed by statute. Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949).

Medietate Jury.—The statute, 28 Edw. 3, c. 13, in England, giving a jury de medietate, is not in force in this State. State v. Antonio, 11 N.C. 200 (1825).

Percolating Waters. — The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and the English common-law doctrine to the contrary is inapplicable under this section. Rouse v. Kinston, 188 N.C. 1, 123 S.E. 482 (1924).

Habeas Corpus.—It is an admitted principle of common law that every court of record of superior jurisdiction has the power to issue the writ of habeas corpus. This power is preserved in this State and can be exercised by all courts of record of superior jurisdiction. In re Bryan, 60 N.C. 1 (1863).

Forfeiture for felony, which was the established rule at common law, has had no force in this State since 1778. White v. Fort, 10 N.C. 251 (1824).

Exemption from Civil Process. — The common-law privilege of the exemption of nonresidents from service of civil process while attending upon litigation in the courts of this State, as suitors or witnesses, was not repealed by implication by §§ 8-64, 9-18. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

The common-law writ of error coram nobis to challenge the validity of petitioner's conviction for matters extraneous the record, is available under our procedure. In re Taylor, 230 N.C. 566, 53 S.E.2d 857 (1949); State v. Daniels, 231 N.C. 17, 56 S.E.2d 2 (1949).

Survivorship; Husband and Wife Tenants by Entireties. — The common-law doctrine of survivorship between husband and wife as tenants by entireties has not been changed by statute and is in force in this State. Dorsey v. Kirkland, 177 N.C. 520, 99 S.E. 407 (1919).

Survival of Actions.—Since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute. Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946).

Presumption as to Common Law in Sister States.—Where there is no evidence to the contrary, the presumption is that the common law is in force in a sister state. Hipps v. Southern Ry., 177 N.C. 472, 99 S.E. 335 (1919).

Presumption of Death. — The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. Steele v. Metropolitan Life Ins. Co., 196 N.C. 408, 145 S.E. 787 (1928).

Limitation Over in Personal Property. —The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this State, under this section, and has been recognized by judicial decision and by statutory implication.

Speight v. Speight, 208 N.C. 132, 179 S.E. 461 (1935).

Champerty is an offense at common law, and prevails in this State, being retained under this section. Merrell v. Stuart, 220 N.C. 326, 17 S.E.2d 458 (1941).

Barratry.—The common-law offense of barratry obtains in this State, since it has never been the subject of legislation in North Carolina and is not repugnant nor inconsistent with our form of government. State v. Batson, 220 N.C. 411, 17 S.E.2d 511, 139 A.L.R. 614 (1941).

The solicitation of another to commit a felony is a crime, although the solicitation is of no effect, and the crime is not committed, the common-law rule being in effect and controlling. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936).

Punishment When No Penalty Expressly Provided.—The common-law rule obtains in this State that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. State v. Bishop, 228 N.C. 371, 45 S.E.2d 858 (1947).

Implied Warranty in Sale of Food. — The common-law rule of implied warranty in the sale of food by a retailer to a consumer, even though the food may be sold in a sealed container, has not been rendered obsolete by the changes in the manner and method of the manufacture, preparation and distribution of food. Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939).

Suicide.—The North Carolina Constitution and statutes have repealed and abrogated the common law as to suicide only as to punishment and possibly the quality of the offense. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

At common law suicide was a felony. Attempted suicide was a misdemeanor, punishable by fine and imprisonment. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Suicide may not be punished in North Carolina. But this fact does not change the criminal character of the act, and an attempt to commit suicide is an indictable misdemeanor in this State. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Tortious Killing. — The common law, adopted as the law of North Carolina in this section, gave no right of action for the tortious killing of a human being. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Trademarks. – State statutes providing for registration of trademarks are in affirmance of the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962).

The remedies given by statutes providing for registration of trademarks are either declaratory or are cumulative and additional to those recognized by the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962).

The common-law definition of arson is still in force in this State State v Long 243 N.C. 393, 90 S.E.2d 739 (1956).

Tort Action by Child against Parent.— The common-law rule that an unemancipated, minor child, living in the household of its parents, cannot maintain an action in tort against its parents or either of them, still prevails in North Carolina. Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952).

The common-law rule that future interests in personal property may be created by will but not by deed prevails in this State, since it has not been abrogated or repealed by statute or become obsolete and is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State. Woodard v. Clark, 236 N.C. 190, 72 S.E.2d 433 (1952).

Applied in Wells v. Guardian Life Ins. Co., 213 N.C. 178, 195 S.E. 394, 116 A.L.R. 130 (1938); State v. Sullivan, 229 N.C. 251, 49 S.E.2d 458 (1948).

Quoted in Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

Cited in Hinton v. Hinton, 196 N.C. 341, 145 S.E. 615 (1928); Rhodes v. Collins, 198 N.C. 23, 150 S.E. 492 (1929); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); State v. Emery, 224 N.C. 581, 31 S.E.2d 858 (1944).

Chapter 5.

Contempt.

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

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

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

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

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

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

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

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

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

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

I. GENERAL CONSIDERATION.

Editor's Note.—It is essential for an effective administration of justice in an orderly and efficient way that the court possess certain powers to enforce its mandate. A legislative interference to the extent of depriving the courts of these powers is

tantamount to depriving the judicial department of the means of self-preservation and cannot be constitutionally justified. See Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621 (1922).

These powers, however, as they existed at common law, while they may not be abrogated, may be reasonably regulated by legislation. See In re Robinson, 117 N.C. 533, 23 S.E. 453 (1895). Thus, this and the following sections are regulatory legislation upon the subject, and being in accord with modern doctrine, cannot be assailed on the ground of unconstitutionality. See In re Oldham, 89 N.C. 23 (1883); In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

The enumeration of the acts punishable for contempt under this section is exhaustive; hence no other act than those specifically designated may be the subject matter of contempt proceedings. See In re Odum, 133 N.C. 250, 45 S.E. 569 (1903).

For discussions of the history, nature, and extent of the power of courts to punish for contempt, see Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); In re Brown, 168 N.C. 417, 84 S.E. 690 (1915). See also 12 N.C.L. Rev. 260.

For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

Construed Strictly.—This section should be strictly construed as a criminal statute. West v. West, 199 N.C. 12, 153 S.E. 600 (1930). See In re Hege, 205 N.C. 625, 172 S.E. 345 (1934); North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967).

Nature and Purpose of Proceedings.—Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey. See In re Chiles, 89 U.S. (22 Wall.) 157, 22 L. Ed. 819 (1874); Bessette v. Conkey Co., 194 U.S. 324, 24 S. Ct. 665, 48 L. Ed. 997 (1904).

Resort to civil contempt proceeding is common to enforce orders in the equity jurisdiction of the court, orders for the payment of alimony, and in like matters. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

A contempt proceeding is sui generis. It is criminal in its nature in that the party is charged with doing something forbidden, and if found guilty, is punished. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

A contempt proceeding under this section is sui generis, criminal in its nature, which may be resorted to in civil or criminal actions. Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Contempt proceedings may be resorted to in civil or criminal actions. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Proceedings for contempt are of two classes, criminal and civil. Criminal proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders. Civil proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954)

Contempt proceedings are of two classes; those brought to vindicate the dignity and authority of the court; and those brought to enforce the rights of private parties. The former are as a rule held criminal in their nature and are generally governed by the rules applicable to criminal cases. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967).

Criminal contempt or punishment for contempt is applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966); Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Criminal proceedings, involving as they do offenses against the courts and organized society, are punitive in their nature, and the government, the courts, and the people are interested in their prosecution. Whereas civil proceedings, having as their underlying purpose the preservation of private rights, are primarily remedial and coercive in their nature, and are usually prosecuted at the instance of an aggrieved

suitor. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

The acts and omissions enumerated in this section correspond to criminal contempt and involve offenses against the court and organized society, punishable for contempt for the purpose of preserving the power and vindicating the dignity of the court. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

The distinction between a proceeding under this section and a proceeding as for contempt under § 5-8 should be recognized and enforced. The importance of the distinction lies in the differences in the procedure, the punishment, and the right of review established by law for the two proceedings. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966); Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 206, 154 S.E.2d 320 (1967).

Nature of Offense.—Criminal contempt is the commission of an act tending to interfere with the administration of justice, while civil contempt is the remedy for the enforcement of orders in the equity jurisdiction of the court, and the willful refusal to pay alimony as ordered by the court is civil contempt. Dyer v. Dyer, 213 N.C. 634, 197 S.E. 157 (1938).

A person guilty of any of the acts or omissions enumerated in this section may be punished for contempt because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 206, 154 S.E.2d 320 (1967).

Same—Jury Trial.—Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

In a North Carolina contempt proceeding, the contemnor is not entitled to a jury trial. Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Criminal contempts are crimes. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967).

Accordingly, accused is entitled to benefits of all constitutional safeguards. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967).

The court must specify the particulars of the offense on the record by stating the words, acts or gestures amounting to direct contempt, and when the record contains only conclusions that contemnor was contemptuous, contemnor is entitled to his discharge. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Facts Must Be Found and Filed.—In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on those findings. In re Odum, 133 N.C. 250, 45 S.E. 569 (1903); Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Inherent Powers to Punish for Contempt.—This and the following sections regulating proceedings for contempt confer on the courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

The power to punish for contempt is inherent in all courts. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

Not Repugnant to Principle of Due Process.—Summary proceedings for contempt, in which there is no right of appeal or trial by jury or removal before another judge, are not within the constitutional prohibition contained in the due process clause. The power to punish summarily for contempt has existed at common law "as far as the annals of the law extend." State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

Punishment for Both Criminal and Civil Contempt.—There are certain instances where contemnors may be punished for both criminal contempt, i.e., for contempt, and for civil contempt, i.e., as for contempt. Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Maximum Punishment. — The punishment as to matters punishable for contempt is limited to a fine not to exceed $250 or imprisonment not to exceed thirty days, or both, in the discretion of the court (§ 5-4). However, punishment as for contempt (§ 5-8) is not limited by the terms of § 5-4. Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

The right of review in proceedings for contempt is regulated by § 5-2, which denies to persons adjudged guilty of contempt in the superior court the right of appeal to the appellate division in all cases arising under subdivisions (1), (2), (3)

and (6) of this section, and also in those cases arising under subdivisions (4) and (5) of this section, where the contempt is committed in the presence of the court." Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

In proceedings for contempt the facts found by the trial judge are not reviewable by the appellate division except for the purpose of passing upon their sufficiency to warrant the judgment. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

The right of review in proceedings for contempt is regulated by § 5-2, which denies to persons adjudged guilty of contempt in the superior court the right of appeal to the appellate division except in cases arising under subdivisions (4) and (5) of this section, where the contempt is not committed in the presence of the court. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Cited in Vaughan v. Vaughan, 213 N.C. 189, 195 S.E. 351 (1938).

II. SUBDIVISION (1).

Must Be in Presence of the Court.—A wilful disobedience of the process or order of the superior court to desist from obstruction of a public road is not a contempt committed within the immediate presence or view of the court. In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

Nature of the Acts Punishable for Contempt.—Acts which are punishable under this section include all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough, designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of the business presently before it. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

Protection Extended to Officers of Court, Witnesses, etc.—It is an act of contempt to interfere with the functioning of the business not only of the judge but also of all the officers of the court, and persons such as attorneys, jurors and witnesses, who in the line of their duty are assisting the court in the dispatch of its business. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917); Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621 (1922).

Assaulting Judge during Recess of Court.—Where the respondent visited the judge at his boardinghouse during a recess of the court, before the adjournment of the term and assaulted the judge, it was held that this conduct was a direct contempt of the court as much as if the assault had been committed in the court during trial. Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905).

Appeal.—Actions of judge in respect to contempts committed in the presence of the court are not reversible on appeal except for gross abuse of discretion. See Ex parte Biggs, 64 N.C. 202 (1870); In re Davis, 81 N.C. 72 (1879); State v. Nowell, 156 N.C. 648, 72 S.E. 590 (1911). As to contempts not committed in the presence of the court, however, an appeal lies. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

Fighting in Courthouse Yard.—In State v. Woodfin, 27 N.C. 199 (1844), fighting in the yard of the courthouse, before the courthouse door, constituted the basis of the offense of contempt.

III. SUBDIVISION (2).

Punishment by Court Making the Reference.—When, in the course of supplementary proceedings before a referee, a contempt is committed by refusing to answer the questions, it must be punished by the court making the reference. La-Fontaine v. Southern Underwriters Ass'n, 83 N.C. 133 (1880).

IV. SUBDIVISION (4).

Cross References. — As to contempt in failure of personal representative to file account, see § 28-118. As to failure to obey judgment, see § 1-302. As to failure to obey a court order in supplementary proceedings, see § 1-368. As to acts punished as for contempt, see §§ 5-8, 5-9.

"Wilful" and "Unlawful" Distinguished.—The word "wilful," when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law. The term "unlawfully" implies that an act is done, or not done as the law allows, or requires; while the term "wilfully" implies that the act is done knowingly and of stubborn purpose. In re Hege, 205 N.C. 625, 172 S.E. 345 (1934), citing West v. West, 199 N.C. 12, 153 S.E. 600 (1930).

Failure to obey a court order cannot be punished for contempt unless the disobedience is willful, which imports knowledge and a stubborn purpose. Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948); Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

One does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Where defendant testifies that his fail-

ure after knowledge to obey a court order for the payment of alimony pendente lite was due to his lack of financial means, and no evidence is presented at the hearing tending to negative the truth of defendant's explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court's finding that defendant willfully disobeyed the order is not supported by the record, and judgment committing him to imprisonment for contempt must be set aside. Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948).

Refusal to Deliver Note.—In Thompson v. Onley, 96 N.C. 9, 1 S.E. 620 (1887), it was held that a refusal to obey the order requiring the surrender of a note, whether amounting to contempt or not, warranted a commitment as a means of forcing a compliance.

Disavowal of Disrespectful Intent.—The wilful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt under this section, from which he may not purge himself by disavowing a disrespectful intent. In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

Impossibility to Comply with the Order or Process.—Where the disobedience to the process or order is due to circumstances which make it impossible for the contemnor to obey such order or process, he may not be punished for contempt. Thus where the clerk issued a notice to the respondent to produce a certain will which was in the custody of some other clerk, it was held the order to adjudge the respondent guilty of contempt was reversible on appeal. In re Scarborough Will, 139 N.C. 423, 51 S.E. 931 (1905). But where the impossible circumstances are removed prior to the arrest for contempt the defendant will not be excused. Thomasville Shooting Club v. Thomas, 120 N.C. 334, 26 S.E. 1007 (1897). The excuse is sufficient where the defendant has been unable to pay money according to an order. Kane v. Haywood, 66 N.C. 1 (1872); Boyett v. Vaughan, 89 N.C. 27 (1883); Smith v. Smith, 92 N.C. 304 (1885).

Where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, shows by the uncontradicted testimony of himself and witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence fails to show that the disobedience was wilful, and he may not be adjudged in contempt of court and a sentence imposed upon him. West v. West, 199 N.C. 12, 153 S.E. 600 (1930).

Failure to Pay Alimony, etc.—Upon the hearing of an order to show cause why defendant should not be attached for contempt for failure to pay alimony and counsel fees as required by the prior judgment, defendant pleaded his inability to pay. The court found defendant had earned $140.00 since the original order, and adjudged defendant to be in contempt and the judgment for contempt was not dated and fails to show the length of time during which defendant earned the sum stated, and fails to find any facts on the defendant's plea of disavowal, the record and findings are insufficient to support a judgment for contempt for "willful disobedience" of a court order. Berry v. Berry, 215 N.C. 339, 1 S.E.2d 871 (1939).

The mere fact that defendant, ordered to pay a certain sum monthly for the necessary subsistence of his wife and child, has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is wilfull. Smithwick v. Smithwick, 218 N.C. 503, 11 S.E.2d 455 (1940).

An order of court not "lawfully issued" may not be the basis on which to found a proceeding for contempt. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949); State v. Black, 232 N.C.. 154, 59 S.E.2d 621 (1950).

Where an order is void ab initio, one may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one "lawfully issued" as provided by this section. In re Longley, 205 N.C. 488, 171 S.E. 788 (1933).

Upon application for custody of children after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949).

Where a subpoena issued by a municipal-county court and running outside the county is a nullity because not attested by the seal of the court, neither service of

the process nor voluntary appearance thereunder, can waive the defect or vitalize the process so as to make the willful disobedience of the subpoena a basis for contempt proceedings. State v. Black, 232 N.C. 154, 59 S.E.2d 621 (1950).

Temporary Restraining Orders.—A court has inherent power, necessary to the maintenance of judicial authority, to punish as for contempt the willful violation of its orders, including temporary restraining orders. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

Where courts of competent jurisdiction successively issued three injunctive orders for the purpose of protecting persons who desired to work, and who had a right to work, if they so desired, in plaintiff's plant, while the orders were by their terms temporary and effective only until final trial of the cause, they were lawful orders of a court of competent jurisdiction. Any person guilty of willful disobedience of such orders may be punished for contempt of court. Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Failure to Comply with Separation Agreement.—Husband could not be adjudged in contempt for failure to comply with separation agreement entered into prior to the institution of divorce action, judgment in which provided that it should not affect or invalidate the separation agreement. Brown v. Brown, 224 N.C. 556, 31 S.E.2d 529 (1944).

Advice of Counsel No Excuse. — The failure to obey the order of the court placing property in possession of a receiver is, under this clause, a direct contempt, even though the contemnor acted under an advice of counsel. Such advice is no protection to the intentional violation of the order. Delozier v. Bird, 123 N.C. 689, 31 S.E. 834 (1898). In such a case the counsel himself may be subjected to contempt proceedings. This fact, however, will be considered by the judge in imposing the punishment. Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912). See Green v. Griffin, 95 N.C. 50 (1886).

Disobeying Order of Clerk.—Where, in supplementary proceedings, the defendant has wilfully disobeyed an order of the clerk of the superior court having jurisdiction, in disposing of his property, he is guilty of contempt of court under the provisions of this section. Bank of Zebulon v. Chamblee, 188 N.C. 417, 124 S.E. 741 (1924).

Must Be Able to Obey.—The defendant must have been able to obey the order, and in spite of his ability must have disobeyed it. Inability to obey is a good excuse—for example payment of money. Kane v. Haywood, 66 N.C. 1 (1872); Boyett v. Vaughan, 89 N.C. 27 (1883); Smith v. Smith, 92 N.C. 304 (1885).

Noncompliance with Order to Produce Records of Business.—Where, in response to an order to produce records of his business for a designated period, defendant appears and testifies that the only business records kept by him were the cash register tapes, that these had been destroyed by rats, and therefore, he had no records or documents with which to comply with the order, and there is no evidence to the contrary, it is error for the court to find and conclude defendant was in contempt within the purview of this section for noncompliance with the order. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

In contempt proceedings it is necessary for the court to find the facts supporting the judgment and especially the facts as to the purpose and object of the contemner, since nothing short of "willful disobedience" will justify punishment. Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957).

Conclusions of Law Not So Denominated.—Where the judgment in contempt fully states the facts found and the conclusions of law based thereon, adjudging defendants in contempt for a willful disobedience of an order lawfully issued by the superior court having jurisdiction, exception on the ground that the court did not specifically denominate his conclusions of law as such cannot be sustained. Glendale Mfg. Co. v. Bonano, 242 N.C. 587, 89 S.E.2d 116 (1955).

Cases Involving Violations of Order Restraining Strikers.—For a series of cases involving violations of a restraining order which sought to prohibit violence and mass picketing on the part of strikers, see Harriet Cotton Mills v. Local 578, Textile Workers Union, 251 N.C. 218, 111 S.E.2d 457 (1959); Harriet Cotton Mills v. Local 578, Textile Workers Union, 251 N.C. 231, 111 S.E.2d 465 (1959); Henderson Cotton Mills v. Local 584, Textile Workers Union, 251 N.C. 234, 111 S.E.2d 476 (1959); Henderson Cotton Mills v. Local 584, Textile Workers Union, 251 N.C. 240, 111 S.E.2d 471 (1959); Harriet Cotton Mills v. Local 578, Textile Workers Union, 251 N.C. 248, 111 S.E.2d 467 (1959); Henderson Cotton Mills v. Local 584, Textile Workers Union, 251 N.C. 254, 111 S.E.2d 480 (1959).

Other Actions Held to Constitute Contempt. — Disobeying an injunction or restraining order such as cutting timber

after injunction against the same. Fleming v. Patterson, 99 N.C. 404, 6 S.E. 396 (1888); In re Carolina, C. & O. Ry., 151 N.C. 467, 66 S.E. 438 (1909); Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912). Failure to pay alimony, Zimmerman v. Zimmerman, 113 N.C. 433, 18 S.E. 334 (1893). Failure of clerk to make transcript of record, Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897). See also generally Murray v. Berry, 113 N.C. 46, 18 S.E. 78 (1893). Failure to deliver property, McLean v. Douglass, 28 N.C. 233 (1846). Failure to return process, Ex parte Summers, 27 N.C. 149 (1844). Failure to settle estates by public administrator, In re Brinson, 73 N.C. 278 (1875).

Applied in Dyer v. Dyer, 212 N.C. 620, 194 S.E. 278 (1937).

V. SUBDIVISION (5).

Willfully Preventing Receiver from Taking Possession.—A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt of court in willfully preventing the receiver from taking possession of the property in conformity with a lawful order of the court, even though the order may be erroneous, if no appeal therefrom was perfected by him. Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937).

VI. SUBDIVISION (6).

Commissioner May Ask Aid of Judge; Declaration of Power.—The commissioner before whom the witness had refused to answer, may invoke the aid of the judge to punish for contempt. But the judge has no right to delegate the judicial power to punish for contempt to an executive officer. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

Obviously False or Evasive Testimony Is Equivalent to Refusal to Testify.—The power of the court to require a witness to give proper responses is inherent and necessary for the furtherance of justice, and therefore, testimony which is obviously false or evasive is equivalent to a refusal to testify. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

No Distinction between Refusing to Be Sworn and Refusing to Answer. — This section makes no distinction between one who, in the presence of the court, pursuant to its lawful subpoena, refuses to be sworn as a witness and one who, having been sworn, refuses to answer a proper question. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

The refusal of a witness to testify at all, or his refusal to answer any legal or proper question is punishable for contempt under § 5-1 (6), or as for contempt under § 5-8 (4), depending upon the facts of the particular case. Galyon v Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

It has been uniformly held by the Supreme Court and by courts of other jurisdictions that the power to punish for contempt committed in the presence of the court, is inherent in the court, and not dependent upon statutory authority. Without such power the court cannot perform its judicial function. This principle is especially applicable when the contempt consists in the refusal of the witness in attendance upon the court, after having been duly sworn, to answer a question propounded to him for the purpose of eliciting evidence material to the issue to be decided by the court. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967), quoting In re Hayes, 200 N.C. 133, 156 S.E. 791, 73 A.L.R. 1179 (1931).

Motive of Recalcitrant Witness Immaterial.—Whatever the motive of the recalcitrant witness or party may be, it does not determine whether he may lawfully be adjudged in contempt and punishment. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

The refusal of one subpoenaed as a witness to take the oath or to answer proper questions propounded to him, when done knowingly and intentionally, is contumacious and willful, within the meaning of this statute, even though such person believes it to be his moral duty to refuse to testify. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967), quoting Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948).

Self-Incrimination No Defense. — Witness may not refuse to answer on the ground that his answer may tend to incriminate him. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 133 (1880).

Decrease in Esteem No Justification for Refusing to Testify. — The fact that one called as a witness fears that his testimony may decrease the esteem in which he is held in the community, or may decrease his ability to render service therein, does not justify refusal by him to testify in response to questions otherwise proper. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

Nor Religious Conscience. — The State has a compelling interest that a person called as a witness should be sworn and should testify in the administration of justice between the State and one charged with a serious offense; therefore a minister

called as a witness in such prosecution may be held in contempt of court upon his refusal to be sworn as a witness, notwithstanding he asserts that his refusal is a matter of religious conscience. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

Other Actions Held to Constitute Contempt. — Refusal to testify before a commissioner, Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893). Refusal to testify before a referee, LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 133 (1880).

VII. SUBDIVISION (7).

In General.—To state that the judges of the Supreme Court singly or en masse moved from the path of judicial propriety because of political zeal, subjected the party so stating to liability under this clause of the section. In re Moore, 63 N.C. 396 (1869).

Publication after Adjournment of Court. — For constructive contempt by publication of false matter relating to the conduct of the presiding judge, published after the adjournment of the court, the judge must seek redress by the ordinary method and bring his cause before an impartial tribunal. He may not proceed to determine the matter summarily without the intervention of a jury. In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Publication of Past Matter.—There no longer exists the power to punish summarily for defamatory reports and publications about a matter which is past and ended. To justify contempt proceedings the publication must have been pendente lite. In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Trial of Issue by the Court Instead of the Jury.—If on the face of the publication there is nothing to show that it was grossly incorrect or calculated to bring the court into contempt, the respondent is entitled to have the issue tried not by a jury but by a court. In re Robinson, 117 N.C. 533, 23 S.E. 453 (1895).

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

VIII. SUBDIVISION (8).

Cross References. — As to contempt in failure of personal representative to file account, see § 28-118. As to failure to obey judgment, see § 1-302. As to failure to obey a court order in supplementary proceedings, see § 1-368. As to acts punished as for contempt, see §§ 5-8, 5-9.

Gross negligence of attorneys is a sort of contempt, and courts may order them to pay the costs of cases in which they are guilty of such negligence. Ex parte Robins, 63 N.C. 310 (1869).

Cited in In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940).

§ 5-2. Appeal from judgment of guilty.—Any person adjudged guilty of contempt under the preceding section [§ 5-1] has the right to appeal to the appellate division in the same manner as is provided for appeals in criminal actions, except for the contempts described and defined in subdivisions (1), (2), (3), and (6). Nor shall the right of appeal lie under subdivision (4) and (5) if such contempt is committed in the presence of the court. (Code, s. 648; 1905, c. 449; Rev., s. 939; C. S., s. 979; 1969, c. 44, s. 14.)

Cross References. — As to appeals in criminal actions, see § 15-180 et seq. As to inapplicability of this section to proceedings under § 5-8, see note to § 5-8.

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the first sentence.

The right of review in proceedings for contempt is regulated by this section, which denies to persons adjudged guilty of contempt in the superior court the right of appeal to the appellate division except in cases arising under subdivisions (4) and (5) of § 5-1, where the contempt is not committed in the presence of the court. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Finding of Fact Not Disturbed.—Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, the finding will not be disturbed by appeal. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890); State v. Little, 175 N.C. 743, 94 S.E. 680 (1917). Nor will the finding of fact by the judge be disturbed upon an appeal on an indirect contempt. In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

It is otherwise however on appeals from a subordinate court to the superior court. In such a case the facts as well as the law will be reviewed, and even additional testimony may be heard. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

This section has no application to proceedings as for contempt under § 5-8, and as a result, a person who is penalized as for contempt may obtain a review of the judgment entered against him by a direct appeal. Rose's Stores, Inc. v. Tarrytown

Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

No appeal shall lie from an order of direct contempt. In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965).

But Contemner May Seek Relief by Habeas Corpus.--A contemner imprisoned in consequence of a judgment of direct contempt may seek relief by habeas corpus. In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965).

Where the defendant, punished for direct contempt, contends that his legal rights have been denied, and it is made to appear that the court had no jurisdiction, his remedy is not by appeal, but by habeas corpus proceedings which, if necessary, may be carried up by a writ of certiorari. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

The only question open to inquiry at a habeas corpus hearing of a contemner imprisoned in consequence of a judgment of direct contempt is whether, on the record, the court which imposed the sentence had jurisdiction and acted within its lawful authority. In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965).

As to contempts not committed in the presence of the court, an appeal lies. In re Daves, 81 N.C. 72 (1879); In re Walker, 82 N.C. 95 (1880); Cromartie v. Commissioners of Bladen, 85 N.C. 211 (1881); In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

§ 5-3. Solicitor or Attorney General to appear for the court.—In all cases where a rule for contempt is issued by any court, referee, or other officer, the solicitor shall appear for the court or other officer issuing the rule, and in case of appeal to the appellate division, the Attorney General shall appear for the court or other officer by whom the rule was issued. (Code, s. 648; 1905, c. 449; Rev., s. 939; C. S., s. 980; 1969, c. 44, s. 15.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court."

Applied in In re Palmer, 265 N.C 485, 144 S.E.2d 413 (1965).

§ 5-4. Punishment.—Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court. (Code, s. 649; Rev., s. 940; C. S., s. 981.)

Cross Reference.—See note to § 5-8.

Editor's Note. — For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

The provisions of this section are not applicable to civil contempt proceedings under § 5-8. Smith v. Smith, 248 N.C. 298, 103 S.E.2d 400 (1958).

Punishment as for contempt is not limited by the terms of this section. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

The punishment as to matters punishable for contempt (§ 5-1) is limited to a fine not to exceed $250 or imprisonment not to exceed thirty days, or both, in the discretion of the court. However, punishment as for contempt (§ 5-8) is not limited by the terms of this section. Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

A sentence of ten days in jail, imposed by the superior court for contempt by refusal to be sworn as a witness, was well within the statutory maximum. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

Illegal Punishment. — Imprisonment for 60 days and a fine of $2000 were held illegal under this section. In re Patterson, 99 N.C. 407, 6 S.E. 643 (1888). See also In re Walker, 82 N.C. 95 (1880).

A judgment entered is erroneous in directing that the defendant be committed to jail for an indefinite period rather than for thirty days as prescribed by this section. Basnight v. Basnight, 242 N.C. 645, 89 S.E.2d 259 (1955).

Imprisonment for Debt. — The abolishment of imprisonment for debt does not include commitment under attachments for failure to comply with an order of court. Wood v. Wood, 61 N.C. 538 (1868).

Punishment for civil contempt is not limited to thirty days' imprisonment, this section not being applicable to civil contempt, and a petition for release from imprisonment for willful refusal to pay alimony on the ground that the court exceeded its authority in not limiting the imprisonment to thirty days, is properly refused, but defendant need not serve indefinitely and may obtain his discharge upon a proper showing under appropriate proceedings. Dyer v. Dyer, 213 N.C. 634, 197 S.E. 157 (1938).

Commitment until Alimony Paid. — A judgment for commitment until alimony is paid was held valid. Green v. Green, 130 N.C. 578, 41 S.E. 784 (1902).

Imprisonment until the order is complied with is valid. Cromartie v. Commissioners of Bladen, 85 N.C. 211 (1881); Thompson v. Onley, 96 N.C. 9, 1 S.E. 620 (1887); Delozier v. Bird, 123 N.C. 689, 31 S.E. 834 (1898).

A fine for contempt goes to the State, being a punishment for a wrong to the State, and should not be directed to be paid to a party to the suit. In re Rhodes, 65 N.C. 518 (1871); Morris v. Whitehead, 65 N.C. 637 (1871).

Punishment by Working on Road. — A person sentenced to jail as for contempt of court cannot be worked on the roads. State v. Moore, 146 N.C. 653, 61 S.E. 463 (1908).

Punishment Immediate. — The punishment in contempt cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. State v. Yancy, 4 N.C. 133 (1814).

No Defense to Criminal Prosecution. — The fact that a person has been punished for contempt of court, is no defense to a criminal indictment for the act constituting the contempt. State v. Yancy, 4 N.C. 133 (1814); In re Griffin, 98 N.C. 225, 3 S.E. 515 (1887).

Power of Industrial Commission. — The Industrial Commission proceeding under the Workmen's Compensation Act, being expressly given the authority to subpoena witnesses and have them give evidence at the hearing, acts in a judicial capacity in adjudging in contempt a witness who refuses to give material evidence, and has power to punish by a fine or imprisonment under the provisions of this section. In re Hayes, 200 N.C. 133, 156 S.E. 791 (1931).

Applied in Carolina Wood Turning Co. v. Wiggins, 247 N.C. 115, 100 S.E.2d 218 (1957).

§ 5-5. **Summary punishment for direct contempt.**—Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order. (Code, s. 650; Rev., s. 941; C. S., s. 982.)

Editor's Note.—In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967), cited in the note below, was commented on in 45 N.C.L. Rev. 863, 884, 924 (1967).

Constitutionality.—Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt must be represented by counsel, and therefore sentence for contempt does not deprive the contemner of his liberty without due process of law. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

Direct contempt of court is punishable summarily. In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965).

And the offended court is only requested to "cause the particulars of the offense to be specified on the record." In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965).

Contempt committed in the view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

But Wilful Disobedience of Void Order Is Not Punishable.—Wilful disobedience to an order, void ab initio for want of jurisdiction, may not be made the basis for contempt proceedings. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

What Is Direct Contempt. — A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess, which tend to subvert or prevent justice. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Contempt of De Facto Court.—Particular conduct, which would amount to contempt in the presence of a duly constituted court of proper jurisdiction, would not necessarily be contemptuous in a de facto court. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

A lawyer, or any person for that matter, whose conduct is disrespectful in the view and presence of a judge, sitting judicially under the mistaken but bona fide belief that he has jurisdiction to act as a court, is liable to punishment for direct contempt. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Contumacious and Unlawful Refusal to Be Sworn.—The contumacious and unlawful refusal, in the presence of the court, by one duly subpoenaed, to be sworn as a witness is direct contempt and may be punished summarily. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

Assaulting Judge during Adjournment. —For assaulting a judge in his house pending an adjournment of the court the

petitioner was properly punished for contempt by attachment in summary proceedings. Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905).

Remedy by Habeas Corpus.—This section, providing that the court shall find the facts constituting the contempt and have them spread upon the record, does not have the effect of giving the right to an appeal nor to a writ of certiorari in direct contempts. But such facts when spread upon the record may authorize a revising tribunal, on a habeas corpus, to discharge the party. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

Jury Trial.—It is well settled that the defendant in contempt proceedings is not entitled to a jury trial upon the controverted facts. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

Stated in Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 206, 154 S.E.2d 320 (1967).

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

Editor's Note. — The 1969 amendment rewrote this section.

Referee. — Acts constituting contempt committed before a referee in supplementary proceedings are to be punished by the court making the reference. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 133 (1880).

Authority of Commissioner Not Exclusive.—The power of a commissioner, appointed by the court, to commit for refusal to testify is not given exclusively, if at all; but he may invoke the power of the judge, even though he may be given concurrent authority, under statute. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

A judge of the district court has no authority, except in his own district, to punish for contempt. In re Rhodes, 65 N.C. 518 (1871); Morris v. Whitehead, 65 N.C. 637 (1871).

Nisi Prius Judge.—The right of a nisi prius judge to order a witness or anyone else into immediate custody for a contempt committed in the presence of the court in session is unquestioned. State v. Dick, 60 N.C. 440 (1864); State v. Ownby, 146 N.C. 677, 61 S.E. 630 (1908); State v. Swink, 151 N.C. 726, 66 S.E. 448 (1909).

Contempt of Subordinate Officer Regarded as Contempt of Appointing Court. —A contempt against a subordinate officer appointed by a court, such as a commissioner, ordinarily is regarded as contempt of the authority of the appointing court, and the appointing court has power to punish such contempt. This is true even where such subordinate officer, as with us under this section, is vested with the power to punish. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Procedural Requirements in Proceedings to Punish Contempt of Subordinate Officer.—When the conduct complained of was before a commissioner or other subordinate officer of the court and the court has no direct knowledge of the facts constituting the alleged contempt, in order for the court to take original cognizance thereof and determine the question of contempt, the proceedings must follow the procedural requirements as prescribed for indirect contempt, § 5-7, or "as for contempt," § 5-8, and be based on rule to show cause or other process constituting an initiatory accusation meeting the requirements of due process as prescribed by our statutes Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

§ **5-7. Indirect contempt; order to show cause.**—When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter. (Code, s. 653; Rev., s. 943; C. S., s. 984.)

Indirect Contempt Defined.—An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the

court or interrupt, prevent, or impede the administration of justice Galyon v Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Practice.—In the cases of contempts out of the presence of the court the practice is to have a foundation laid by facts shown forth, by affidavit or otherwise, constituting a prima facie case, and then by a rule to put the accused to show cause against the attachment by an answer denying the alleged facts of which he had notice in the rule or on the record, or excusing his conduct, or, where the gravamen of the charge rested on intention, by a disavowal of the imputed purpose. In re Moore, 63 N.C. 396 (1869); In re Walker, 82 N.C. 95 (1880).

The procedure to punish for indirect contempt is by order to show cause. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Whether the movant uses a petition or other document to obtain an order to show cause in a proceeding under this section, it is the affidavit or verification that imports the verity of the charge of violating the judgment or order of the court, which is required as the basis of the order to show cause Erwin Mills, Inc v Textile Workers Union, 234 N.C. 321, 67 S.E.2d 372 (1951); Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 206, 154 S.E.2d 320 (1967).

The issuance of a show-cause order is necessary both in proceedings to punish for indirect contempt under § 5-7 and in proceedings to punish as for contempt under § 5-9. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Cited in Erwin Mills Inc v Textile Workers Union, 235 N.C. 107, 68 S.E.2d 813 (1952); In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940).

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

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

(2) Parties to suits, attorneys, and all other persons for the nonpayment of any sum of money ordered by such court, in cases where execution cannot be awarded for the collection of the same.

(3) All persons for assuming to be officers, attorneys or counselors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

(4) All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness.

(5) Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom.

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

(7) All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this State to enforce the civil remedies or protect the rights of any party to an action. (Code, ss. 654, 656; Rev., s. 944; C. S., s. 985.)

Cross References.—As to punishment for using profanity within hearing of justice of peace, see § 7-128. As to punishment of witness refusing to testify in ac-

tion against a railroad before a justice of peace, see § 7-146. As to distinctions between proceedings under this section and under § 5-1, see note to § 5-1.

Editor's Note.—See 12 N.C.L. Rev. 260, for comment on this and other sections dealing with contempt.

For a discussion of this section and its relation to the preceding sections, see Cromartie v. Commissioners of Bladen, 85 N.C. 211 (1881).

For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

Contempt proceedings may be resorted to in civil or criminal actions. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

The provisions of this section, except subdivisions (4), (5), and (6), apply only to civil actions. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

Jury Trial.—Respondents in proceedings as for contempt are not entitled to a jury trial. In re Gorham, 129 N.C. 481, 40 S.E. 311 (1901).

A contempt proceeding is sui generis. It is criminal in its nature in that the party is charged with doing something forbidden, and if found guilty, is punished. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Criminal and Civil Contempt Distinguished.—Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966); Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Civil contempt or punishment as for contempt is applied to a continuing act, and the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967); Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Resort to civil contempt proceeding is common to enforce orders in the equity jurisdiction of the court, orders for the payment of alimony, and in like matters. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Nature of Offense.—A person guilty of any of the acts or neglects catalogued in this section is punishable as for contempt because such acts or neglect tend to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court Luther v Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 206, 154 S.E.2d 320 (1967).

The acts and omissions enumerated in this section correspond to civil contempt and involve matters tending to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court, and are punishable as for contempt with the underlying purpose of preserving private rights by coercion. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Essential Elements under Subdivision (1).—An act or default is not punishable by a court of record as for contempt under subdivision (1) of this section unless these three essential elements concur: (1) The alleged contemnor must be a clerk, sheriff, register, solicitor, attorney, counselor, coroner, constable, referee, or other person appointed or selected to perform a ministerial or judicial service; (2) he must be guilty of neglect or violation of duty, or of misconduct in the performance of such service; and (3) his neglect or violation of duty or his misconduct in such respect must have a tendency to defeat, impair, delay, or prejudice the rights or remedies of a party to a cause or matter pending in the court. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Persuading Witness.—Where a defendant in a criminal action tried to persuade the State's witness to leave the State and not to appear against him, it was held that he was subject to proceedings as for contempt. In re Young, 137 N.C. 552, 50 S.E. 220 (1905).

The refusal of a witness to testify at all, or his refusal to answer any legal or proper question is punishable for contempt under § 5-1 (6), or as for contempt under § 5-8 (4), depending upon the facts of the particular case. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Obviously False or Evasive Testimony Is Equivalent to Refusal to Testify.—The power of the court to require a witness to give proper responses is inherent and necessary for the furtherance of justice, and therefore, testimony which is obviously false or evasive is equivalent to a refusal

to testify. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Wilful failure and refusal of a party to make payments for the support of his child in accordance with decree of court is civil contempt under this section and the court may order him into custody until he shows compliance or is otherwise discharged according to law. Section 5-4, limiting sentence of confinement for a period not exceeding thirty days, is not applicable. Smith v. Smith, 248 N.C. 298, 103 S.E.2d 400 (1958).

Civil contempt proceedings to enforce orders for payment of support to children pursuant to consent judgment are authorized by this section. Smith v. Smith, 248 N.C. 298, 103 S.E.2d 400 (1958).

A breach of contract is not punishable as for contempt under this section. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); In re Will of Smith, 249 N.C. 563, 107 S.E.2d 89 (1959).

Where the proceeding as for contempt is set in motion to compel a person to substitute a binding agreement for an invalid one, an order penalizing the plaintiff runs counter to the sound rule that the court will not entertain contempt proceedings where the mover's purpose is to coerce his adversary into making a contract. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

Refusal to effectuate an agreement to sign a consent judgment may not be made the basis for contempt proceedings by this section where it does not appear that the parties ever agreed to the exact terms of such judgment. State v. Clark, 207 N.C. 657, 178 S.E. 119 (1935).

Where the plaintiff and the defendant made an oral contract to settle their lawsuit on agreed terms to be incorporated in a subsequent consent judgment, and the plaintiff breached the oral contract by withholding her consent when the proposed judgment embodying the agreed terms was drafted and presented to her for signing, she was not a person "selected or appointed to perform . . . ministerial or judicial service," and consequently, subdivision (1) of this section did not apply to her. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

Violation of Consent Judgment. — In an action by husband for divorce a mensa in which no divorce was granted but in which the parties entered into a consent judgment in 1954 prior to the 1955 amendment to former § 50-16 permitting permanent alimony in actions for divorce a mensa, the violation of the judgment for support payments by the husband did not make him liable for contempt under this section, since the judgment was only a contract. Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956).

The violation of a provision of a judgment which is void cannot be made the basis for contempt. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Under subdivision (3) a person may be punished as for contempt, for unlawful interference with proceedings in any action. In re Gorham, 129 N.C. 481, 40 S.E. 311 (1901).

Suggesting to Witness Not to Attend. — Suggesting to a material witness not to attend court, etc., with apparent intent to prevent the attendanec of the witness, is under this clause an unlawful interference with the process and proceedings of the court. State v. Moore, 146 N.C. 653, 61 S.E. 463 (1908).

Juror Improperly Influenced. — Under subdivision (5) a juror may be punished as for contempt for allowing himself to be improperly influenced. In re Gorham, 129 N.C. 481, 40 S.E. 311 (1901).

Refusal of municipal officers to surrender their offices in accordance with the results of an election held pursuant to the provisions of a decree of court cannot be made the basis for contempt proceedings, since upon the hearing of the order to show cause the court must first adjudicate the rights of the parties to the offices and such adjudication can be made only in a direct proceeding for that purpose under article 41, chapter 1, of the General Statutes. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Section 5-2 has no application to proceedings as for contempt under this section. As a consequence, no legal impediment bars a person, who is penalized as for contempt, from obtaining a review of the judgment entered against him in the superior court by a direct appeal to the appellate division. Such right of appeal has been exercised in proceedings as for contempt without question for upwards of a hundred years. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

Section 5-2 has no application to proceedings as for contempt under this section, and as a result a person who is penalized as for contempt may obtain a review of the judgment entered against him by a direct appeal to the appellate division. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Nor Does § 5-4 Limit Punishment.—The punishment as to matters punishable for contempt is limited by § 5-4 to a fine not

to exceed $250 or imprisonment not to exceed thirty days, or both, in the discretion of the court. However, punishment as for contempt is not limited by the terms of that section. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967); Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Punishment for Both Criminal and Civil Contempt. — There are certain instances where contemnors may be punished for both criminal contempt, i.e., for contempt, and for civil contempt, i.e., as for contempt. Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

Effect of Payment of Fine.—A party to a proceeding as for contempt undoubtedly waives his right to have the judgment in the proceeding reviewed on appeal by voluntarily paying the fine imposed upon him by the judgment. But where the record reveals that the fine was paid under protest at the precise moment an appeal was noted from the order imposing it, and that the party took this course to avoid being committed to jail until the fine was paid, inasmuch as the payment was the product of coercion, the right of appeal was not waived by making it. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

Applied in Gorrell v. Gorrell, 264 N.C. 403, 141 S.E.2d 794 (1965); Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

Cited in Dyer v. Dyer, 213 N.C. 634, 197 S.E. 157 (1938).

§ 5-9. **Trial of proceedings in contempt.**—Proceedings as for contempt shall be by an order directing the offender to appear within a reasonable time and show cause why he should not be attached for contempt. In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceedings for the disobedience of a judicial order rendered in any pending action. (Code, s. 655; Rev., s. 945; 1915, c. 4; C. S., s. 986; 1947, c. 781.)

The procedure to punish as for contempt is by order to show cause based upon a petition, affidavit, or other proper verification charging a wilful violation of an order of court. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

The issuance of a show-cause order is necessary both in proceedings to punish for indirect contempt under § 5-7 and in proceedings to punish as for contempt under § 5-9. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Precedent decrees that a judge should recuse himself in contempt proceedings involving his personal feelings which do not make for an impartial and calm judicial consideration and conclusion in the matter. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951).

And this section declares a sound public policy that no judge should sit in his own case, or participate in a matter in which he has a personal interest, or has taken sides therein. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951).

The last sentence of this section was not intended to cover an order entered in the same cause by the same judge when the propriety of his acting in the premises, and issuing the very order alleged to have been violated, is called in question. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951), wherein judge had taken active part in election out of which proceedings arose.

Chapter 6.
Costs.

Article 1.
Generally.

Article 2.
When State Liable for Costs.

Article 3.
Civil Actions and Proceedings.

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Article 6.
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Article 8.
Fees of Witnesses.

ARTICLE 1.

Generally.

§ 6-1. Items allowed as costs.—To either party for whom judgment is given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same.

Where a party to a civil action gives a prosecution bond as required by G.S. 1-109 or a bond for costs as required by G.S. 1-111 with a surety company instead of a personal surety, the premiums on all such surety bonds shall be taxed as a part of the costs. (Code, s. 528; Rev., s. 1249; C. S., s. 1225; 1955, c. 922.)

Cross References. — As to prosecution bonds for costs, see § 1-109 et seq. As to partial recovery, see § 6-18 and note. As to fees of witnesses, see § 6-51 et seq. and notes.

Editor's Note.—In general this section states the rule that costs follow the judgment, a rule which is founded on policy and natural justice, designed to prevent the unsuccessful litigant from escaping the consequence ensuing from the unfavorable termination of a suit, and which, to a great extent, acts as deterrent to the prosecution or appeal of promiscuous and frivolous litigation. Criminal actions and civil suits alike are controlled by the principle. In State v. Horne, 119 N.C. 853, 26 S.E. 36 (1896), it is said: "There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment." The true and only test of liability for costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. Kincaid v. Graham, 92 N.C. 154 (1885); Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905); Smith v. Cashie & Cowan R.R. & Lumber Co., 148 N.C. 334, 62 S.E. 416 (1908); Kinston Cotton Mills v. Rocky Mount Hosiery Mills, 154 N.C. 462, 70 S.E. 910 (1911); Ritchie v. Ritchie, 192 N.C. 538, 135 S.E. 458 (1926).

This basic rule of costs is underlying throughout and apparent from the other provisions of this chapter, and, as stated in Costin v. Baxter, 29 N.C. 11 (1846), "in no instance found in the books has the losing party recovered his costs or any part of them."

For discussion of costs generally, see State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

Dependent upon Statutes.—At common law neither party to a civil action could recover costs. Costin v. Baxter, 29 N.C. 111 (1846); State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889); Charwick v. Life Ins. Co., 158 N.C. 380, 74 S.E. 115 (1912); Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919). And it has been frequently held that costs are entitrely creatures of legislation, without which they do not exist. Clerk's Office v. Commissioners of Carteret County, 121 N.C. 29, 27 S.E. 1003 (1897).

The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, etc., is and always has been within the regulation and control of the legislature. See Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897).

Jurisdiction Essential.—Where a court has no jurisdiction of a case, it cannot award costs, or order execution to issue for them. See Mansfield, G. & L.M. Ry. v. Swan, 111 U.S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

This section does not include expenses for returning defendants to this State from

points without the State. State v. Patterson, 224 N.C. 471, 31 S.E.2d 380 (1944).

Expense of Transporting Witnesses.—A provision in an order for removal that movant should pay "costs" of transporting the witnesses of the adverse party, held to mean "expense," since such "costs" are no part of the costs of the action. Nichols v. Goldston, 231 N.C. 581, 58 S.E.2d 348 (1950).

An action upon a contract sounding in damages is one at law, and the costs are taxable under this section, and are not in the discretion of the court as an equity proceeding controlled by § 6-20. Highland Cotton Mills v. Ragan Knitting Co., 194 N.C. 80, 138 S.E. 428 (1927).

Where the appellate court allows improvements claimed in partition proceedings, claimant is not to be taxed with the costs of trial in the superior court involving her claim. Jenkins v. Strickland, 214 N.C. 441, 199 S.E. 612 (1938).

Nominal Damages Entitling Plaintiff to Costs Not Allowed in Action for Wrongful Death. — Where, in an action for wrongful death the sole issue is that of damages and there is no pecuniary loss on which recovery could be based, nominal damages, which would entitle plaintiff to costs, would not be allowed. Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1958).

Cited in Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

§ 6-2. Summary judgment for official fees.—If any officer, to whom fees are payable by any person, fails to receive them at the time the service is performed, he may have judgment therefor on motion to the court in which the action is or was pending, upon twenty days' notice to the person to be charged, at any time within one year after the termination of the action in which the same was performed. If the motion for judgment be in behalf of the clerk of the superior court, it shall be made to the judge of the court in or out of term. (1868-9, c. 279, s. 561; Code, s. 3760; Rev., s. 1250; C. S., s. 1226.)

Advance Fees for Docketing Transcript.—This section impliedly authorizes the clerk of the Supreme Court to refuse to docket the transcript when the prescribed fee is not paid in advance. Section 138-2 specifically authorizes the refusal. Andrews v. Whisnant, 83 N.C. 446 (1880); Dunn v. Clerk's Office, 176 N.C. 50, 96 S.E. 738 (1918).

When Cause Is Still Pending.—This section is not applicable to the claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report. Farmers Bank, Inc. v. Merchants & Farmers Bank, 204 N.C. 378, 168 S.E. 221 (1933).

Time of Motion to Retax.—This section permits a motion to retax costs to be made in favor of any officer within one year after termination of the action. In re Smith, 105 N.C. 167, 10 S.E. 982 (1890).

Judgment Becomes a Lien.—A judgment under this section becomes a lien on the lands of the defendants. Sheppard v. Bland, 87 N.C. 163 (1882).

Where, as a condition of a continuance, the plaintiff in an action was required to pay the accrued costs and they were taxed, docketed and paid, and a judgment was subsequently entered in the action directing the repayment of such costs by the defendant, it was held, that such costs became a part of the judgment already ascertained by reference to the docket as for so much money paid by the plaintiff for the defendant's benefit, and hence, there was no necessity for a retaxation of the costs. Owen v. Paxton, 122 N.C. 770, 30 S.E. 343 (1898).

§ 6-3. Sureties on prosecution bonds liable for costs.—When an action is brought in any court in which security is given for the prosecution thereof, or when any case is brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit has been given, and judgment is rendered against the plaintiff for the costs of the defendant, the appellate court shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety. (1831, c. 46; R. S., c. 31, s. 133; R. C., c. 31, s. 126; Code, s. 543; Rev., s. 1251; 1913, c. 189, s. 1; C. S., s. 1227.)

Cross References.—As to use of mortgages in lieu of security for costs, etc., see § 109-25. As to appeal bonds, see § 1-297.

Applies to Judgment for Defendant.—The section is so broadly worded as to apply to all cases where the costs are adjudged for the defendant against the plaintiff, and not simply to those where the

plaintiff appeals. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Applies in Supreme Court.—This section cannot be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given there, but only in the superior court, or in the Supreme Court if an action is brought there against the State, or perhaps in some other cases not cognizable by a justice of the peace. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914); Grimes v. Andrews, 171 N.C. 367, 88 S.E. 513 (1916).

The words "appellate court," as used by the amendment of this section in 1913, in view of the context could mean only the Supreme Court. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

The words "security for the prosecution" mean the prosecution bond. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Increasing Penalty of Bond.—Where the defendant has been successful on his appeal to the appellate court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Partial New Trial.—This section does not apply where the defendant does not gain an entire reversal in the appellate court; where a partial new trial only is awarded the costs are in the discretion of the appellate court as provided in § 6-33. Rayburn v. Casualty Co., 142 N.C. 376, 55 S.E. 296 (1906).

Application.—Where an action is brought to recover fees of an office, and in the same action judgment is asked against the sureties on a bond given in a quo warranto proceeding, the superior court has jurisdiction and judgment may be rendered against the sureties. McCall v. Zachary, 131 N.C. 466, 42 S.E. 903 (1902).

Appeal.—Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. Smith v. Arthur, Coffin & Co., 116 N.C. 871, 21 S.E. 696 (1895).

§ 6-4. Execution for unpaid fees; itemized bill of costs to be annexed.—The clerks of the General Court of Justice and of inferior courts, where suits are determined and the fees are not paid by the party from whom they are due, shall sue out executions, directed to the sheriff of any county in the State, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words so as plainly to show each item of costs and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued. (R. C., c. 102, s. 24; Code, s. 3762; Rev., s. 1252; C. S., s. 1228; 1969, c. 44, s. 17.)

Editor's Note.—The 1969 amendment substituted "The clerks of the General Court of Justice and of inferior courts" for "The clerks of the Supreme, superior and criminal courts" at the beginning of the section.

Every execution presupposes a judgment of some sort, and the right given by this section to issue the one implies the existence of the other. Sheppard v. Bland, 87 N.C. 163 (1882).

§ 6-5. Jurors' tax fees. — On every indictment or criminal proceeding, tried or otherwise disposed of in the superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of four dollars unless a different jury tax is prescribed elsewhere. In every civil action in any court of record for which different jury taxes are not prescribed by law the party adjudged to pay the costs shall pay a tax of five dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerk in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending the courts thereof. (1830, c. 1; R. C., c. 28; 1879, c. 325; 1881, c. 249; Code, s. 732; 1905, c. 348; Rev., s. 1253; 1909, c. 1; 1919, c. 319; C. S., s. 1229; 1945, c. 635.)

Local Modification. — Alamance: 1957, c. 1016; Harnett: 1933, c. 75, s. 1(c); Wayne: 1927, c. 156; 1937, c. 120; 1941, c. 88.

Cross References.—As to fees of jurors, see § 9-8. As to unclaimed fees of jurors, see § 2-50.

Not a "Tax" within Meaning of Constitution.—The tax prescribed by Rev. Code, ch. 28, § 4, (similar to this section) was not a tax within the meaning of the Revenue Act of 1858-59, which repealed all taxes not therein imposed; nor was it a tax within the meaning of the Constitution, Art. V, § 3, which requires taxes to be equal and uniform. Such a tax was not in violation of the Constitution, Art. I, § 35. State ex rel. Hewlet v. Nutt, 79 N.C. 263 (1878).

Failure to List Taxes.—The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act comes within the intent and meaning of this section requiring in criminal cases a tax of $4 against the "party convicted or adjudged to pay the cost," and applies whether the jury has been impaneled or not; and the tax of $5 in the civil actions should be imposed as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefor, though apparent, is immaterial in construing the meaning of the statute. State v. Smith, 184 N.C. 728, 114 S.E. 625 (1922).

§ 6-6. In criminal cases, not demandable in advance.—In all cases of criminal complaints before justices of the Supreme Court, judges of the Court of Appeals, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process are not entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable. (1868-9, c. 178, subch. 3, s. 40; Code, s. 1173; Rev., s. 1254; C. S., s. 1230; 1969, c. 44, s. 18.)

Cross Reference.—As to costs payable in advance in civil actions, see § 2-29.

Editor's Note.—The 1969 amendment inserted "judges of the Court of Appeals" near the beginning of the section.

§ 6-7. Clerk to state in detail in entry of judgment.—The clerk shall insert in the entry of judgment the allowances for costs allowed by law, and the necessary disbursements, including the fees of officers and witnesses, and the reasonable compensation of referees and commissioners in taking depositions. The disbursements shall be stated in detail. When it is necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required to be made by the judge. (Code, s. 532; Rev., s. 1255; C. S., s. 1231.)

In General.—In Young v. Connelly, 112 N.C. 646, 17 S.E. 424 (1893), the court cites this section to the following statement: "The referee's fee was a part of the costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his honor."

Costs Properly Adjudged after Decision of Appellate Court.—After decision of the appellate court modifying and affirming a judgment of the superior court on appeal from the referee allowances constituting items of costs may be adjudged as provided by this section. Clark v. Cagle, 226 N.C. 230, 37 S.E.2d 672 (1946).

§ 6-8. Clerk to itemize bills of criminal costs.—It is the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk. (1873-4, c. 116; 1879, c. 264; Code, s. 733; Rev., s. 1256; C. S., s. 1232; 1953, c. 58.)

Local Modification.—Harnett: 1933, c. 75, s. 3.

§§ 6-9, 6-10: See Supplement.

§ 6-11. Bills of costs open to the public.—Every bill of costs shall at all times be open to the inspection of any person interested therein. (1873-4, c. 116; Code, s. 735; Rev., s. 1258; C. S., s. 1235.)

§ **6-12. Clerks to tax solicitors' fees; paid to school fund.** — The clerks of the superior courts of the several counties of the State shall, in computing bills of costs in criminal cases, tax against the party convicted the solicitors' fees hereinafter set forth. The solicitors' fees shall be collected by the clerks and paid into the school funds of the respective counties: Provided, that no such fees which are now required by law to be paid by the county shall be taxed in the bills of costs, nor shall any such fees be taxed in said bills of costs in cases where the defendants are assigned to work on the public roads of the State, or on any county properties.

The solicitors' fees are as follows:

(1) For every conviction under an indictment charging a capital crime, whether by plea or verdict, forty dollars.

(2) For perjury, forgery, passing or attempting to pass or sell any forged or counterfeited paper, or evidence of debt; maliciously injuring or attempting to injure any railroad or railroad car, or any person traveling on such railroad car; stealing or obliterating records; maliciously burning or attempting to burn houses or bridges; seduction; slander of an innocent woman, and embezzlement; breaking into houses otherwise than burglariously; assault with intent to commit rape; larcenies from the person; false pretense, and secret assault; in each of the above cases, twenty dollars.

(3) For larceny, receiving stolen goods, frauds, maims, deceits, escapes, and other felonies, fifteen dollars.

(4) For disturbing religious and other public meetings; for all violations of the prohibition law as to intoxicating liquors and narcotics; for fornication and adultery and resisting an officer, twelve dollars.

(5) For all other offenses, eight dollars.

No larger fee than ten dollars shall be taxed for the solicitor in an indictment against the justices of the peace of any county, as justices, when there are more than three justices who are found guilty.

The solicitors of the several judicial districts and criminal courts shall prosecute all penalties and forfeited recognizances entered in their courts respectively, and a sum to be fixed by the court, not to exceed ten per centum of the amount collected upon such penalty or forfeited recognizance, shall be taxed in such prosecutions.

For the performance of the solicitor's duties for the appointment of a receiver of an estate of a minor, there shall be taxed a sum to be fixed by the judge, not to exceed ten dollars; for passing on the returns of the receiver in such cases, where the estate of the infant does not exceed five hundred dollars, a sum not to exceed five dollars, and where the estate exceeds five hundred dollars, a sum to be fixed by the judge, not to exceed ten dollars; and in each case such sums taxed shall be paid out of the fund. (1873-4, c. 170; Code, s. 3737; 1885, c. 130; 1895, c. 14; 1901, c. 4, s. 5; Rev., s. 2768; 1915, c. 86; Ex. Sess. 1920, c. 97; Ex. Sess. 1921, c. 75; 1923, c. 157, s. 3; C. S., ss. 1235(a), 3891.)

Local Modification.—Columbus: 1951, c. 710.

Cross References.—As to salary of solicitors in lieu of fees, see §§ 7-44, 7-45.

As to solicitors' fees where the bill of indictment contains more than one count, see § 15-152.

ARTICLE 2.

When State Liable for Costs.

§ **6-13. Civil actions by the State; joinder of private party.**—In all civil actions prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases and to the

same extent as private parties. If a private person be joined with the State as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the State till after execution is issued therefor against such private party and returned unsatisfied. (Code, s. 536; Rev., s. 1259; C. S., s. 1236.)

Constitutionality. — In Blount v. Simmons, 119 N.C. 50, 25 S.E. 789 (1896), it was held that nothing in the Constitution deprives the legislature of power to enact this section.

Dependent upon Statute.—The general statutes giving costs do not include the sovereign, and the State is only liable for costs in the event of express statutory provisions. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

Judgment against State.—Upon the failure of the litigation, the State is, under this section, liable for the costs of an action authorized by act of the General Assembly and prosecuted in its name by the solicitor, and judgment may be rendered in such action against the State for such costs. Blount v. Simmons, 119 N.C. 50, 25 S.E. 789 (1896).

Application to Legislature for Payment. —In an article entitled Jurisdiction of The North Carolina Supreme Court, 5 N.C.L. Rev. 1, 9, the following appears: "While the State may be sued only in the Supreme Court, it may sue in any court having jurisdiction over the cause of action, and the cost of such litigation may be taxed against the State as in case of private litigants. Such costs, however, do not constitute a claim against the State as contemplated in the jurisdiction of the Supreme Court, but are only incidental to the right to sue. The court in which the action is brought adjudicates the costs, and the parties interested should apply to the legislature for payment." Blount v. Simmons, 119 N.C. 50, 25 S.E. 789 (1896); Garner v. Worth, 122 N.C. 250, 29 S.E. 364 (1898); Miller v. State, 134 N.C. 270, 46 S.E. 514 (1904).

Actions to Vacate Oyster-Bed Entry.— Where, in an action by the solicitor in the name of the State to vacate an oyster-bed entry, the plaintiff was nonsuited, it was error to tax the costs against the county, which was not a party to the action. Blount v. Simmons, 118 N.C. 9, 23 S.E. 923 (1896).

Under this section the State is liable for the costs of an action instituted by the State Solicitor to vacate an oyster-bed entry. In such case, it seems that the persons making the required affidavit, alleging that the entry is a fraud upon the State, might be held liable as relators if it should appear that the action was for their benefit and at their instance. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

Where the proceedings for disbarment of an attorney have not been sustained the costs are taxable against the State under the provisions of this section, and an order erroneously taxing them against the county in which the matter was tried will be vacated. State ex rel. Committee on Grievances v. Strickland, 201 N.C. 619, 161 S.E. 76 (1931).

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

§ 6-15. Actions by State for private persons, etc.—In an action prosecuted in the name of the State for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the State. (Code, s. 537; Rev., s. 1261; C. S., s. 1238.)

§ 6-16. Costs of county in certain bribery prosecutions to be a charge against State.—The expenses incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any State officer or member of the General Assembly within said county, and of receiving bribes by any State officer or member of the General Assembly in said county, shall

be a charge against the State, and the properly attested claim of the county commissioners shall be paid by the Treasurer of the State. (1868-9, c. 176, s. 6; 1874-5, c. 5; Code, s. 742; Rev., s. 1262; C. S., s. 1239.)

§ 6-17. Costs of State on appeals to federal courts.—In all cases, whether civil or criminal, to which the State of North Carolina is a party, and which are carried from the courts of this State, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the Supreme Court of the United States, and the State is adjudged to pay the costs, it is the duty of the Attorney General to certify the amount of such costs to the Auditor, who shall thereupon issue a warrant for the same, directed to the Treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated. (1871-2, c. 26; Code, s. 538; Rev., s. 1263; C. S., s. 1240.)

§ 6-17.1. Costs and expenses of State in connection with federal litigation arising out of State cases.—In all cases of litigation in any court of the United States arising out of or by reason of any cases pending or tried in any court of the State of North Carolina, or in any action originally instituted in any court of the United States, the expenses for State court costs, securing of court records and transcripts, and other necessary expenses in representing the State of North Carolina or any of its departments, officials or agencies shall be allocated from and paid out of the State Contingency and Emergency Fund. (1963, c. 844.)

ARTICLE 3.

Civil Actions and Proceedings.

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

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

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

(3) See Supplement.

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

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

I. In General.
II. Actions for Recovery of Real Property, etc.
III. Recovery of Personalty.
IV. No More Recovery of Costs than Damages.

I. IN GENERAL.

Meaning of Recovery.—The recovery referred to in this section is a final determination upon the merits, and success in the appellate court is by no means equivalent to a recovery in the court below. Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905).

And a recovery within the meaning of the section cannot be predicated upon anything coming to the plaintiff which was not

in the contemplation of the plaintiff when he filed his complaint, and especially of a thing to which he virtually disclaimed any right or title. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

In order to determine who should pay the costs, the general result must be considered and inquiry made as to who has, in the view of the law, succeeded in the action. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

Partial Recovery.—There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In Wall v. Covington, 76 N.C. 150 (1877), it was held that no part of the costs in such actions can be taxed against the party recovering. And in Horton v. Horne, 99 N.C. 219, 5 S.E. 927 (1888), it was decided in an action to recover personal property, that if the plaintiff establishes his title to only a portion of the property delivered to him under claim and delivery proceedings, he will be entitled to costs. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892); Ferrabow v. Green, 110 N.C. 414, 14 S.E. 973 (1892); Kinston Cotton Mills v. Rocky Mount Hosiery Co., 154 N.C. 462, 70 S.E. 910 (1911).

Where the plaintiff is entitled to nominal damages, such damages will carry with it the costs under this section. Wilson v. Forbes, 13 N.C. 30 (1828); Britton v. Ruffin, 123 N.C. 67, 21 S.E. 271 (1898).

Section Qualified by § 28-115.—Where the action is not of such a nature that it falls within any of the subdivisions of this section or of the following section, it comes within the terms and is included by § 6-20. Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889); Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915). All these sections are, however, subject to the exception as to when costs are allowed against an administrator as stated in § 28-115. Whitaker v. Whitaker, 138 N.C. 205, 50 S.E. 630 (1905).

Action by Executor.—Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment for costs under this section. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

II. ACTIONS FOR RECOVERY OF REAL PROPERTY, ETC.

Common-Law Rule.—Subdivision (1) of the section is in affirmance of the principle established before its enactment. Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895).

Construed with § 6-21. — This section, allowing plaintiffs' costs as of course, upon recovery, in an action involving title to real estate, and § 6-21, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertain to the same subject matter, and must be construed in pari materia. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

Partial Recovery.—Applying the general rule as to partial recovery, which is set out under the preceding analysis line, it is held that where the plaintiff is adjudged entitled to a part of the land sued for, whether such land is a portion of one tract or is one of several tracts for which the action is brought, then the plaintiff is exonerated as to costs and no part thereof should be found against him. Ferrabow v. Green, 110 N.C. 414, 14 S.E. 973 (1892); Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895); Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897); Vanderbilt v. Johnson, 141 N.C. 370, 54 S.E. 298 (1906). See Staley v. Staley, 174 N.C. 640, 94 S.E. 407 (1917).

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to find for the plaintiff if they believe the evidence as to a certain part, and the issue is found for the defendant as to the remaining land, the costs of the action are properly awarded against the defendant. Swain v. Clemmons, 175 N.C. 240, 95 S.E. 489 (1918).

When There Is More than One Issue.—In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant' answer, and the jury find the issue as to the title in favor of the plaintiff, and the issue as to the trespass in favor of the defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor. Murray v. Spencer, 92 N.C. 264 (1885).

Boundary Dispute.—Where, in an action in ejectment and for damages for cutting of timber, defendant files answer defending plaintiffs' title to the land in dispute, and verdict is entered in favor of plaintiffs, plaintiffs, as a matter of law, are not liable for any of the costs notwithstanding that upon the trial each party admitted the title of the other within the boundaries of their respective grants and

the only controversy was as to the location of the boundary between their respective grants. Cody v. England, 221 N.C. 40, 19 S.E.2d 10 (1942).

Actions to Recover Both Realty and Personalty.—Under this section the plaintiff in an action to recover both real and personal property is entitled to recover costs, although he recovers the real property only. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892).

Equitable Defense.—One who successfully maintains an equitable defense against the recovery of land on the bare legal title is entitled to judgment for his costs. Vestal v. Sloan, 83 N.C. 555 (1880).

Necessity for Disclaimer.—A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs. Swain v. Clemmons, 175 N.C. 240, 95 S.E. 489 (1918).

This rule is forcibly illustrated by the case of Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895), where, in an action in trespass, the defendant failed to disclaim title to all the land declared for by plaintiff, but recovered according to the boundaries set up in his answer, with a greater amount for damages on his counterclaim than was allowed the plaintiff, and the plaintiff was nevertheless held entitled to costs.

But if the defendant disclaims title to all the land declared for, except that for which he proves his right, no issue as to the plaintiff' title will arise, and the findings that the defendant's title, disputed by the plaintiff, is good and that the defendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will entitle the defendant to costs. Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895).

So in ejectment, where the defendant denies the right to possession and denies that the plaintiff holds the title in trust for him, and judgment is rendered that the defendant is entitled to the land upon payment of an amount found due the plaintiff, no part of the cost is taxable against the defendant. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

It would seem that in order to escape potential liability for costs the defendant must enter his disclaimer of all the lands declared for, and that a disclaimer of half the locus in quo will not suffice to enable him to escape upon the unfavorable adjudication of the other half. See In re Hurley, 185 N.C. 422, 117 S.E. 345 (1923).

Liability of Intervener.—Where the defendant intervenes in an action to recover real property and files a joint answer with his codefendant, and makes a joint defense, the plaintiff is entitled to the costs under this subdivision of the section. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. Spruill v. Arrington, 109 N.C. 192, 13 S.E. 779 (1891). See Willis v. Coleburn, 169 N.C. 670, 86 S.E. 596 (1915).

Bill of Interpleader.—The United States Supreme Court in Spring v. South Carolina Ins. Co., 21 U.S. (8 Wheat) 268, 5 L. Ed. 614 (1823), held that on a bill of interpleader, the plaintiffs are, in general, entitled to their costs out of the fund.

III. RECOVERY OF PERSONALTY.

Partial Recovery.—There is no exception to the partial recovery rule (see ante, this note, I. "In General") when the action is for the recovery of personalty, and when the plaintiff establishes title to any part of the property sued for, he is entitled to judgment for costs. Wooden v. Walters, 110 N.C. 251, 14 S.E. 734 (1892); Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897). This is not the case where some of the defendants recover judgment, in which case, of course, they recover costs. Phillips v. Little, 147 N.C. 282, 61 S.E. 49 (1908).

As an example of the application of this rule to claims for personal property it has been held that the plaintiff on being adjudged entitled to only a portion of a crop in a suit for claim and delivery was entitled to costs. Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897).

Claim and Delivery. — Judgment in an action of claim and delivery carries all costs under this section. Rawlings v. Neal, 126 N.C. 271, 35 S.E. 597 (1900).

Right to Possession Determines.—Where the controversey is made to depend upon the right of the mechanic to repossess an automobile that he has repaired, in order that he may enforce his lien thereon, and the jury has found in the plaintiff's favor upon determinative issues, but in the defendant's favor upon an issue of fraud, the question of taxing the cost does not depend upon the finding of the jury upon the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, is entitled to recover the costs, under this section. Maxton Auto Co. v. Rudd, 176 N.C. 497, 97 S.E. 477 (1918).

IV. NO MORE RECOVERY OF COSTS THAN DAMAGES.

In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages, and if the amount is less than fifty dollars the plaintiff, under this section, recovers no more costs than damages. Palmer v. Winston-Salem Ry., 131 N.C. 250, 42 S.E. 604 (1902). The subdivision was applied where the recovery for slander was less than fifty dollars in Smith v. Myers, 188 N.C. 551, 125 S.E. 178 (1924). And again when one dollar damages were sustained by the erection of a mill. See Bridgers v. Purcell, 23 N.C. 232 (1840). The former rule as to slander is stated in Coates v. Stephenson, 54 N.C. 124 (1859), where it was held that the costs of the plaintiff, under R.C., c. 31, § 78, could not be taxed against the defendant.

For a case where an instructed verdict for one penny damages and one penny costs, under this section, was held erroneous because actual and not nominal damage was shown, see Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Applied, as to action of slander, in Wolfe v. Montgomery Ward & Co., 211 N.C. 295, 189 S.E. 772 (1937).

§ 6-19. When costs allowed as of course to defendant.—Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section [6-18] unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them. (C. C. P., s. 277; Code, ss. 526, 527; Rev., s. 1266; C. S., s. 1242.)

Cross Reference.—See § 6-18 and note.

Where plaintiff fails to recover in an action involving title to real property in which a court survey is ordered, the clerk is without authority to tax the surveyor's fees in the bill of costs, but on appeal from the clerk's order, the superior court, while properly affirming the clerk's order, should pass upon the motion for taxing such fees as a part of the costs as a matter of right. Ipock v. Miller, 245 N.C. 585, 96 S.E.2d 729 (1957). See § 38-4 and note.

Applications.—Where the plaintiff fails in an action upon a covenant, the defendant recovers costs under this section. Britton v. Ruffin, 123 N.C. 67, 31 S.E. 271 (1898).

Costs were properly awarded to the grantee in a deed in an unsuccessful action to set aside such deed. D. B. Brisco & Co. v Norris, 112 N.C. 671, 16 S.E. 850 (1893).

Cited in Gold v. Kiker, 218 N.C. 204, 10 S.E.2d 650 (1940).

§ 6-20. Costs allowed or not, in discretion of court.—In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law. (Code, s. 527; Rev., s. 1267; C. S., s. 1243.)

The purpose of this provision is to give the court authority to allow costs, as the justice of the case may require. Gulley v. Macy, 89 N.C. 343 (1883); Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889).

In actions of an equitable nature the costs are in the discretion of the court. Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915).

Exercise of Discretion Presumed. — Nothing to the contrary appearing, it will be taken that the court gave judgment in the exercise of its discretion as provided in this section. Gulley v. Macy, 89 N.C. 343 (1883); Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892).

Discretion Not Reviewable. — By this section the taxing of the costs is placed in the discretion of the trial judge, which discretion is not reviewable. Klutz v. Allison, 214 N.C. 379, 199 S.E. 395 (1938); Chriscoe v. Chriscoe, 268 N.C. 554, 151 S.E.2d 33 (1966).

The exercise of the court's discretionary authority is not reviewable Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

In equity there was a broad discretion on the subject of costs, Little v. Lockman, 50 N.C. 433 (1858), and the allowance rested with the court. Worthy v. Brower, 93 N.C. 492 (1885); Hooper v. Davis, 166 N.C. 236, 81 S.E. 1063 (1914). And even since the abolition of the courts of equity in this State, it is held that where the case partakes of an equitable nature, the question of costs is in the court's discretion. For example in Hare v. Hare, 183 N.C. 419, 111 S.E. 620 (1922), it was held where the jury found that each party was entitled to an undivided half in land, and the appeal was from taxing the de-

fendant with costs, there being no element of an action in ejectment, neither party was permitted to recover costs from the other, especially as the question was of an equitable nature, and the taxing of costs was, under this section, in the sound discretion of the court.

But a consolidated action, tried before the referee, in which judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court under this section. Highland Cotton Mills v. Ragan Knitting Co., 194 N.C. 80, 138 S.E. 428 (1927).

If an action is equitable in nature the taxing of the costs is within the discretion of the court, and the court may allow costs in favor of one party or the other, or require the parties to share the costs. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

New Trial.—See § 6-33 and note thereto.

Qualified by § 28-115.—This provision is subject to the exception contained in § 28-115, relative to costs against a representative. Whitaker v. Whitaker, 138 N.C. 205, 50 S.E. 630 (1905).

Creditor's Bill.—It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by materialmen, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection; and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. Bond v. Pickett Cotton Mills, Inc., 166 N.C. 20, 81 S.E. 936 1914).

Specific Performance.—Where the purpose of an action was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtness incident to that contract, it was clearly within this section. Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889).

Where one of defendants in injunction suit seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court since the controversy is of an equitable nature. Consequently the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

Setting Aside Proceedings of Probate Court.—Where the action is to set aside certain proceedings in the probate court, the court is vested with discretion in the matter of allowing costs, under this section: each party is ordered to pay his own and each to pay one half of the allowance to the referee. Gulley v. Macy, 89 N.C. 343 (1883).

Apportionment of Costs.—Where a jury found that the allegations of the complaint with respect to the maintenance of the nuisance were true, the trial court, when it ordered the personal property sold, had discretionary power with respect to the apportionment of the costs. State ex rel. Morris v. Shinn, 262 N.C. 88, 136 S.E.2d 244 (1964).

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

(1) Application for year's support, for widow or children.

(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, however, that in any caveat proceeding under this subdivision, if the court finds that the proceeding is without substantial merit, the court may disallow attorneys' fees for the attorneys for the caveators.

(3) Habeas corpus; and the court shall direct what officer shall tax the costs thereof.

(4) In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate, as may be just.

(5) Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of county commissioners may order the costs incurred before them paid in their discretion.

(6) The compensation of referees and commissioners to take depositions.
(7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition.
(8) In all proceedings under the chapter entitled Drainage, except as therein otherwise provided.
(9) In proceedings for reallotment of homestead for increase in value, as provided in the chapter, Civil Procedure.
(10) In proceedings regarding illegitimate children under article 3, chapter 49 of the General Statutes.

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

Local Modification. — Edgecombe: 1953, c. 737; Johnston: 1967, c. 835; Nash: 1939, c. 46; 1941, c. 18; 1953, c. 737.

Editor's Note. — The first 1967 amendment added subdivision (10).

The second 1967 amendment added the proviso at the end of the section.

Section 9 of c. 1152, Session Laws 1967, provides that the act shall not apply to pending litigation.

For article discussing the effect of the 1937 amendment to this section and the history of attorneys' fees as costs in this State, see 15 N.C.L. Rev. 333.

For discussion as to attorneys' fees being awarded a successful litigant, see 38 N.C.L. Rev. 156 (1960).

Attorney Fees. — Ordinarily attorney fees are taxable as costs only when expressly authorized by statute. Horner v. Chamber of Commerce, 236 N.C. 96, 72 S.E.2d 21 (1952). For note commenting on case, see 31 N.C.L. Rev. 115 (1952).

Except as otherwise provided by this section, attorney fees are not now regarded as part of the court costs in North Carolina. Wachovia Bank & Trust Co. v. Schneider, 235 N.C. 446, 70 S.E.2d 578 (1952); Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953); Horner v. Chamber of Commerce, 236 N.C. 96, 72 S.E.2d 21 (1952); Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963); Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

This section, by implication, authorizes attorney fees in certain enumerated actions to be taxed as a part of the costs, to be paid out of the fund which is the subject matter of the action. Such a case as a civil action to enjoin the issuance of county bonds and to restrain the disbursement of county funds is not included Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953).

But in the types of cases enumerated in this section, attorneys' fees may be included as a part of the costs in such amounts as the court in its discretion determines and allows. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

A reasonable allowance for attorney's fees may be made as a part of the costs in habeas corpus proceedings, but not until there is a proper hearing or an opportunity for defendant to be heard. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964)

The expense of employing attorneys in the successful defense of a suit for damages for tort is not allowable as part of the costs or recoverable in the absence of an express agreement therefor. Queen City Coach Co. v. Lumberton Coach Co., 229 N.C. 534, 50 S.E.2d 288 (1948).

Caveats to Wills.—It is within the discretionary power of a court, under this section, before which an issue of devisavit vel non is tried, to direct the payment of the costs out of the estate. Mayo v. Jones, 78 N.C. 406 (1878). See In re Will of Hargrove, 206 N.C. 307, 173 S.E. 577 (1934), for dicta on this point.

Where certain land contiguous to the lands of other devisees are devised, without direction in the will for the survey or partition or for perfecting the title, the cost of survey and registration of deeds should be borne by the devisees of the lands, and it is not a proper charge against the estate to be paid by the executor. In re Winston, 172 N.C. 270, 90 S.E. 201 (1916).

Under this section, even though judg-

ment is entered in favor of propounders, the trial court may tax the costs, including an allowance to counsel representing caveators, against the estate upon finding that the filing of the caveat was apt and proper and done in good faith. In re Will of Slade, 214 N.C. 361, 199 S.E. 290 (1938).

The allowance of attorney fees to counsel for the propounders is in the sound discretion of the trial court. In re Will of Coffield, 216 N.C. 285, 4 S.E.2d 870 (1939).

Subdivision (2) of this section leaves the taxing of court costs and the apportionment thereof to be made in the discretion of the court. Moreover, the fixing of reasonable attorney fees in applicable cases is likewise a matter within the sound discretion of the trial court. Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963).

Fees for services rendered by attorneys to the parties in a caveat to a will do not automatically become costs of the proceeding merely because they are incurred and paid. This section commits the allowance and apportionment of the fees and the determination of the amounts thereof to the discretion of the court. Where the court had made no determination of the matter, but the amounts were fixed by contingent agreement between attorneys and clients prior to suit, and the allowance of the fees as part of the costs of the proceeding was intentionally excluded from the judgment of the court, the amounts paid to the attorneys did not and could not become part of the taxable costs of the suit under this section. Commercial Nat'l Bank v. United States, 196 F.2d 182 (4th Cir. 1952).

Where appellant did not contend that the fees allowed counsel were unreasonable and nothing to the contrary appeared in the record, it was taken that the court taxed the costs and attorneys' fees in the exercise of its discretion and that there was no abuse of this discretion. Wachovia Bank & Trust Co. v. Dodson, 260 N.C. 22, 131 S.E.2d 875 (1963).

In actions for divorce the husband, whether successful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases in the discretion of the court. Broom v. Broom, 130 N.C. 562, 41 S.E. 673 (1902).

Allowance to Referee.—Originally, under the Code of 1883, § 533, referees' fees were taxed, like other costs, against the losing party, but by amendment (Laws 1889, ch. 37) the court was authorized to apportion them in its discretion. Cobb v. Rhea, 137 N.C. 295, 49 S.E. 161 (1904).

Where, upon the trial in the superior court upon appeal from the referee, judgment is entered in the superior court in favor of plaintiffs, entitling plaintiffs to recover costs in the trial, such recovery does not include compensation of the referee. Cody v. England, 221 N.C. 40, 19 S.E.2d 10 (1942).

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, and order of the court prorating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Ordinarily, in litigation over a fund in the nature of an in rem proceeding, such items of costs, as referee's allowances and stenographic reporter's bills, are paid out of the fund, although taxable in the discretion of the court, but in Lightner v. Boone, 222 N.C. 421, 23 S.E.2d 313 (1942), it was held that, when such costs have been ordered paid from the estate, they cannot afterwards be taxed against an executor personally.

The apportionment of the compensation for a referee and the court reporter employed by him is within the discretionary power given the court by this section. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Division of the costs of a reference proceeding is within the judge's discretion. Morpul, Inc. v. Mayo Knitting Mill, Inc., 259 N.C. 704, 131 S.E.2d 326 (1963).

Same — Analogy to Allowance to Receiver.—The allowance to the receiver is a part of the costs of the action, and usually taxable against the losing party. Whether the receiver's fees should be divided is a matter in the discretion of the presiding judge, as is now the case also with referees' fees. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896).

Same—Not Precluded by Former Judgment. — A former judgment, Horner v. Oxford Water & Elec. Co., 153 N.C. 535, 69 S.E. 607, 138 Am. St. R. 681 (1910), appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," does not preclude a subsequent trial judge from taxing the cost of reference "against either party or apportioning it among the parties in his discretion" under this section. Horner v. Oxford Water & Elec. Co., 156 N.C. 494, 72 S.E. 624 (1911).

Costs in Partition.—The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. Fortune v. Hunt, 152 N.C. 715, 68 S.E. 213 (1910).

Where, in a petition for partition, defendant pleads sole seizin, and the trial of such issue results in a verdict for plaintiffs, and in judgment that the parties are tenants in common and appointing a commissioner to make sale, plaintiff is entitled to all costs from the filing of the answer through the final judgment below, that is, while the case was pending on the civil issue docket. This does not include costs of reference, which may be taxed in the discretion of the court. Costs of the partition proceeding, exclusive of the issue of sole seizin, may be apportioned. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1943).

Discretion Not Reviewable.—The exercise of the court's discretionary authority is not reviewable. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1962).

Construction of Wills.—In an action pursuant to the Uniform Declaratory Judgment Act for construction of certain trust provisions of a will the taxing of costs, the inclusion therein of attorneys' fees, and the fixing of reasonable counsel fees, are matters within the sound discretion of the trial court. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

Specific Performance.—In an action between husband and wife seeking specific performance of an agreement between them to "pool" their property and assets, to declare a resulting trust, and for an accounting, the court has discretionary authority to apportion the costs, the action being equitable in nature, but the attorneys' fees of the respective parties in such instance do not come within the statutory or equitable exceptions to the general rule and may not be taxed as a part of the costs. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Applied in Tyser v. Sears, 252 N.C. 65, 112 S.E.2d 750 (1960); Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897).

Quoted in Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Stated in Perry v. Pulley, 206 N.C. 701, 175 S.E. 89 (1934).

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

—In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs. (1959, c. 688; 1963, c. 1193; 1967, c. 927; 1969, c. 786.)

Editor's Note. — The 1967 amendment made this section applicable to certain suits against insurance companies.

The 1969 amendment increased the limit on judgments from $1,000.00 to $2,000.00.

Attorneys' fees are not now regarded as part of court costs in this jurisdiction, except as otherwise provided by statute. Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

This section refers to personal injury damage suits and property damage suits tried in a court where there is a presiding trial judge. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

This section is not applicable in cases arising under the Workmen's Compensation Act. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Finding of Unwarranted Refusal to Pay Claim.—It is only when the suit is brought against an insurance company by the insured or beneficiary, as plaintiff, under a policy issued by such insurance company, that there must be a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim before attorney fees may be allowed as a part of the costs when the judgment for recovery of damages is one thousand dollars or less. Rogers v. Rogers, 2 N.C. App. 668, 163 S.E.2d 645 (1968).

Applied in Smith v. Whisenhunt, 259 N.C. 234, 130 S.E.2d 334 (1963).

Cited in Whitley v. City of Durham, 256 N.C. 106, 122 S.E.2d 784 (1961); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Mims v. Dixon, 272 N.C. 256, 158 S.E.2d 91 (1967).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.—Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

(1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(3) As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the "outstanding balance" shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.

(4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the "outstanding balance" shall mean the "time price balance" owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

(5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by § 25-9-503, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the "outstanding balance." (1967, c. 562, s. 4.)

Editor's Note.—See Editor's note to § 25-1-201.

Attorneys' fees are not now regarded as part of court costs in this jurisdiction, except as otherwise provided by statute. Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

§ 6-22. Petitioner to pay costs in certain cases.—The petitioner shall pay the costs in the following proceedings:

(1) In petitions for draining or damming lowlands where the petitioner alone is benefited.

(2) In petitions for condemnation of water millsites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

(3) In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

(4) When the petition is refused. (Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562; Rev., s. 1269; C. S., s. 1245; 1945, c. 635.)

Condemnation Proceedings.—In proceedings brought by a railroad where it was found by the jury on appeal that the defendant's benefit exceeded his damages and then found they were equal, it was held that the plaintiff was taxable with costs up to the time of appeal. Madison County Ry. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912).

§ 6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.—In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. (Code, s. 216; Rev., s. 1270; C. S., s. 1246.)

§ 6-24. Suits in forma pauperis; no costs unless recovery.—When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him. (1868-9, c. 96, s. 3; Code, s. 212; 1895, c. 149; Rev., s. 1265; C. S., s. 1247.)

Cross Reference. — As to when suits in forma pauperis may be permitted, see § 1-110.

Leave to Sue. — The leave to sue as a pauper does not extend in civil actions beyond the trial in the superior court. Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896).

Costs of Witnesses.—One suing in forma pauperis is not entitled to recover costs of his witnesses. Draper v. Buxton, 90 N.C. 182 (1884). Nor does the section excuse the pauper from liability for his witnesses. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

This provision, in terms, deprives all officers of costs, and the last cause of it is very sweeping, and manifestly embraces the costs of witnesses. Compensation to witnesses is part of the cost of an action, as much so as any other statutory charges in and about the same. Booshee v. Surles, 85 N.C. 90 (1881); Hall v. Younts, 87 N.C. 285 (1882); Draper v. Buxton, 90 N.C. 182 (1884).

The Act of 1868-69, ch. 96, § 3, amending the section, ameliorates the rigors of the preexisting law in regard to witnesses, who are not compelled to attend for more than one day, if the party summoning shall, on presentation of the certificate of such attendance, fail to pay what may be then due them. Booshee v. Surles, 85 N.C. 90 (1881).

§ 6-25. Party seeking recovery on usurious contracts; no costs.—No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract. (1895, c. 69; Rev., s. 1271; C. S., s. 1248.)

Cross Reference.—As to usury generally, see §§ 24-1, 24-2.

§ 6-26. Costs in special proceedings.—The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. (Code, s. 541; Rev., s. 1272; C. S., s. 1249.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

§ 6-27. Fees and disbursements in supplemental proceedings.—The court or judge may allow to the judgment creditor, or to any party examined in proceedings supplemental to execution, whether a party to the action or not, witnesses' fees and disbursements. (C. C. P., s. 273; Code, s. 499; Rev., s. 1273; C. S., s. 1250.)

Cross Reference.—As to examination of parties and witnesses in proceedings supplemental to execution, see § 1-356.

§ 6-28. Costs of laying off homestead and exemption.—The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead. (Code, s. 510; Rev., s. 1274; C. S., s. 1251.)

Local Modification.—Pitt: 1953, c. 1276.

Cross References. — As to appraisal and laying off of homestead and personal property exemptions, see §§ 1-372, 1-378. As to costs in reallotment of homestead for increase in value, see § 6-21, subdivision (9).

Payment of Fees as Condition.—Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought in forma pauperis. Whitmore-Ligon Co. v. Hyatt, 175 N.C. 117, 95 S.E. 38 (1918).

Applied in Beavans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887); Long v. Walker, 105 N.C. 90, 10 S.E. 658 (1890).

§ 6-29. Costs of reassessment of homestead.—If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining. (Code, s. 521; Rev., s. 1275; C. S., s. 1252.)

Cross References. — As to reassessment of homestead, see § 1-381. As to costs in reallotment of homestead for increase in value, see § 6-21, subdivision (9).

Applied in Beavans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887).

§ 6-30. Costs against infant plaintiff; guardian responsible.—When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor. (Code, s. 534; Rev., s. 1276; C. S., s. 1253.)

§ 6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary

disbursements, to be taxed according to law. (Code, s. 535; Rev., s. 1277; C. S., s. 1254.)

Cross References. — As to liability of personal representative for denial of claim, see § 28-133. As to when costs against representative are allowed, see § 28-115. As to liability of guardian for costs for defaults, see § 33-30. As to reference of disputed claim generally, see §§ 28-111, 28-112.

When Fiduciary Personally Liable.—By virtue of this section costs should be taxed against the estate in the hands of a trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement, or bad faith, in such action or defense. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890); Sugg v. Bernard, 122 N.C. 155, 29 S.E. 221 (1898); Lance v. Russell, 165 N.C. 626, 81 S.E. 922 (1914).

The same rule is applied to actions against administrators and executors, State v. Roberts, 106 N.C. 662, 19 S.E. 900 (1890); Varner v. Johnston, 112 N.C. 570, 17 S.E. 483 (1893), with the additional limitation prescribed by § 28-115. Whitaker v. Whitaker, 138 N.C. 205, 50 S.E. 630 (1905). See § 28-115 and note.

Includes Next Friends. — While "next friends" may not be embraced in the strict letter of this section, they come within its purview. Smith v. Smith, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891). And it is error to tax "next friends" who are not parties without a finding of mismanagement or bad faith. Hockoday v. Lawrence, 156 N.C. 319, 72 S.E. 387 (1911).

Allowance to Trustee. — A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the funds to the payment of costs and expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements against one who establishes an adverse title to the property. Chemical Co. v. Johnson, 101 N.C. 223, 7 S.E. 770 (1888).

Cited in In re Will of Hargrove, 206 N.C. 307, 173 S.E. 577 (1934).

§ 6-32. Costs against assignee after action brought.—In actions in which the cause of action becomes by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party. (Code, s. 539; Rev., s. 1278; C. S., s. 1255.)

Absolute Assignments. — Cases have been decided in which it is held that the assignments contemplated by this section are only such as are absolute, and that such as are intended to be a collateral security only for a continuing obligation or claim are not within the purview of the section. Nor does the section apply when the assignment is only of a part and not of the whole cause of action. Davis v. Higgins, 92 N.C. 203 (1885).

ARTICLE 4.

Costs on Appeal.

§ 6-33. Costs on appeal generally.—On an appeal from a justice of the peace to a superior court, or from a superior court or a judgment thereof to the appellate division, if the appellant recovers judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below had the judgment of that court been correct, and also restitution of any costs of the court appealed from which he has paid under the erroneous judgment of such court. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court. (Code, s. 540; Rev., s. 1279; C. S., s. 1256; 1969, c. 44, s. 19.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the first sentence.

In General.—The first part of this section manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. The trial court cannot ordinarily tax the costs of an action in favor of either party unless there is a judgment, costs being an incident of the judgment. What is said by the court in Dodson v. Southern Ry., 133 N.C. 624, 45 S.E. 958 (1903), refers to the restitution

of costs paid by the appellant in the court below. Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905).

New Trial. — Where a new trial is granted, the awarding of costs is discretionary. Universal Metal Co. v. Durham & C.R.R., 145 N.C. 293, 59 S.E. 50 (1907).

When the new trial is on the ground of newly discovered evidence, the costs of the appellate court should always fall upon the party obtaining the new trial, unless in exceptional cases and for special reasons, since the other party is in no laches, as is shown by its having obtained the judgment below. This is also a wholesome rule of practice, as new trials on this ground are outside of the regular course and are only granted, in discretion, when justice requires a departure from the usual procedure. By analogy, when a continuance is asked for on the ground of newly discovered evidence, the statute expressly forbids it to be granted except upon payment of the costs of the term. Ladd v. Ladd, 121 N.C. 118, 28 S.E. 190 (1897); Herndon v. North Carolina R.R., 121 N.C. 498, 28 S.E. 144 (1897).

When both parties are entitled to a new trial, each will pay his own costs in the appellate court. Ladd v. Ladd, 121 N.C. 118, 28 S.E. 190 (1897).

The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court. Satterthwaite v. Goodyear, 137 N.C. 302, 49 S.E. 205 (1904).

Where the subject matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. Taylor v. Vann, 127 N.C. 243, 37 S.E. 263 (1900).

Reversal Necessary to Tax Appellee. — Unless the court upon the merit reverses the judgment below, it cannot adjudge any part of the cost against the appellee. Commissioners of Vance County v. Gill, 126 N.C. 86, 35 S.E. 228 (1900).

Motion in Superior Court to Recover Costs of Transcript.—The cost of preparing the transcription of the record is a part of the costs in the appellate division, and the judge of the superior court upon the subsequent trial is without jurisdiction to entertain motion for the recovery of such costs. Ward v. Cruse, 236 N.C. 400, 72 S.E.2d 835 (1952).

Modification and Affirmance. — Where the judgment of the court below is modified and affirmed, the appellate division may apportion the costs on appeal between the parties in the exercise of its discretion Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Partial Affirmance and Partial Reversal. — Where the judgment appealed from is partly affirmed and partly reversed, in the exercise of the discretion permitted by this section, the costs in the appellate court may be divided so that each party pays his own costs. Smith v. Old Dominion Bldg. & Loan Ass'n, 119 N.C. 249, 26 S.E. 41 (1896); Hawkins v. Richmond Cedar Works, 122 N.C. 87, 30 S.E. 13 (1898).

Under this section, where the appellant was awarded a partial new trial only, as to one issue only out of several, the costs of the appeal are in the discretion of the court. Rayburn v. Casualty Co., 142 N.C. 376, 55 S.E. 296 (1906).

In McLean v. Breece, 113 N.C. 390, 18 S.E. 694 (1893), where the judgment was modified in the Supreme Court, the costs were taxed against the appellee. And where the plaintiffs recovered a part judgment on their demand, by establishing a mechanic's lien, they were entitled to costs of appeal. See Hogsed v. Gloucester Lumber Co., 170 N.C. 529, 87 S.E. 337 (1915).

Case Remanded. — Where an appellant fails to show that he was prejudiced by the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded. Harrington v. Rawls, 136 N.C. 65, 48 S.E. 571 (1904).

Modification by Superior Court. — The superior court is without power to modify former orders of the appellate court taxing costs on former appeals, as costs thus incurred are no part of superior court costs, but are taxed by, and executions issue out of, the appellate court. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

Applied in Kincaid v. Graham, 92 N.C. 154 (1885); Ebert v. Disher, 216 N.C. 546, 5 S.E.2d 716 (1939).

§ 6-34. Costs of transcript on appeal taxed in appellate division. When an appeal is taken from the superior court to the appellate division, the clerk of the superior court, when he sends up the transcript, shall send therewith an itemized statement of the costs of making up the transcript on appeal, and the costs thereof shall be taxed as a part of the costs of the appellate division. (1905, c. 456; Rev., s. 1280; C. S., s. 1257; 1969, c. 44, s. 20.)

Cross Reference. — As to duty of clerk to prepare transcript, see § 1-284.

Editor's Note.—The 1969 amendment substituted "appellate division" for "Su-

preme Court" near the beginning and at the end of the section.

Former Rule. — Prior to the enactment of this section, it was held that the successful party on appeal from the superior court was entitled to recover back the costs of the transcript and certificate, though subsequently final judgment was rendered in the lower court against him. Dobson v. Southern Ry., 133 N.C. 624, 45 S.E. 958 (1903).

Unnecessary Matter. — The Supreme Court has always held that the cost of printing unnecessary matter may be taxed against the party causing it to be sent up, regardless of the issue of the appeal. Finch v. Strickland, 130 N.C. 44, 40 S.E. 841 (1902); Yow v. Hamilton, 136 N.C. 357, 48 S.E. 782 (1904); Wilson v. Railroad, 142 N.C. 333, 55 S.E. 257 (1906).

Especially is this so where the party has insisted on unnecessary matter being incorporated against the objection of the other party. See Roanoke R.R. & Lumber Co. v. Privette, 179 N.C. 1, 101 S.E. 489 (1919).

Transcript of Testimony. — "The costs of making up the transcript on appeal" has reference to and includes only the cost of transcribing the judgment roll and case on appeal, as finally agreed or settled, which the clerk of the superior court is required to certify to the appellate division. The amount expended for a transcript of the testimony preliminary to preparing and serving appellant's proposed case on appeal constitutes no part of this cost. Ward v. Cruse, 236 N.C. 400, 72 S.E.2d 835 (1952). As to motion in superior court to recover such costs, see note to § 6-33.

§ **6-35**: See Supplement.

ARTICLE 5.

Liability of Counties in Criminal Actions.

§§ **6-36 to 6-44**: See Supplement.

ARTICLE 6.

Liability of Defendant in Criminal Actions.

§ **6-45. Costs against defendant convicted, confessing, or submitting.**—Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution. (R. C., c. 35, s. 46; Code, s. 1211; Rev., s. 1291; C. S., s. 1267.)

The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include the costs incurred by the defendant in resisting the prosecution. State v. Wallin, 89 N.C. 578 (1883).

Where a defendant is taxed with the costs of prosecution, a witness, though summoned by the defendant and examined in his defense, has no right to have his ticket for attendance allowed in the bill of costs. It is a personal debt of the defendant, the payment of which the witness may enforce by suing out execution in the cause. State v. Wallin, 89 N.C. 578 (1883).

No Part of Punishment. — The order for the payment of the costs of a criminal prosecution upon a suspension of judgment does not constitute any part of the punishment; the legal effect being only to vest the right to the costs in those entitled to them. State v. Crook, 115 N.C. 760, 20 S.E. 513 (1894); State v. Jennings, 254 N.C. 760, 120 S.E.2d 65 (1961).

Quoted in State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

Cited in State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

§ **6-46. Defendant imprisoned not discharged until costs paid.** — If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison, after the expiration of the fixed time for his imprisonment, until the costs shall be paid, or until he shall otherwise be discharged according to law. (1868-9, c. 178; Code, s. 905; Rev., s. 1292; C. S., s. 1268.)

As to imprisonment for costs, see §§ 23-24, 153-191, 153-194 and State v. Morgan, 141 N.C. 726, 53 S.E. 142 (1906). As to when prosecutor may be imprisoned for failure to pay costs, see §§ 6-50 and 6-64.

Cost Not Part of Punishment. — The taxing the cost in a criminal action is not

a part of the punishment for the offense committed. State v. Smith, 196 N.C. 438, 146 S.E. 73 (1929).

Applied in State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959); State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

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

Cross Reference. — As to bonds generally, see § 153-177.

In General. — The power of the courts to suspend judgment in criminal cases should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that the order was made in the defendant's presence without his objection, and that its evident purpose was to save the defendant from a more grievous penalty permitted or required by law. State v. Hilton, 151 N.C. 687, 65 S.E. 1011 (1909).

Quoted in State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

Cited in State v. Smith, 196 N.C. 438, 146 S.E. 73 (1929).

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

Section Inapplicable to Judgment Not in Compliance with § 6-46. Where judgment upon conviction of a defendant imposes a prison sentence and also directs that defendant pay a fine in a stipulated sum and the costs, but the judgment does not direct that defendant be imprisoned until the fine and costs are paid or until defendant is discharged according to law, such judgment is not in compliance with § 6-46 and this section is not applicable. Therefore, after defendant has served the sentence and been discharged, the superior court has no authority at a later term to order that the defendant be imprisoned until the fine and costs should be paid. State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

Cited in State v. Smith, 196 N.C. 438, 146 S.E. 73 (1929).

ARTICLE 7.

Liability of Prosecutor for Costs.

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

Every judge or justice is authorized to determine who the prosecutor is at

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

Cross Reference.—See also §§ 6-50, 6-52 and 6-64.

General Consideration. — This section was intended to enlarge the power of the courts over the question of costs in criminal actions. State v. Norwood, 84 N.C. 794 (1881). Its enactment was within the power of the legislature. State v. Cannady, 78 N.C. 539 (1878).

Certifying Witnesses as Proper for Defense. — Where the court below taxed the costs of an unsuccessful prosecution against the prosecutor without finding that the defendant's witnesses were proper for the defense, as required by this section, judgment will be allowed to stand if the court below will make and certify the requisite finding that the said witnesses were proper for the defense. State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

In State v. Owens, 87 N.C. 565 (1882), it was stated that the section includes such witnesses for the defense as are certified by the counsel to have been proper for the defense, and the Supreme Court approved that judgment. But this was not the point in the appeal, and was only incidentally presented. See State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889). In State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890), which was also a judgment taxing the prosecutor with the costs, the judge did not find and certify that the prosecution was frivolous, malicious or was not for the public good. The Supreme Court held that this judgment was erroneous, and that the statute only allowed a party to be taxed as prosecutor with the costs upon the findings of these facts. State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

See remarks of Mr. Justice Ashe upon the Act of 1875, ch. 247, and the substitution of the words "opinion" for "certify" and "or" for "and," by the Act of 1879, in State v. Norwood, 84 N.C. 794 (1881).

"Not Required for Public Interest". — A finding by the trial judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." State v. Baker, 114 N.C. 812, 19 S.E. 145 (1894).

Notice. — It is necessary for the trial court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under it. This may be done on motion of the defendant's counsel or by the court of its own motion. State v. Hughes, 83 N.C. 665 (1880); State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890). The court should find the facts, and when this is done the findings are not reviewable in the appellate court. State v. Owens, 87 N.C. 565 (1882); State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890); State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

A notice to mark one as prosecutor under this section need not be in writing. Where it was announced in open court, upon the calling and continuance of a State case, that a motion would be made at the next term to mark a witness as prosecutor (all the witnesses being present), and on the argument of the motion it was announced that all the parties were present, it was held to be sufficient evidence that such notice was given, and warranted the court in ordering the witness to be marked as prosecutor. State v. Norwood, 84 N.C. 794 (1881).

Insolvent Prosecutor—County Liable. — When a judge below orders an insolvent prosecutor to pay costs, and he fails or is unable to pay, the county in which the offense was committed becomes liable to pay the same. Pegram v. Commissioners of Guilford County, 75 N.C. 120 (1876).

Conclusiveness of Finding. — A judgment that a prosecution is frivolous and not required by the public interest, and that the prosecutor pay the costs, is conclusive and not appealable. State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890).

The finding by the judge below that a criminal prosecution was frivolous and malicious is conclusive, and will support a judgment that the prosecutor pay costs, or in default thereof be imprisoned. State v. Lance, 109 N.C. 789, 14 S.E. 110 (1891).

But where the trial judge has dismissed

a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position, and relevant to the issue, so as to deprive them of the benefits of the due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

In this latter case it is said: "In the disposition made of this appeal we do not intend to impair or qualify our former decisions on the subject, notably State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890), and State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890), to the effect that, on a hearing of this character, the findings of fact by the trial judge are conclusive. In the disposition of these and like motions there must necessarily be some tribunal having the power to determine the ultimate facts on which the rights of the parties depend, and we think the cases which refer this power to the trial judge, who is present and has opportunity to personally observe and note the circumstances and attendant conditions, are grounded in good reason; but, on the facts as they appear from his honor's findings, and we think it not improper to say that he has spread them on the record with commendable candor, we are of opinion that these men, as heretofore stated, have had no proper hearing, within the meaning of the constitutional provision, and that the judgment against them must be set aside."

Applied in State v. Darr, 63 N.C. 516 (1869); State v. Baker, 114 N.C. 812, 19 S.E. 145 (1894).

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

Constitutionality — This section is constitutional. State v. Cannady, 78 N.C. 539 (1878); State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890).

Costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, do not constitute a debt within the meaning of N.C. Const., Art. I, § 16, and hence the defendant may be imprisoned for nonpayment of the same. State v. Wallin, 89 N.C. 578 (1883).

Where Bill Ignored. — No power is conferred by this section to tax a prosecutor with costs when the bill is ignored. State v. Cockerham, 23 N.C. 381 (1841); State v. Horton, 89 N.C. 581 (1883); State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890).

Article 8.

Fees of Witnesses.

§ 6-51. Not entitled to fees in advance.—Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the State or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned shall, after one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may be due for traveling to the place of examination and for the number of days of attendance. (1868-9, c. 279, subch. 11, s. 3; Code, s. 1368; Rev., s. 1298; C. S., s. 1273.)

Cross Reference.—As to attendance of witnesses, see § 8-63.

§ 6-52: See Supplement.

§ 6-53. Witness to prove attendance; action for fees.—Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party,

it whose instance such witness was summoned (witnesses for the State and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered. (1777, c. 115, s. 46, P. R.; 1796, c. 458, P. R.; R. C., c. 31, s. 73; 1868-9, c. 279, subch. 11, ss. 2, 4; Code, s. 1369; Rev., s. 1299; C. S., s. 1274.)

Cross Reference.—As to attendance of witnesses generally, see §§ 8-59, 8-60.

In General.—Payment of witnesses by the sovereign is neither given by common law nor is it an inherent right. It is granted at the discretion of the court in the cases, and only within the limits authorized by statute. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889). See State v. Wheeler, 141 N.C. 773, 53 S.E. 358 (1906).

Need Not Show Assignment of Witness Tickets. — The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the superior court that these fees have been taxed against the party recovering the judgment, and paid by him, he is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. McClure v. Fulbright, 196 N.C. 450, 146 S.E. 74 (1929).

Witnesses Not Sworn or Tendered. — Where a trial is had and the witnesses are not sworn or tendered, their costs cannot be taxed against the party cost. Loftis v. Raxter, 66 N.C. 340 (1872). But where the defendant's witnesses are present and are not sworn or tendered because the plaintiff takes a nonsuit, the costs of such witnesses are properly taxable against the plaintiff. Henderson v. Williams, 120 N.C. 339, 27 S.E. 30 (1897).

There is no provision in our law authorizing the taxation as costs, of the fees for attendance and mileage of witnesses who have not been summoned, nor of witnesses who have been summoned but who are nonresidents of the State. Stern v. Herren, 101 N.C. 516, 8 S.E. 221 (1888).

Witnesses Subpoenaed but Not Examined. — When a cause has been tried, only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the other. Hobbs v. Atlantic Coast Line R.R., 151 N.C. 134, 65 S.E. 755 (1909); Chadwick v. Life Ins. Co., 158 N.C. 380, 74 S.E. 115 (1912).

It has always been the recognized practice that, inasmuch as only two witnesses of the successful party to prove any single fact can be taxed against the losing party, the purport of the evidence of the witnesses so sought to be taxed shall be demonstrated by examination on the trial, or at least that the losing party may have an opportunity to ascertain the materiality of the evidence of such witnesses and prevent being taxed with an excessive number upon any single point by such witnesses being sworn and tendered to the opposite party for examination. Porter v. Durham, 79 N.C. 596 (1878). It is true that in Loftis v. Raxter, 66 N.C. 340 (1872), it is said that the witnesses must be "sworn or tendered," but this is an inadvertent expression for "sworn and examined or tendered," i.e., witnesses subpoenaed by the successful party cannot be taxed against the losing party unless sworn and examined by the successful party, or sworn and tendered to the losing party to be examined, that their materiality may be shown. Otherwise, a successful party may oppress the losing party by subpoenaing and swearing any number of witnesses and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of this materiality. They must be examined or tendered to the opposite party to be examined, should he so choose, and if examined by the opposite party they are to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination pertaining to the examination of an adversary's witnesses. Sitton v. Lumber Co., 135 N.C. 540, 47 S.E. 609 (1904).

Effect of Nonsuit. — The costs of the defendant's witnesses who are present when the case is brought for trial, but are not sworn, because the plaintiff takes a nonsuit, are properly taxed against the latter. Henderson v. Williams, 120 N.C. 339, 27 S.E. 30 (1897), citing Loftis v. Raxter, 66 N.C. 340 (1872), cited in Sitton v. Lumber Co., 135 N.C. 540, 47 S.E. 609 (1904).

A pauper is not excused from liability

for his witnesses. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

Witnesses Summoned by Both Parties.—A witness summoned by each party to a suit is entitled to compensation from each. Peace v. Person, 5 N.C. 188 (1808).

§ 6-54. Witness tickets to be filed; only two witnesses for single fact.—At the court where the cause is finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact. (1783, c. 189, s. 3, P. R.; 1796, c. 458, s. 2, P. R.; R. C., c. 31, s. 74; Code, s. 1370; Rev., s. 1300; C. S., s. 1275.)

Local Modification.—Anson, Buncombe, Columbus, Forsyth, Gaston, Richmond, Robeson, Rutherford, Surry: C.S. 1276.

Editor's Note.—Service as a witness, as stated in State v. Wheeler, 141 N.C. 773, 53 S.E. 358 (1906), is the exaction of a public duty, which men are required to render either wholly without compensation or usually with inadequate pay, as the sovereign may require. Originally none received any pay, and to this day witnesses, above two to each material fact, receive no pay.

Where the issue submitted is a complex one, involving the investigation of a multiplicity of single facts material to be ascertained, to establish each such fact two witnesses are allowable under this section. Ex parte Beckwith, 124 N.C. 111, 32 S.E. 393 (1899).

Four Witnesses Summoned—Two Called by Each Party.—Where there was only one issue in the case, and plaintiff summoned four witnesses, but called only two of them, and the defendant summoned the witness who did not attend, the defendant was nevertheless liable for the costs of the two witnesses not sworn, as the court could not say that they had not been summoned to contradict testimony expected from the defendant's witness. Hayle v. Cowan, 2 N.C. 21 (1793).

Against Parties Summoning Witnesses. — While not more than two witnesses, summoned by the successful party to prove a single fact, can be taxed against the losing party under this section, this does not abridge the right of all the witnesses to recover compensation against the party summoning them. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

This section does not apply to expert witnesses, the court being allowed under § 6-52 to exercise its discretion with reference to compensation for same. Connor v. Hayworth, 206 N.C. 721, 175 S.E. 140 (1934). See also § 7A-314.

Applied in Cureton v. Garrison, 111 N.C. 271, 16 S.E. 338 (1892).

§ 6-55. Fees of witnesses before jury of view, commissioner, etc. —Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the State, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this State, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning. (1805, c. 685, P. R.; 1848, c. 66; 1850, c. 188, s. 3; R. C., c. 31, s. 67; Code, s. 1365; Rev., s. 1301; C. S., s. 1277.)

Cross Reference.—See § 1-553.

§ 6-56: See Supplement.

§ 6-57. Repealed by Session Laws 1947, c. 781.

§ 6-58. County to pay State's witnesses in certain cases.—Witnesses summoned or recognized on behalf of the State to attend on any criminal prosecution in the superior or criminal courts, except in actions or proceedings in which a

justice of the peace has final jurisdiction, which are commenced or tried in a court of a justice of the peace, mayor, or in a county or recorder's court, where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence on behalf of the State, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards retaken, the court shall order the witnesses to be paid. (1804, c. 665; P. R.; 1819, c. 1008, P. R.; 1824, c. 1253, P. R.; R. C., c. 28, s. 9; Code, s. 740; Rev., s. 1289; C. S., s. 1281; 1947, c. 781.)

Local Modification.—Durham: C.S. 1282; Wake: C.S. 1282; 1929, c. 102; 1931, c. 201; Wilkes: C.S. 1282.

Cross Reference.—See note to § 6-36.

Editor's Note.—For history of pay of State's witnesses, see State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

Service out of State.—The service of a subpoena on a witness beyond the borders of the State in a criminal action is not valid; and where the trial judge has allowed a necessary nonresident witness to prove his ticket against the county with mileage to the State line, there is no authority for him to allow the witness to prove for services rendered by him outside of the State when service has been attempted there. State v. Means, 175 N.C. 820, 95 S.E. 912 (1918).

§ **6-59:** See Supplement.

§ 6-60. **Fees of State witnesses; two only in misdemeanors; one fee for day's attendance.**—No person shall receive pay as a witness for the State on the trial of any criminal action unless such person was summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the State in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day. (1871-2, c. 186; 1879, c. 264; Code, s. 744; Rev., s. 1303; C. S., s. 1284.)

§ **6-61:** See Supplement.

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

Cross Reference.—As to discharge of witnesses generally, see § 8-63.

§ 6-63. **Witnesses not paid without certificate; court's discretion.**—No county, prosecutor or defendant shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name is certified to the clerk by the solicitor, or included in the order of the court. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law. The court, at any time within one year after judgment, may order that any witness may be paid who for any good reason satisfactory to the court failed to have his fees included in

the original bills of costs. (1879, c. 264; 1881, c. 312; Code, ss. 733, 748; Rev., s. 1306; C. S., s. 1287.)

The discretion conferred upon the court, in this section, in respect to regulating, or refusing to allow any compensation to the witnesses therein named, is not reviewable. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

It is within the discretion of the trial court (under § 733 of the Code of 1883) to refuse to make an order for the payment by the county of the fees of witnesses for a defendant acquitted of a criminal charge, where no prosecutor is marked, and the exercise of such discretion is not reviewable. State v. Ray, 122 N.C. 1095, 29 S.E. 948 (1898).

Appeal.—In an appeal from defendant's motion to retax the costs in a criminal action it should appear on the record that the provisions of this and § 6-60 were complied with, and when it does not so appear the case will be remanded. State v. Kirby, 201 N.C. 789, 161 S.E. 483 (1931).

ARTICLE 9.

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

§§ **6-64, 6-65:** See Supplement.

Chapter 7.
Courts.

SUBCHAPTER I. SUPREME COURT.

Article 1.
Organization and Terms.

Sec.
7-1 to 7-7. [Repealed.]

Article 2.
Jurisdiction.

7-8 to 7-21. [Repealed.]

Article 3.
Officers of Court.

7-22 to 7-29.1. [Repealed.]

Article 4.
Supreme Court Library.

7-30 to 7-33. [Repealed.]

Article 5.
Supreme Court Reports.

7-34, 7-35. [Repealed.]

Article 6.
Salaries of Supreme Court Employees.

7-36 to 7-39. [Repealed.]

Article 6A.
Retirement of Justices; Recall to Serve as Emergency Justices.

7-39.1 to 7-39.15. [Repealed.]

SUBCHAPTER II. SUPERIOR COURTS.

Article 7.
Organization.

7-40, 7-41. [Repealed.]
7-42. [Transferred.]
7-43 to 7-43.3. [Repealed.]
7-44, 7-45. [See Supplement.]
7-46 to 7-51.2. [Repealed.]
7-52 to 7-55. [Transferred.]
7-56, 7-57. [Repealed.]
7-58. [Transferred.]
7-59. [Repealed.]
7-60. [Transferred.]
7-61. [Repealed.]
7-61.1, 7-62. [Transferred.]

Article 8.
Jurisdiction.

7-63, 7-64. [Repealed.]
7-65. [Transferred.]
7-66, 7-67. [Repealed.]

Article 9.
Judicial and Solicitorial Districts and Terms of Court.

Sec.
7-68. [See Supplement.]
7-68.1 to 7-70.1. [Repealed.]
7-70.2. [Transferred.]
7-71 to 7-71.2. [Repealed.]
7-72, 7-73.1. [Transferred.]
7-74, 7-75. [Repealed.]
7-76. [Transferred.]

Article 10.
Special Terms of Court.

7-77. [Repealed.]
7-78. [Transferred.]
7-79. [Repealed.]
7-80. [Transferred.]
7-81, 7-82. [Repealed.]
7-83. [Transferred.]
7-84, 7-85. [Repealed.]

Article 11.
Special Regulations.

7-86 to 7-88. [Repealed.]
7-89. Court reporters.
7-90 to 7-92.4. [Repealed.]

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.

Article 12.
Commission for Improvement of Laws.

7-93 to 7-100. [Repealed.]

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Article 13.
Domestic Relations Courts.

7-101 to 7-111. [See Supplement.]

SUBCHAPTER V. JUSTICES OF THE PEACE.

Article 14.
Election and Qualification.

7-112 to 7-120. [See Supplement.]

Article 14A.
Appointment by Judge and Abolition of Fee System.

7-120.1 to 7-120.11. [Repealed.]

Article 15.
Jurisdiction.

7-121 to 7-129. [See Supplement.]

SUBCHAPTER I. SUPREME COURT.

ARTICLE 1.

Organization and Terms.

§§ **7-1 to 7-7:** Repealed by Session Laws 1967, c. 108, s. 12.

ARTICLE 2.

Jurisdiction.

§§ **7-8 to 7-21:** Repealed by Session Laws 1967, c. 108, s. 12.

ARTICLE 3.

Officers of Court.

§§ **7-22 to 7-29:** Repealed by Session Laws 1967, c. 108, s. 12.

§ **7-29.1:** Repealed by Session Laws 1965, c. 310, s. 4, effective July 1, 1965.

ARTICLE 4.

Supreme Court Library.

§§ **7-30 to 7-33:** Repealed by Session Laws 1967, c. 108, s. 12.

ARTICLE 5.

Supreme Court Reports.

§§ **7-34, 7-35:** Repealed by Session Laws 1967, c. 108, s. 12.

ARTICLE 6.

Salaries of Supreme Court Employees.

§§ **7-36 to 7-39:** Repealed by Session Laws, 1967, c. 108, s. 12.)

ARTICLE 6A.

Retirement of Justices; Recall to Serve as Emergency Justices.

§§ **7-39.1 to 7-39.15:** Repealed by Session Laws 1967, c. 108, s. 12.

SUBCHAPTER II. SUPERIOR COURTS.

Article 7.

Organization.

§§ **7-40, 7-41:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ **7-42:** Transferred to § 7A-44 by Session Laws 1969, c. 1190, s. 36, effective July 1, 1969.

§ **7-43:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§§ **7-43.1 to 7-43.3:** Repealed by Session Laws 1965, c. 310, s. 4, effective first Monday in December, 1966.

§ **7-44. Solicitors; compensation.**—See Supplement.

§ **7-45. Travel and office expenses of solicitors.**—See Supplement.

§§ **7-46 to 7-49:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§§ **7-50 to 7-51.2:** Repealed by Session Laws, 1967, c. 108, s. 2.

§ **7-52:** Transferred to § 7A-48 by Session Laws 1969, c. 1190, s. 39, effective July 1, 1969.

§ **7-53:** Transferred to § 7A-49 by Session Laws 1969, c. 1190, s. 40, effective July 1, 1969.

§§ **7-54, 7-55:** Transferred to § 7A-45 by Session Laws 1969, c. 1190, s. 41, effective July 1, 1969.

§ **7-56:** Repealed by Session Laws 1956, c. 1016, s. 2.

§ **7-57:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ **7-58:** Transferred to § 7A-45 by Session Laws 1969, c. 1190, s. 41, effective July 1, 1969.

§ **7-59:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ **7-60:** Transferred to § 7A-45 by Session Laws 1969, c. 1190, s. 41, effective July 1, 1969.

§ **7-61:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ **7-61.1:** Transferred to § 7A-47 by Session Laws 1969, c. 1190, s. 42, effective July 1, 1969.

§ **7-62:** Transferred to § 7A-49.1 by Session Laws 1969, c. 1190, s. 43, effective July 1, 1969.

Article 8.

Jurisdiction.

§§ **7-63, 7-64:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ **7-65:** Transferred to § 7A-47.1 by Session Laws 1969, c. 1190, s. 47, effective July 1, 1969.

§§ **7-66, 7-67:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

ARTICLE 9.

Judicial and Solicitorial Districts and Terms of Court.

§ 7-68: See Supplement.

§§ 7-68.1 to 7-69: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§§ 7-70, 7-70.1: Repealed by Session Laws 1967, c. 108, s. 12.

§ 7-70.2: Transferred to § 7A-42 by Session Laws 1969, c. 1190, s. 48, effective July 1, 1969.

§§ 7-71 to 7-71.2: Repealed by Session Laws 1967, c. 108, s. 12.

§§ 7-72, 7-73: Transferred to § 7A-49.2 by Session Laws 1969, c. 1190, s. 44, effective July 1, 1969.

§ 7-73.1: Transferred to § 7A-49.3 by Session Laws 1969, c. 1190, s. 45, effective July 1, 1969.

§ 7-74: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ 7-75: Repealed by Session Laws 1967, c. 108, s. 12.

§ 7-76: Transferred to § 7A-96 by Session Laws 1969, c. 1190, s. 49, effective July 1, 1969.

ARTICLE 10.

Special Terms of Court.

§ 7-77: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ 7-78: Transferred to § 7A-46 by Session Laws 1969, c. 1190, s. 46, effective July 1, 1969.

§ 7-79: Repealed by Session Laws 1967, c. 108, s. 12.

§ 7-80: Transferred to § 7A-46 by Session Laws 1969, c. 1190, s. 46, effective July 1, 1969.

§§ 7-81, 7-82: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ 7-83: Transferred to § 7A-46 by Session Laws 1969, c. 1190, s. 46, effective July 1, 1969.

§§ 7-84, 7-85: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

ARTICLE 11.

Special Regulations.

§§ 7-86 to 7-88: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ 7-89. Court reporters.

[See Supplement.]

The testimony taken and transcribed by said court reporter or said court reporter pro tem, as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is taken and transcribed, in the same manner, and under the same rule governing the introduction of depositions in civil actions.

(Ex. Sess. 1913, c. 69; C. S., s. 1461; Ex. Sess. 1921, c. 57; 1927, c. 268;

Pub. Loc. 1927, c. 49; 1933, c. 75, s. 2; 1955, c. 1317, s. 2; 1961, c. 844; 1967, c. 1121.)

Cross Reference. — As to reporting of trials, see § 7A-95.

§§ **7-90 to 7-92**: Repealed by Session Laws 1955, c. 1317, s. 1.

§§ **7-92.1 to 7-92.3**: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ **7-92.4**: Repealed by Session Laws 1967, c. 691, s. 59, effective July 1, 1967.

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.

ARTICLE 12.

Commission for Improvement of Laws.

§§ **7-93 to 7-100**: Repealed by Session Laws 1943, c. 746.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

ARTICLE 13.

Domestic Relations Courts.

§§ **7-101 to 7-111**: See Supplement.

SUBCHAPTER V. JUSTICES OF THE PEACE.

ARTICLE 14.

Election and Qualification.

§§ **7-112 to 7-120**: See Supplement.

ARTICLE 14A.

Appointment by Judge and Abolition of Fee System.

§§ **7-120.1 to 7-120.11**: Repealed by Session Laws 1967, c. 691, s. 59, effective July 1, 1967.

ARTICLE 15.

Jurisdiction.

§§ **7-121 to 7-129**: See Supplement.

ARTICLE 16.

Dockets.

§§ **7-130 to 7-133**: See Supplement.

ARTICLE 17.

Fees.

§ **7-134**: See Supplement.

ARTICLE 17A.

Warrants and Receipts.

§§ **7-134.1 to 7-134.6**: See Supplement.

ARTICLE 18.

Process.

§§ **7-135 to 7-146:** See Supplement.

ARTICLE 19.

Pleading and Practice.

§§ **7-147 to 7-149:** See Supplement.

ARTICLE 20.

Jury Trial.

§§ **7-150 to 7-165:** See Supplement.

ARTICLE 21.

Judgment and Execution.

§§ **7-166 to 7-176:** See Supplement.

ARTICLE 22.

Appeal.

§§ **7-177 to 7-183:** See Supplement.

ARTICLE 23.

Forms.

§ **7-184:** See Supplement.

SUBCHAPTER VI. RECORDERS' COURTS.

ARTICLE 24.

Municipal Recorders' Courts.

§§ **7-185 to 7-217:** See Supplement.

ARTICLE 25.

County Recorders' Courts.

§§ **7-218 to 7-239:** See Supplement.

ARTICLE 26.

Municipal-County Courts.

§§ **7-240 to 7-242:** Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

ARTICLE 27.

Provisions Applicable to All Recorders' Courts.

§§ **7-243 to 7-245:** See Supplement.

ARTICLE 28.

Civil Jurisdiction of Recorders' Courts.

§§ **7-246 to 7-255**: See Supplement.

ARTICLE 29.

Elections to Establish Recorders' Courts.

§§ **7-256 to 7-264**: See Supplement.

ARTICLE 29A.

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

§ **7-264.1**: See Supplement.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

ARTICLE 30.

Establishment, Organization and Jurisdiction.

§§ **7-265 to 7-285**: See Supplement.

ARTICLE 31.

Practice and Procedure.

§§ **7-286 to 7-296**: See Supplement.

ARTICLE 31A.

With Civil Jurisdiction Not to Exceed $3,000.00; with Criminal Jurisdiction of Offenses below the Grade of Felony.

§§ **7-296.1 to 7-296.18**: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

ARTICLE 32.

District County Courts.

§§ **7-297 to 7-307**: Repealed by Session Laws, 1967, c. 691, s. 59, effective July 1, 1967.

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

ARTICLE 33.

With Jurisdiction Not to Exceed $3000.

§§ **7-308 to 7-331**: Repealed by Session Laws 1967, c. 691, s. 59, effective July 1, 1967.

ARTICLE 34.

With Jurisdiction Not to Exceed $5000.

§ **7-332 to 7-350**: Repealed by Session Laws 1967, c. 691, s. 59, effective July 1, 1967.

ARTICLE 35.

With Jurisdiction Not to Exceed $1500.

§§ **7-351 to 7-383**: Repealed by Session Laws 1967, c. 691, s. 59, effective July 1, 1967.

ARTICLE 35A.

Additional Method of Establishing County Court.

§§ **7-383.1 to 7-383.33**: Repealed by Session Laws 1967, c. 691, s. 59, effective July 1, 1967.

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

ARTICLE 36.

County Criminal Courts.

§§ **7-384 to 7-404**: See Supplement.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

ARTICLE 37.

Special County Courts.

§§ **7-405 to 7-447**: See Supplement.

SUBCHAPTER XI. JUDICIAL COUNCIL.

ARTICLE 38.

Judicial Council.

§ **7-448. Establishment and membership.**—A Judicial Council is hereby created which shall consist of the Chief Justice of the Supreme Court or some other member of that court designated by him, the Chief Judge of the Court of Appeals or some other member of that court designated by him, two judges of the superior court and one judge of the district court designated by the Chief Justice, the Attorney General or some member of his staff designated by him, two solicitors of the superior court designated by the Chief Justice, and ten additional members, two of whom shall be appointed by the Governor, two by the President of the Senate from among the members of the Senate, two by the Speaker of the House of Representatives from among the members of the House and four by the Council of the North Carolina State Bar. All appointive members of the Judicial Council shall be selected on the basis of their interest in and competency for the study of law reform. The four members to be appointed by the Council of the North Carolina State Bar shall be active practitioners in the trial and appellate courts. (1949, c. 1052, s. 1; 1953, c. 74, s. 1; 1969, c. 1015, s. 1.)

Editor's Note. — The 1969 amendment rewrote the first sentence.

For a summary of this article, see 27 N.C.L. Rev. 405.

§ **7-449. Terms of office.**—Members of the Council shall hold office for the following terms:

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

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

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

(4) All other members shall hold office from the time of their designation or appointment until June 30th of the next odd numbered year. Those authorized to designate or appoint members to the Council shall make such designation or appointment to take effect on July 1st of each odd numbered year or as soon thereafter as practicable. Any member is eligible for redesignation or reappointment provided he continues to have the qualifications prescribed in § 7-448. (1949, c. 1052, s. 2; 1953, c. 74, ss. 2, 3; 1969, c. 1015, ss. 2-4.)

Editor's Note. — The 1969 amendment added present subdivision (2) and renumbered former subdivisions (2) and (3) as (3) and (4).

§ 7-450. Vacancy appointments. — Vacancies shall be filled for the remainder of any term in the same manner as the original appointment. (1949, c. 1052, s. 3.)

§ 7-451. Chairman of Council.—The member from the Supreme Court shall serve as chairman of the Council. (1949, c. 1052, s. 4.)

§ 7-452. Meetings.—The Council shall meet at least once each quarter of the calendar year, or more often at the call of the chairman. (1949, c. 1052, s. 5.)

§ 7-453. Duties of Council.—It is the duty of the Judicial Council:

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

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

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

§ 7-454. Annual report; submission of recommendations.—The Council shall annually file a report with the Governor. The Council shall submit any recommendations it may have for the improvement of the administration of justice to the Governor, who shall transmit the same to the General Assembly. (1949, c. 1052, s. 7.)

§ 7-455. Compensation of members.—The members of the Council shall be paid the sum of seven dollars ($7.00) per day and such necessary travel expenses and subsistence as may be incurred. (1949, c. 1052, s. 8.)

§ 7-456. Executive secretary; stenographer or clerical assistant.—The Council and the Chief Justice of the Supreme Court, by and with the advice, consent and approval of the Governor and Council of State, may employ an executive secretary who shall be a licensed attorney and fix his salary and also may employ a stenographer or clerical assistant and fix his or her salary. Said salaries shall be paid out of the contingency and emergency fund. The executive secretary shall perform such duties as the Council may assign to him. When not actively engaged in the discharge of duties assigned to him by said Council, he shall perform such duties as the Chief Justice may assign to him. (1949, c. 1052, s. 9; 1953, c. 1111, ss. 1, 2; 1957, c. 1417.)

Chapter 7A.
Judicial Department.

§ 7A-1. Short title.—This chapter shall be known and may be cited as the "Judicial Department Act of 1965." (1965, c. 310, s. 1.)

Cited in Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

§ 7A-2. Purpose of chapter.—This chapter is intended to implement Article IV of the Constitution of North Carolina and promote the just and prompt disposition of litigation by:

(1) Providing a new chapter in the General Statutes into which, at a time not later than January 1, 1971, when the General Court of Justice is fully operational in all counties of the State, all statutes concerning the organization, jurisdiction and administration of each division of the General Court of Justice may be placed;
(2) Amending certain laws with respect to the superior court division to conform them to the laws set forth in this chapter, to the end that each trial division may be a harmonious part of the General Court of Justice;
(3) Creating the district court division of the General Court of Justice, and the Administrative Office of the Courts;
(4) Establishing in accordance with a fixed schedule the various district courts of the district court division;
(5) Providing for the organization, jurisdiction and procedures necessary for the operation of the district court division;
(6) Providing for the financial support of the judicial department, and for uniform costs and fees in the trial divisions of the General Court of Justice;
(7) Providing for an orderly transition from the present system of courts to a uniform system completely operational in all counties of the State not later than January 1, 1971;
(8) Repealing certain laws inconsistent with the foregoing purposes; and
(9) Effectuating other purposes incidental and supplemental to the foregoing enumerated purposes. (1965, c. 310, s. 1.)

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

ARTICLE 1.

Judicial Power and Organization.

§ 7A-3. Judicial power; transition provisions.—Except for the judicial power vested in the court for the trial of impeachments, and except for such judicial power as may from time to time be vested by the General Assembly in administrative agencies, the judicial power of the State is vested exclusively in the General Court of Justice. Provided, that all existing courts of the State inferior to the superior courts, including justice of the peace courts and mayor's courts, shall continue to exist and to exercise the judicial powers vested in them by law until specifically abolished by law, or until the establishment within the county of their situs of a district court, or until January 1, 1971, whichever event shall first occur. Judgments of inferior courts which cease to exist under the provisions of this section continue in force and effect as though the issuing court continued to exist, and the General Court of Justice is hereby vested with jurisdiction to enforce such judgments. (1965, c. 310, s. 1.)

§ 7A-4. Composition and organization.—The General Court of Justice constitutes a unified judicial system for purposes of jurisdiction, operation and administration, and consists of an appellate division, a superior court division, and a district court division. (1965, c. 310, s. 1.)

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

ARTICLE 2.

Appellate Division Organization.

§ 7A-5. Organization.—The appellate division of the General Court of Justice consists of the Supreme Court and the Court of Appeals. (1965, c. 310, s. 1; 1967, c. 108, s. 1.)

Editor's Note.—Prior to c. 108, Session Laws 1967, this article was designated "Article 1A. Appellate Division Organization and Terms," and consisted of former § 7A-5, which read, "The appellate division of the General Court of Justice consists of the Supreme Court of North Carolina. (Chapter 7, subchapter I, articles 1-6, of the General Statutes, is applicable.)" The former section derived from c. 310, s. 1, Session Laws 1965.

Cited in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

§ 7A-6. Appellate division reporters; reports.—(a) The Supreme Court shall appoint one or more reporters for the appellate division, to serve at its pleasure. It shall be the duty of the reporters to prepare for publication the opinions of the Supreme Court and the Court of Appeals. The salary of the reporters shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court.

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

(c) The Administrative Officer of the Courts shall furnish, without charge, one copy of the advance sheets of the appellate division to each justice and judge of the General Court of Justice, to each superior court solicitor, to each superior court clerk, each district court prosecutor, and, in such numbers as may be reasonably necessary, to the Supreme Court library. (1967, c. 108, s. 1; c. 691, s. 57; 1969, c. 1190, s. 1.)

Editor's Note.—Section 57, c. 691, Session Laws 1967, added the present second and third sentences in subsection (b).

The 1969 amendment substituted "one or more reporters" for "a reporter" in the first sentence of subsection (a), substituted "reporters" for "reporter" in the second and third sentences of subsection (a), deleted the former last sentence of subsection (a), relating to assistant reporters, and inserted "each district court prosecutor" in subsection (c).

§ 7A-7. Law clerks; secretaries and stenographers.—(a) Each justice and judge of the appellate division is entitled to the services of one research assistant, who must be a graduate of an accredited law school. The salaries of research assistants shall be set by the Administrative Officer of the Courts, subject to the approval of the Supreme Court.

(b) The Administrative Officer of the Courts shall determine the number and salaries of all secretaries and stenographers in the appellate division. (1967, c. 108, s. 1.)

§§ 7A-8, 7A-9: Reserved for future codification purposes.

Article 3.

The Supreme Court.

§ 7A-10. Organization; compensation of justices.—(a) The Supreme Court shall consist of a Chief Justice and six associate justices, elected by the qualified voters of the State for terms of eight years. Before entering upon the duties of his office, each justice shall take an oath of office. Four justices shall constitute a quorum for the transaction of the business of the court. Sessions of the court shall be held in the city of Raleigh, and scheduled by rule of court so as to discharge expeditiously the court's business.

(b) The Chief Justice and each of the associate justices shall receive the annual salary provided in the budget appropriations act. Each justice is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally. (1967, c. 108, s. 1.)

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

Editor's Note. — The 1969 amendment added the present last sentence of the section and deleted former subsection (b), setting out the form of the oath to be taken by the clerk.

§ 7A-12. Supreme Court marshal.—The Supreme Court may appoint a marshal to serve at its pleasure, and to perform such duties as it may assign. The marshal shall have the criminal and civil powers of a sheriff, and any additional powers necessary to execute the orders of the appellate division in any county of the State. His salary shall be fixed by the Administrative Officer, subject to the approval of the Supreme Court. The marshal may appoint such assistants and at such salaries, as may be authorized by the Administrative Officer of the Courts. The Supreme Court, in its discretion, may appoint the Supreme Court librarian, or some other suitable employee of the court, to serve in the additional capacity of marshal. (1967, c. 108, s. 1.)

§ 7A-13. Supreme Court library; functions; librarian; library committee; seal of office.—(a) The Supreme Court shall appoint a librarian of the Supreme Court library, to serve at the pleasure of the court. The annual salary of the librarian shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The librarian may appoint assistants in numbers and at salaries to be fixed by the Administrative Officer of the Courts.

(b) The primary function of the Supreme Court library is to serve the appellate division of the General Court of Justice, but it may render service to the trial divisions of the General Court of Justice, to State agencies, and to the general

public, under such regulations as the librarian, subject to the approval of the library committee, may promulgate.

(c) The library shall be maintained in the city of Raleigh, except that if the Court of Appeals sits regularly in locations other than the city of Raleigh, branch libraries may be established at such locations for the use of the Court of Appeals.

(d) The librarian shall promulgate rules and regulations for the use of the library, subject to the approval of a library committee, to be composed of two justices of the Supreme Court appointed by the Chief Justice, and one judge of the Court of Appeals appointed by the Chief Judge.

(e) The librarian may adopt a seal of office.

(f) The librarian may operate a copying service by means of which he may furnish certified or uncertified copies of all or portions of any document, paper, book, or other writing in the library that legally may be copied. When a certificate is made under his hand and attested by his official seal, it shall be received as prima facie evidence of the correctness of the matter therein contained, and as such shall receive full faith and credit. The fees for copies shall be approved by the library committee, and the fees so collected shall be administered in the same manner as the charges to litigants for the reproduction of appellate records and briefs. (1967, c. 108, s. 1.)

Cross Reference.—For rules and regulations governing use of library, see Appendix VII-A in Volume 4A.

§§ **7A-14, 7A-15:** Reserved for future codification purposes.

ARTICLE 4.

Court of Appeals.

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

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

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

Effective January 1, 1969, the number of judges is increased to nine, and the Governor, on or after March 1, 1969, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1971. Their successors shall be elected at the general election for members of the General Assembly in November, 1970, and shall take office on January 1, 1971, to serve for the remainder of the unexpired term which began on January 1, 1969.

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

Three judges shall constitute a quorum for the transaction of the business of the court, except as may be provided in § 7A-32. (1967, c. 108, s. 1; 1969, c. 1190, s. 3.)

Editor's Note.—The 1969 amendment rewrote the last sentence of the first paragraph.

For article on "The North Carolina Court of Appeals—An Outline of Appellate Procedure," see 46 N.C.L. Rev. 705 (1968).

Cited in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

§ **7A-17**: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

Editor's Note. — The repealed section was codified from Session Laws 1967, c. 108, s. 1.

§ **7A-18. Compensation of judges.**—The Chief Judge and each associate judge of the Court of Appeals shall receive the annual salary provided in the budget appropriations act. Each judge is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally. (1967, c. 108, s. 1.)

§ **7A-19. Seats and sessions of court.**—(a) The Court of Appeals shall sit in Raleigh, and at such other locations within the State as the Supreme Court may designate.

(b) The Department of Administration shall provide adequate quarters for the Court of Appeals.

(c) The Chief Judge shall schedule sessions of the court as required to discharge expeditiously the court's business. (1967, c. 108, s. 1.)

§ **7A-20. Clerk; oath; bond; salary; assistants; fees.**—(a) The Court of Appeals shall appoint a clerk to serve at its pleasure. Before entering upon his duties, the clerk shall take the oath of office prescribed for the clerk of the Supreme Court, conformed to the office of clerk of the Court of Appeals, and shall be bonded, in the same manner as the clerk of superior court, in an amount prescribed by the Administrative Officer of the Courts, payable to the State, for the faithful performance of his duties. The salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Court of Appeals. The number and salaries of his assistants, and their bonds, if required, shall be fixed by the Administrative Officer of the Courts. The clerk shall adopt a seal of office, to be approved by the Court of Appeals.

(b) Subject to approval of the Supreme Court, the Court of Appeals shall promulgate from time to time a fee bill for services rendered by the clerk, and such fees shall be remitted to the State Treasurer, except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court. The State Auditor shall audit the financial accounts of the clerk at least once a year. (1967, c. 108, s. 1.)

§§ **7A-21 to 7A-24**: Reserved for future codification purposes.

ARTICLE 5.

Jurisdiction.

§ **7A-25. Original jurisdiction of the Supreme Court.** — The Supreme Court has original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; the decisions shall be reported to the next session of the General Assembly for its action. The court shall by rule prescribe the procedures to be followed in the proper exercise of the jurisdiction conferred by this section. (1967, c. 108, s. 1.)

§ 7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.—The Supreme Court and the Court of Appeals respectively have jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, in accordance with the system of appeals provided in this article. (1967, c. 108, s. 1.)

Quoted in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

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

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

(c) From any final judgment of a district court in a civil action appeal lies of right directly to the Court of Appeals.

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or
(2) In effect determines the action and prevents a judgment from which appeal might be taken, or
(3) Discontinues the action, or
(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1.)

No Appeal as Matter of Right from Interlocutory Orders in Criminal Cases.—In this section there is no provision for an appeal as a matter of right from interlocutory orders in criminal cases. State v. Lance, 1 N.C. App. 620, 162 S.E.2d 154 (1968); State v. Smith, 4 N.C. App. 491, 166 S.E.2d 870 (1969).

Applied in State v. Henry, 1 N.C. App. 409, 161 S.E.2d 622 (1968); State v. Lentz, 5 N.C. App. 177, 167 S.E.2d 887 (1969).

Cited in State v. Lipscomb, 274 N.C. 436, 163 S.E.2d 788 (1968).

§ 7A-28. Decisions of Court of Appeals in post-conviction proceedings final.—Decisions of the Court of Appeals rendered upon review of post-conviction proceedings conducted under article 22 of chapter 15 are final and not subject to further review in the General Court of Justice by appeal, certification, writ, or otherwise. (1967, c. 108, s. 1.)

§ 7A-29. Appeals of right from certain administrative agencies.—From any final order or decision of the North Carolina Utilities Commission or of the North Carolina Industrial Commission, appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1.)

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.—Except as provided in § 7A-28, from any decision of the Court of Appeals rendered in a case

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or
(2) In which there is a dissent, or
(3) Which involves review of a decision of the North Carolina Utilities Commission in a general rate-making case, an appeal lies of right to the Supreme Court. (1967, c. 108, s. 1.)

Requirements of Constitutional Question.—The constitutional question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. State

v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

Scope of Review. — When the Supreme Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by § 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of the Court of Appeals is before the Supreme Court for review. The Supreme Court inquires into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Its inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in the Supreme Court, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to the Supreme Court. Supreme Court review of a decision by the Court of Appeals upon an appeal from it to the Supreme Court as a matter of right, pursuant to this section, is similarly limited. State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968).

Once involvement of a substantial constitutional question is established, the Supreme Court will retain the case and may, in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented for review. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

Dismissal Where Involvement of Substantial Constitutional Question Not Shown.—An appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

Mouthing of Constitutional Phrases Will Not Avoid Dismissal.—Mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" will not avoid dismissal. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

Applied in State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968).

Cited in Harris v. Board of Comm'rs, 274 N.C. 343, 163 S.E.2d 387 (1968); Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968); Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968); State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969); Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969); State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969).

§ 7A-31. Discretionary review by the Supreme Court.—(a) In any cause in which appeal has been taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission or the North Carolina Industrial Commission, and except a cause involving review of a post-conviction proceeding under article 22, chapter 15, the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from the Utilities Commission or the Industrial Commission may be certified in similar fashion but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

The State may move for the certification for review of any criminal cause or any cause involving review of a post-conviction proceeding, but only after determination of the cause by the Court of Appeals.

(b) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court before determination of the cause by the Court of Appeals when in the opinion of the Supreme Court

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or

(4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

(d) The procedure for certification by the Supreme Court on its own motion, or upon petition of a party, shall be prescribed by rule of the Supreme Court. (1967, c. 108, s. 1; 1969, c. 1044.)

Editor's Note. — The 1969 amendment added the second paragraph of subsection (a).

Scope of Review. — When the Supreme Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by this section, grants certiorari to review the decision of the Court of Appeals, only the decision of the Court of Appeals is before the Supreme Court for review. The Supreme Court inquires into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Its inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in the Supreme Court, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to the Supreme Court. Supreme Court review of a decision by the Court of Appeals upon an appeal from it to the Supreme Court as a matter of right, pursuant to § 7A-30, is similarly limited. State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968).

The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. State v. Parrish, 275 N.C. 69, 165 S.E.2d 230 (1969).

The Supreme Court will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was timely raised and passed upon in the trial court if it could have been, or in the Court of Appeals if the question arose after the trial. State v. Parrish, 275 N.C. 69, 165 S.E.2d 230 (1969).

Cited in Carolina Beach Fishing Pier v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968); Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968); Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968); S.S. Kresge Co. v. Tomlinson, 275 N.C. 1, 165 S.E.2d 236 (1969); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969); Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969); State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs. — (a) The Supreme Court and the Court of Appeals have jurisdiction, exercisable by any one of the justices or judges of the respective courts, to issue the writ of habeas corpus upon the application of any person described in G.S. 17-3, according to the practice and procedure provided therefor in chapter 17 of the General Statutes, and to rule of the Supreme Court.

(b) The Supreme Court has jurisdiction, exercisable by one justice or by such number of justices as the court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction or in exercise of its general power to supervise and control the

proceedings of any of the other courts of the General Court of Justice. The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

(c) The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law. (1967, c. 108, s. 1.)

§ 7A-33. Supreme Court to prescribe appellate division rules of practice and procedure.—The Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division. (1967, c. 108, s. 1.)

Cross References.—For Supreme Court rules, see Appendix I, (1), in Volume 4A. For rules of practice in Court of Appeals, see Appendix I, (1.1), in Volume 4A.

Cited in State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969).

§ 7A-34. Rules of practice and procedure in trial courts.—The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly. (1967, c. 108, s. 1.)

§ 7A-35. Disposition of appeals during transitional period. — (a) Civil cases tried in the district court in which notice of appeal to the superior court has been given on or before September 30, 1967, and which have not been finally determined in the superior court on that date, shall be disposed of as provided by rule of the Supreme Court, and the jurisdiction of the superior court over civil appeals from the district court continues to the extent necessary for this purpose.

(b) All cases in which notice of appeal from the superior court to the Supreme Court has been given on or before September 30, 1967, and which have not been finally determined on that date, shall be disposed of in accordance with the laws and rules governing such appeals which were applicable immediately prior to September 30, 1967.

(c) On and after October 1, 1967, all causes appealed to the appellate division from the Utilities Commission, the Industrial Commission, the district court in civil cases, or the superior court, other than criminal cases which impose a sentence of death or life imprisonment, shall be filed with the clerk of the Court of Appeals.

(d) The Supreme Court by rule shall implement this section to the end that all causes appealed from the trial divisions to the appellate division during the period of transition from the existing judicial structure to a fully operational General Court of Justice are processed efficiently and without prejudice or inconvenience to any litigant. (1967, c. 108, s. 1.)

The jurisdiction of the Court of Appeals is derivative. Therefore, if the court from which the appeal is taken had no jurisdiction, the Court of Appeals cannot acquire jurisdiction by appeal. Wiggins v. Pyramid Life Ins. Co., 3 N.C. App. 476, 165 S.E.2d 54 (1969).

Jurisdiction cannot be conferred by consent where it does not otherwise exist. Wiggins v. Pyramid Life Ins. Co., 3 N.C. App. 476, 165 S.E.2d 54 (1969).

Subsections (a) and (c) make the date of notice of appeal controlling, not the date of the trial or the judgment. Wiggins v. Pyramid Life Ins. Co., 3 N.C. App. 476, 165 S.E.2d 54 (1969).

Applied in Bumgarner v. Sherrill, 1 N.C. App. 173, 160 S.E.2d 520 (1968).

§ **7A-36**: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

Editor's Note. — The repealed section was codified from Session Laws 1967, c. 108, s. 1.

§§ **7A-37 to 7A-39**: Reserved for future codification purposes.

ARTICLE 6.

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

§ **7A-39.1. Justice, emergency justice, judge and emergency judge defined.**—(a) As herein used "justice of the Supreme Court" includes the Chief Justice of the Supreme Court, and "judge of the Court of Appeals" includes the Chief Judge of the Court of Appeals unless the context clearly indicates a contrary intent.

(b) As used herein, "emergency justice" or "emergency judge" means any justice of the Supreme Court or any judge of the Court of Appeals, respectively, who has retired subject to recall for temporary service in the place of any active member of the court from which he retired. (1967, c. 108, s. 1.)

Editor's Note.—The act inserting this article is effective July 1, 1967.

Former § 7A-39.1, which was enacted by Session Laws 1965, c. 310, s. 1, was transferred and renumbered § 7A-42 by s. 1, c. 691, Session Laws 1967.

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

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

(c) Any justice of the Supreme Court or judge of the Court of Appeals who has served for eight consecutive years as justice or judge in the appellate division may, at age seventy-five, retire and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired.

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

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

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

§ 7A-39.4. Retirement creates vacancy.—The retirement of any justice of the Supreme Court or any judge of the Court of Appeals under the provisions of this article shall create a vacancy in his office to be filled as provided by law. (1967, c. 108, s. 1.)

§ 7A-39.5. Recall of emergency justice or emergency judge upon temporary incapacity of a justice or judge.—(a) Upon the request of any justice of the Supreme Court who has been advised in writing by a reputable and competent physician that he is temporarily incapable of performing efficiently and promptly all the duties of his office, the Chief Justice may recall any emergency justice who, in his opinion, is competent to perform the duties of an associate justice, to serve temporarily in the place of the justice in whose behalf he is recalled; provided, that when the incapacity of a justice of the Supreme Court is such that he cannot request the recall of an emergency justice to serve in his place, an order of recall may be issued by the Chief Justice upon satisfactory medical proof of the facts upon which the order of recall must be based. Orders of recall shall be in writing and entered upon the minutes of the court.

(b) Upon the request of any judge of the Court of Appeals who has been advised in writing by a reputable and competent physician that he is temporarily incapable of performing efficiently and promptly all the duties of his office, the Chief Judge may recall any emergency judge who, in his opinion, is competent to perform the duties of a judge of the Court of Appeals, to serve temporarily in the place of the judge in whose behalf he is recalled; provided, that when the incapacity of a judge of the Court of Appeals is such that he cannot request the recall of an emergency judge to serve in his place, an order of recall may be issued by the Chief Judge upon satisfactory medical proof of the facts upon which the order of recall must be based. Orders of recall shall be in writing and entered upon the minutes of the court. (1967, c. 108, s. 1.)

§ 7A-39.6. Notice to Governor of intention to retire; commission as emergency justice or emergency judge.—Any justice of the Supreme Court or judge of the Court of Appeals who is qualified and who desires to retire under the provisions of § 7A-39.2 shall notify the Governor in writing of his intention to do so, including in the notice the facts which entitle him to retire. Upon receipt of such notice, the Governor shall issue a commission as an emergency justice or judge, as appropriate, to the applicant, effective upon the date of his retirement. The commission shall be effective for life. (1967, c. 108, s. 1.)

§ 7A-39.7. Jurisdiction and authority of emergency justices and emergency judges.—An emergency justice or emergency judge shall not have or possess any jurisdiction or authority to hear arguments or participate in the consideration and decision of any cause or perform any other duty or function of a justice of the Supreme Court or judge of the Court of Appeals, respectively, except while serving under an order of recall and in respect to appeals, motions, and other matters heard, considered, and decided by the court during the period of

his temporary service under such order; and the justice of the Supreme Court or judge of the Court of Appeals in whose behalf an emergency justice or emergency judge is recalled to active service shall be disqualified to participate in the consideration and decision of any question presented to the court by appeal, motion or otherwise in which any emergency justice or emergency judge recalled in his behalf participated. (1967, c. 108, s. 1.)

§ **7A-39.8. Court authorized to adopt rules.**—The Supreme Court shall prescribe rules respecting the filing of opinions prepared by an emergency justice or an emergency judge after his period of temporary service has expired, and any other matter deemed necessary and consistent with the provisions of this article. (1967, c. 108, s. 1.)

§ **7A-39.9. Chief Justice and Chief Judge may recall and terminate recall of justices and judges; procedure when Chief Justice or Chief Judge incapacitated.** — (a) The Chief Justice of the Supreme Court and the Chief Judge of the Court of Appeals are vested with authority to issue orders of recall to emergency justices and judges, respectively, and to perform any and all other acts deemed necessary to effectuate the purposes of this article, and their decisions, when not in conflict herewith, shall be final.

(b) The Chief Justice or Chief Judge, may, at any time, in his discretion, cancel any order of recall issued by him or fix the termination date thereof.

(c) Whenever the Chief Justice is the justice in whose behalf an emergency justice is recalled to temporary service, the powers vested in him as Chief Justice by this article shall be exercised by the associate justice senior in point of time served on the Supreme Court. Whenever the Chief Judge is the judge in whose behalf an emergency judge is recalled to temporary service the powers vested in him as Chief Judge by this article shall be exercised by the associate judge senior in point of time served on the Court of Appeals. If two or more judges have served the same length of time on the Court of Appeals, the eldest shall be deemed the senior judge. (1967, c. 108, s. 1.)

§ **7A-39.10. Article applicable to previously retired justices.** — All provisions of this article shall apply to every justice of the Supreme Court who has heretofore retired and is receiving compensation as an emergency justice. (1967, c. 108, s. 1.)

§ **7A-39.11. Retirement on account of total and permanent disability.**—Every justice of the Supreme Court or judge of the Court of Appeals who has served for eight years or more on the Supreme Court, the Court of Appeals, or the superior court, or as Administrative Officer of the Courts, or in any combination of these offices, and who while in active service becomes totally and permanently disabled so as to be unable to perform efficiently the duties of his office, and who retires by reason of such disability, shall receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired. In determining whether a judge is eligible for retirement under this section, time served as district solicitor of the superior court prior to January 1, 1971, may be included. Whenever any justice or judge claims retirement benefits under this section on account of total and permanent disability, the Governor and Council of State, acting together, shall, after notice and an opportunity to be heard is given the applicant, by a majority vote of said body, make findings of fact from the evidence offered. Such findings of fact shall be reduced to writing and entered upon the minutes of the Council of State. The findings so made shall be conclusive as to such matters and determine the right of the applicant to retirement benefits under this section. Justices and judges retired under the provisions of this section are not subject to recall as emergency justices or judges. (1967, c. 108, s. 1.)

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

ARTICLE 7.

Organization.

§ 7A-40. Composition; judicial powers of clerk; statutes applicable.—The superior court division of the General Court of Justice consists of the several superior courts of the State. The clerk of superior court in the exercise of the judicial power conferred upon him as ex officio judge of probate, and in the exercise of other judicial powers conferred upon him by law in respect of special proceedings and the administration of guardianships and trusts, is a judicial officer of the superior court division, and not a separate court. (Except as otherwise provided in this chapter, chapter 7, subchapter II, articles 7-11 of the General Statutes is applicable.) (1965, c. 310, s. 1; 1967, c. 691, s. 1; 1969, c. 1190, s. 4.)

Editor's Note. — This section was originally § 7A-39.1. It was transferred and renumbered § 7A-42 by Session Laws 1967, c. 691, s. 1, effective July 1, 1967. It was again transferred, and renumbered § 7A-40, by Session Laws 1969, c. 1190, s. 4, effective July 1, 1969.

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

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

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-time Asst. Solicitors
	19	Cabarrus, Montgomery, Randolph, Rowan	2	3
	20	Anson, Moore, Richmond, Stanly, Union	1	2
	21	Forsyth	2	4
	22	Alexander, Davidson, Davie, Iredell	1	2
	23	Alleghany, Ashe, Wilkes, Yadkin	1	1
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	1
	25	Burke, Caldwell, Catawba	1	3
	26	Mecklenburg	3	6
	27	Cleveland, Gaston, Lincoln	2	5
	28	Buncombe	2	2
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1	2
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1	1

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

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

Full-time assistant solicitors are not authorized under this section until January 1, 1971. (1969, c. 1190, s. 4.)

Additional Resident Judge of Fifth Judicial District.—Session Laws 1969, c. 1171, ss. 1-3, read as follows:

"Section 1. There is hereby created the office of additional resident judge of the fifth judicial district effective as of January 1, 1970. The Governor shall appoint this additional resident judge for the fifth judicial district on or after September 1, 1969, to take office on January 1, 1970. The successor of the Governor's appointee shall be chosen in the manner prescribed by law for other resident superior court judges in the general election of 1970 to serve for the unexpired portion of the term of eight years which began as of January 1, 1969, and his successors shall be chosen thereafter in the manner and serve for the same term as prescribed for other resident superior court judges.

"Sec. 2. The present resident judge of the fifth judicial district shall be the senior resident judge of the district.

"Sec. 3. The additional resident judge of the fifth judicial district shall, in respect to the exercise of judicial power, have equal jurisdiction, authority and status with the senior resident judge of such district; but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and re-

moval from office, which are not related to a case, controversy, or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the resident judge of the judicial district senior in point of continuous service on the superior court; and if two judges be of equal seniority, then by the judge who is senior in point of age."

Editor's Note.—Session Laws 1969, c. 1190, s. 59, makes the act effective July 1, 1969.

§ 7A-42. Sessions of superior court in cities other than county seats. —(a) Sessions of the superior court shall be held in each city in the State which is not a county seat and which has a population of 35,000 or more, according to the 1960 federal census.

(b) For the purpose of segregating the cases to be tried in any city referred to in subsection (a), and to designate the place of trial, the clerk of superior court in any county having one or more such cities shall set up a criminal docket and a civil docket, which dockets shall indicate the cases and proceedings to be tried in each such city in his county. Such dockets shall bear the name of the city in which such sessions of court are to be held, followed by the word "Division." Summons in actions to be tried in any such city shall clearly designate the place of trial.

(c) For the purpose of determining the proper place of trial of any action or proceeding, whether civil or criminal, the county in which any city described in subsection (a) is located shall be divided into divisions, and the territory embraced in the division in which each such city is located shall consist of the township in which such city lies and all contiguous townships within such county, such division of the superior court to be known by the name of such city followed by the word "Division." All other townships of any such county shall constitute a division of the superior court to be known by the name of the county seat followed by the word "Division." All laws, rules, and regulations now or hereafter in force and effect in determining the proper venue as between the superior courts of the several counties of the State shall apply for the purpose of determining the proper place of trial as between such divisions within such county and as between each of such divisions and any other county of the superior court in North Carolina.

(d) The clerk of superior court of any county with an additional seat of superior court may, but shall not be required to, hear matters in any place other than at his office at the county seat.

(e) The grand jury for the several divisions of court of any county in which a city described in subsection (a) is located shall be drawn from the whole county, and may hold hearings and meetings at either the county seat or elsewhere within the county as it may elect, or as it may be directed by the judge holding any session of superior court within such county; provided, however, that in arranging the sessions of the court for the trial of criminal cases for any county in which any such city is located a session of one week or more shall be held at the county seat preceding any session of one week or more to be held in any such city, so as to facilitate the work of the grand jury, and so as to confine its meetings to the county seat as fully as may be practicable. All petit jurors for all sessions of court in the several divisions of such county shall be drawn, as now or hereafter provided by law, from the whole of the county in which any such city is located for all sessions of courts in the several divisions of such county.

(f) Special sessions of court for the trial of either civil or criminal cases in any city described in subsection (a) may be arranged as by law now or hereafter provided for special sessions of the superior court.

(g) All court records of all such divisions of the superior court of any such county shall be kept in the office of the clerk of the superior court at the county seat, but they may be temporarily removed under the direction and supervision

of the clerk to any such division or divisions. No judgment or order rendered at any session held in any such city shall become a lien upon or otherwise affect the title to any real estate within such county until it has been docketed in the office of the clerk of the superior court at the county seat as now or may hereafter be provided by law; provided, that nothing herein shall affect the provisions of G.S. 1-233 and the equities therein provided for shall be preserved as to all judgments and orders rendered at any session of the superior court in any such city.

(h) It shall be the duty of the board of county commissioners of the county in which any such city is located to provide a suitable place for holding such sessions of court, and to provide for the payment of the extra expense, if any, of the sheriff and his deputies in attending the sessions of court of any such division, and the expense of keeping, housing and feeding prisoners while awaiting trial. (1943, c. 121; 1969, c. 1190, s. 48.)

Editor's Note. — This section was formerly § 7-70.2. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 48.

§ 7A-43: Reserved for future codification purposes.

§ 7A-43.1 to 7A-43.3: See Supplement.

§ 7A-44. Salary and expenses of superior court judge.—A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be allowed five thousand dollars ($5,000.00) per year, payable monthly, in lieu of necessary travel and subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred outside of the State for professional education. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36.)

Editor's Note. — This section was formerly § 7-42. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 36.

Additional Compensation Part of Salary. —Additional compensation of one hundred dollars given to a superior court judge by the former wording of § 7-42 for services in holding a special term was a part of his salary. Buxton v. Commissioners of Rutherford, 82 N.C. 91 (1880).

As to taxing salaries of judges, see Const., Art. IV, § 18.

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

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters whatsoever that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court

and in chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1927, c. 206, ss. 1, 2, 5, 7; 1929, c. 137, ss. 1, 2, 5, 7; 1931, c. 29, ss. 1, 2, 5, 7; 1933, c. 217, ss. 1, 2, 5, 7; 1935, c. 97, ss. 1, 2, 5, 7; 1937, c. 72, ss. 1, 2, 5, 7; 1939, c. 31, ss. 1, 2, 5, 7; 1941, c. 51, ss. 1, 2, 5, 7; 1943, c. 58, ss. 1, 2, 5, 7; 1945, c. 153, ss. 1, 2, 5, 7; 1947, c. 24, ss. 1, 2, 5, 7; 1949, c. 681, ss. 1, 2, 5, 7; 1951, c. 78, s. 1; c. 1119, ss. 1, 2, 5, 7; 1953, c. 1322, ss. 1, 2, 5, 7; 1955, c. 1016, s. 1; 1959, c. 465; 1961, c. 34; 1963, c. 1170; 1969, c. 1190, s. 41.)

Editor's Note. — This section combines former §§ 7-54, 7-55, 7-58 and 7-60. The provisions of the former sections were rewritten, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 41.

The cases cited in the following annotation were decided under the former sections.

No Jurisdiction When Not Holding Term of Court. — A special or emergency judge has no authority to determine a controversy without action at chambers when not holding a term of court. Greene v. Stadiem, 197 N.C. 472, 149 S.E. 685 (1929). See Bohannon v. Virginia Trust Co., 198 N.C. 702, 153 S.E. 263 (1930).

Judicial Notice of Appointment as Special Judge.—The appellate court will take judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of this chapter. Greene v. Stadiem, 197 N.C. 472, 149 S.E. 685 (1929).

When necessary for the determination of a case on appeal, the appellate court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor under the authority of this section. Reid v. Reid, 199 N.C. 740, 155 S.E. 719 (1930).

Motions in Cause Made at Term.—Civil actions pending on the civil issue docket of a county are always subject to motion in the cause. These motions may be made before the judge at term. In many instances they may be made out of term. When made at term the judge presiding, whether regular or special, has jurisdiction. To this extent this section has full constitutional sanction. Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943.)

Special Judge May Hear Matter Out of Term by Consent.—Once having acquired jurisdiction at term a special or emergency judge, by consent, may hear the matter out of term nunc pro tunc. Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943.)

Proceeding to Obtain Custody of Child. —A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re Cranford, 231 N.C. 91, 56 S.E.2d 35 (1949).

Motion for Alimony. — Where a special judge has been authorized under commission of the Governor to hold a term of court in only one county of a district, he may not issue an order for alimony, attorney's fees and costs in a proceeding in an action for divorce a vinculo pending in another county of the district and continued to be heard before a judge regularly holding the terms of court in that district. Public Laws 1929, c. 137, under which the special judge was commissioned, provided that writs, orders and notices shall be returnable before special judges only in the county where the suit, proceeding or other cause is pending, unless such special judge is then holding the courts of that district, in which case the same may be returnable before him as before the regular judge. Reid v. Reid, 199 N.C. 740, 155 S.E. 719 (1930).

§ 7A-46. Special sessions.—Whenever it appears to the Chief Justice of the Supreme Court that there is need for a special session of superior court in any county, he may order a special session in that county, and order any regular, special, or emergency judge to hold such session. The Chief Justice shall notify the clerk of superior court of the county, who shall initiate action under chapter 9 of the General Statutes to provide a jury for the special session, if a jury is required.

Special sessions have all the jurisdiction and powers that regular sessions have.

(R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Code, ss. 914, 915, 916; Rev., ss. 1512, 1513, 1516; C. S., ss. 1450, 1452, 1455; Ex. Sess. 1924, c. 100; 1951, c. 491, ss. 1, 3; 1959, c. 360; 1969, c. 1190, s. 46.)

Editor's Note. — This section combines former §§ 7-78, 7-80 and 7-83. The former sections were revised, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 46.

The cases cited in the following annotation were decided under the former sections.

Constitutionality.—See State v. Ketchey, 70 N.C. 621 (1874).

The power to order special terms is not restricted to instances where there is accumulation of business, nor when such fact is recited as a reason in the commission is the power of the judge restricted to the trial of indictments found before that term. State v. Register, 133 N.C. 746, 46 S.E. 21 (1903). See note of State v. Lewis, 107 N.C. 967, 12 S.E. 457, 13 S.E. 247 (1890).

Regular Order Presumed.—When it appears from the record that a cause was tried at a special term of a superior court, it is presumed prima facie that an order for holding it was duly made, and that it was duly held. Sparkman v. Daughtry, 35 N.C. 168 (1851).

No reason need be assigned by the Governor (now the Chief Justice) for calling special terms. State v. Watson, 75 N.C. 136 (1876). He is the sole judge of the evidence necessitating such action. State v. Lewis, 107 N.C. 967, 12 S.E. 457, 13 S.E. 247 (1890).

Must Appoint Judge.—When the Governor (now the Chief Justice) has ordered such term as provided in this section to be held in any county of this State, it is his duty to appoint one of the judges of the superior court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935).

Court Held Outside Judge's District.— A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties. Henry v. Hilliard, 120 N.C. 479, 27 S.E. 130 (1897).

Removal of Cause.—A superior court at a special term has the same power to remove a cause to another county that it has at a regular term. Sparkman v. Daughtry, 35 N.C. 168 (1851).

Judgment by Default. — Whether at a regular or special term of the court, notice to the adverse party of a motion in term for judgment by default for want of an answer is not necessary. Reynolds v. Greensboro Boiler & Mach. Co., 153 N.C. 342, 69 S.E. 248 (1910).

Plea Denying Existence of Court. — A plea of the defendant that the court was unlawfully called because the Governor (now the Chief Justice) was absent from the State when he attempted to order the holding of the court is properly overruled. State v. Hall, 142 N.C. 710, 55 S.E. 806 (1906).

Arraignment at Former Term. — It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. State v. Ketchey, 70 N.C. 621 (1874).

Applied in State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

Cited in State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935).

§ 7A-47. Powers of regular judges holding courts by assignment or exchange.—A regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district has, and his jurisdiction in chambers shall extend until the session is adjourned or the session expires by operation of law, whichever is later. (1951, c. 740; 1969, c. 1190, s. 42.)

Editor's Note. — This section was formerly § 7-61.1. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 42.

§ 7A-47.1. Jurisdiction in vacation or in session.—In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. The resident judge of the judicial district and any special superior court judge residing in the district and the judge regularly presiding over the courts of the district have concurrent jurisdiction in all matters and proceedings in which the superior court has jurisdiction out of session;

provided, that in all matters and proceedings not requiring a jury or in which a jury is waived, the resident judge of the district and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court. (1871-2, c. 3; Code, c. 10, s. 230; Rev., s. 1501; C. S., s. 1438; 1939, c. 69; 1945, c. 142; 1951, c. 78, s. 2; 1969, c. 1190, s. 47.)

Editor's Note. — This section was formerly § 7-65. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 47.

The cases cited in the following annotation were decided under the former section.

"Vacation" or "in Chambers" Jurisdiction.—"It may be said that a regular judge holding the courts of the district has general jurisdiction of all 'in chambers' matters arising in the district. The general 'vacation' or 'in chambers' jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and it is never dependent upon and does not arise out of the fact that he is at the time presiding over a designated term of court or in a particular county. As to him, it is limited, ordinarily, to the district to which he is assigned by statute. It may not be exercised even within the district of his residence except when specially authorized by statute." Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954), quoting Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943).

Jurisdiction in Vacation Generally. — Matters and proceedings not requiring the intervention of a jury, or in which trial by jury has been waived, may be heard in vacation. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Concurrent Jurisdiction of Judges.—The resident judge of a judicial district and the judge regularly presiding over the courts of the district and any special judge residing in the district have concurrent jurisdiction in all matters and proceedings wherein the superior court has jurisdiction out of term. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Residence of Judge.—The resident judge of a district has no other power within such district in vacation than any other judge of the superior court. State v. Ray, 97 N.C. 510, 1 S.E. 876 (1887).

The judge holding the courts of a judicial district has authority to act in all matters within the jurisdiction of the superior court, with the consent of the parties, by signing judgments out of term and in or out of the county and out of the district. Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942).

Hearing Demurrers in Chambers. — A special judge has jurisdiction in the county of his residence to hear and determine in chambers a demurrer to the complaint in an action pending in the county. Parker v. Underwood, 239 N.C. 308, 79 S.E.2d 765 (1954); Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

Or Controversies without Action. — A special judge in the county of his residence has jurisdiction to hear and determine in chambers a controversy without action. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

Motions.—After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. May v. National Fire Ins. Co., 172 N.C. 795, 90 S.E. 890 (1916).

Motion for Judgment of Voluntary Nonsuit.—A resident judge has jurisdiction to hear and determine in chambers a motion for judgment of voluntary nonsuit. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

Interlocutory Order.—It seems that the superior court has power to make an amendment to an interlocutory order in an ancillary proceeding out of term. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

Mandamus Proceedings. — A regular judge of the superior court while assigned by rotation to hold the courts of the judicial district of his residence has no jurisdiction to hear a petition for mandamus in chambers in another judicial district to which he is not assigned to hold court. Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

Action Involving Title to Bank Account.—A regular judge has jurisdiction to hear and determine in chambers an action involving title to a bank account in which the answer raised no issues of fact; a special judge in the county of his residence has jurisdiction to hear and determine a demurrer in chambers, and to hear and determine a controversy without action.

Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

Proceeding to Obtain Custody of Child.—A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re Cranford, 231 N.C. 91, 56 S.E.2d 35 (1949).

Resident judge issued order to defendant wife to appear outside county and outside district to show cause why temporary order awarding custody of children to husband should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949).

Rendering Judgment by Consent of Parties.—A judge has no power to render judgment after the expiration of the term of court without the consent of parties. Hardin v. Ray, 89 N.C. 364 (1883).

By consent, the superior court can grant judgment in civil cases in vacation. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

Jurisdiction to Order Payment of Expenses Out of the Recovery.—In an action by taxpayers against public officers under § 128-10, to recover public funds unlawfully expended, plaintiffs disclaimed in their complaint any right personally to participate in the recovery. After recovery, and the entry of a consent judgment dismissing appeals, and after payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is then without jurisdiction under this section to order payments, out of the recovery, of such petitioner's expenses and counsel fees. Hill v. Stanbury, 224 N.C. 356, 30 S.E.2d 150 (1944), commented on in 23 N.C.L. Rev. 40.

Applied in Parmele v. Eaton, 240 N.C. 539, 83 S.E.2d 93 (1954).

§ 7A-48. Jurisdiction of emergency judges.—Emergency superior court judges have the same power and authority in all matters whatsoever, in the courts which they are assigned to hold, that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or judicial district has the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, but his jurisdiction in chambers extends only until the session is adjourned or the session expires by operation of law, whichever is later. (Ex. Sess. 1921, c. 94, s. 1; C. S., s. 1435(b); 1925, c. 8; 1941, c. 52, s. 2; 1951, c. 88; 1969, c. 1190, s. 39.)

Editor's Note. — This section was formerly § 7-52. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 39.

The cases cited in the following annotation were decided under the former section.

Limitations on Jurisdiction.—The power and authority given to emergency judges are to be exercised only "in the courts in which they are assigned to hold." The jurisdiction of an emergency judge "in chambers" terminates with the adjournment or termination of the term of court which he is assigned to hold. Lewis v. Harris, 238 N.C. 642, 78 S.E.2d 715 (1953). But the statute places no such limitation on the "in term" jurisdiction of an emergency judge. Strickland v. Kornegay, 240 N.C. 758, 83 S.E.2d 903 (1954).

Cited in Spaugh v. City of Charlotte, 239 N.C. 149, 79 S.E.2d 748 (1954).

§ 7A-49. Orders returnable to another judge; notice.—When any special or emergency judge makes any matter returnable before him, and thereafter he is called upon by the Chief Justice to hold court elsewhere, he shall order the matter heard before some other judge, setting forth in the order the time and place where it is to be heard, and he shall send copies of the order to the attorneys representing the parties in such matter. (Ex. Sess. 1921, c. 94, s. 2; C. S., s. 1435(c); 1951, c. 491, s. 1; 1969, c. 1190, s. 40.)

Editor's Note. — This section was formerly § 7-53. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 40.

§ 7A-49.1. Disposition of motions when judge disqualified.—Whenever a judge before whom a motion is made, either in open court or in chambers,

disqualifies himself from determining it, he may in his discretion refer the motion for disposition to the resident judge or any judge regularly holding the courts of the district or of any adjoining district, who shall have full power and authority to hear and determine the motion in the same manner as if he were the presiding judge of the district in which the cause arose. (1939, c. 48; 1961, c. 50; 1969, c. 1190, s. 43.)

Editor's Note. — This section was formerly § 7-62. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 43.

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

(b) For sessions of court designated for the trial of civil cases only, no grand juries shall be drawn and no criminal process shall be made returnable to any civil session. (1901, c. 28; Rev., ss. 1507, 1508; 1913, c. 196; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; C. S., ss. 1444, 1445; 1931, c. 394; 1947, c. 25; 1969, c. 1190, s. 44.)

Editor's Note. — This section combines former §§ 7-72 and 7-73. The former sections were revised, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 44.

The cases cited in the following annotation were decided under the former sections.

Failure to Give Notice.—It is required by the provisions of this section that due notice be given of motions in civil action to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the superior court has ordered a dismissal of the action, the judgment will be reversed on appeal. Dawkins v. Phillips, 185 N.C. 608, 116 S.E. 723 (1923).

The superior court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, and therefore when it does not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only will be held for error as being presumptively outside the authority of the court. Beck v. Lexington Coca-Cola Bottling Co., 216 N.C. 579, 5 S.E.2d 855 (1939).

Motion for New Trial in Criminal Case May Not Be Determined at Civil Term.—A motion which, if allowed, would set aside a verdict and judgment in a case on the criminal docket, specifically, a motion for a new trial on the ground of newly discovered evidence, may not be determined at a term expressly restricted by statute as a term "for the trial of civil cases only." Such a motion is for determination at a term of the court (in which the verdict and judgment to which the motion is addressed were rendered) provided for the trial of criminal cases. In re Renfrow, 247 N.C. 55, 100 S.E.2d 315 (1957).

§ 7A-49.3. Calendar for criminal trial sessions.—(a) At least one week before the beginning of any session of the superior court for the trial of criminal cases, the solicitor shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session. The calendar shall fix a day for the trial of each case listed thereon. The solicitor may place on the calendar for the first day of the session all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day. No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court. Any case docketed after the calendar has been filed with the clerk may be placed on the calendar at the discretion of the solicitor.

(b) All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses. Witnesses shall not be entitled to prove their attendance for any day or days prior to the day on which the case in which

they are witnesses is set for trial, unless otherwise ordered by the presiding judge.

(c) Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial. (1949, c. 169; 1969, c. 1190, s. 45.)

Editor's Note. — This section was formerly § 7-73.1. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 45.

For brief comment on section, see 27 N.C.L. Rev. 451.

Article 8.

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

§ 7A-50. Emergency judge defined.—As used in this article "emergency judge" means any judge of the superior court who has retired subject to recall to active service for temporary duty. (1967, c. 108, s. 2.)

§ 7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.—(a) Any judge of the superior court, or Administrative Officer of the Courts, who has attained the age of sixty-five years, and who has served for a total of fifteen years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired.

(b) Any judge of the superior court, or Administrative Officer of the Courts, who has served for twelve years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined may, at age sixty-eight, retire and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired.

(c) Any person who has served for a total of twenty-four years, whether continuously or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire, regardless of age, and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired. In determining whether a person meets the requirements of this subsection, time served as district solicitor of the superior court prior to January 1, 1971, may be included, so long as the person has served at least eight years as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and Administrative Officer of the Courts combined.

(d) Any judge of the superior court who has attained the age of seventy years must retire on the first day of the month following his seventieth birthday, and upon retirement such person is entitled to the benefits of this section, if he is otherwise qualified under subsections (a), (b), or (c). This subsection shall not require any judge of the superior court who reaches the age of seventy to retire until the expiration of the term of office during which he is or becomes qualified for retirement under the provisions of this article. (1967, c. 108, s. 2.)

§ 7A-52. Retired judges constituted emergency judges subject to recall to active service; compensation for emergency judges on recall.—(a) Judges of the superior court who retire under the provisions of § 7A-51 are hereby constituted emergency judges of the superior court for life. The Chief Justice of the Supreme Court may order any emergency judge who, in his opinion, is competent to perform the duties of a superior court judge, to hold regular or

special sessions of superior court, as needed. Orders of assignment shall be in writing and entered upon the minutes of the superior court.

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

§ 7A-53. Notice to Governor of intention to retire; commission as emergency judge.—Any judge of the superior court who is qualified and who desires to retire under the provisions of § 7A-51 shall notify the Governor in writing of his intention to do so, including in the notice the facts which entitle him to retire. Upon receipt of such notice, the Governor shall issue a commission as emergency judge to the applicant, effective upon the date of his retirement. The commission shall be effective for life. (1967, c. 108, s. 2.)

§ 7A-54. Article applicable to judges retired under prior law. — All judges of the superior court who have heretofore retired and who are receiving retirement compensation under the provisions of any judicial retirement law previously enacted shall be entitled to the benefits of this article. All such judges shall be subject to assignment as emergency judges by the Chief Justice of the Supreme Court, except judges retired for total disability. (1967, c. 108, s. 2.)

§ 7A-55. Retirement on account of total and permanent disability.— Every judge of the superior court or Administrative Officer of the Courts who has served for eight years or more on the superior court, or as Administrative Officer of the Courts, or on the superior court and as Administrative Officer of the Courts combined, and who while in active service becomes totally and permanently disabled so as to be unable to perform efficiently the duties of his office, and who retires by reason of such disability, shall receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired. In determining whether a person meets the requirements for retirement under this section, time served as district solicitor of the superior court prior to January 1, 1971, may be included. Whenever any judge claims retirement benefits under this section on account of total and permanent disability, the Governor and Council of State, acting together, shall, after notice and an opportunity to be heard is given the applicant, by a majority vote of said body, make findings of fact from the evidence offered. Such findings of fact shall be reduced to writing and entered upon the minutes of the Council of State. The findings so made shall be conclusive as to such matters and determine the right of the applicant to retirement benefits under this section. Judges retired under the provisions of this section are not subject to recall as emergency judges. (1967, c. 108, s. 2.)

§§ 7A-56 to 7A-59: Reserved for future codification purposes.

ARTICLE 9.

Solicitors and Solicitorial Districts.

§ 7A-60. Solicitors and solicitorial districts.—Effective January 1, 1971, the State shall be divided into solicitorial districts, the numbers and boundaries of which shall be identical with those of the superior court judicial districts. In the general election of November, 1970, a solicitor shall be elected for a four-year term for each solicitorial district. The solicitor shall be a resident of the district for which elected, and shall take office on January 1 following his election. A vacancy in the office of solicitor shall be filled as provided in article IV, § 17 of the Constitution. (1967, c. 1049, s. 1.)

Effective Date.—See § 7A-67.

§ 7A-61. Duties of solicitor.—The solicitor shall prosecute in the name of

the State all criminal actions requiring prosecution in the superior and district courts of his district, advise the officers of justice in his district, and perform such duties related to appeals to the appellate division from his district as the Attorney General may require. Effective January 1, 1971, the solicitor shall also represent the State in juvenile cases in which the juvenile is represented by an attorney. Each solicitor shall devote his full time to the duties of his office and shall not engage in the private practice of law. (1967, c. 1049, s. 1; 1969, c. 1190, s. 5.)

Editor's Note. — The 1969 amendment added the second sentence. By the terms of § 7A-67, as enacted by Session Laws 1967, c. 1049, s. 1, this section will become effective on Jan. 1, 1971.

§ 7A-62. Acting solicitor.—When a solicitor becomes for any reason unable to perform his duties, the Governor shall appoint an acting solicitor to serve during the period of disability. An acting solicitor has all the power, authority and duties of the regular solicitor. He shall take the oath of office prescribed for the regular solicitor, and shall receive the same compensation as the regular solicitor. (1967, c. 1049, s. 1.)

Effective Date.—See § 7A-67.

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

Editor's Note. — The 1969 amendment substituted "this subchapter" for "G.S. 7A-133" near the beginning of the section. By the terms of § 7A-67, as enacted by Session Laws 1967, c. 1049, s. 1, this section will become effective on Jan. 1, 1971.

§ 7A-64. Temporary assistance when dockets overcrowded.—When criminal cases accumulate on the dockets of the superior or district courts of a district beyond the capacity of the solicitor and his full-time assistants to keep the dockets reasonably current, the Administrative Officer of the Courts may, on request of the solicitor, supported by facts indicating the need for assistance:

(1) Temporarily assign an assistant solicitor from another district, after consultation with the solicitor thereof, to assist in the prosecution of cases in the requesting district; or

(2) Authorize the temporary appointment, by the requesting solicitor, of a qualified attorney to assist the requesting solicitor.

The length of service and compensation of such temporary appointee shall be fixed by the Administrative Officer of the Courts in each case. (1967, c. 1049, s. 1.)

Effective Date.—See § 7A-67.

§ 7A-65. Compensation and allowances of solicitors and assistant solicitors.—The annual salary of solicitors and full-time assistant solicitors shall be as provided in the Budget Appropriations Act. When traveling on official business, each solicitor and assistant solicitor is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1967, c. 1049, s. 1.)

Effective Date.—See § 7A-67.

§ 7A-66. Removal of solicitors and assistant solicitors.—A solicitor or assistant solicitor may be suspended or removed from office, and reinstated,

for the same causes and under the same procedures as are applicable to removal of a district court judge. (1967, c. 1049, s. 1.)

Effective Date.—See § 7A-67.

§ 7A-67. Effective date.—Except as otherwise provided in § 7A-60, this article shall become effective January 1, 1971. (1967, c. 1049, s. 1.)

ARTICLE 10.

§§ 7A-68 to 7A-94: Reserved for future codification purposes.

ARTICLE 11.

Special Regulations.

§ 7A-95. Reporting of trials. — (a) Court reporting personnel shall be utilized if available, for the reporting of trials in the superior court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon the request of the senior regular resident superior court judge.

(b) The Administrative Office of the Courts shall from time to time investigate the state of the art and techniques of recording testimony, and shall provide such electronic or mechanical devices as are found to be most efficient for this purpose.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some person designated by the clerk to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, and transcribe the record as required. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Appointment of a reporter or reporters for superior court proceedings in each district shall be made by the senior regular resident superior court judge. The compensation and allowances of reporters in each district shall be fixed by the senior regular resident superior court judge, within limits determined by the Administrative Officer of the Courts, and paid by the State.

(f) This section applies only to those districts wherein a district court is established. (1965, c. 310, s. 1; 1969, c. 1190, s. 7.)

Editor's Note. — The 1969 amendment added the second sentence of subsection (c).

§ 7A-96. Court adjourned by sheriff when judge not present.—If the judge of a superior court shall not be present to hold any session of court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the session, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day, unless he shall be sooner informed that the judge for any reason cannot hold the session. (Code, s. 926; 1887, c. 13; 1901, c. 269; Rev., s. 1510; C. S., s. 1448; 1969, c. 1190, s. 49.)

Editor's Note. — This section was formerly § 7-76. It was rewritten and transferred to its present position by Session Laws 1969, c. 1190, s. 49.

The cases cited in the following annotation were decided under the former section.

For comment on this section, see 21 N.C.L. Rev. 338.

Presumption of Adjournment. — Where the record recited that a regular term of a superior court was opened and held Wednesday, instead of on Monday, of the week fixed by the statutes, it will be presumed that the sheriff had duly opened the court and adjourned it from day to day as provided in this section. State v. Weaver, 104 N.C. 758, 10 S.E. 486 (1889).

Duty of Defendant to Attend Special Term.—A defendant bound over to an-

swer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. State v. Horton, 123 N.C. 695, 31 S.E. 218 (1898).

All Matters Carried Over.—This section by operation of law carries all matters over to the next term, in the same plight and condition. State v. Horton, 123 N.C. 695, 31 S.E. 218 (1898).

Newly Elected Judge.—Where a newly elected judge, as successor to one who was to have held the term of a court commencing on the 30th of December, continuing for several weeks, and designated by the statute as a spring term, has ordered the sheriff to adjourn the court from day to day, not exceeding four days, to enable him to take the oath of office and preside, and accordingly he qualifies and holds the court, those of his acts are valid, as an officer de jure. And if not, they are valid as those of an officer de facto, and an exception to the validity of a trial of an action on that ground is untenable. State v. Harden, 177 N.C. 580, 98 S.E. 782 (1919).

Stated in State v. McGimsey, 80 N.C. 377 (1879).

§§ 7A-97 to 7A-100: Reserved for future codification purposes.

ARTICLE 12.

Clerk of Superior Court.

§ 7A-101. Compensation.—(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the 1960 federal decennial census, according to the following schedule:

Population	*Salary*
Less than 10,000	$ 7,000.00
10,000 to 19,999	7,650.00
20,000 to 49,999	10,200.00
50,000 to 99,999	11,500.00
100,000 to 149,999	13,200.00
150,000 to 199,999	15,500.00
200,000 and above	18,000.00

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

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

(b) For the fiscal year beginning July 1, 1967, and annually thereafter, the Administrative Officer of the Courts may, in his discretion, authorize an increase in the annual salary of any clerk of the superior court in an amount not to exceed ten percent (10%) of the salary set forth in subsection (a). In no event, however, shall the increase or increases cause the salary of any clerk to exceed the salary set out in subsection (a) for the next higher population group. Salary increases for any clerk in the population group of 250,000 and above shall not exceed ten percent (10%) of the salary set out in subsection (a) for that group.

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

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

(2) The responsibilities of the clerk, due to rapid population growth or rapid

increase in judicial business, have increased above the average for clerks in his salary grouping.

The decision of the Administrative Officer of the Courts under this subsection shall be final. This subsection shall not apply to a clerk who has served less than one year in office. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3.)

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a), added subsection (b) and rewrote the exception at the end of what is now subsection (a).

The 1969 amendment rewrote the table in subsection (a).

§ 7A-102. Number, salaries, appointment, etc., of assistants, deputies and employees.—The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts, after consultation with the clerk of superior court and with the board of county commissioners or its designated representative in each county, and the salaries shall be fixed with due regard to the salary levels and the economic situation in the county. All personnel in the clerk's office are employees of the State. The clerk of superior court appoints the assistants, deputies, and other employees in his office, to serve at his pleasure. (1965, c. 310, s. 1.)

§ 7A-102.1. Transfer of sick leave earned as county or municipal employees by certain employees in offices of clerks of superior court.—(a) All assistant clerks, deputy clerks and other employees of the clerks of the superior court of this State, secretaries to superior court judges and solicitors, and court reporters of the superior courts, who have heretofore been, or shall hereafter be, changed in status from county employees to State employees by reason of the enactment of chapter 7A of the General Statutes, shall be entitled to transfer sick leave accumulated as a county employee pursuant to any county system and standing to the credit of such employee at the time of such change of status to State employee, not exceeding earned sick leave in an amount totaling 30 work days. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the county, and the Administrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee.

(b) All clerks, assistant clerks, deputy clerks and other employees of any court inferior to the superior court which has been or may be abolished by reason of the enactment of chapter 7A of the General Statutes, who shall thereafter become a State employee by employment in the Judicial Department, shall be entitled to transfer sick leave earned as a municipal or county employee pursuant to any municipal or county system in effect on the date said court was abolished, not exceeding earned sick leave in an amount totaling 30 work days. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the municipality or county, and the Administrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee. (1967, c. 1187, ss. 1, 2; 1969, c. 1190, s. 8.)

Editor's Note.—Section 4, c. 1187, Session Laws 1967, provides: "This act shall become effective upon its ratification and shall be effective retroactively to December 5, 1966, with respect to employees whose status has already been changed by operation of law."

The 1969 amendment inserted "secretaries to superior court judges and solicitors" near the beginning of subsection (a) and substituted "Judicial Department" for "office of the clerk of the superior court" in the first sentence of subsection (b).

§ 7A-103. Accounting for fees and other receipts; annual audit.—The Administrative Office of the Courts, subject to the approval of the State Auditor, shall establish procedures for the receipt, deposit, protection, investment, and

disbursement of all funds coming into the hands of the clerk of superior court. The fees to be remitted to counties and municipalities shall be paid to them monthly by the clerk of superior court.

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

Editor's Note. — The 1969 amendment deleted "and the Department of Administration" following "Courts" near the beginning of the first sentence.

§ 7A-104. Suspension, removal, and reinstatement of clerk.—A clerk of superior court may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to a district court judge, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides. If suspension is ordered, the senior regular resident superior court judge shall appoint some qualified person to act as clerk during the period of the suspension. (1967, c. 691, s. 6.)

Editor's Note.—Section 6, c. 691, Session Laws 1967, repealed former § 7A-104 and enacted a new section in lieu thereof. The former section derived from s. 1, c. 310, Session Laws 1965, and related to the bond of the clerk.

§ 7A-105. Bonds of clerks, assistant and deputy clerks, and employees of office.—The Administrative Officer of the Courts may require, or purchase, in such amounts as he deems proper, individual or blanket bonds for any and all clerks of superior court, assistant clerks, deputy clerks, and other persons employed in the offices of the various clerks of superior court, or one blanket bond covering all such clerks and other persons, such bond or bonds to be conditioned upon faithful performance of duty, and made payable to the State. The premiums shall be paid by the State. (1965, c. 310, s. 1; 1967, c. 691, s. 7.)

Editor's Note. — The 1967 amendment rewrote the section.

§ 7A-106. Application of article—The provisions of this article apply in each county of the State on and after the date that a district court is established therein. (1965, c. 310, s. 1.)

§§ 7A-107 to 7A-129: Reserved for future codification purposes.

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

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-130. Creation of district court division and district court districts; seats of court.—The district court division of the General Court of Justice is hereby created. It consists of various district courts organized in territorial districts. The numbers and boundaries of the districts are identical to those of the superior court judicial districts. The district court shall sit in the county seat of each county, and at such additional places in each county as the General Assembly may authorize, except that sessions of court are not required at an additional seat of court unless the chief district judge and the Administrative Officer of the Courts concur in a finding that the facilities are adequate. (1965, c. 310, s. 1.)

§ 7A-131. Establishment of district courts.—District courts are established, within districts, in accordance with the following schedule:

(1) On the first Monday in December, 1966, the first, the twelfth, the fourteenth, the sixteenth, the twenty-fifth, and the thirtieth districts;

(2) On the first Monday in December, 1968, the second, the third, the fourth, the fifth, the sixth, the seventh, the eighth, the ninth, the tenth, the eleventh, the thirteenth, the fifteenth, the eighteenth, the twentieth, the twenty-first, the twenty-fourth, the twenty-sixth, the twenty-seventh, and the twenty-ninth districts;

(3) On the first Monday in December, 1970, the seventeenth, the nineteenth, the twenty-second, the twenty-third, and the twenty-eighth districts. (1965, c. 310, s. 1.)

Issuance of Warrants. — Only officials authorized to issue warrants by statutes in force on November 6, 1962, may continue to issue warrants until district courts are established in the district. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969); State v. Stilley, 4 N.C. App. 638, 167 S.E.2d 529 (1969).

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

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

Amendment Effective January 1, 1971. —Session Laws 1967, c. 1049, s. 5, effective Jan. 1, 1971, will substitute "solicitor" for "prosecutor" at the end of the first sentence, and will substitute "solicitors" for "prosecutors" at the end of the third sentence.

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

District	Judges	Full-Time Asst. Pros.	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
1	2	0	Camden	1	2	
			Chowan	2	3	
			Currituck	1	2	
			Dare	2	3	
			Gates	2	3	
			Pasquotank	3	4	
			Perquimans	2	3	
2	2	0	Martin	3	4	
			Beaufort	4	5	Belhaven
			Tyrrell	1	2	
			Hyde	2	3	
			Washington	3	4	
3	4	1	Craven	5	7	
			Pitt	9	11	Farmville Ayden
			Pamlico	2	3	
			Carteret	4	5	

District	Judges	Full-Time Asst. Pros.	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
4	4	1	Sampson	5	7	
			Duplin	9	10	
			Jones	2	3	
			Onslow	8	10	
5	3	0	New Hanover	6	8	
			Pender	4	6	
6	3	0	Northampton	5	6	
			Halifax	7	9	Roanoke Rapids
			Bertie	4	5	
			Hertford	5	6	
7	4	1	Nash	7	9	Rocky Mount
			Edgecombe	4	6	Rocky Mount
			Wilson	4	6	
8	4	1	Wayne	5	7	Mount Olive
			Greene	2	3	
			Lenoir	4	6	
9	3	0	Person	3	4	
			Granville	3	4	
			Vance	3	4	
			Warren	3	4	
			Franklin	3	4	
10	5	2	Wake	12	16	Apex Wendell Fuquay-Varina
11	4	1	Harnett	7	9	Dunn
			Johnston	10	12	Benson and Selma
			Lee	3	5	
12	4	2	Cumberland	10	15	
			Hoke	2	3	
13	2	0	Bladen	4	6	
			Brunswick	4	6	Shallotte
			Columbus	6	8	Tabor City
14	3	1	Durham	6	8	
15	4	1	Alamance	7	9	Burlington
			Chatham	3	4	Siler City
			Orange	4	6	Chapel Hill
16	3	1	Robeson	8	12	Fairmont Maxton Red Springs Rowland St. Pauls
			Scotland	2	3	

District	Judges	Full-Time Asst. Pros.	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
17	4		Caswell	2	3	
			Rockingham	4	8	Reidsville Eden Madison
			Stokes	2	3	
			Surry	4	6	Mt. Airy
18	7	4	Guilford	17	22	High Point
19	5		Cabarrus	4	7	Kannapolis
			Montgomery	2	3	
			Randolph	4	6	
			Rowan	4	8	
20	4	1	Stanly	5	6	
			Union	4	6	
			Anson	4	5	
			Richmond	5	6	Hamlet
			Moore	5	6	Southern Pines
21	5	2	Forsyth	10	15	Kernersville
22	4		Alexander	2	3	
			Davidson	5	7	Thomasville
			Davie	2	3	
			Iredell	4	6	Mooresville
23	2		Alleghany	1	2	
			Ashe	2	3	
			Wilkes	4	6	
			Yadkin	2	3	
24	2	0	Avery	2	3	
			Madison	3	4	
			Mitchell	3	4	
			Watauga	3	4	
			Yancey	2	3	
25	4	1	Burke	4	6	Hickory
			Caldwell	4	6	
			Catawba	6	9	
26	7	4	Mecklenburg	15	25	
27	5	2	Cleveland	5	8	
			Gaston	10	18	
			Lincoln	3	5	
28	4		Buncombe	6	10	
29	3	1	Henderson	4	6	
			McDowell	3	4	
			Polk	2	3	
			Rutherford	6	8	
			Transylvania	2	3	

District	Judges	Full-Time Asst. Pros.	County	Magistrates Min.	Max.	Additional Seats of Court
30	2	0	Cherokee	2	3	
			Clay	1	2	
			Graham	2	3	
			Haywood	4	6	Canton
			Jackson	2	3	
			Macon	2	3	
			Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 527; c. 1190, s. 10; c. 1254.)

Editor's Note.—Session Laws 1967, c. 691, s. 8, struck out the former table and inserted the present table in lieu thereof.

Session Laws 1969, c. 527, designated Belhaven as an additional seat of court for Beaufort County.

Session Laws 1969, c. 1190, s. 10, subsections (b) through (e), effective July 1, 1969, increased the number of judges in the twenty-fifth judicial district from three to four and the number of judges in the eighteenth and twenty-sixth judicial districts from six to seven, increased the number of full-time assistant prosecutors in the fourteenth judicial district from zero to one, in the eighteenth and twenty-sixth judicial districts from three to four and in the twenty-seventh judicial district from one to two, changed the minimum and maximum quotas of magistrates for Anson, Beaufort, Duplin, Guilford, Harnett, Johnston, Moore, Onslow, Pitt, Richmond and Stanly counties, and added to the table provisions for the seventeenth, nineteenth, twenty-second, twenty-third and twenty-eighth judicial districts. The increase in the number of judges in the twenty-fifth judicial district is made effective the first Monday in December, 1966, and the increase in the number of judges for the eighteenth and twenty-sixth judicial districts is made effective the first Monday in December, 1968.

Session Laws 1969, c. 1254, effective July 1, 1969, inserted in the table provision for a seat of the district court in Hamlet in Richmond County.

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

§ 7A-134. Family court services.—In any district court district having a county with a population of 85,000 or more, according to the latest federal decennial census, the chief district judge and the Administrative Officer of the Courts may determine that special counselor services should be made available in the district to the district judge or judges hearing domestic relations and juvenile cases. In this event, the chief district judge may appoint a chief counselor and such assistant counselors as the Administrative Officer may authorize, to provide investigative, supervisory, and other related services. The salaries of the chief counselor and the assistant counselors shall be determined by the Administrative Officer of the Courts, with due regard to the salary levels and the economic situation in the district, and all counselors shall be employees of the State. The chief counselor and his assistants shall serve at the pleasure of the chief district judge. Counselors shall have the same powers and authority as is conferred upon juvenile court probation officers by G. S. 110-33. (1965, c. 310, s. 1; 1967, c. 691, s. 9; c. 1164.)

Editor's Note.—The first 1967 amendment substituted "85,000" for "100,000" near the beginning of the section. The second 1967 amendment added the last sentence.

§ 7A-135. Transfer of pending cases when present inferior courts replaced by district courts.—On the date that the district court is established in

any county, cases pending in the inferior court or courts of that county shall be transferred to the appropriate division of the General Court of Justice, and all records of these courts shall be transferred to the office of clerk of superior court in that county pursuant to rule of Supreme Court. (1965, c. 310, s. 1.)

§§ **7A-136 to 7A-139:** Reserved for future codification purposes.

Article 14.

District Judges.

§ **7A-140. Number; election; term; qualification; oath.**—There shall be at least one district judge for each district. Each district judge shall be elected by the qualified voters of the district court district in which he is to serve at the time of the election for members of the General Assembly. The number of judges for each district shall be determined by the General Assembly. Each judge shall be a resident of the district for which elected, and shall serve a term of four years, beginning on the first Monday in December following his election.

Each district judge shall devote his full time to the duties of his office. He shall not practice law during his term, nor shall he during such term be the partner or associate of any person engaged in the practice of law.

Before entering upon his duties, each district judge, in addition to other oaths prescribed by law, shall take the oath of office prescribed for a judge of the General Court of Justice. (1965, c. 310, s. 1; 1969, c. 1190, s. 11.)

Editor's Note. — The 1969 amendment rewrote the last paragraph.

§ **7A-141. Designation of chief judge; assignment of judge to another district for temporary or specialized duty.**—When more than one judge is authorized in a district, the Chief Justice of the Supreme Court shall designate one of the judges as chief district judge to serve in such capacity at the pleasure of the Chief Justice. In a single judge district, the judge is the chief district judge.

The Chief Justice may transfer a district judge from one district to another for temporary or specialized duty. (1965, c. 310, s. 1.)

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

§ **7A-143. Suspension; removal; reinstatement.**—The following shall be grounds for suspension of a district judge or for his removal from office:

(1) Willful or habitual neglect or refusal to perform the duties of his office;
(2) Willful misconduct or maladministration in office;
(3) Corruption;
(4) Extortion;
(5) Conviction of a felony; or
(6) Mental or physical incapacity.

A proceeding to suspend or remove a district judge is commenced by filing with the clerk of superior court of the county where the judge resides a sworn affidavit charging the judge with one or more grounds for removal. The clerk shall immediately bring the matter to the attention of the senior regular resident superior court judge for the district, who shall within 15 days either review and act on the charges or refer them for review and action within 15 days to another superior court judge residing in or regularly holding the courts of the district. If the superior court judge upon review finds that the charges if true constitute grounds

for suspension, he may enter an order suspending the district judge from performing the duties of his office until a final determination of the charges on the merits. During suspension the salary of the judge continues.

If suspension is ordered, the suspended judge shall receive immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter. The matter shall be set for hearing before the judge who originally examined the charges or before another regular superior court judge resident in or regularly holding the courts of the district. The hearing shall be open to the public. All testimony offered shall be recorded. At the hearing the superior court judge shall hear evidence and make findings of fact and conclusions of law and if he finds that one of the above grounds for removal exists, he shall enter an order permanently removing the district judge from office, and terminating his salary. If he finds that no grounds exist, he shall terminate the suspension.

The district judge may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court. Pending decision of the case on appeal, the district judge shall not perform any of the duties of his office. If, upon final determination, he is ordered reinstated either by the appellate division or by the superior court upon remand, his salary shall be restored from the date of the original order of removal. (1965, c. 310, s. 1; 1967, c. 108, s. 3.)

Editor's Note. — The 1967 amendment substituted "Court of Appeals" for "Supreme Court" in the first sentence of the last paragraph, and substituted "appellate division" for "Supreme Court" in the third sentence of the last paragraph.

§ 7A-144. Compensation.—Each judge shall receive the annual salary provided in the Budget Appropriations Act, and reimbursement on the same basis as State employees generally, for his necessary travel and subsistence expenses. (1965, c. 310, s. 1; 1967, c. 691, s. 10.)

Editor's Note. — The 1967 amendment rewrote the section, which formerly consisted of three sentences and specified the amount of compensation.

§ 7A-145. Holdover judges; judges taking office after ratification of chapter.—A judge who becomes a district judge by holding over under the provisions of Article IV, § 21 of the Constitution (herein referred to as a holdover judge) shall perform only such duties in each district as the chief district judge shall determine. A holdover judge who is not assigned full-time duties, and who is a practicing attorney, may continue the practice of law. A vacancy in the office of holdover judge shall not be filled.

The term of any judge taking office after the ratification of this chapter to serve any existing inferior court in a county shall, unless it has sooner expired, automatically expire on the date on which a district court is established for that county.

The compensation of a holdover judge until the expiration of his term shall not be less than that which he received during the last full year of his former judgeship. If he is assigned to full-time duty as a district judge, he shall receive not less than the salary and allowances of a regular district judge for the period of the assignment. If he is assigned to less than full-time duties, which duties nevertheless require more time than he was devoting to his former judgeship, he shall receive such additional compensation and allowances as may be determined by the Administrative Officer of the Courts, but in no case more than that received by a regular district judge. (1965, c. 310, s. 1.)

Editor's Note.—The act inserting this chapter was ratified April 27, 1965. Section 5 of the act provides: "Except as otherwise provided in this act, this act shall become effective on July 1, 1965."

§ 7A-146. Administrative authority and duties of chief district judge.—The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the op-

eration of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:

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

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

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

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

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

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

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

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

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

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

Opinions of Attorney General.—Honorable John C. Clifford, Judge of the Twenty-first Judicial District Court, 10/7/69.

§ 7A-147. Specialized judgeships.—(a) Prior to January 1 of each year in which elections for district court judges are to be held, the Administrative Officer of the Courts may, with the approval of the chief district judge, designate one or more judgeships in districts having three or more judgeships, as specialized judgeships, naming in each case the specialty. Designations shall become effective when filed with the State Board of Elections. Nominees for the position or positions of specialist judge shall be made in the ensuing primary and the position or positions shall be filled at the general election thereafter. The State Board of Elections shall prepare primary and general election ballots to effectuate the purposes of this section.

(b) The designation of a specialized judgeship shall in no way impair the right of the chief district judge to arrange sessions for the trial of specialized cases and to assign any district judge to preside over these sessions. A judge elected to a specialized judgeship has the same powers as a regular district judge. (1965, c. 310, s. 1.)

§ 7A-148. Annual conference of chief district judges. — (a) The chief district judges of the various district court districts shall meet at least once a year upon call of the Chief Justice of the Supreme Court to discuss mutual problems affecting the courts and the improvement of court operations, to prepare and adopt a uniform schedule of traffic offenses for which magistrates and clerks of court may accept written appearances, waivers of trial and pleas of guilty, and establish a schedule of fines therefor, and to take such further action as may be found practicable and desirable to promote the uniform administration of justice.

(b) The chief district judges shall prescribe a multicopy uniform traffic ticket

and complaint for exclusive use in each county of the State not later than December 31, 1970. (1965, c. 310, s. 1; 1967, c. 691, s. 11.)

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

§§ **7A-149 to 7A-159:** Reserved for future codification purposes.

Article 15.

District Prosecutors.

§§ **7A-160 to 7A-165:** See Supplement.

§§ **7A-166 to 7A-169:** Reserved for future codification purposes.

Article 16.

Magistrates.

§ **7A-170. Nature of office; oath; office and court hours.**—A magistrate is an officer of the district court. Before entering upon the duties of his office, a magistrate shall take the oath of office prescribed for a magistrate of the General Court of Justice. The times and places at which each magistrate is required to maintain regular office and court hours and to be otherwise available for the performance of his duties is prescribed by the chief district judge of the district in which he is resident, but a magistrate possesses all the powers of his office at all times during his term. (1965, c. 310, s. 1; 1969, c. 1190, s. 13.)

Editor's Note. — The 1969 amendment rewrote the second sentence.

§ **7A-171. Numbers; fixing of salaries; appointment and terms; vacancies.**—(a) The General Assembly shall establish a minimum and a maximum quota of magistrates for each county. In no county shall the minimum quota be less than one. A magistrate shall be a resident of the county for which appointed.

(b) Not later than the first Monday in September of each even-numbered year, the Administrative Officer of the courts, after consultation with the chief district judge (or the senior regular resident superior court judge, if there is no chief district judge) shall prescribe and notify the clerk of superior court of the salaries to be paid to the various magistrates to be appointed to fill the minimum quota established for the county. A salary shall be prescribed for each office within the minimum quota upon consideration of the time which the particular magistrate will be required by the chief district judge to devote to the performance of the duties of his office. Not later than the first Monday in October of each even-numbered year, the clerk of superior court shall submit to the senior regular resident superior court judge of his district the names of two (or more, if requested by the judge) nominees for each magisterial office in the minimum quota established for the county, specifying as to each nominee the salary level for which nominated. Not later than the first Monday in November, the senior regular superior court judge shall, from the nominations submitted by the clerk of superior court, appoint magistrates to fill the minimum quota established for each county of his district, such appointments to be at the various salary levels prescribed by the Administrative Officer of the Courts. The term of a magistrate so appointed shall be two years, commencing on the first Monday in December of each even-numbered year.

(c) After the biennial appointment of the minimum quota of magistrates, additional magistrates in a number not to exceed, in total, the maximum quota established for each county may be appointed in the following manner. The chief district judge, with the approval of the Administrative Officer of the Courts, may certify to the clerk of superior court that the minimum quota is insufficient for the efficient administration of justice and that a specified additional number, not to exceed the

maximum quota established for the county, is required at salary levels specified by the Administrative Officer for each additional office. Within 15 days after the receipt of this certification the clerk of superior court shall submit to the senior regular resident superior court judge of his district the names of two (or more, if requested by the judge) nominees for each additional magisterial office, specifying as to each nominee the salary level for which nominated. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall from the nominations submitted appoint magistrates in the number and at the salary levels specified in the certification. A magistrate so appointed shall serve a term commencing immediately and expiring on the same day as the terms of office of magistrates appointed to fill the minimum quota for the county.

(d) A vacancy in the office of magistrate is filled in the following manner. Whether the magistrate in whose office a vacancy occurs was appointed to fill the minimum quota or as an additional appointment, the clerk of the superior court shall within 30 days after such vacancy occurs submit to the senior regular resident superior court judge the names of two (or more, if requested by the judge) nominees for the office vacated, and at the same salary level. Within 15 days after receipt of the nominations, the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and serve for the remainder of the unexpired term. (1965, c. 310, s. 1; 1967, c. 691, s. 15.)

Editor's Note. — The 1967 amendment substituted "the names of two (or more, if requested by the judge) nominees for each magisterial office in" for "nominations of magistrates to fill" in the third sentence of subsection (b), substituted "the names of two (or more, if requested by the judge) nominees for each additional magisterial office" for "nominations of magistrates to fill the additional offices" in the third sentence of subsection (c) and substituted "the names of two (or more, if requested by the judge) nominees" for "nominations" in the second sentence in subsection (d).

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

Editor's Note. — The 1969 amendment increased the maximum salary from six thousand dollars to seventy-two hundred dollars.

§ 7A-173. Suspension; removal; reinstatement. — (a) A magistrate may be suspended from performing the duties of his office by the chief district judge, or removed from office by the senior regular resident superior court judge or any regular superior court judge holding court in the district. Grounds for suspension or removal are the same as for a district judge.

(b) Suspension from performing the duties of the office may be ordered upon filing of sworn written charges in the office of clerk of superior court for the county in which the magistrate resides. If the chief district judge, upon examination of the sworn charges, finds that the charges, if true, constitute grounds for removal, he may enter an order suspending the magistrate from performing the duties of his office until a final determination of the charges on the merits. During suspension the salary of the magistrate continues.

(c) If suspension is ordered, the magistrate against whom the charges have been made shall be given immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set by the chief district judge for hearing before the senior regular resident superior court judge or a regular superior court judge holding court in the district. The hearing shall be held within the district not less than 10 days nor more than 30 days after the magistrate has received a copy of the charges. The hearing shall be open to the public. All testimony offered shall be recorded. At the hearing the superior court judge shall receive evidence, and make findings of fact and conclusions of law. If he finds

that grounds for removal exist, he shall enter an order permanently removing the magistrate from office, and terminating his salary. If he finds that no such grounds exist, he shall terminate the suspension.

(d) A magistrate may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court judge. Pending decision of the case on appeal, the magistrate shall not perform any of the duties of his office. If, upon final determination, he is ordered reinstated, either by the appellate division or by the superior court on remand, his salary shall be restored from the date of the original order of removal. (1965, c. 310, s. 1; 1967, c. 108, s. 4.)

Editor's Note. — The 1967 amendment substituted "Court of Appeals" for "Supreme Court" in the first sentence of subsection (d), and substituted "appellate division" for "Supreme Court" in the third sentence of subsection (d).

§ **7A-174. Bonds.**—Prior to taking office, magistrates shall be bonded, individually or collectively, in such amount or amounts as the Administrative Officer of the Courts shall determine. The bond or bonds shall be conditioned upon the faithful performance of the duties of the office of magistrate. The Administrative Officer shall procure such bond or bonds from any indemnity or guaranty company authorized to do business in North Carolina, and the premium or premiums shall be paid by the State. (1965, c. 310, s. 1.)

§ **7A-175. Records to be kept.**—A magistrate shall keep such dockets, accounts, and other records, under the general supervision of the clerk of superior court, as may be prescribed by the Administrative Office of the Courts. (1965, c. 310, s. 1.)

§ **7A-176. Office of justice of the peace abolished.** — The office of justice of the peace is abolished in each county upon the establishment of a district court therein. (1965, c. 310, s. 1.)

§§ **7A-177 to 7A-179:** Reserved for future codification purposes.

ARTICLE 17.

Clerical Functions in the District Court.

§ **7A-180. Functions of clerk of superior court in district court matters.**—In any county wherein a district court is established, the clerk of superior court thereupon:

(1) Has and exercises all of the judicial powers and duties in respect of actions and proceedings pending from time to time in the district court of his county which are now or hereafter conferred or imposed upon him by law in respect of actions and proceedings pending in the superior court of his county;

(2) Performs all of the clerical, administrative and fiscal functions required in the operation of the district court of his county in the same manner as he is required to perform such functions in the operation of the superior court of his county;

(3) Immediately sets up and thereafter maintains, under the supervision of the Administrative Office of the Courts, an office of uniform consolidated records of all judicial proceedings in the superior court division and the district court division of the General Court of Justice in his county. Those records shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court and all other records required by law to be maintained. The form and procedure for filing, docketing, indexing, and recording shall be as prescribed by the Administrative Officer of the Courts notwithstanding any contrary statutory provision as to the title and form of the record or as a method of indexing;

(4) Has the power to accept written appearances, waivers of trial and pleas of guilty to certain traffic offenses in accordance with a schedule of offenses and fines promulgated by the chief district judge, and, in such cases, to collect the fines and costs;

(5) Has the power to issue warrants of arrest valid throughout the State, and search warrants valid throughout the county of the issuing clerk;

(6) Has the power, in traffic cases, upon waiver of a preliminary examination, to set bail, in accordance with a bail schedule furnished by the chief district judge; and

(7) Continues to exercise all powers, duties and authority theretofore vested in or imposed upon clerks of superior court by general law, with the exception of jurisdiction in juvenile matters. (1965, c. 310, s. 1; 1967, c. 691, s. 16; 1969, c. 1190, s. 14.)

Editor's Note. — The 1969 amendment changed this section as previously amended in 1967 by rewriting subdivision (3), deleting former subdivision (4), providing that the clerk should continue to maintain all books, indexes, registers and records required by law to be maintained by the clerk of superior court, and renumbering former subdivisions (5) through (8) as (4) through (7).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-181. Functions of assistant and deputy clerks of superior court in district court matters.—In any county wherein a district court is established, assistant and deputy clerks of superior court thereupon:

(1) Have the same powers and duties with respect to matters in the district court division as they have in the superior court division;

(2) Have the same powers as the clerk of superior court with respect to the issuance of warrants and acceptance of written appearances, waivers of trial and pleas of guilty to traffic offenses; and

(3) Have the same power as the clerk of superior court, with respect to traffic cases in which a preliminary examination is waived, to set bail. (1965, c. 310, s. 1; 1967, c. 691, s. 17.)

Editor's Note. — The 1967 amendment added subdivision (3).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-182. Clerical functions at additional seats of court.—(a) In any county in which the General Assembly has authorized the district court to hold sessions at a place or places in addition to the county seat, the clerk of superior court shall furnish assistant and deputy clerks to the extent necessary to process efficiently the judicial business at such additional seat or seats of court. Only such records as are necessary for the expeditious processing of current judicial business shall be kept at the additional seat or seats of court. The office of the clerk of superior court at the county seat shall remain the permanent depository of official records.

(b) If an additional seat of a district court is designated for any municipality located in more than one county of a district, the clerical functions for that seat of court shall be provided by the clerks of superior court of the contiguous counties, in accordance with standing rules issued by the chief district judge, after consultation with the clerks concerned and a committee of the district bar appointed for this purpose. An assistant or deputy clerk assigned to a seat of district court described in this subsection shall have the same powers and authority as if he were acting in his own county. (1965, c. 310, s. 1; 1967, c. 691, s. 18; 1969, c. 1190, s. 15.)

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

The 1969 amendment added the second sentence of subsection (b).

§§ **7A-183 to 7A-189:** Reserved for future codification purposes.

ARTICLE 18.

District Court Practice and Procedure Generally.

§ **7A-190. District courts always open.**—The district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this chapter. (1965, c. 310, s. 1.)

Opinions of Attorney General.—Honorable John C. Clifford, Judge of the Twenty-first Judicial District Court, 10/7/69.

Quoted in Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968).

§ **7A-191. Trials; hearings and orders in chambers.**—All trials on the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other proceedings, hearings, and acts may be done or conducted by a judge in chambers in the absence of the clerk or other court officials and at any place within the district; but no hearing may be held, nor order entered, in any cause outside the district in which it is pending without the consent of all parties affected thereby. (1965, c. 310, s. 1.)

§ **7A-192. By whom power of district court to enter interlocutory orders exercised.**—Any district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside. The chief district judge and any district judge designated by written order or rule of the chief district judge, may in chambers hear motions and enter interlocutory orders in all causes pending in the district courts of the district, including causes transferred from the superior court to the district court under the provisions of this chapter. The designation is effective from the time filed in the office of the clerk of superior court of each county of the district until revoked or amended by written order of the chief district judge. (1965, c. 310, s. 1; 1969, c. 1190, s. 16.)

Editor's Note. — The 1969 amendment added at the end of the second sentence "including causes transferred from the superior court to the district court under the provisions of this chapter."

§ **7A-193. Civil procedure generally.**—Except as otherwise provided in this chapter, the civil procedure provided in chapters 1 and 1A of the General Statutes applies in the district court division of the General Court of Justice. Where there is reference in chapters 1 and 1A of the General Statutes to the superior court, it shall be deemed to refer also to the district court in respect of causes in the district court division. (1965, c. 310, s. 1; 1969, c. 1190, s. 17.)

Editor's Note. — The 1969 amendment inserted the references to chapter 1A in the first and second sentences.

For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

Making Calendar for Trial of Civil Cases Discretionary.—In the superior court, making a calendar for the trial of civil cases appears to be discretionary rather than mandatory; this section makes the same rule apply to the district court. Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968).

§ **7A-194. Criminal procedure generally.**—Except as otherwise provided in this chapter, the criminal procedure provided in chapter 15 of the General Statutes applies in the district court division of the General Court of Justice. (1965, c. 310, s. 1.)

§ 7A-195: Repealed by Session Laws 1969, c. 911, s. 5.

Editor's Note. — Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

§ 7A-196. Jury trials.—(a) In civil cases in the district court there shall be a right to trial by a jury of 12 in conformity with Rules 38 and 39 of the Rules of Civil Procedure.

(b) In criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law. (1965, c. 310, s. 1; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment added "in conformity with Rules 38 and 39 of the Rules of Civil Procedure" at the end of subsection (a), designated former subsection (e) as present subsection (b), and deleted former subsections (b), (c) and (d).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Rules 38 and 39 of the Rules of Civil Procedure (§ 1A-1), which apply in both the superior court and the district courts, closely follow former subsections (b), (c) and (d) of this section. Accordingly, those subsections have been replaced with a reference to the appropriate rules.

The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Stated in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968).

§ 7A-197. Petit jurors.—Unless otherwise provided in this chapter, the provisions of chapter 9 of the General Statutes with respect to petit jurors for the trial of civil actions in the superior court are applicable to the trial of civil actions in the district court. (1965, c. 310, s. 1.)

§ 7A-198. Reporting of civil trials.—(a) Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge.

(b) The Administrative Office of the Courts shall from time to time investigate the state of the art and techniques of recording testimony, and shall provide such electronic or mechanical devices as are found to be most efficient for this purpose.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some other person designated by him to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, and transcribe the record as required. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs, or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Reporting will not be provided in trials before magistrates.

(f) Appointment of a reporter or reporters for district court proceedings in each district shall be made by the chief district judge. The compensation and allowances of reporters in each district shall be fixed by the chief district judge, within limits determined by the Administrative Officer of the Courts, and paid by the State. (1965, c. 310, s. 1; 1969, c. 1190, s. 18.)

Editor's Note. — The 1969 amendment added the second sentence of subsection (c).

§ 7A-199. Special venue rule when district court sits without jury in seat of court lying in more than one county; where judgments recorded.—(a) In any nonjury civil action or juvenile matter properly pending in

the district court division, regularly assigned for a hearing or trial before a district judge at a seat of the district court in a municipality the corporate limits of which extend into two or more contiguous counties, venue is properly laid for such trial or hearing if by statute or common law it is properly laid in any of the contiguous counties.

(b) In any jury civil action regularly assigned for a hearing or trial before a district judge at a seat of the district court in a municipality the corporate limits of which extend into two or more contiguous counties, venue is properly laid for such jury trial if by statute or common law it is properly laid in any of the contiguous counties; provided, however, any such action shall be instituted in the county of proper venue, and the jurors summoned shall be from the county where such action was instituted. Notwithstanding the fact that the place of trial within such municipality is in a different county from the county where such action was commenced, the sheriff of the county where such action was commenced is authorized to summon the jurors to appear at such place of trial. Such jurors shall be subject to the same challenge as other jurors, except challenges for nonresidence in the county of trial.

(c) A district court judge sitting at a seat of court described in this section may, in criminal cases, conduct preliminary hearings and try misdemeanors arising within the corporate limits of the municipality plus the territory embraced within a distance of one mile in all directions therefrom.

(d) The judgment or order rendered in any civil action or juvenile matter heard or tried under the authority of this section shall be recorded in the county where the action was commenced. The judgment or finding of probable cause or other determination in any criminal action heard or tried under the authority of this section shall be recorded in the county where the offense was committed. (1967, c. 691, s. 19.)

§§ **7A-200 to 7A-209:** Reserved for future codification purposes.

ARTICLE 19.

Small Claim Actions in District Court.

§ **7A-210. Small claim action defined.**—For purposes of this article a small claim action is a civil action wherein:

(1) The amount in controversy, computed in accordance with § 7A-243, does not exceed three hundred dollars ($300.00); and

(2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and

(3) The plaintiff has requested assignment to a magistrate in the manner provided in this article.

The seeking of the ancillary remedy of claim and delivery does not prevent an action otherwise qualifying as a small claim action under this article from so qualifying. (1965, c. 310, s. 1.)

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ **7A-211. Small claim actions assignable to magistrates.**—In the interest of speedy and convenient determination, the chief district judge may, in his discretion, by specific order or general rule, assign to any magistrate of his district any small claim action pending in his district if the defendant is a resident of the county in which the magistrate resides. If there is more than one defendant, at least one of them must be a bona fide resident of the county in which the magistrate resides. (1965, c. 310, s. 1, 1967, c. 1165.)

Editor's Note.—The 1967 amendment substituted "the defendant is a resident" for "all the defendants are residents" near the end of the present first sentence and added the second sentence in the section.

§ 7A-212. Judgment of magistrate in civil action improperly assigned or not assigned.—No judgment of the district court rendered by a magistrate in a civil action assigned to him by the chief district judge is void, voidable, or irregular for the reason that the action is not one properly assignable to the magistrate under this article. The sole remedy for improper assignment is appeal for trial de novo before a district judge in the manner provided in this article. No judgment rendered by a magistrate in a civil action is valid when the action was not assigned to him by the chief district judge. (1965, c. 310, s. 1.)

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

Editor's Note. — The 1969 amendment rewrote the fifth sentence.

§ 7A-214. Time within which trial is set.—The time for trial of a small claim action is set not later than 30 days after the action is commenced. By consent of all parties the time for trial may be changed from the time set. For good cause shown, the magistrate to whom the action is assigned may grant continuances from time to time. (1965, c. 310, s. 1.)

§ 7A-215. Procedure upon nonassignment of small claim action.—Failure of the chief district judge to assign a claim within five days after the filing of a complaint requesting its assignment constitutes nonassignment. The chief district judge may sooner order nonassignment. Upon nonassignment, the clerk immediately issues summons in the manner and form provided for commencement of civil actions generally, whereupon process is served, return made, and pleadings are required to be filed in the manner provided for civil actions generally. Upon issuing civil summons, the clerk gives written notice of nonassignment to the plaintiff. The plaintiff within five days after notice of nonassignment, and the defendant before or with the filing of his answer, may request a jury trial. Failure within the times so limited to request a jury trial constitutes a waiver of the right thereto. Upon the joining of issue, the clerk places the action upon the civil issue docket for trial in the district court division. (1965, c. 310, s. 1.)

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

§ 7A-217. Methods of subjecting person of defendant to jurisdiction. —When by order or rule a small claim action is assigned to a magistrate, the defendant may be subjected to the jurisdiction of the court over his person by the following methods:

(1) The defendant may be subjected to the jurisdiction of the court over his person in any small claim action by personal service of process. When the defendant is under any legal disability, he may only be subjected to personal jurisdiction by personal service of process in the manner provided by law.

(2) When the defendant is not under any legal disability and when request is made therefor by the plaintiff, service of process may be made upon the defendant by mail, as herein provided. The plaintiff requests service upon defendant by mail by endorsement in writing upon his complaint, which request shall include the address to be used in mailing. The clerk mails to the defendant at the address given in the endorsement a copy of the complaint and a magistrate summons substantially in the form provided in this article. Service of process by mail is made by certified mail, return receipt requested, and is complete upon return to the office of the clerk of the receipt signed by the defendant. Service by mail is proved prima facie by the signature of defendant upon the return receipt. The plaintiff bears the cost of service of process by mail.

(3) When the defendant is under no legal disability, he may be subjected to the jurisdiction of the court over his person by his written acceptance of service, or by his voluntary appearance.

(4) In summary ejectment cases only, service as provided in G.S. 42-29 is also authorized. (1965, c. 310, s. 1; 1969, c. 1190, s. 20.)

Editor's Note. — The 1969 amendment added subdivision (4).

§ 7A-218. Answer of defendant.—At any time prior to the time set for trial, the defendant may file a written answer admitting or denying all or any of the allegations in the complaint, or pleading new matter in avoidance. No particular form is required, but it is sufficient if in a form to enable a person of common understanding to know the nature of the defense intended. A general denial of all the allegations of the complaint is permissible.

Failure of defendant to file a written answer after being subjected to the jurisdiction of the court over his person constitutes a general denial. (1965, c. 310, s. 1; 1967, c. 691, s. 20.)

Editor's Note. — The 1967 amendment struck out the former last sentence, relating to default judgments.

§ 7A-219. Certain counterclaims; cross-claims; third party claims not permissible.—No counterclaim, cross-claim or third party claim which would make the amount in controversy exceed three hundred dollars ($300.00) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. (1965, c. 310, s. 1.)

§ 7A-220. No pleadings other than complaint and answer.—There are no pleadings in assigned small claim actions other than the complaint and answer. Any new matter pleaded in avoidance in the answer is deemed denied or avoided. But on appeal from judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims, cross-claims, third party claims, replies, and answers to cross-claims. (1965, c. 310, s. 1.)

§ 7A-221. Objections to venue and jurisdiction over person.—By motion prior to filing answer, or in the answer, the defendant may object that the venue is improper, or move for change of venue, or object to the jurisdiction of the court over his person. These motions or objections are heard on notice by the chief district judge or a district judge designated by order or rule of the chief district judge. Assignment to the magistrate is suspended pending determination of the objection, and the clerk gives notice of the suspension by any convenient means to the magistrate to whom the action has been assigned. All these objections are waived if not made prior to the date set for trial. If venue is determined to be improper, or is ordered changed, the action is transferred to the district court of the new venue, and is not thereafter assigned to a magistrate, but proceeds as in the case of civil actions generally. (1965, c. 310, s. 1.)

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

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

Editor's Note. — The 1967 amendment rewrote the second sentence.

§ 7A-224. Rendition and entry of judgment.—Judgment in a small claim action is rendered in writing and signed by the magistrate. The judgment so rendered is a judgment of the district court, and is recorded and indexed as are judgments of the district and superior court generally. Entry is made as soon as practicable after rendition. (1965, c. 310, s. 1; 1969, c. 1190, s. 21.)

Editor's Note. — The 1969 amendment rewrote the former second and third sentences as the present second sentence.

§ 7A-225. Lien and execution of judgment.—From the time of docketing, the judgment rendered by a magistrate in a small claim action constitutes a lien and is subject to execution in the manner provided in chapter 1, article 28, of the General Statutes. (1965, c. 310, s. 1.)

§ 7A-226. Priority of judgment when appeal taken.—When appeal is taken from a judgment in a small claim action, the lien acquired by docketing merges into any judgment rendered after trial de novo on appeal, continues as a lien from the first docketing, and has priority over any judgment docketed subsequent to the first docketing. (1965, c. 310, s. 1.)

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

Editor's Note. — The 1967 amendment corrected an error by substituting "or" for "of" near the middle of the second sentence. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ 7A-228. No new trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice.—No new trial is allowed before the magistrate. The sole remedy for a party aggrieved is by appeal for trial de novo before a district judge. Appeal is perfected by serving written notice thereof on all other parties and by filing written notice with the clerk of superior court within 10 days after rendition of judgment. Notice of appeal may also be given orally in open court upon announcement of or rendition of the judgment, and shall thereupon be noted in writing by the magistrate upon the judgment. (1965, c. 310, s. 1; 1969, c. 1190, s. 22.)

Editor's Note. — The 1969 amendment substituted "rendition of judgment" for "entry and indexing of the judgment on the civil judgment docket" at the end of the third sentence.

For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

Quoted in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ 7A-229. Trial de novo on appeal.—Upon appeal noted, the clerk of superior court places the action upon the civil issue docket of the district court division. The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed. (1965, c. 310, s. 1.)

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ 7A-230. Jury trial on appeal.—The appellant in his notice of appeal, and any appellee by written notice served on all other parties and on the clerk of superior court within five days after notice of appeal, may demand a jury on the trial de novo. Failure to demand a jury is a waiver of the right thereto. (1965, c. 310, s. 1.)

§ 7A-231. Provisional and incidental remedies.—The provisional and incidental remedies of claim and delivery, subpoena duces tecum, and production of documents are obtainable in small claim actions. The practice and procedure provided therefor in respect of civil actions generally is observed, conformed as may be required. No other provisional or incidental remedies are obtainable while the action is pending before the magistrate. (1965, c. 310, s. 1.)

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

FORM 1.

MAGISTRATE SUMMONS

NORTH CAROLINA
..... COUNTY

General Court of Justice
District Court Division
Before the Magistrate

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

SUMMONS

To the above-named Defendant:

You are hereby summoned to appear before His Honor ....., Magistrate of the District Court, at ..... (time) ....., on .... (date) ...., at the ..... (address) ..... in the ..... (city) ....., then and there to defend against proof of the claim stated in the complaint filed in this action, copy of which is served herewith. You may file written answer making defense to the claim in the office of the Clerk of Superior Court of ..... County in ....., N. C., not later than the time set for trial. If you do not file answer, plaintiff must nevertheless prove his claim before the Magistrate. But if you fail to appear and defend against the proof offered, judgment for the relief demanded in the complaint may be rendered against you.

This .... day of ..... (month) ....., 19.....

.....
Clerk of Superior Court
..... County

FORM 2.

NOTICE OF NON-ASSIGNMENT OF ACTION

NORTH CAROLINA
..... County

General Court of Justice
District Court Division

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

NOTICE OF NON-ASSIGNMENT OF ACTION

To the above-named Plaintiff:

Take notice that the civil action styled as above which you requested be assigned for trial before a Magistrate will not be assigned. Thirty day summons to answer is being issued for service upon defendant, and upon the joining of issue this action will be placed on the civil issue docket for trial before a district judge.

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

.....
Clerk of Superior Court
..... County

FORM 3.

NOTICE OF ASSIGNMENT OF ACTION

NORTH CAROLINA
..... County

General Court of Justice
District Court Division
Before the Magistrate

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

NOTICE OF ASSIGNMENT OF ACTION

To the above-named Plaintiff:

Take notice that the civil action styled as above, commenced by you as plaintiff,

has been assigned for trial before His Honor ....., Magistrate of the District Court, at ..... (time) ..... on .... (date) ...., at ..... (address) ..... in ..... (city) ....., N. C.

.....
Clerk of Superior Court
..... County

FORM 4.

COMPLAINT ON A PROMISSORY NOTE

NORTH CAROLINA
..... COUNTY

General Court of Justice
District Court Division
SMALL CLAIM

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

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

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

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

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

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

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

(Verification)

Service by mail is, is not, requested.

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

FORM 5.

COMPLAINT ON AN ACCOUNT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) according to the account annexed as Exhibit A.

Wherefore (etc., as in form 4).

FORM 6.

COMPLAINT FOR GOODS SOLD AND DELIVERED

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) for goods sold and delivered to defendant between June 1, 1965, and December 1, 1965.

Wherefore (etc., as in form 4).

FORM 7.

COMPLAINT FOR MONEY LENT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) for money lent by plaintiff to defendant on or about June 1, 1965.

Wherefore (etc., as in form 4).

FORM 8.

COMPLAINT FOR CONVERSION

(Caption as in form 4)

1. (Allegation of residence of parties)

2. On or about June 1, 1965, defendant converted to his own use a set of plumbing tools of the value of two hundred and fifty dollars ($250.00), the property of plaintiff.

Wherefore (etc., as in form 4).

FORM 9.

COMPLAINT FOR INJURY TO PERSON OR PROPERTY

(Caption as in form 4)

1. (Allegation of residence of parties)

2. On or about June 1, 1965, at the intersection of Main and Church Streets in the Town of Ashley, N. C., defendant (intentionally struck plaintiff a blow in the face) (negligently drove a bicycle into plaintiff) (intentionally tore plaintiff's clothing) (negligently drove a motorcycle into the side of plaintiff's automobile).

3. As a result (plaintiff suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one hundred and fifty dollars ($150.00) (plaintiff suffered damage to his property above described in the sum of two hundred and fifty dollars ($250.00).

Wherefore (etc., as in form 4).

FORM 10.

COMPLAINT TO RECOVER POSSESSION OF CHATTEL

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant has in his possession a set of plumber's tools of the value of two hundred dollars ($200.00), the property of plaintiff. Plaintiff is entitled to immediate possession of the same but defendant refuses on demand to deliver the same to plaintiff.

3. Defendant has unlawfully kept possession of the property above described since on or about June 1, 1965, and has thereby deprived plaintiff of its use, to his damage in the sum of fifty dollars ($50.00).

Wherefore plaintiff demands judgment against defendant for the recovery of possession of the property above described and for the sum of fifty dollars ($50.00), interest and costs. (etc., as in form 4).

FORM 11.

COMPLAINT IN SUMMARY EJECTMENT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant entered into possession of a tract of land (briefly described) as a

lessee of plaintiff (or as lessee of E. F. who, after making the lease, assigned his estate to the plaintiff); the term of defendant expired on the 1st day of June, 1965 (or his term has ceased by nonpayment of rent, or otherwise, as the fact may be); the plaintiff has demanded possession of the premises of the defendant, who refused to surrender it, but holds over; the estate of plaintiff is still subsisting, and the plaintiff is entitled to immediate possession.

3. Defendant owes plaintiff the sum of fifty dollars ($50.00) for rent of the premises from the 1st of May, 1965, to the 1st day of June, 1965, and one hundred dollars ($100.00) for the occupation of the premises since the 1st day of June, 1965 to the present.

Wherefore, plaintiff demands judgment against defendant that he be put in immediate possession of the premises, and that he recover the sum of one hundred and fifty dollars ($150.00), interest and costs. (etc., as in form 4).

(1965 c. 310, s. 1.)

§§ 7A-233 to 7A-239: Reserved for future codification purposes.

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

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.—Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division. (1965, c. 310, s. 1.)

§ 7A-241. Original jurisdiction in probate and administration of decedents' estates.—Exclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law. (1965, c. 310, s. 1.)

§ 7A-242. Concurrently held original jurisdiction allocated between trial divisions.—For the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings in accordance with the allocations provided in this article. But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding. (1965, c. 310, s. 1.)

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.—Except as otherwise provided in this article, the district court division is the proper division for the trial of all civil actions in which the amount in controversy is five thousand dollars ($5,000.00) or less, and the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds five thousand dollars ($5,000.00).

For purposes of determining the amount in controversy, the following rules apply whether the relief prayed is monetary or nonmonetary, or both, and with respect to claims asserted by complaint, counterclaim, cross-complaint or third party complaint:

(1) The amount in controversy is computed without regard to interest and costs.

(2) Where monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages. The value of any property seized in attachment, claim and delivery, or other ancillary proceeding, is not in controversy and is not considered in determining the amount in controversy.

(3) Where no monetary relief is sought, but the relief sought would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy. The judge may required by rule or order that parties make a good faith estimate of the value of any nonmonetary relief sought.

(4) a. Except as provided in subparagraph c of this subdivision, where a single party asserts two or more properly joined claims, the claims are aggregated in computing the amount in controversy.

b. Except as provided in subparagraph c, where there are two or more parties properly joined in an action and their interests are aligned, their claims are aggregated in computing the amount in controversy.

c. No claims are aggregated which are mutually exclusive and in the alternative, or which are successive, in the sense that satisfaction of one claim will bar recovery upon the other.

d. Where there are two or more claims not subject to aggregation the highest claim is the amount in controversy.

(5) Where the value of the relief to a claimant differs from the cost thereof to an opposing party, the higher amount is used in determining the amount in controversy. (1965, c. 310, s. 1.)

Cited in Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

§ 7A-244. Domestic relations.—The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody. (1965, c. 310, s. 1.)

§ 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.—(a) The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed is

(1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;

(2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation;

(3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or

(4) The enforcement or declaration of any claim of constitutional right

(b) When a case is otherwise properly in the district court division, a prayer for injunctive or declaratory relief by any party not a plaintiff on grounds stated in this section is not ground for transfer. (1965, c. 310, s. 1.)

§ 7A-246. Special proceedings; guardianship and trust administration.—The superior court division is the proper division, without regard to the

amount in controversy, for the hearing and trial of all special proceedings and of all proceedings involving the appointment of guardians and the administration by legal guardians and trustees of express trusts of the estates of their wards and beneficiaries, according to the practice and procedure provided by law for the particular proceeding. (1965, c. 310, s. 1.)

§ **7A-247. Mandamus; quo warranto.**—The superior court division is the proper division, without regard to the amount in controversy, for the trial of all civil actions seeking as principal relief the remedies of mandamus and quo warranto, according to the practice and procedure provided for obtaining each remedy. (1965, c. 310, s. 1.)

§ **7A-248. Condemnation actions and proceedings.**—The superior court division is the proper division, without regard to the amount in controversy, for the trial of all actions and proceedings wherein property is being taken by condemnation in exercise of the power of eminent domain, according to the practice and procedure provided by law for the particular action or proceeding. Nothing in this section is in derogation of the validity of such administrative or quasi-judicial procedures for value appraisal as may be provided for the particular action or proceeding prior to the raising of justiciable issues of fact or law requiring determination in the superior court. (1965, c. 310, s. 1.)

§ **7A-249. Corporate receiverships.**—The superior court division is the proper division, without regard to the amount in controversy, for actions for corporate receiverships under chapter 1, article 38, of the General Statutes. (1965, c. 310, s. 1.)

§ **7A-250. Review of decisions of administrative agencies.** — The superior court division is the proper division, without regard to the amount in controversy, for review by original action or proceeding, or by appeal, of the decisions of administrative agencies, according to the practice and procedure provided for the particular action, or proceeding, or appeal, except that the Court of Appeals shall have jurisdiction to review final orders or decisions of the North Carolina Utilities Commission and the North Carolina Industrial Commission, as provided in article 5 of this chapter. (1965, c. 310, s. 1; 1967, c. 108, s. 6.)

Editor's Note. — The 1967 amendment added the exception at the end of this section.

§ **7A-251. Appeal from clerk to judge.**—In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in chapter 1 of the General Statutes (1965, c. 310, s. 1.)

§ **7A-252. Application of article.**—The provisions of this article apply in each county of the State on and after the date that a district court is established therein (1965, c. 310, s. 1.)

§§ **7A-253, 7A-254:** Reserved for future codification purposes.

ARTICLE 21.

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

§ **7A-255. Clerk of superior court processes all actions and proceedings.**—All civil actions and proceedings in the General Court of Justice are instituted in, and the original records thereof are maintained in, the office of the clerk of superior court, without regard to the trial divisions in which the cause is

pending from time to time. When the commencement of an action or proceeding requires issuance of summons, the clerk of superior court issues the summons, and such summons runs and is valid as general process of the State without regard to the trial division in which the action or proceeding may be pending from time to time. (1965, c. 310, s. 1; 1967, c. 691, s. 22.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "as general process of the State" for "throughout the State" in the second sentence.

§ 7A-256. Causes docketed and retained in originally designated trial division until transferred.—Upon the institution of any action or proceeding in the General Court of Justice the party instituting it designates upon the face of the originating pleading or other originating paper when filed, which trial division of the General Court of Justice he deems proper for disposition of the cause. The clerk dockets the cause for the trial division so designated and the cause is retained for complete disposition in that division unless thereafter transferred in accordance with the provisions of this article. If no designation is made the clerk dockets the cause for the superior court division, and the cause is retained for complete disposition in that division unless thereafter transferred in accordance with the provisions of this article. (1965, c. 310, s. 1.)

§ 7A-257. Waiver of proper division.—Any party may move for transfer between the trial divisions as provided in this article. Failure of a party to move for transfer within the time prescribed is a waiver of any objection to the division, except that there shall be no waiver of the jurisdiction of the superior court division in probate of wills and administration of decedents' estates. Where more than one party is aligned in interest, any party may move for transfer of the entire case, notwithstanding waiver by other parties or coparties. A waiver of objection to the division does not prevent the judge from ordering a transfer on his own motion as provided in this article. (1965, c. 310, s. 1.)

§ 7A-258. Motion to transfer.—(a) Any party, including the plaintiff, may move on notice to all parties to transfer the civil action or special proceeding to the proper division when the division in which the case is pending is improper under the rules stated in this article. A motion to transfer to another division may also be made if all parties to the action or proceeding consent thereto, and if the judge deems the transfer will facilitate the efficient administration of justice.

(b) A motion to transfer is filed in the action or proceeding sought to be transferred, but it is heard and determined by a judge of the superior court division whether the case is pending in that division or not. A regular resident superior court judge of the district in which the action or proceeding is pending, any special superior court judge residing in the district, or any superior court judge presiding over any courts of the district may hear and determine such motion. The motion is heard and determined within the district, except by consent of the parties.

(c) A motion to transfer by any party other than the plaintiff must be filed within 30 days after the moving party is served with a copy of the pleading which justifies transfer. A motion to transfer by the plaintiff, if based upon the pleading of any other party, must be filed within 20 days after the pleading has been filed. A motion to transfer by any party, based upon an amendment to his own pleading must be made not later than 10 days after such amendment is filed. In no event is a motion to transfer made or determined after the case has been called for trial. Failure to move for transfer within the required time is a waiver of any objection to the division in which the case is pending, except in matters of probate of wills or administration of decedents' estates.

(d) A motion to transfer is in writing and contains:

(1) A short and direct statement of the grounds for transfer with specific reference to the provision of this chapter which determines the proper division; and

(2) A statement by an attorney for the moving party, or if the party is not represented by counsel, a statement by the party that the motion is made in the good faith belief that it may be properly granted and that he intends no amendment which would affect propriety of transfer.

(e) A motion to transfer is made on notice to all parties.

(f) Objection to the jurisdiction of the court over person or property is waived when a motion to transfer is filed unless such objection is raised at the time of filing or before. In no other case does the filing of a motion to transfer waive any rights under other motions or pleadings, nor does it prevent the filing of other motions or pleadings, except as provided in Rule 12 of the Rules of Civil Procedure. The filing of a motion to transfer does not stay further proceedings in the case except that:

(1) Involuntary dismissal is not ordered while a motion to transfer is pending;

(2) Assignment to a magistrate is not ordered while a motion to transfer is pending; and

(3) A change of venue is not ordered while a motion to transfer is pending, except by consent.

When a change of venue is ordered by consent while a motion to transfer is pending, the motion to transfer is determined in the new venue. The filing of a motion to transfer does not enlarge the time for filing responsive pleadings, nor does the filing of any other motion or pleading waive any rights under the motion to transfer.

(g) The motion for transfer provided herein is the sole method for seeking a transfer, and no transfer is effected by the use of mandamus, injunction, prohibition, certiorari, or other extraordinary writs; provided, however, that transfer may be sought in a responsive pleading when permitted by Rules 7 (b) and 12 (b) of the Rules of Civil Procedure.

(h) Transfer is effected when an order of transfer is filed. When transfer is ordered, the clerk makes appropriate entries on the dockets of each division and transfers the file of the case to the new division. No further proceedings are taken in the division from which the case is transferred. Papers filed after a transfer are properly filed notwithstanding any erroneous reference to the division from which the case is transferred. All orders made prior to transfer including restraining orders, remain effective after transfer, as if no transfer had been made, until modified or set aside in the division to which the case is transferred.

(i) A claim of new or different relief asserted after transfer has been effected does not authorize a second transfer. (1965, c. 310, s. 1; 1967, c. 954, s. 3; 1969, c. 1190, s. 22½.)

Editor's Note. — The 1967 amendment added the exception at the end of the second sentence of subsection (f), and added the proviso at the end of subsection (g).

The Rules of Civil Procedure are found in § 1A-1.

The 1969 amendment added the second sentence of subsection (a).

Session Laws 1969, c. 803, amended Session Laws 1967, c. 954, s. 10 (originally effective July 1, 1969), so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

§ 7A-259. Transfer on judge's own motion.—(a) If no party has moved for transfer within the time allowed to parties, any superior court judge who may hear and determine motions to transfer may order a transfer upon his own motion for the purpose of efficient administration of the trial divisions at any time before the case is calendared for trial. Transfer is not made on the judge's own motion unless the pleadings clearly show that the case is pending in an improper division. No hearing is held on such transfers, but the parties are given prompt notice when transfer is effected. Nothing in this section affects the power of the clerk to transfer matters and proceedings pending before him when an issue of fact is raised.

(b) When a district court is established in a district, any superior court judge authorized to hear and determine motions to transfer may, on his own motion, subject to the requirements of subsection (a), transfer to the district court cases pending in the superior court. (1965, c. 310, s. 1; 1967, c. 691, s. 23.)

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

§ 7A-260. Review of transfer matters.—Orders transferring or refusing to transfer are not immediately appealable, even for abuse of discretion. Such orders are reviewable only by the appellate division on appeal from a final judgment. If on review, such an order is found erroneous, reversal or remand is not granted unless prejudice is shown. If, on review, a new trial or partial new trial is ordered for other reasons, the appellate division may specify the proper division for new trial and order a transfer thereto. (1965, c. 310, s. 1; 1967, c. 108, s. 7.)

Editor's Note. — The 1967 amendment substituted "appellate division" for "Supreme Court" in the second and fourth sentences.

§ 7A-261. Application of article.—The provisions of this article apply in each county of the State on and after the date that a district court is established therein. (1965, c. 310, s. 1.)

§§ 7A-262 to 7A-269: Reserved for future codification purposes.

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-270. Generally.—General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice. (1965, c. 310, s. 1.)

Jurisdiction of District Court. — Under this section and § 7A-271, the district court has original jurisdiction for the trial of all criminal actions below the grade of felony, that is, of all prosecutions for misdemeanors; and the district court has exclusive original jurisdiction of all misdemeanors except in the four specific instances defined in subsections (a) (1), (a) (2), (a) (3) and (a) (4) of § 7A-271. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

§ 7A-271. Jurisdiction of superior court.—(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this article, except that the superior court has jurisdiction to try a misdemeanor:

(1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or
(2) When the charge is initiated by presentment; or
(3) Which may be properly consolidated for trial with a felony under G.S. 15-152;
(4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or
(5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser-included or related charge.

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

(c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of sub-

section (a), and which is not pending in the superior court on appeal from a lower court. (1965, c. 310, s. 1; 1967, c. 691, s. 24; 1969, c. 1190, ss. 23, 24.)

Cross Reference.—See note to § 7A-270.

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a) and added present subsection (c).

The 1969 amendment added subdivision (5) of subsection (a), inserted present subsection (b) and redesignated former subsection (b) as (c).

"Presentment".—In this jurisdiction, the accepted definition of the word "presentment" is as follows: "A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others without any bill of indictment, but, since the enactment of § 15-137, trials upon presentments have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment." State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Where Court of Appeals orders that a new trial be held in a misdemeanor prosecution originally tried in a municipal court and then tried de novo in the superior court, the case on retrial maintains its status as a case pending in the superior court on appeal from a lower court, and defendant's motion to quash the indictment on the ground that the district court has jurisdiction of the case is properly denied. State v. Patton, 5 N.C. App. 164, 167 S.E.2d 821 (1969).

Violation of § 20-7 (a).—Obviously, subsections (a) (1), (a) (2), and (a) (4) of this section do not apply to a criminal prosecution for operation of an automobile without an operator's license in violation of § 20-7 (a). With reference to subsection (a) (3), it is sufficient to say that defendant was not tried for or charged with any felony. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Violation of § 20-105.—The prosecution for violation of § 20-105 was not "initiated by presentment" within the meaning of subsection (a) (2). Although the prerequisites to conviction for the felony charged in the warrant and the misdemeanor charged in the indictment were different, the prosecution for the alleged criminal conduct of defendant in respect of the alleged unlawful taking of a car was initiated by warrant issued by the district court. It was not initiated in the superior court by presentment or otherwise. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

The warrant on which defendant was arrested and bound over to superior court charged a felony, to wit, the larceny of an automobile valued at more than $200.00, and the indictment charged a misdemeanor, to wit, a violation of § 20-105, the "temporary larceny" statute. Since defendant, in the superior court, was not tried for or charged with any felony, subsections (a) (1), (a) (3), and (a) (4) of this section did not apply to the criminal prosecution for the violation of § 20-105. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

§ 7A-272. Jurisdiction of district court. — (a) Except as provided in this article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

(b) The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment. (1965, c. 310, s. 1.)

Opinions of Attorney General. — Mr. Amsey A. Boyd, Tax Supervisor of Richmond County 7/29/69.

The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Demand for Jury Trial.—Where, upon defendant's demand for a jury trial on a charge of driving without an operator's license, the district court ordered defendant to appear at the next session of superior court, the district judge apparently being of opinion that the defendant by moving for a jury trial could avoid trial in the district court and have his case transferred forthwith for trial in the superior court, the district court acted under a misapprehension of the law and erred by failing to proceed to trial of defendant for this criminal offense in accordance with the accusation contained in the warrant. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Where Court of Appeals orders that a new trial be held in a misdemeanor prosecution originally tried in a municipal court

and then tried de novo in the superior court, the case on retrial maintains its status as a case pending in the superior court on appeal from a lower court, and defendant's motion to quash the indictment on the ground that the district court has jurisdiction of the case is properly denied. State v. Patton, 5 N.C. App. 164, 167 S.E.2d 821 (1969).

Violation of § 20-7 (a). — The district court had jurisdiction to try defendant on the warrant charging operation of an automobile without an operator's license in violation of § 20-7 (a). State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Stated in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968).

§ 7A-273. Powers of magistrates in criminal actions. — In criminal actions, any magistrate has power:

(1) In misdemeanor cases, other than traffic offenses, in which the maximum punishment which can be adjudged cannot exceed imprisonment for thirty days, or a fine of fifty dollars ($50.00), exclusive of costs, to accept guilty pleas and enter judgment;

(2) In misdemeanor cases involving traffic offenses, to accept written appearances, waivers of trial and pleas of guilty, in accordance with a schedule of offenses and fines promulgated by the chief district judge;

(3) In any misdemeanor case, to conduct a preliminary examination and bind the accused over to the district court for trial upon a waiver of examination or upon a finding of probable cause, making appropriate orders as to bail or commitment;

(4) To issue arrest warrants valid throughout the State;

(5) To issue search warrants valid throughout the county; and

(6) To grant bail before trial for any noncapital offense.

(7) Notwithstanding the provisions of subdivision (1) of this section, to hear and enter judgment in all worthless check cases brought under G.S. 14-107, when the amount of the check is fifty dollars ($50.00) or less. (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25.)

Editor's Note. — The first 1969 amendment added subdivision (7).

The second 1969 amendment deleted "peace and" following "issue" in subdivision (5).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-274. Power of mayors, law enforcement officers, etc., to issue warrants and set bail restricted. — The power of mayors, law enforcement officers, and other persons not officers of the General Court of Justice to issue arrest, search, or peace warrants, or to set bail, is terminated in any district court district upon the establishment of a district court therein. (1965, c. 310, s. 1.)

Editor's Note.—For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-275. Application of article. — The provisions of this article apply in each county of the State on and after the date a district court has been established therein. (1965, c. 310, s. 1.)

§ 7A-276: Reserved for future codification purposes.

ARTICLE 23.

Jurisdiction and Procedure Applicable to Children.

§ 7A-277. Purpose.—The purpose of this article is to provide procedures and resources for children under the age of sixteen years which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults. These procedures are intended to provide a simple judicial process for the exercise of juvenile jurisdiction by the district court in such manner as will as-

sure the protection, treatment, rehabilitation or correction which is appropriate in relation to the needs of the child and the best interest of the State. Therefore, this article should be interpreted as remedial in its purposes to the end that any child subject to the procedures applicable to children in the district court will be benefitted through the exercise of the court's juvenile jurisdiction. (1969, c. 911, s. 2.)

Revision of Article. — Session Laws 1969, c. 911, s. 2, rewrote this article, which formerly comprised only one section, numbered § 7A-277, to appear as present §§ 7A-277 through 7A-289. Prior to the 1969 act, jurisdiction and procedure applicable to juveniles were covered by chapter 110, article 2, §§ 110-21 through 110-44. Section 1 of the 1969 act revised and rewrote chapter 110, article 2, to appear as present §§ 110-21 through 110-24, eliminating provisions relating to jurisdiction and procedure and leaving in that article only provisions relating to probation and detention homes for juveniles. Where the sections in this article are similar to sections appearing in former article 2 of chapter 110, the historical citations to the former sections have been added to the new sections.

Former §§ 7A-280 through 7A-287, codified from Session Laws 1965, c. 310, s. 1, and relating to jurisdiction and procedure in civil appeals from districts courts, were repealed by Session Laws 1967, c. 108, s. 8.

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

§ 7A-278. Definitions.—The terms or phrases used in this article shall be defined as follows, unless the context or subject matter otherwise requires:

(1) "Child" is any person who has not reached his sixteenth birthday.

(2) "Delinquent child" includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or a child who has violated the conditions of his probation under this article.

(3) "Dependent child" is a child who is in need of placement, special care or treatment because such child has no parent, guardian or custodian to be responsible for his supervision or care, or whose parent, guardian or custodian is unable to provide for his supervision or care.

(4) "Neglected child" is any child who does not receive proper care or supervision or discipline from his parent, guardian, custodian or other person acting as a parent, or who has been abandoned, or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

(5) "Undisciplined child" includes any child who is unlawfully absent from school, or who is regularly disobedient to his parents or guardian or custodian and beyond their disciplinary control, or who is regularly found in places where it is unlawful for a child to be, or who has run away from home.

(6) "Court" means the district court division of the General Court of Justice, except as otherwise specified.

(7) "Custodian" is a person or agency that has been awarded legal custody of a child by a court, or a person other than parents or legal guardian who stands in loco parentis to a child. (1969, c. 911, s. 2.)

§ 7A-279. Juvenile jurisdiction.—The court shall have exclusive, original jurisdiction over any case involving a child who resides in or is found in the district and who is alleged to be delinquent, undisciplined, dependent or neglected, or who comes within the provisions of the Interstate Compact on Juveniles, except as otherwise provided. This jurisdiction shall be exercised solely by the district judge. (1965, c. 310, s. 1; 1969, c. 911, s. 2.)

§ 7A-280. Felony cases.—If a child who has reached his fourteenth birthday is alleged to have committed an offense which constitutes a felony, the judge

shall conduct a preliminary hearing to determine probable cause after notice to the parties as provided by this article. Such hearing shall provide due process of law and fair treatment to the child, including the right to counsel, privately retained or at State expense if indigent.

If the judge finds probable cause, he may proceed to hear the case under the procedures established by this article, or if the judge finds that the needs of the child or the best interest of the State will be served, the judge may transfer the case to the superior court division for trial as in the case of adults. The child's attorney shall have a right to examine any court or probation records considered by the court in exercising its discretion to transfer the case, and the order of transfer shall specify the reasons for transfer.

If the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court division for trial as in the case of adults.

In case of transfer of any case to the superior court division under this section, the judge may order that the child be detained in a juvenile detention home or separate section of a local jail as provided by G.S. 110-24, pending trial in the superior court division. (1919, c. 97, s. 9; C. S., s. 5047; 1929, c. 84; 1957, c. 100, s. 1; 1963, c. 631; 1969, c. 911, s. 2.)

§ **7A-281. Petition.**—Any person having knowledge or information that a case has arisen which invokes the juvenile jurisdiction established by this article may file a verified petition with the clerk of superior court. The petition shall contain the name, age and address of the child, the name and last known address of his parents or guardian or custodian, and shall allege the facts which invoke the juvenile jurisdiction of the court.

After a petition is filed, any judge exercising juvenile jurisdiction may arrange for evaluation of juvenile cases through the county director of social services or the chief family counselor or such other personnel as may be available to the court. The purpose of this procedure is to use available community resources for the diagnosis or treatment or protection of a child in cases where it is in the best interest of the child or the community to adjust the matter without a formal hearing. (1919, c. 97, s. 5; C. S., s. 5043; 1969, c. 911, s. 2.)

§ **7A-282. Issuance of summons.**—After a petition is filed and when directed by the court, the clerk of superior court shall cause a summons to be issued directed to the parents or guardian or custodian and to the child, requiring them to appear for a hearing at the time and place stated in the summons. (1919, c. 97, s. 6; C. S., s. 5044; 1939, c. 50; 1969, c. 911, s. 2.)

§ **7A-283. Service of summons and petition.**—The summons and a copy of the petition shall be served upon the parents or either of them or the guardian or custodian, and the child, not less than five days prior to the date scheduled for the hearing, provided that the time provided herein may be waived in the discretion of the judge in the best interest of the child. Service of the summons and petition shall be made personally by leaving a copy of the summons and the petition with the person summoned. If personal service upon a parent is attempted at his last known address but such parent cannot be located, and there is no parent, guardian or custodian available to appear with the child for the hearing, the court shall appoint a guardian ad litem or a guardian of the person to appear with the child.

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

If the parent, guardian or custodian is personally served as herein provided and fails without reasonable cause to appear and to bring the child, he may be pro-

ceeded against as for contempt of court. (1919, c. 97, s. 8; C. S., s. 5046; 1969, c. 911, s. 2.)

§ **7A-284. Immediate custody of a child.**—If it appears from a petition that a child is in danger, or subject to such serious neglect as may endanger his health or morals, or that the best interest of the child requires that the court assume immediate custody of the child prior to a hearing on the merits of the case, the judge may enter an order directing an officer or other authorized person to assume immediate custody of the child. Such an order shall constitute authority to assume physical custody of the child and to take the child to such place or person as is designated in the order. The court shall conduct a hearing on the merits at the earliest practicable time within five days after assuming custody, and if such a hearing is not held within five days, the child shall be released. (1919, c. 97, s. 7; C. S., s. 5045; 1969, c. 911, s. 2.)

§ **7A-285. Juvenile hearing.** — Juvenile hearings shall be held in each county in the district at such times and places as the chief district judge shall designate. The general public may be excluded from any juvenile hearing in the discretion of the judge. Reporting of juvenile cases shall be as provided by G.S. 7A-198 for reporting of civil trials.

The juvenile hearing shall be a simple judicial process designed to adjudicate the existence or nonexistence of any of the conditions defined by G.S. 7A-278 (2) through (5) which have been alleged to exist, and to make an appropriate disposition to achieve the purposes of this article. In the adjudication part of the hearing, the judge shall find the facts and shall protect the rights of the child and his parents in order to assure due process of law, including the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. In cases where the petition alleges that a child is delinquent or undisciplined and where the child may be committed to a State institution, the child shall have a right to assigned counsel as provided by law in cases of indigency.

The court may continue any case from time to time to allow additional factual evidence, social information or other information needed in the best interest of the child. If the court finds that the conditions alleged do not exist, or that the child is not in need of the care, protection or discipline of the State, the petition shall be dismissed.

At the conclusion of the adjudicatory part of the hearing, the court may proceed to the disposition part of the hearing, or the court may continue the case for disposition after the juvenile probation officer or family counselor or other personnel available to the court has secured such social, medical, psychiatric, psychological or other information as may be needed for the court to develop a disposition related to the needs of the child or in the best interest of the State. The disposition part of the hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the child.

The child or his parents, guardian or custodian shall have an opportunity to present evidence if they desire to do so, or they may advise the court concerning the disposition which they believe to be in the best interest of the child.

In all cases, the court order shall be in writing and shall contain appropriate findings of fact and conclusions of law. (1919, c. 97, s. 9; C. S., s. 5047; 1929, c. 84; 1957, c. 100, s. 1; 1963, c. 631; 1969, c. 911, s. 2.)

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

the court may find it is in the best interest of the child to postpone adjudication or disposition of the case for a specified time or subject to certain conditions.

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

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

The following alternatives for disposition shall be available to any judge exercising juvenile jurisdiction:

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

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

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

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

c. Place the child in the custody of the county department of social services in the county of his residence, or in the case of a child who has legal residence outside the State, in the temporary custody of the county department of social services in the county where the child is found so that said agency may return the child to the responsible authorities.

In any case where the court removes custody from a parent, the court may order any parent who appears in court with such child to pay such support for the child as may be reasonable under the circumstances, or after notice to the parent as provided in this article, the court may hold a hearing and order such parent to pay such support as may be reasonable under the circumstances.

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

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

a. Place the child on probation for whatever period of time the court

may specify, and subject to such conditions of probation as the court finds are related to the needs of the child and which the court shall specify, under the supervision of the juvenile probation officer or family counselor; or

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

c. Commit the child to the care of the North Carolina Board of Juvenile Correction to be assigned to whatever facility operated by such Board as the Board or its administrative personnel may find to be in the best interest of the child. Said commitment shall be for an indefinite term, not to extend beyond the eighteenth birthday of the child, as the Board or its administrative personnel may find to be in the best interest of the child, provided that if a child is engaged in a vocational training program when he becomes eighteen years of age, the Board may extend the indefinite term of such child beyond the eighteenth birthday until the vocational training program is completed. The Board or its administrative personnel shall have final authority to determine when any child who has been admitted to any facility operated by the Board has sufficiently benefited from the program as to be ready for release. At the end of any term, the Board shall notify the court that the child is ready for release and shall plan for the return of the child to the community in cooperation with the juvenile probation officer or the family counselor or such other appropriate personnel as may be available. If the Board finds that any child committed to its care is not suitable for the program of any facility operated by the Board, or that further court action is needed to protect the best interest of a child at the end of his term, the Board shall make a motion in the cause so that the court may enter an appropriate order.

(5) In any case, the court may order that the child be examined by a physician, psychiatrist, psychologist or other professional person as may be needed for the court to determine the needs of the child. If the court finds the child to be in need of medical, surgical, psychiatric, psychological or other treatment, the court may allow the parents or other responsible persons to arrange for such care. If the parents decline or are unable to make such arrangements, the court may order the needed treatment, surgery or other needed care, and the court may order the parents or other responsible parties to pay the cost of such care, or if the court finds the parents are unable to pay the cost of such care, such cost shall be a charge upon the county when approved by the court. If the court finds the child to be in need of institutional care because of mental illness or mental retardation, the court may commit the child to the appropriate institution operated by the State, provided two physicians certify in writing that such commitment is in the best interest of the child and the State. After such commitment, the child may be released only by the governing board or administrative personnel of such State institution, who shall report to the court from time to time on the progress of such child and who shall return the child to the court upon release during his minority for such further orders as the court finds to be in the best interest of the child.

(6) In any case where there is no parent to appear in a hearing with the

child or where the court finds it would be in the best interest of the child, the court may appoint a guardian of the person for the child, who shall operate under the supervision of the court with or without bond, and who shall file only such reports as the court shall require. Such guardian of the person shall have the care, custody and control of the child or may arrange a suitable placement for the child, and may represent the child in legal actions before any court. Such guardian of the person shall also have authority to consent to certain actions on the part of the child in place of the parents, including but not limited to marriage, enlisting in the armed forces, major surgery, or such other actions as the court shall designate where parental consent is required. The authority of the guardian of the person shall continue for whatever period of time the court shall designate during the minority of the child. (1919, c. 97, s. 9; C. S., s. 5047; 1929, c. 84; 1957, c. 100, s. 1; 1963, c. 631; 1969, c. 911, s. 2.)

§ 7A-287. Juvenile records.—The court shall maintain a complete record of all juvenile cases to be known as the juvenile record, which shall be withheld from public inspection and may be examined only by order of the judge, except that the child, his parents, guardian, custodian and attorney, or other authorized representative of the child shall have a right to examine the child's juvenile record. The juvenile record may be divided into two parts, social and legal:

(1) The social part of the juvenile record may include family background information or reports of social, medical, psychiatric, psychological or other information concerning a child or his family, or a record of the probation reports of a child or interviews with his family, or other information which the judge finds should be protected from public inspection in the best interest of the child. The social part of the juvenile record may be filed separate from other records of the court under rule of the Administrative Office of the Courts.

(2) The legal part of the record includes the summons, petition, court order, written motions, the transcript of the hearing and other papers filed in the proceeding.

An adjudication that a child is delinquent or undisciplined shall not disqualify the child for public office nor be considered as conviction of any criminal offense. (1919, c. 97, s. 4; C. S., s. 5042; 1969, c. 911, s. 2.)

§ 7A-288. Termination of parental rights.—In cases where the court has adjudicated a child to be neglected or dependent, the court shall have authority to enter an order which terminates the parental rights with respect to such child if the court finds any one of the following:

(1) That the parent has abandoned the child for six consecutive months prior to the special hearing in which termination of parental rights is considered or that a child is an abandoned child as defined by chapter 48 of the General Statutes entitled "Adoption of Minors."

(2) That a child born out of wedlock is living under such conditions that the health or general welfare of the child is endangered by the living conditions and environment, pursuant to the procedure established by G.S. 130-58.1 and as specified by G.S. 48-6.1; or

(3) That the parent has willfully failed to contribute adequate financial support to a child placed in the custody of an agency or child-care institution, or living in a foster home or with a relative, for a period of six months; or

(4) That the parent has so physically abused or seriously neglected the child that it would be in the best interest of the child that he not be returned to such parent.

The court shall conduct a special hearing to consider any case involving termination of parental rights. There shall be a petition requesting such termination and alleging facts which would justify termination as herein provided. The parent shall be notified in advance of such special hearing by personal service of the summons and petition as provided in this article or under the procedures established by Rule 4 of the Rules of Civil Procedure of chapter 1A of the North Carolina General Statutes. Before entering an order of termination of parental rights, the court shall consider all available facts and social information concerning the child to evaluate whether the parent may reestablish a suitable home for the child, for the policy of law is to preserve natural family ties where possible in the best interest of the child.

Such an order terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship. Such a parent is not thereafter entitled to notice of proceedings for the adoption of the child and has no right to object thereto or otherwise participate therein.

In such cases, the court shall place the child by written order in the custody of the county department of social services or a licensed child-placing agency, and such custodian shall have the right to make such placement plans for the child as it finds to be in his best interest. Such county department of social services or licensed child-placing agency shall further have the authority to consent to the adoption of the child, to its marriage, to its enlistment in the armed forces of the United States, and to surgical and other medical treatment of the child. (1969, c. 911, s. 2.)

Editor's Note.—Former § 7A-288, relating to appeals from district court in criminal cases, was renumbered § 7A-290 by Session Laws 1969, c. 911, s. 5.

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

Opinions of Attorney General. — Mr. W.H.S. Burgwyn, Jr., Solicitor, Sixth Judicial District, 9/16/69.

§ **7A-289. Appeals.**—Any child, parent, guardian, custodian or agency who is a party to a proceeding under this article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in open court at the time of the hearing or in writing within ten days after the hearing. Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State. (1919, c. 97, s. 20; C. S., s. 5058; 1949, c. 976; 1969, c. 911, s. 2.)

ARTICLE 24.

[Reserved.]

ARTICLE 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

§ **7A-290. Appeals from district court in criminal cases; notice; appeal bond.**—Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon receiving notice of appeal, the clerk shall transfer the case to the district or superior court criminal

docket. Appeal bond may be set by the judge in his discretion. (1965, c. 310, s. 1; 1967, c. 601, s. 1; 1969, c. 876, s. 3; c. 911, s. 5; c. 1190, s. 26.)

Editor's Note. — The above section was formerly numbered § 7A-288. It was renumbered § 7A-290 by Session Laws 1969.

Session Laws 1969, c. 876, s. 3, added the first sentence and inserted "district or" in the fourth sentence.

Session Laws 1969, c. 1190, s. 26, inserted "in writing" in the third sentence and deleted a sentence inserted by the 1967 amendment which related to time for withdrawal of appeal.

This section and § 49-7, when properly construed together, are not inconsistent. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Hence, the proviso in § 49-7 was not repealed either expressly or by implication by enactment of this section. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Stated in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968).

ARTICLE 26.

Additional Powers of District Court Judges and Magistrates.

§ 7A-291. Additional powers of district court judges.—In addition to the jurisdiction and powers assigned in this chapter, a district court judge has the following powers:

(1) To administer oaths;
(2) To punish for contempt;
(3) To compel the attendance of witnesses and the production of evidence;
(4) To set bail;
(5) To issue arrest warrants valid throughout the State, and peace and search warrants valid throughout the district of issue; and
(6) To issue all process and orders necessary or proper in the exercise of his powers and authority, and to effectuate his lawful judgments and decrees. (1965, c. 310, s. 1; 1969, c. 1190, s. 27.)

Editor's Note. — The 1969 amendment inserted "peace and" in subdivision (5).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

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

(1) To administer oaths;
(2) To punish for contempt;
(3) When authorized by the chief district judge, to take depositions and examinations before trial;
(4) To issue subpoenas and capiases valid throughout the county;
(5) To take affidavits for the verification of pleadings;
(6) To appoint assessors to allot property for homestead and personal property exemptions, as provided in G.S. 1-386;
(7) To issue writs of habeas corpus ad testificandum, as provided in G.S. 17-41;
(8) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in chapter 30, article 4, of the General Statutes;
(9) To take acknowledgments of instruments, as provided in G.S. 47-1;
(10) To perform the marriage ceremony, as provided in G.S. 51-1;
(11) To take acknowledgment of a written contract or separation agreement between husband and wife, and to make a private examination of the wife, as provided in G.S. 52-6;
(12) To conduct proceedings for the valuation of a division fence, as provided in G.S. 68-10;

(13) To assess contribution for damages or for work done on a dam, canal, or ditch, as provided in G.S. 156-15; and

(14) To perform any civil, quasi-judicial or ministerial function assigned by general law to the office of justice of the peace. (1965, c. 310, s. 1; 1967, c. 691, s. 25.)

Editor's Note. — The 1967 amendment inserted present subdivisions (5) through (13) and renumbered former subdivision (5) as subdivision (14).

§ 7A-293. Special authority of a magistrate assigned to a municipality located in more than one county of a district court district. — A magistrate assigned to an incorporated municipality, the boundaries of which lie in more than one county of a district court district, may, in criminal matters, exercise the powers granted by G.S. 7A-273 as if the corporate limits plus the territory embraced within a distance of one mile in all directions therefrom were located wholly within the magistrate's county of residence. Appeals from a magistrate exercising the authority granted by this section shall be taken in the district court in the county in which the offense was committed. A magistrate exercising the special authority granted by this section shall transmit all records, reports, and monies collected to the clerk of the superior court of the county in which the offense was committed. (1967, c. 691, s. 26.)

§§ **7A-294 to 7A-299:** Reserved for future codification purposes.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

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

(1) Salaries, departmental expense, printing and other costs of the appellate division;

(2) Salaries and expenses of superior court judges, solicitors, assistant solicitors, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of subchapter IX of this chapter;

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

(4) Salaries and travel expenses of district judges (including holdover judges), prosecutors, assistant prosecutors, acting prosecutors, magistrates, and family court counselors;

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

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

(7) Compensation and allowances of court reporters;

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

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

(b) The expense items enumerated in (4) through (8) of subsection (a) shall not be paid from State funds in any judicial district until the district court has been established in the district. (1965, c. 310, s. 1; 1967, c. 108, s. 9; 1969, c. 1013, s. 2.)

Editor's Note. — Session Laws 1967, c. 108, s. 9, substituted "appellate division" for "Supreme Court" in subdivision (1) of subsection (a).

The 1969 amendment rewrote subdivision (2) of subsection (a) inserted present subdivision (8) and renumbered former subdivision (8) of subsection (a) as (9) and substituted "(8)" for "(7)" in subsection (b).

Amendment Effective January 1, 1971.— Session Laws 1967, c. 1049, s. 5, effective Jan. 1, 1971, will delete "prosecutors, assistant prosecutors, acting prosecutors" preceding "magistrates" in subsection (a) (4).

§ 7A-301. Disbursement of expenses.—The salaries and expenses of all personnel in the Judicial Department and other operating expenses shall be paid out of the State Treasury upon warrants duly drawn thereon, except that the Administrative Office of the Courts and the Department of Administration, with the approval of the State Auditor, may establish alternative procedures for the prompt payment of juror fees, witness fees, and other small expense items. (1965, c. 310, s. 1.)

§ 7A-302. Counties and municipalities responsible for physical facilities.—In each county in which a district court has been established, courtrooms and related judicial facilities (including furniture), as defined in this subchapter, shall be provided by the county, except that courtrooms and related judicial facilities may, with the approval of the Administrative Officer of the Courts, after consultation with county and municipal authorities, be provided by a municipality in the county. To assist a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the costs of court, known as the "facilities fee," collected for the State by the clerk of superior court, shall be remitted to the county or municipality providing the facilities. (1965, c. 310, s. 1.)

§ 7A-303. Equipment and supplies in clerk's office.—Upon the establishment of the district court in any county, supplies and all equipment in the office of the clerk of superior court shall become the property of the State. (1965, c. 310, s. 1.)

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

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

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

(2) For the use of the courtroom and related judicial facilities, the sum of two dollars ($2.00) in the district court, including cases before a magistrate, and the sum of fifteen dollars ($15.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a mu-

nicipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: Adequate space and furniture for judges, solicitors, prosecutors, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

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

(4) For support of the General Court of Justice, the sum of eight dollars ($8.00) in the district court, including cases before a magistrate, and the sum of twenty dollars ($20.00) in the superior court, to be remitted to the State Treasurer.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law Enforcement Officers' Benefit and Retirement Fund shall be assessed only once in each case.

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

(d) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the partial payment of the same has been made to the clerk of superior court, and no additional payments have been made for a period of 12 months, and, in the opinion of the clerk, further payments are unlikely, the clerk shall disburse the partial payment in accordance with the following priorities:

(1) Costs due the State, with the Law Enforcement Officers' Benefit and Relief Fund last;
(2) The facilities fee;
(3) The arrest fee;
(4) Any other charge due the county or city, with the county first;
(5) Fines to the county school fund;
(6) Sums in restitution, prorated among the persons entitled thereto.

Partial payments made pursuant to court order for the purchase of saving bonds or for deposit in savings accounts are excepted from the provisions of this subsection. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29.)

Editor's Note. — Session Laws 1967, c. 601, s. 2, inserted, in subsection (b), a former provision as to costs where an appeal from the district court to the superior court is withdrawn.

Session Laws 1967, c. 691, ss. 27-29, in-

serted the exception at the end of the introductory paragraph in subsection (a), inserted in the last sentence of subdivision (2) of subsection (a) the provision as to reimbursing the county or municipality for funds expended in constructing or renovating the facilities and added subsection (d).

Session Laws 1969, c. 1013, inserted "public defenders" in the third sentence of subdivision (2) of subsection (a).

Session Laws 1969, c. 1190, inserted "and subpoenas" near the beginning of subdivision (1) of subsection (a) and deleted, in subsection (b), a provision as to costs when an appeal from the district court to the superior court was withdrawn within a specified time.

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

Cited in In re Board of Comm'rs, 4 N.C. App. 626, 167 S.E.2d 488 (1969).

§ 7A-305. Costs in civil actions.—(a) In every civil action in the superior or district court the following costs shall be assessed:

(1) For the use of courtroom and related judicial facilities, the sum of two dollars ($2.00) in cases heard before a magistrate, and the sum of five dollars ($5.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of twenty dollars ($20.00) in the superior court, and the sum of ten dollars ($10.00) in the district court, except that in the district court if the amount sued for is more than one hundred dollars ($100.00) but does not exceed three hundred dollars ($300.00), excluding interest, the sum shall be six dollars ($6.00), and if the amount sued for is one hundred dollars ($100.00) or less, excluding interest, the sum shall be three dollars ($3.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate; and when cases in the district court are appealed to the superior court the General Court of Justice fee and the facilities fee applicable in the superior court shall be added to the fees assessed in the district court. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee and General Court of Justice fee, except in suits in forma pauperis.

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

(1) Witness fees, as provided by law.
(2) Jail fees, as provided by law.
(3) Counsel fees, as provided by law.
(4) Expense of service of process by certified mail.
(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
(6) Fees for personal service of civil process and other sheriff's fees, as provided by law.

(7) Fees of guardians ad litem, next friends, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30.)

Editor's Note.—The first 1967 amendment inserted "or to the appellate division, as the case may be" in subdivision (5) of subsection (d).

The second 1967 amendment substituted "does not exceed" for "less than" near the middle of the first sentence in subdivision (2) of subsection (a) and added subdivision (8) of subsection (d).

Appealing Party Not Prejudiced by Failure of Clerk to Collect Costs.—Under the provisions of subsection (c) of this section, it is clear that the duty of collecting the additional costs at the time of the filing of the papers initiating an appeal is imposed upon the clerk. But a failure of the clerk to perform his duty in this respect should not operate to prejudice the appealing party. Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ 7A-306. Costs in special proceedings.—(a) In every special proceeding in the superior court, the following costs shall be assessed:

(1) For the use of courtroom and related judicial facilities, the sum of two dollars ($2.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice the sum of thirteen dollars ($13.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars ($100.00), there shall be an additional sum of twenty cents (20¢), per one hundred dollars ($100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of one hundred dollars ($100.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation. Sums collected under this subsection shall be remitted to the State Treasurer.

(b) The facilities fee and thirteen dollars ($13.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

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

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.

(5) Fees of guardians ad litem, next friends, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(6) Fees for a special jury, if any, at two dollars ($2.00) per special juror for each proceeding.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 24, s. 2.)

Editor's Note. — The 1967 amendment corrected an error by inserting the word "dollars" near the beginning of subsection (b). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

§ 7A-307. Costs in administration of estates. — (a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, the following costs shall be assessed

(1) For the use of courtroom and related judicial facilities, the sum of two dollars ($2.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice the sum of eight dollars ($8.00), plus an additional ten cents (10¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate. Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. This fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be one dollar ($1.00). In no case shall the cumulative fee exceed one thousand dollars ($1,000.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(b) The facilities fee and eight dollars ($8.00) of the General Court of Justice fee shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, the ten dollars ($10.00) shall be paid at the time of the qualification of the fiduciary.

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

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

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30.

Editor's Note. — The 1967 amendment substituted "section" for "article" near the beginning of subsection (c). The 1969 amendment rewrote subsection (b).

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

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

(15) On all funds placed with the clerk by virtue of his office, to be administered by him according to the provisions of G.S. 2-53 or G.S. 28-68, a three percent (3%) commission. On all funds placed with the clerk by virtue of his office and invested by him, a three percent (3%) commission on the first one thousand dollars ($1,000.00), and a one percent (1%) commission on all funds above one thousand dollars ($1,000.00).

(b) The fees and commissions set forth in this section are not chargeable when the service is performed as a part of the regular disposition of any action or special proceeding or the administration of an estate. When a transaction involves more than one of the services set forth in this section, only the greater service fee shall be charged.

(c) The miscellaneous fees and commissions enumerated in this section are complete and exclusive, and in lieu of any and all other miscellaneous fees and commissions. (1965, c. 310, s. 1; 1967, c. 691, ss. 32, 33; 1969, c. 1190, s. 31.)

Editor's Note. — The 1967 amendment struck out former subdivisions (1), (7) and (16) in subsection (a), renumbered the other subdivisions, inserted "excluding welfare liens" in present subdivision (11), added the last sentence in present subdivision (15) and substituted "section" for "article" in both sentences in subsection (b).

The 1969 amendment added the exception clause in parentheses at the end of subdivision (8) of subsection (a) and reduced the fee in subdivision (12) of subsection (a) from one dollar to fifty cents.

§ **7A-309. Magistrate's special fees.**—The following special fees shall be collected by the magistrate and remitted to the clerk of the superior court for the use of the State in support of the General Court of Justice:

(1) Performing marriage ceremony	$4.00
(2) Hearing petition for year's allowance to surviving spouse or child, issuing notices to commissioners, allotting the same, and making return	4.00
(3) Taking a deposition	3.00
(4) Proof of execution or acknowledgment of any instrument	.50
(5) Performing any other statutory function not incident to a civil or criminal action	1.00

(1965, c. 310, s. 1.)

§ **7A-310. Fees of commissioners and assessors appointed by magistrate.**—Any person appointed by a magistrate as a commissioner or assessor, and who shall serve, shall be paid the sum of two dollars ($2.00), to be taxed as a part of the bill of costs of the proceeding. (1965, c. 310, s. 1.)

§ **7A-311. Uniform civil process fees.** — (a) In a civil action or special proceeding, the following fees and commissions shall be assessed, collected, and remitted to the county:

(1) For each item of civil process, including summons, subpoenas, notices, motions, orders, writs and pleadings, served, or attempted to be served, two dollars ($2.00). When two or more items of civil process are served simultaneously on one party, only one two-dollar ($2.00) fee shall be charged. When an item of civil process is served on two or more persons or organizations, a separate service charge shall be made for each person or organization. This subsection shall not apply to service of summons to jurors.

(2) For the seizure of personal property and its care after seizure, all necessary expenses, in addition to any fees for service of process.

(3) For all sales by the sheriff of property, either real or personal, or for funds collected by the sheriff under any judgment, five percent (5%) on the first five hundred dollars ($500.00), and two and one-half percent (2½%) on all sums over five hundred dollars ($500.00), plus necessary expenses of sale.

(4) For execution of a judgment of ejectment, all necessary expenses, in addition to any fees for service of process.

(5) For necessary transportation of individuals to or from State institutions or another state, the same mileage and subsistence allowances as are provided for State employees.

(b) All fees shall be collected in advance (except in suits in forma pauperis) except those contingent on expenses or sales prices. When the fee is not collected in advance or at the time of assessment, a lien shall exist in favor of the county on all property of the party owing the fee. If the fee remains unpaid it shall be entered as a judgment against the debtor and shall be docketed in the judgment docket in the office of the clerk of superior court.

(c) The process fees and commissions set forth in this section are complete and exclusive and in lieu of any and all other process fees and commissions in civil actions and special proceedings. (1965, c. 310, s. 1; 1967, c. 691, s. 34; 1969, c. 1190, s. 31½.)

Editor's Note. — The 1967 amendment rewrote the second sentence in subdivision (1) of subsection (a).

The 1969 amendment inserted "by the sheriff" near the beginning of subdivision (3), deleted former subdivision (5), providing the fee for each appraiser or commissioner, and renumbered former subdivision (6) as (5), all in subsection (a).

§ **7A-312. Uniform fees for jurors; meals.** — A juror in the General Court of Justice, including a coroner's juror, but excluding a juror in a special proceeding, shall receive eight dollars ($8.00) per day. A juror required to remain overnight at the site of the trial shall be furnished adequate accommodations and subsistence. If required by the presiding judge to remain in a body during the trial of a case, meals shall be furnished the jurors during the period of sequestration. A juror in a special proceeding shall receive two dollars ($2.00) for each proceeding. (1965, c. 310, s. 1; 1967, c. 1169; 1969, c. 1190, s. 32.)

Editor's Note.—The 1967 amendment added the present third sentence.

The 1969 amendment rewrote the first sentence and deleted "in lieu of daily mileage" at the end of the second sentence.

§ **7A-313. Uniform jail fees.**—Any person lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the

sum of three dollars ($3.00) for each day's confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if a nolle prosequi is entered, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill. (1965, c. 310, s. 1; 1969, c. 1190, s. 33.)

Editor's Note. — The 1969 amendment increased the jail fee from two dollars to three dollars a day.

§ 7A-314. Uniform fees for witnesses; experts; limit on number. —A witness under subpoena, or bound over, or recognized, other than a salaried State, county, or municipal law enforcement officer, whether to testify before the court, grand jury, magistrate, clerk, referee, commissioner or arbitrator, shall receive three dollars ($3.00) per day, or fraction thereof, during his attendance. A witness entitled to this fee shall also receive reimbursement for travel expenses, at the rate currently authorized for State employees, for each mile necessarily traveled from his place of residence to the place of appearance and return, each day, except that a witness required to remain overnight at the site of the trial shall be furnished subsistence in lieu of daily mileage. An expert witness shall receive such compensation and allowances as the court, in its discretion, may authorize. If more than two witnesses shall be subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1969, c. 1190, s. 34.)

Editor's Note. — The 1969 amendment added, at the end of the second sentence, the provision for subsistence in lieu of daily mileage for a witness required to remain overnight at the site of the trial.

§ 7A-315. Liability of State for witness fees in criminal cases when defendant not liable.—In a criminal action, if no prosecuting witness is designated by the court as liable for the costs, and the defendant is acquitted, or convicted and unable to pay, or a nolle prosequi is entered, or judgment is arrested, or probable cause is not found, or the grand jury fails to return a true bill, the State shall be liable for the witness fees. (1965, c. 310, s. 1.)

§ 7A-316. Payment of witness fees in criminal actions.—A witness in a criminal action who is entitled to a witness fee and who proves his attendance shall be paid by the clerk from State funds and the amount disbursed shall be assessed in the bill of costs, unless the State is liable for the fee, except that if more than two witnesses shall be subpoenaed, bound over, or recognized, to prove a single material fact, disbursements to such additional witnesses shall be charged against the party issuing or requesting the subpoena. (1965, c. 310, s. 1.)

§ 7A-317. Counties and municipalities not required to advance certain fees.—Counties and municipalities are not required to advance costs for the facilities fee, the General Court of Justice fee, the miscellaneous fees enumerated in G.S. 7A-308, or the civil process fees enumerated in G.S. 7A-311. (1967, c. 691, s. 35.)

Editor's Note.—Section 35, c. 691, Session Laws 1967, which inserted this section, renumbered former §§ 7A-317 and 7A-318 as §§ 7A-318 and 7A-319, respectively.

§ 7A-317.1. Disposition of fees in counties with unincorporated seats of court.—Notwithstanding any other provision of this article, if a municipality listed in G.S. 7A-133 as an additional seat of district court is not incorporated, the arrest, facilities, and jail fees which would ordinarily accrue thereto, shall instead accrue to the county in which the unincorporated municipality is located. (1969, c. 1190, s. 34½.)

§ 7A-318. Determination and disbursement of costs on and after date district court established.—(a) On and after the date that the district court is established in a judicial district, costs in every action, proceeding or other matter pending in the General Court of Justice in that district, shall be assessed as provided in this article, unless costs have been finally assessed according to prior law. In computing costs as provided in this section, the parties shall be given credit for any fees, costs, and commissions paid in the pending action, proceeding or other matter, before the district court was established in the district, except that no refunds are authorized.

(b) In the administration of estates, costs shall be considered finally assessed according to prior law when they have been assessed at the time of the filing of any inventory, account, or other report. Costs at any filing on or after the date the district court is established in a judicial district shall be assessed as provided in this article.

(c) When the General Court of Justice fee and the facilities fee are assessed as provided in this article and credit is given for fees, costs, and commissions paid before the district court was established in the district, the actual amount thereafter received by the clerk shall be remitted to the State for the support of the General Court of Justice.

(d) When costs have been finally assessed according to prior law, but come into the hands of the clerk after the district court is established in the district, funds so received shall be disbursed according to prior law.

(e) Cost funds in the hands of the clerk at the time the district court is established shall be disbursed according to prior law. (1965, c. 310, s. 1; 1967, c. 691, s. 35.)

Cross Reference.—See note to § 7A-317.

§ 7A-319. Application of article.—The provisions of this article apply in each county of the State on and after the date that a district court is established therein. (1965, c. 310, s. 1; 1967, c. 691, s. 35.)

Cross Reference.—See note to § 7A-317.

§§ 7A-320 to 7A-339: Reserved for future codification purposes.

SUBCHAPTER VII. ADMINISTRATIVE OFFICE OF THE COURTS.

Article 29.

Administrative Office of the Courts.

§ 7A-340. Administrative Office of the Courts; establishment; officers.—There is hereby established a State office to be known as the Administrative Office of the Courts. It shall be supervised by a Director, assisted by an assistant director. (1965, c. 310, s. 1.)

§ 7A-341. Appointment and compensation of Director.—The Director shall be appointed by the Chief Justice of the Supreme Court, to serve at his pleasure. He shall receive the annual salary provided in the Budget Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally. Service as Director shall be equivalent to service as a superior court judge for the purposes of entitlement to retirement pay or to retirement for disability. (1965, c. 310, s. 1; 1967, c. 691, s. 36.)

Editor's Note. — The 1967 amendment rewrote the second sentence.

§ 7A-342. Appointment and compensation of assistant director and other employees.—The assistant director shall also be appointed by the Chief

Justice, to serve at his pleasure. The assistant director shall receive the annual salary provided in the Budget Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally.

The Director may appoint such other assistants and employees as are necessary to enable him to perform the duties of his office. (1965, c. 310, s. 1; 1967, c. 691, s. 37.)

Editor's Note. — The 1967 amendment rewrote the second sentence of the first paragraph and deleted "subject to the provisions of the State Personnel Act" following "employees" in the second paragraph.

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

(1) Collect and compile statistical data and other information on the judicial and financial operation of the courts and on the operation of other offices directly related to and serving the courts;

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

(3) Prescribe uniform administrative and business methods, systems, forms and records to be used in the offices of the clerks of superior court;

(4) Prepare and submit budget estimates of State appropriations necessary for the maintenance and operation of the Judicial Department, and authorize expenditures from funds appropriated for these purposes;

(5) Investigate, make recommendations concerning, and assist in the securing of adequate physical accommodations for the General Court of Justice;

(6) Procure, distribute, exchange, transfer, and assign such equipment, books, forms and supplies as are to be acquired with State funds for the General Court of Justice;

(7) Make recommendations for the improvement of the operations of the Judicial Department;

(8) Prepare and submit an annual report on the work of the Judicial Department to the Chief Justice, and transmit a copy to each member of the General Assembly;

(9) Assist the Chief Justice in performing his duties relating to the transfer of district court judges for temporary or specialized duty; and

(10) Perform such additional duties and exercise such additional powers as may be prescribed by statute or assigned by the Chief Justice. (1965, c. 310, s. 1.)

Amendment Effective January 1, 1971.— Session Laws 1967, c. 1049, s. 5, effective Jan. 1, 1971, will delete "prosecutors" following "solicitors" in subdivision (2).

§ 7A-344. Special duties of Director concerning representation of indigent persons.—In addition to the duties prescribed in G.S. 7A-343, the Director shall also:

(1) Supervise and coordinate the operation of the laws and regulations concerning the assignment of legal counsel for indigent persons under subchapter IX of this chapter to the end that all indigent persons are adequately represented;

(2) Advise and cooperate with the offices of the public defenders as needed to achieve maximum effectiveness in the discharge of the defender's responsibilities;

(3) Collect data on the operation of the assigned counsel and the public defender systems, and make such recommendations to the General

Assembly for improvement in the operation of these systems as appear to him to be appropriate; and

(4) Accept and utilize federal or private funds, as available, to improve defense services for the indigent. (1969, c. 1013, s. 4.)

Editor's Note. — The above section was inserted by Session Laws 1969, c. 1013. The section formerly numbered § 7A-344 was renumbered § 7A-345 by the 1969 act.

§ 7A-345. Duties of assistant director. — The assistant director is the administrative assistant to the Chief Justice, and his duties include the following:

(1) Assist the Chief Justice in performing his duties relating to the assignment of superior court judges;

(2) Assist the Supreme Court in preparing calendars of superior court trial sessions; and

(3) Performing such additional functions as may be assigned by the Chief Justice or the Director of the Administrative Office. (1965, c. 310, s. 1; 1969, c. 1013, s. 4.)

Editor's Note. — Before the enactment of Session Laws 1969, c. 1013, the above section was numbered § 7A-344. The 1969 act added a new section numbereed 7A-344 and renumbered former §§ 7A-344 and 7A-345 as 7A-345 and 7A-346.

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

Editor's Note. — Before the enactment of Session Laws 1969, c. 1013, the above section was § 7A-345. Session Laws 1969, c. 1013, s. 4 added a new section numbered § 7A-344 and renumbered former §§ 7A-344 and 7A-345 as 7A-345 and 7A-346.

Session Laws 1969, c. 1013, s. 5 amended this section by adding "public defenders" near the beginning of the section.

Amendment Effective January 1, 1971. —Session Laws 1967, c. 1049, s. 5, effective Jan. 1, 1971, will delete "prosecutors" following "solicitors" near the beginning of this section.

§§ 7A-347 to 7A-399: Reserved for future codification purposes.

SUBCHAPTER VIII. TRANSITIONAL MATTERS.

ARTICLE 30.

Transitional Matters.

§ 7A-400. Venue transfers into counties having no district court.— When a civil or criminal action is for any reason of venue transferred from a county wherein a district court has been established to a county wherein a district court has not been established, the action shall be placed on the criminal docket or the civil issue docket of the superior court of the county to which transfer is made. The superior court of the county to which transfer is made is hereby given jurisdiction to determine the action without regard to any other provisions of law pertaining to jurisdiction. (1965, c. 310, s. 1.)

§ 7A-401. Venue transfers into counties having district court.—When a civil or criminal action is for any reason of venue transferred from a county wherein a district court has not been established to a county wherein a district court has been established, the action shall be docketed in the superior court division of the county to which transfer is made. The superior court division of the county to which transfer is made is hereby constituted the proper division for, and is here-

by given jurisdiction to determine the action without regard to any other provision of law pertaining to jurisdiction or proper forum. (1965, c. 310, s. 1.)

ARTICLES 31 TO 35.

§§ 7A-402 to 7A-449: Reserved for future codification purposes.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination. — (a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter.

(b) Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation. (1969, c. 1013, s. 1.)

§ 7A-451. Scope of entitlement.—(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment or a five hundred dollars ($500.00) fine;
(2) A hearing on a petition for a writ of habeas corpus under chapter 17 of the General Statutes;
(3) A post-conviction proceeding under chapter 15 of the General Statutes;
(4) A hearing for revocation of probation, if counsel was provided at trial or if confinement of more than six months is possible as a result of the hearing;
(5) A hearing in which extradition to another state is sought;
(6) A proceeding for judicial hospitalization under chapter 122, article 11 (Mentally Ill Criminals), of the General Statutes;
(7) A civil arrest and bail proceeding under chapter 1, article 34, of the General Statutes; and
(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

(1) An in-custody interrogation;
(2) A pretrial identification procedure at which the presence of the indigent is required;
(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
(4) A preliminary hearing;
(5) Trial and sentencing; and

(6) Direct review of any judgment or decree, including review by the United States Supreme Court of final judgments or decrees rendered by the highest court of North Carolina in which decision may be had. (1969, c. 1013, s. 1.)

§ 7A-452. Source of counsel; fees; appellate records.—(a) Counsel for an indigent person shall be assigned by the court. In those districts which have a public defender, however, the public defender may tentatively assign himself or an assistant public defender to represent an indigent person, subject to subsequent approval by the court.

(b) Fees of assigned counsel and salaries and other operating expenses of the offices of the public defenders shall be borne by the State.

(c) In a county in which the district court has not yet been established, when an appeal is taken by an indigent person, the county shall make available a trial transcript and any other records required for adequate appellate review. (1969, c. 1013, s. 1.)

§ 7A-453. Duty of custodian of a possibly indigent person; determination of indigency.—(a) In districts which have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the public defender. The public defender shall make a preliminary determination as to the person's entitlement to his services, and proceed accordingly. The court shall make the final determination.

(b) In districts which do not have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court. The clerk shall make a preliminary determination as to the person's entitlement to counsel and so inform any district or superior court judge holding court in the county. The judge so informed may assign counsel. The court shall make the final determination.

(c) In any district, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the defender or the clerk of superior court, as the case may be, who shall take action as provided in this section.

(d) The duties imposed by this section upon authorities having custody of persons who may be indigent are in addition to the duties imposed upon arresting officers under G.S. 15-47. (1969, c. 1013, s. 1.)

§ 7A-454. Supporting services.—The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State. (1969, c. 1013, s. 1.)

§ 7A-455. Partial indigency; liens; acquittals.—(a) If, in the opinion of the court, an indigent person is financially able to pay a portion, but not all, of the value of the legal services rendered for him by assigned counsel or by the public defender, and other necessary expenses of representation, he shall order the partially indigent person to pay such portion to the clerk of superior court for transmission to the State treasury.

(b) In all cases the court shall fix the money value of services rendered by assigned counsel or the public defender, and such sum, to the extent not reimbursed to the State by the indigent person as provided in subsection (a), plus any sums allowed by the court for other necessary expenses of representing the indigent person, shall be entered as a judgment in the office of the clerk of superior court, and shall constitute a lien as prescribed by the general law of the State applicable to judgments. Funds collected by reason of any such judgment shall be deposited in the State treasury.

(c) If the indigent person is not finally convicted, the foregoing provisions with respect to partial payments and liens shall not be applicable. (1969, c. 1013, s. 1.)

§ **7A-456. False statements; penalty.**—A false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes perjury, and upon conviction thereof, the defendant may be punished as provided in G.S. 14-209. (1969, c. 1013, s. 1.)

§ **7A-457. Waiver of counsel; pleas of guilty.**—(a) An indigent person who has been informed of his rights under this subchapter may, in writing, waive any right granted by this subchapter, if the court finds of record that at the time of the waiver the indigent person acted with full awareness of his rights and of the consequences of a waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged. A waiver shall not be allowed in a capital case.

(b) If an indigent person waives counsel as provided in subsection (a), and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. An indigent person without counsel shall not be allowed to plead guilty to a capital offense. (1969, c. 1013, s. 1.)

§ **7A-458. Counsel fees.**—In districts which do not have a public defender, the court shall fix the fee to which an attorney who represents an indigent person is entitled. In doing so, the court shall allow a fee based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, the time, effort and responsibility involved, and the fee usually charged in similar cases. Fees shall be fixed by the district court judge for actions or proceedings finally determined in the district court and by the superior court judge for actions or proceedings originating in, heard on appeal in, or appealed from the superior court. Even if the trial, appeal, hearing or other proceeding is never held, preparation therefor is nevertheless compensable. (1969, c. 1013, s. 1.)

§ **7A-459. Implementing regulations by State Bar Council.**—In districts which do not have a public defender, the North Carolina State Bar Council shall make rules and regulations consistent with this article relating to the manner and method of assigning counsel, the procedure for the determination of indigency, the waiver of counsel, the adoption and approval of plans by any district bar regarding the method of assignment of counsel among the licensed attorneys of the district, and such other matters as shall provide for the protection of the constitutional rights of all indigent persons and the reasonable allocation of responsibility for the representation of indigent persons among the licensed attorneys of this State. Such rules and regulations shall not become effective until certified to and approved by the Supreme Court of North Carolina. (1969, c. 1013, s. 1.)

§§ **7A-460 to 7A-464:** Reserved for future codification purposes.

ARTICLE 37.

The Public Defender.

§ **7A-465. Public defender; defender districts; qualifications; compensation.**—The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office. The compensation of the defender is the same as that of a full-time district solicitor, and is paid by the State. (1969, c. 1013, s. 1.)

§ **7A-466. Selection of defender; term; removal.**—The public defender shall be appointed by the Governor from a list of not less than two names and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The term of office of the public defender is four years beginning January 1, 1970, and each fourth year thereafter.

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

A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a district court judge. (1969, c. 1013, s. 1.)

§ **7A-467. Assistant defenders; assigned counsel.** — Each public defender is entitled to at least one full-time assistant public defender, and to such additional assistants, full-time or part-time, as may be authorized by the Administrative Office of the Courts. Assistants are appointed by the public defender and serve at his pleasure. Compensation of assistants shall be as provided in the biennial budget appropriations act. Assistants shall perform such duties as may be assigned by the public defender.

A member of the district bar who consents to such service may be assigned by the public defender to represent an indigent person, and when so assigned is entitled to the services of the defender's office to the same extent as a full-time public defender. In assigning assistant defenders and members of the bar generally the defender shall consider the nature of the case and the skill of counsel, to the end that all indigent persons are adequately represented.

If a conflict of interests prohibits the public defender from representing an indigent person, or in unusual circumstances when, in the opinion of the court the proper administration of justice requires it, the court may assign any member of the district bar to represent an indigent person, and when so assigned, counsel is entitled to the services of the defender's office to the same extent as counsel assigned by the public defender.

Members of the bar assigned by the defender or by the court are compensated in the same manner as assigned counsel are compensated in districts which do not have a public defender. (1969, c. 1013, s. 1.)

§ **7A-468. Investigative services.**—Each public defender is entitled to the services of one investigator, to be appointed by the defender to serve at his pleasure. The Administrative Officer of the Courts shall fix the compensation of each investigator, and may authorize additional investigators, full-time or part-time, upon a showing of need. (1969, c. 1013, s. 1.)

§ **7A-469. Support for office of defender.**—The Administrative Officer of the Courts shall procure office equipment and supplies for the public defender, and provide secretarial and library support from State funds appropriated to his office for this purpose. (1969, c. 1013, s. 1.)

§ **7A-470. Reports.**—The public defender shall keep appropriate records and make periodic reports, as requested, to the Administrative Office of the Courts on matters related to the operation of his office. (1969, c. 1013, s. 1.)

Articles 38, 39.

§§ **7A-471 to 7A-499:** Reserved for future codification purposes.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

ARTICLE 40.

North Carolina Courts Commission.

§ 7A-500. Creation; members; terms; qualifications; vacancies.—The North Carolina Courts Commission is hereby created. It shall consist of fifteen regular members, seven of whom shall be appointed by the President of the Senate, seven by the Speaker of the House, and one by the President of the Senate and the Speaker of the House jointly. At least eight of the appointees shall be members or former members of the North Carolina General Assembly. Two of the appointees shall be laymen. Four of the appointees of the President of the Senate shall serve for two years, and three for four years. Four of the appointees of the Speaker of the House shall serve for two years, and three for four years. The joint appointee shall serve for four years. All initial terms shall begin July 1, 1969. Subsequent terms shall begin July 1 of odd-numbered years. A vacancy in Commission membership shall be filled by the remaining members of the Commission to serve for the remainder of the term vacated. A member whose term expires may be reappointed. (1969, c. 910, s. 1.)

§ 7A-501. Ex officio members.—The following additional members shall serve ex officio: The Administrative Officer of the Courts; a representative of the North Carolina State Bar appointed by the Council thereof; and a representative of the North Carolina Bar Association appointed by the Board of Governors thereof. Ex officio members shall have no vote. (1969, c. 910, s. 1.)

§ 7A-502. Commission supersedes temporary commission of same name.—The Commission shall succeed to the records and research in progress of the temporary Courts Commission established by Resolution 73 of the 1963 General Assembly. (1969, c. 910, s. 1.)

§ 7A-503. Duties.—It shall be the duty of the Commission to make continuing studies of the structure, organization, jurisdiction, procedures and personnel of the Judicial Department and of the General Court of Justice and to make recommendations to the General Assembly for such changes therein as will facilitate the administration of justice. (1969, c. 910, s. 1.)

§ 7A-504. Chairman; meetings; compensation of members. — The Commission shall elect its own chairman, and shall meet at such times and places as the chairman shall designate. The facilities of the State Legislative Building shall be available to the Commission. The members of the Commission shall receive the same per diem and allowances as members of State boards and commissions generally. (1969, c. 910, s. 1.)

§ 7A-505. Supporting services.—The Commission is authorized to contract for such professional and clerical services as is necessary in the proper performance of its duties. (1969, c. 910, s. 1.)

Chapter 8.
Evidence.

Article 1.
Statutes.

Article 2.
Grants, Deeds and Wills.

Article 3.
Public Records.

Article 3A.
Findings, Records and Reports of Federal Officers and Employees.

Article 4.
Other Writings in Evidence.

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

ARTICLE 1

Statutes.

§ 8-1. Printed statutes and certified copies evidence.—All statutes, or joint resolutions, passed by the General Assembly may be read in evidence from

the printed statute book; or a copy of any act of the General Assembly certified by the Secretary of State shall be received in evidence in every court. (1826, c. 7; R. C., c. 44, ss. 4, 5; Code, ss. 1339, 1340; Rev., ss. 1592, 1593; C. S., s. 1747.)

Editor's Note.—For case law survey on evidence, see 41 N.C.L. Rev. 476 (1963); 44 N.C.L. Rev. 1005 (1966); 45 N.C.L. Rev. 934 (1967).

Public Statute Admissible.—Where the public printer has published a certain act with other public acts of the General Assembly, it is made, presumptively at least, a part of the public laws of the State and every person having occasion to do so has the right to read it in evidence in any court of the State as the law. Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896).

Private Statute Not Admissible.—The statute incorporating the North Carolina Railroad Company is a private act; and it is error to permit it to be read and commented on to the court or jury until it has been properly introduced as evidence. Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Same—Question of Law.—Whether the statute, or some enactment in it, is public or private, is a question of law, which the court must determine, in the absence of statutory enactment declaring and settling its nature. Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Journal of Legislature.—A copy of the journal of the legislature deposited with the Secretary of State is not evidence for any purpose. Wilson v. Markley, 133 N.C. 616, 45 S.E. 1023 (1903), wherein the court said: "It is the journal, which we understand to be the original, which is to be filed in the office of the Secretary of State, and it is this original or an exemplification made therefrom by him which, when competent, is to be used in evidence."

Applied in C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

§ 8-2. Martin's collection of private acts.—Any private act published by Francis X. Martin, in his collection of private acts, shall be received in evidence in every court. (1826, c. 7, s. 2; R. C., c. 44, s. 5; Code, s. 1340; Rev., s. 1593; C. S., s. 1748.)

§ 8-3. Laws of other states or foreign countries.—(a) A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof.

(b) Any party may exhibit a copy of the law of another state, territory, or foreign country copied from a printed volume of the laws of such state, territory, or country on file in

(1) The offices of the Governor or the Secretary of State, and duly certified by the Secretary of State, or
(2) The State Library and certified as provided in G.S. 125-6, or
(3) The Supreme Court Library and certified as provided in G.S. 7A-13 (f).

(1823, c. 1193, ss. 1, 3, P. R.; R. C., c. 44, s. 3; C. C. P., s. 360; Code, s. 1338; Rev., s. 1594; C. S., s. 1749; 1967, c. 565.)

Editor's Note.—The 1967 amendment designated the first three sentences of this section as subsection (a), deleted the former fourth sentence of the section, and added subsection (b).

When any question arises as to the law of any other state or territory, or of the United States, or of any foreign country, the courts of this State are now required to take judicial notice thereof. See § 8-4 and note. Prior to the enactment of such section the rule was otherwise and such laws were required to be proved. Gooch v. Faucett, 12 N.C. 270, 29 S.E. 362 (1898); Miller v. Atlantic Coast Line R.R., 154 N.C. 441, 70 S.E. 838 (1911); Kelly Spring-

field Tire Co. v. Lester, 192 N.C. 642, 135 S.E. 778 (1926). These cases and the others cited in this annotation were decided prior to § 8-4 and should be read with that fact in mind.

Instructions to Jury.—Where the foreign law has been proved it is the duty of the court to instruct the jury as to the meaning of the law, its applicability to the case at hand, and its effect on the case, and it is error to refer the whole case to the jury without instructions. Hooper v. Moore, 50 N.C. 130 (1857).

Publication of Foreign Laws Admissible.—A book purporting to be the publication of the statute laws of another state, and to be published by the authority of such state, is admissible as evidence of such laws. Balk v. Harris, 122 N.C. 64, 30 S.E. 318; Copeland v. Collins, 122 N.C. 619, 30 S.E. 315 (1898).

Same—Printed Copy Admissible. — By the terms of this section, a printed copy of the acts of the legislature of another state, is admissible in our courts to prove the statute law of such other state. Under the law as it stood prior to the enactment of this section, a printed copy of the acts of the legislature of a foreign state was not admissible in evidence. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894).

United States Agricultural Regulations Judicially Noticed.—The regulations of the United States Department of Agriculture concerning the transportation of cattle, are not foreign laws within the meaning of this section, and the courts are required to take judicial notice of them. State v. Railroad, 141 N.C. 846, 54 S.E. 294 (1906).

Presumption as Regards Common Law.—In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister state, except in those states whose jurisprudence is not founded on the common law. Miller v. Atlantic Coast Line R.R., 154 N.C. 441, 70 S.E. 838 (1911).

Same—Question for Jury.—Where the common law of another state is proved, the court must leave the evidence of what that law is to the jury and cannot inform them what the law is. Moore v. Gwynn, 27 N.C. 187 (1844).

Witnesses.—Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under this section, testify to and explain them before courts and juries. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894).

The law of another state may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other state, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

A transcript of a statute duly certified by the Secretary of State is evidence at all times of its being in force according to its terms unless a repeal is shown. State v. Cheek, 35 N.C. 114 (1851).

The certificate of the Secretary of State, in relation to the statutes of another state, given in pursuance of this section is evidence in criminal and civil cases. State v. Patterson, 24 N.C. 346 (1842).

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State. (1931, c. 30.)

Cross Reference.—As to judicial notice of private statutes, see § 1-157.

Survival of Action under Law of Another State.—In an action to recover for the alleged tortious conversion of personalty by a nonresident, instituted in this State after the death of the nonresident, against his personal representative, the failure of the complaint to allege that the cause of action survived under the laws of the state in which it arose does not render the complaint demurrable. Suskin v. Hodges, 216 N.C. 333, 4 S.E.2d 891 (1939).

Negligent Injury Occurring in Another State.—In an action instituted in this State to recover for negligent injury occurring in another state, liability must be determined according to the substantive law of such other state, of which the North Carolina courts must take notice. Thames v. Nello L. Teer Co., 267 N.C. 565, 148 S.E.2d 527 (1966).

Collision in Virginia. — In an action brought in this State under the Tort Claims Act for a collision which occurred in Virginia, the substantive law of Virginia and the procedural law of North Carolina apply. Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969).

Applied in Handley Motor Co. v. Wood, 238 N.C. 468, 78 S.E.2d 391 (1953); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957); Kirby v. Fulbright, 262 N.C. 144, 136 S.E.2d 652 (1964); Arnold v. Ray Charles Enterprises, Inc., 264 N.C. 92, 141 S.E.2d 14 (1965). Suskin v. Hodges, 216 N.C. 333, 4 S.E.2d 891 (1939); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911, 148 A.L.R. 1126 (1943); Lewis v. Furr, 228 N.C. 89, 44 S.E.2d 604 (1947); Caldwell v. Abernathy, 231 N.C. 692, 58 S.E.2d 763 (1950); Johnson v. Salsbury, 232 N.C. 432, 61 S.E.2d 327 (1950).

§ 8-5. Town ordinances certified.—In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance. (1899, c. 277, s. 2; Rev., s. 1595; C. S., s. 1750.)

Cross Reference.—As to how ordinances are pleaded and proved, see § 160-272.

When Certification Unnecessary. — The certification of a town ordinance as required by this section, is only prima facie evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the official records of the town by the proper officer, which shows its passage. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1929).

Evidence Insufficient to Rebut Prima Facie Case.—When the defendant, convicted of the violation of a city ordinance, on appeal introduces in evidence the minutes of the meeting of the governing authorities of the town held on the date when the purported ordinance was alleged to have been adopted, which does not show its passage on that date, it is not conclusive that the ordinance had not been passed at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction. State v. Gill, 195 N.C. 425, 142 S.E. 328 (1928).

No Evidence of Certification or Publication.—The refusal to permit police officer to testify on cross-examination as to existence and contents of a paper-writing which purported to be an ordinance of the city, was not error where there was no evidence that purported ordinance had been certified, as required by this section, or that it had been printed and published by the city as provided in § 160-272. Toler v. Savage, 226 N.C. 208, 37 S.E.2d 485 (1946).

Cited in State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); Black v. Penland, 255 N.C. 691, 122 S.E.2d 504 (1961).

ARTICLE 2.

Grants, Deeds and Wills.

§ 8-6. Copies certified by Secretary of State or State Archivist.—Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the Secretary of State, or in the Department of Archives and History, which copies, upon certification by the Secretary of State as to those records in his office, or the State Archivist as to those records in the Department of Archives and History, as true copies, shall be as good evidence, in any court, as the original. (1822, c. 1154, P. R.; R. C., c. 44, s. 6; Code, s. 1341; Rev., s. 1596; C. S., s. 1751; 1961, c. 740, s. 1.)

In General.—This section does not make the copies better evidence than the original; and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. Richards v. W.M. Ritter Lumber Co., 158 N.C. 54, 73 S.E. 485 (1911).

Certification by Clerk of Secretary of State.—See § 8-9.

Abstract Competent to Show Title. — Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the State. Marshall v. Corbett, 137 N.C. 555, 50 S.E. 210 (1905).

Applied in Meekins v. Miller, 245 N.C. 567, 96 S.E.2d 715 (1957).

§ 8-7. Certified copies of grants and abstracts.—For the purpose of showing title from the State of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the Secretary

of State, or in the Department of Archives and History, given in abstract or in full, and with or without the signature of the Governor and the great seal of the State appearing upon such record, shall be competent evidence in the courts of this State or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the State to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 1; C. S., s. 1752; 1961, c. 740, s. 2.)

Section Constitutional.—This section is constitutional and valid. Howell v. Hurley, 170 N.C. 401, 87 S.E. 107 (1915).

Copy Conclusive as to Regularity of Original.—An abstract of a grant of the State's land by the Secretary of State imports the regularity of its issuance, and that the constitutional mandate of affixing the seal of the original had been legally complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. Howell v. Hurley, 170 N.C. 401, 87 S.E. 107 (1915).

§ 8-8. **Certified copies of grants and abstracts recorded.** — Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the State of North Carolina to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 2; C. S., s. 1753.)

Cross Reference.—As to registration of certified copies of any deeds or writings, and their use in evidence, see § 47-31.

§ 8-9. **Copies of grants certified by clerk of Secretary of State validated.**—All copies of grants heretofore issued from the office of the Secretary of State, duly certified under the great seal of the State, and to which the name of the Secretary has been written or affixed by the clerk of the said Secretary of State, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this State when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the Secretary of State in person and duly registered. (1901, c. 613; Rev., s. 1597; C. S., s. 1754.)

Editor's Note.—Prior to the enactment of this section it was consistently held that the clerk of the Secretary of State had no power to certify and affix the great seal of the State to copies of grants and other papers from the Secretary of State's office. Beam v. Jennings, 96 N.C. 82, 2 S.E. 245 (1887), but such acts on the part of the clerk are now validated by the provisions of this section.

§ 8-10. **Copies of grants in Burke.**—Copies of grants issued by the State within the county of Burke prior to the destruction of the records of said county by General Stoneman in the year one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant. (1901, c. 513; Rev., s. 1610; C. S., s. 1755.)

Cross Reference.—As to copies of destroyed record as evidence generally, see § 98-1 et seq.

§ 8-11. **Copies of grants in Moore.**—Copies of grants for land situated in Moore County and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the Secretary of State, shall have

the force and effect of the originals and be evidence in all courts. (1903, c. 214; Rev., s. 1613; C. S., s. 1756.)

§ 8-12. Copies of grants in Onslow.—The copies of grants made by the register of deeds of Onslow County under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow County issued prior to the year one thousand eight hundred, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said chapter 434 of the laws of one thousand nine hundred and seven, shall be received as evidence in all courts of the State, and certified copies therefrom shall be received as evidence. (1907, c. 434; C. S., s. 1757.)

§ 8-13. Certain deeds dated before 1835 evidence of due execution.—In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the State of North Carolina are grantees and bearing date prior to the year one thousand eight hundred and thirty-five and purporting to have been filed and recorded in the office of the Secretary of State of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for or on behalf of any society, tribe, nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the General Assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation of persons, shall be prima facie evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be prima facie evidence of the truth thereof in any such actions. (1915, c. 75; C. S., s. 1758.)

§ 8-14. Certified copies of maps of Cherokee lands.—Certified copies by the Secretary of State of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in chapter one hundred and seventy-five of the laws of one thousand nine hundred and eleven, shall have the same force and effect and be entitled to the same force and effect as evidence as certified copies of the whole or parts of the original maps. (1911, c. 175; C. S., s. 1759.)

§ 8-15. Certified copies of certain surveys and maps obtained from the State of Tennessee.—A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the State of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the Secretary of State under the provisions of chapter one hundred and sixty-two of the laws of one thousand nine hundred and thirteen, shall, when certified under the hand and seal of the Secretary of State, be competent evidence in the trial of any action in the courts of the State. (1913, c. 162; C. S., s. 1760.)

§ 8-16. Evidence of title under H.E. McCulloch grants.—In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or

powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made. (1819, c. 1021, P. R.; R. C., c. 44, s. 1; Code, s. 1336; Rev., s. 1600; C. S., s. 1761.)

§ 8-17. Conveyances or certified copies evidence of title under McCulloch.—In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts numbers one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence. (1807, c. 724, P. R.; R. C., c. 44, s. 2; Code, s. 1337; Rev., s. 1601; C. S., s. 1762.)

§ 8-18. Certified copies of registered instruments evidence.—A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the State where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (1846, c. 68, s. 1; R. C., c. 37, s. 16; Code, s. 1251; 1893, c. 119, s. 2; Rev., s. 1598; C. S., s. 1763.)

Cross Reference.—As to recordation and use in evidence of certified copies generally, see § 47-31.

This section is not applicable when the original instrument is offered in evidence with the certificate of the register of deeds appearing thereon with respect to the time filed for registration and the book and page where it has been registered and the date of such registration. State v. Dunn, 264 N.C. 391, 141 S.E.2d 630 (1965).

Certified Copy as Evidence.—The record of a registered deed is competent evidence without producing the original where no rule of court for the production of the original has been issued. Ratliff v. Ratliff, 131 N.C. 425, 42 S.E. 887 (1902).

Copy of Registered Bond.—The "registry" or copy of the record of a bond to make title to land made by a deceased person, under which a deed has been made by the administrator of said obligor, is within the spirit and meaning of this section, and is admissible without accounting for the absence of the original. Doe v. Shelton, 46 N.C. 370 (1854).

Same—Official Bond.—Inasmuch as the duly certified copy of the record of any instrument required to be registered is admissible as full and sufficient evidence of such instrument, and as the register of deeds is required to register and keep the bond of the superior court clerk, a duly certified copy of the record of such bond is competent evidence of its provisions. State ex rel. Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896).

Lack of Seal No Effect.—A copy of a grant from the register's office, which affirmatively shows that it was issued under the great seal of the State, is admissible in evidence, though the registry does not show the impress of the seal, or scroll to indicate it. And while the seal may be necessary to authenticate the grant, it will be presumed to have been affixed as required by law. Aycock v. Raleigh &. A. Air-Line R.R., 89 N.C. 321 (1883).

Signature of Clerk Essential.—The failure of the clerk to sign his name to the certificate for registration, a requirement found in the provisions of § 47-14, renders the instrument inadmissible as evidence under this section. Woodlieff v. Woodlieff, 192 N.C. 634, 135 S.E. 612 (1926).

Production of Original to Correct Mistakes.—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the

deed was acknowledged. Brown v. Hutchinson, 155 N.C. 205, 71 S.E. 302 (1911).

Parol Evidence to Explain Variance. — Where the original deed was lost, and it was contended that there was a material variance between the certified copy and the original deed, parol evidence to prove the correct description contained in the original instrument was rejected, this section being construed as to have no application to such a case. Hooper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892).

Time and Manner of Objecting. — A party against whom the registry of a deed (or other instrument), or a copy thereof has been introduced in evidence, cannot then raise the objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required the production of the original in the way provided by this section. Devereux v. McMahon, 108 N.C. 134, 12 S.E. 902 (1891).

Issue of Tenancy in Common.—Where defendant in partition proceedings denies the allegations in the petition that petitioner is a tenant in common with defendants and seized of an undivided fee simple interest in the land, but does not plead sole seizin, petitioner is not required to prove title as in an action in ejectment, and petitioner's record evidence is held sufficient to be submitted to the jury upon the sole issue of whether petitioner is a tenant in common with defendants in the land. Tally v. Murchison, 212 N.C. 205, 193 S.E. 148 (1937).

Cited in Merchants & Farmers Bank v. Sherrill, 231 N.C. 731, 58 S.E.2d 741 (1950).

§ 8-19. Common survey of contiguous tracts evidence.—Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner. (1869-70, c. 34, ss. 1, 2; Code, s. 1277; Rev., s. 1505; C. S., s. 1764.)

When Possession of Part Equivalent to Whole.—Under the provisions of this section, by recording and registering a survey of the outer lines of several contiguous tracts, so as to exhibit their outer boundaries, as if the whole territory had been covered by one tract, a possession at any one point on either of the separate tracts will become equivalent to a possession of "the whole and every part." McNamee v. Alexander, 109 N.C. 242, 13 S.E. 777 (1891).

Sufficiency of Proof.—The surveyor's testimony that the map is correct is sufficient to make it competent. Greenleaf v. Bartlett, 146 N.C. 495, 60 S.E. 419 (1908).

§ 8-20. Certified copies registered in another county and used in evidence.—A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the State where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (1846, c. 68; R. C., c. 37, s. 16; Code, s. 1253; 1893, c. 119, s. 3; Rev., s. 1599; C. S., s. 1765.)

Cross Reference.—As to variance between original and copy, see note to § 8-18.

Cited in Universal Fin. Co. v. Clary, 227 N.C. 247, 41 S.E.2d 760 (1947).

§ 8-21. Deeds and records thereof lost, presumed to be in due form.—Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance, and that it was made upon sufficient consideration. (1854, c. 17; R. C., c. 44, s. 14; Code, s. 1348; Rev., s. 1602; C. S., s. 1766.)

Cross Reference.—As to burnt and lost records, see § 98-1 et seq.

Presumption of Regularity.—The registration of a deed is presumed to be correct. Cochran v. Linville Improvement Co., 127 N.C. 386, 37 S.E. 496 (1900).

§ 8-22. Local: recitals in tax deeds in Haywood and Henderson.—In all legal controversies touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited. (R. C., c. 44, s. 11; Code, s. 1346; Rev., s. 1606; C. S., s. 1767.)

§ 8-23. Local: copies of records from Tyrrell.—Copies of records of the county of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the Superior Court of Tyrrell County as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in Washington County, shall be treated in all respects as originial records and received as evidence in all courts of Washington County. (1903, c. 199; Rev., s. 1612; C. S., s. 1768.)

§ 8-24. Local: records of partition in Duplin.—The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees. (1907, c. 395, ss. 3, 4; C. S., s. 1769.)

§ 8-25. Local: records of wills in Duplin.—The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior and up to the January term of the County Court of Duplin County, one thousand eight hundred and thirty, and entered in a book designated as Records of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills. (1907, c. 395, ss. 1, 2; C. S., s. 1770.)

§ 8-26. Local: records of deeds and wills in Anson.—The copies of the deeds and deed books and of the wills and will books made in Anson County under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds

and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpoena or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect, as the original books. (1905, c. 663, s. 3; Rev., s. 1615; C. S., s. 1771.)

§ 8-27. Local: records of wills in Brunswick.—Under the provisions of chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the Superior Court of Brunswick County, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the books of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted. (1908, s. 106; C. S., s. 1772.)

§ 8-28. Copies of wills.—Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence. (1784, c. 225, s. 6, P. R.; R. C., c. 119, s. 21; Code, s. 2175; Rev., s. 1603; C. S., s. 1773.)

Cross Reference.—As to probate of copy of lost will, see §§ 98-4, 98-5.

Certified Copy as Evidence.—Under this section a certified copy of a will is competent evidence in any case wherein the contents of the will would be competent evidence. Hampton v. Hardin, 88 N.C. 592 (1883).

Copy of Will Made in Another State. — See note to § 8-32.

§ 8-29. Copies of wills in Secretary of State's office.—Copies of wills filed or recorded in the office of the Secretary of State, attested by the Secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon. (1852, c. 172; R. C., c. 44, s. 12; 1856-7, c. 22; Code, s. 2181; Rev., s. 1607; C. S., s. 1774.)

§ 8-30. Copies of wills recorded in wrong county.—Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the State, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this State. (1858-9, c. 18; Code, s. 2182; Rev., s. 1608; C. S., s. 1775.)

§ 8-31. Copy of will proved and lost before recorded.—When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in chapter 98 entitled Burnt and Lost Records. (1866-7, c. 127; Code, s. 2183; Rev., s. 1609; C. S., s. 1776.)

§ 8-32. Certified copies of deeds and wills from other states.—In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this State, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of Congress or by the proper officer of the said state or territory, shall be read as evidence. (1802, c. 623, P. R.; R. C., c. 44, s. 9; Code, s. 1344; Rev., s. 1619; C. S., s. 1777.)

In General.—Records of other states, to be used in evidence in this State, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it have one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. Hunter v. Kelly, 92 N.C. 285 (1885); Kinseley v. Rumbough, 96 N.C. 193, 2 S.E. 174 (1887); Riley v. Carter, 158 N.C. 484, 74 S.E. 463 (1912).

Test for Admission under Section.—The copy, to be admissible in evidence, must be of such a will as would be admitted to record in North Carolina; hence where a will was executed in Tennessee and from the certificate of probate on the exemplified copy produced here, it appears that but one witness swore that he subscribed the will as witness in the presence of the testator and other witness to the will did not appear to have been sworn at all, it was held that such a will should not be read in evidence. Blount v. Patton, 9 N.C. 237 (1822).

Properly Authenticated Copy Admissible.—A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state, that the person who gave that certificate was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will to authorize its reception as evidence in our courts. Knight v. Wall, 19 N.C. 125 (1836).

Incomplete Authentication. — Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence. Hunter v. Kelly, 92 N.C. 285 (1885).

§ 8-33. Copies of lost records in Bladen.—The clerk of the Superior Court of Bladen County shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed. (1895, c. 415; 1903, c. 65; Rev., s. 1611; C. S., s. 1778.)

ARTICLE 3.

Public Records.

§ 8-34. Copies of official writings.—Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the Governor, Treasurer, Auditor, Secretary of State, Attorney General, Adjutant General, or the State Department of Archives and History, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county. (1792, c. 368, s. 11, P. R.; R. C., c. 44, s.

8; 1868-9, c. 20, s. 21; 1871-2, c. 91; Code, ss. 715, 1342; Rev., s. 1616; C. S., s. 1779; 1961, c. 739.)

Copy Defined. — A copy, within the meaning of this section, is a transcript of the original—a writing exactly like another writing. State v. Champion, 116 N.C. 987, 21 S.E. 700 (1895). See Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

The Copy Certified.—The power of an officer, who is the keeper of certain public records, to certify copies is confined to a certification of their contents as they appear by the records themselves, and the records must, therefore, be so certified, for he has no authority to certify to the substance of them, nor that any particular fact, as a date, appears on them. Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

A "Copy" of the Instrument Required.—This section makes competent only the "copies" of official records, etc., and a mere certified statement from the register's office is only evidence of the correctness of the record, and cannot be admitted in evidence in place of the original record. State v. Champion, 116 N.C. 987, 21 S.E. 700 (1895), approved in Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

Original Record Admitted.—This section does not prevent the admission in evidence of the original record itself. State v. Voight, 90 N.C. 741 (1884); State ex rel. Carolina Iron Co. v. Abernathy, 94 N.C. 545 (1886). See State v. Hunter, 94 N.C. 829 (1886); Charles S. Riley & Co. v. Carter, 165 N.C. 334, 81 S.E. 414 (1914); Blalock v. Whisnant, 216 N.C. 417, 5 S.E.2d 130 (1939).

Original Record Lost.—A certified copy of a petition in a suit is admissible in evidence upon proof of the loss of the original records. Weeks v. McPhail, 128 N.C. 130, 38 S.E. 472 (1901).

Where a superior court record is lost, a certified copy of the transcript of the same in the appellate court is sufficient evidence of the record. Aiken v. Lyon, 127 N.C. 171, 37 S.E. 199 (1900).

Incriminating Evidence Contained in Document.—Where the document admitted under the provisions of this section contains incriminating evidence, the defense often interposed by the accused is that to admit such paper would be in violation of the constitutional right of the defendant on trial for crime to have opportunity to confront his accusers and the witnesses offered to sustain the charge. It is settled, however, that this section is not violative of this constitutional right, since these provisions constitute a well-recognized exception to the privilege given by the Constitution. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894); State v. Dowdy, 145 N.C. 432, 58 S.E. 1002 (1907).

Cited in State v. Beamon, 2 N.C. App. 583, 163 S.E.2d 544 (1968).

§ 8-35. **Authenticated copies of public records.**—All copies of bonds, contracts, notes, mortgages, or other papers relating to or connected with any loan, account, settlement of any account or any part thereof, or other transaction, between the United States or any state thereof or any corporation all of whose stock is beneficially owned by the United States or any state thereof, either directly or indirectly, and any person, natural or artificial; or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the State or the United States or of any corporation all of whose stock is beneficially owned by the United States or by any state thereof, directly or indirectly, shall be received in evidence and entitled to full faith and credit in any of the courts of this State when certified to by the chief officer or agent in charge of such public office or of such office of such corporation, or by the secretary or an assistant secretary of such corporation, to be true copies, and authenticated under the seal of the office, department, or corporation concerned. Any such certificate shall be prima facie evidence of the genuineness of such certificate and seal, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed. (1891, c. 501; Rev., s. 1617; C. S., s. 1780; 1939, c. 149.)

Cross References. — As to records judicially noticed, see § 8-3 and notes thereto, and also §§ 1-157, 8-4.

The matters appearing in transcript of any paper on file or records of any public office of the State or United States, being relevant to an account which a referee was directed to take, are admissible in evidence by virtue of the provisions of this section. Wallace Bros. v. Douglas, 114 N.C. 450,

19 S.E. 668 (1894). See Hinton v. Lake Drummond Canal Co., 166 N.C. 484, 82 S.E. 844 (1914).

Authentication Essential. — Proper authentication is essential to the admission in evidence of the copies of the original records, and papers purporting to be exemplification from the Treasury Department of the United States, not authenticated, will not be admitted. Mott v. Ramsay, 92 N.C. 152 (1885).

In order for this section to apply it must affirmatively appear that the evidence was offered as a properly authenticated copy of a public record in accordance with the section. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951).

Parol Evidence Inadmissible.—The contents of the original record may not be proved by parol evidence under this section, but must be shown by a certified copy. National Sur. Co. v. Brock, 176 N.C. 507, 97 S.E. 417 (1918).

This section has no application to an uncertified copy of a coroner's report but only to a duly certified copy. Robinson v. Life & Cas. Ins. Co., 255 N.C. 669, 122 S.E.2d 801 (1961).

A record of the Department of Motor Vehicles, disclosing that defendant's license was in a state of revocation under official Department action during the period defendant was charged with driving on a highway of this State, is competent under this section when the record is certified under seal of the Department. State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

Applied in Dunes Club, Inc. v. Cherokee Ins. Co., 259 N.C. 293, 130 S.E.2d 625 (1963).

§ 8-36. **Authenticated copy of record of administration.** — When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of such state or territory, shall be allowed as evidence. (1834, c. 4; R. C., c. 44, s. 7; Code, s. 1343; Rev., s. 1618; C. S., s. 1781.)

§ 8-37. **Certificate of Commissioner of Motor Vehicles as to ownership of automobile.**—In all civil actions, arising out of an injury to person or property by reason of the operation of a motor vehicle of any kind, evidence as to the display numbers on a particular car, a copy of the record kept by the Commissioner of Motor Vehicles of such display numbers and the persons who obtained them, certified under the hand and seal of said Commissioner of Motor Vehicles shall be competent evidence of the ownership of the motor vehicle inflicting the injury or doing the damage. (1931, c. 88, s. 1; 1943, c. 650.)

Cross Reference.—As to registration and certificate of title for motor vehicles generally, see § 20-50 et seq.

Applied in Woodruff v. Holbrook, 255 N.C. 740, 122 S.E.2d 709 (1961).

Article 3A.

Findings, Records and Reports of Federal Officers and Employees.

§ 8-37.1. **Finding of presumed death.**—A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P.L. 408, ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this State as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance. (1945, c. 731, s. 1.)

§ 8-37.2. **Report or record that person missing, interned, captured, etc.**—An official written report or record, or duly certified copy thereof, that a

person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the act referred to in § 8-37.1, or by any other law of the United States to make same, shall be received in any court, office or other place in this State as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be. (1945, c. 731, s. 2.)

§ 8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.—For the purposes of §§ 8-37.1 and 8-37.2 any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify. (1945, c. 731, s. 3.)

ARTICLE 4.

Other Writings in Evidence.

§ 8-38. Proof by attesting witness not required. — It is not necessary to prove by the attesting witness instruments to the validity of which the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto: Provided, that this section shall not affect the method and manner of proving instruments for registration. (1905, c. 204; Rev., s. 1604; C. S., s. 1782.)

Cross Reference. — As to essentials of registration, see § 47-1 et seq. and § 31-12 et seq.

§ 8-39. Parol evidence to identify land described.—In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest. (1891, c. 465, s. 1; Rev., s. 1605; C. S., s. 1783.)

Cross Reference. — As to vagueness of description in deeds, see § 39-2 and note thereto.

In General.—A deed which fails to describe any land is as void now as it was before the passage of this section. But a description by name, where lands have a known name, is sufficient. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

This section applies only where there is a description which can be aided by parol, but not when there is no description. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893); Hemphill v. Annis, 119 N.C. 514, 26 S.E. 152 (1896); Harris v. Woodward, 130 N.C. 580, 41 S.E. 790 (1902).

This rule has been sanctioned by the courts, not only upon the idea that there must be a certain subject matter, but because its observance is essential to a proper enforcement of the statute of frauds. Blow v. Vaughan, 105 N.C. 198, 10 S.E. 891 (1890).

The statute applies only when there is a description which can be aided by parol, and cannot be held to validate a deed where the description is too vague and indefinite to identify the land claimed and to fit it to the description. At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed.

Failing in this, the deed is void. Holloman v. Davis, 238 N.C. 386, 78 S.E.2d 143 (1953).

The statutory rule permitting the use of parol testimony to fit the description in the deed to the land intended to be conveyed does not relieve the invalidity due to vagueness, indefiniteness and uncertainty unless there be elements of description which are either certain in themselves or are capable of being reduced to certainty by reference to something extrinsic, to which the deed refers. The liberal rule of construction does not permit the passing of title to land by parol. Such evidence cannot be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence aliunde to make the description complete is to be sought. Holloman v. Davis, 238 N.C. 386, 78 S.E.2d 143 (1953).

The purpose of parol evidence is to fit the description to the property, not to create a description. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965); Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968).

Evidence dehors the deed is admissible to "fit the description to the thing" only when it tends to explain, locate, or make certain some call or descriptive term used in the deed. It is the deed that must speak. The oral evidence must only interpret what has been said therein. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Methods of Proving Title.—Plaintiffs in order to recover had the burden of proving their title to the disputed area by any one of the various methods set out in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889). Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The identity or location of the land may be shown by documentary evidence, such as plats, surveys, and field notes. A map made by a surveyor of the premises sued for and of other tracts adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The description must identify the land, or it must refer to something that will identify it with certainty. Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968).

Ambiguous or Indefinite Terms.—Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written. Ward v. Gay, 137 N.C. 399, 49 S.E. 884 (1905).

A patent ambiguity in the description of the land cannot be removed by parol evidence. Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968).

Not Retroactive in Operation.—There is a general presumption against the retroactive operation of a statute where it would impair vested rights, therefore this section cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of the section. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893).

When Description Sufficient. — A description of land in a deed as all that tract or land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land & Timber Co. v. Yarbrough, 179 N.C. 335, 102 S.E. 630 (1920).

While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to find but not to make a corner. Holmes v. Sapphire Valley Co., 121 N.C. 410, 28 S.E. 545 (1897).

Scope of Descriptive Words May Not Be Enlarged. — Parol evidence is admissible to fit the description in a deed showing color of title to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Fitting Description in Deeds to Earth's Surface.—In an action to recover for the wrongful cutting and removal of timber from land claimed by plaintiffs, plaintiffs must locate the land by fitting the description in their deeds to the earth's surface, regardless of whether they rely upon their deeds as proof of title or color of title, or, in the absence of title or color of title, they are required to establish the known and visible lines and boundaries of the

land actually occupied by them for the statutory period. Andrews v. Bruton, 242 N.C. 93, 86 S.E.2d 786 (1955).

Those having the burden of proof must locate the land they claim title to by fitting the description contained in the paper-writing offered as evidence of title to the land's surface. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Allegations as to title having been denied, it was incumbent upon plaintiffs to establish both ownership and trespass. Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

In an ejectment action a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed. That is, he must show that the very deeds upon which he relies convey, or the descriptions therein contained embrace within their bounds, the identical lands in controversy. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Contentions of All Parties Should Be Shown on One Map.—It is highly desirable in the trial of a lawsuit involving the location of disputed boundary lines to have one map showing thereon the contentions of all the parties. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Proof Where Allegations as to Title and Trespass Are Denied.—In an action for the recovery of land and for trespass thereon, where the allegations of plaintiffs as to their title and the trespass of the defendant are denied, it was then incumbent upon plaintiffs to establish both the issue of ownership and the issue of trespass. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Applied in McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941).

Quoted in Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961).

Stated in Baldwin v. Hinton, 243 N.C. 113, 90 S.E.2d 316 (1955); Brown v. Hurley, 243 N.C. 138, 90 S.E.2d 324 (1955); Peel v. Calais, 224 N.C. 421, 31 S.E.2d 440 (1944).

§ 8-40. **Proof of handwriting by comparison.**—In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute: Provided, this shall not apply to actions pending on March 5, 1913. (1913, c. 52; C. S., s. 1784.)

Editor's Note.—For article on the taking of handwriting exemplars, see 4 Wake Forest Intra. L. Rev. 1 (1968).

In General. — The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven to be that of the party, has been changed by this section, and where the disputed writing has been rendered competent under this principle, it may, in actions instituted after March 5, 1913, be submitted to the jury, together with that admitted or proven. Newton v. Newton, 182 N.C. 54, 108 S.E. 336 (1921).

This section provides for the proof of handwriting by comparison. Clayton v. Prudential Ins. Co. of America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

Rule under Prior Law.—Before the passage of this section it was incompetent for a handwriting expert to testify to the genuineness of the signature of a party to a writing, his testimony being based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so. Boyd v. Leatherwood, 165 N.C. 614, 81 S.E. 1025 (1914); In re McGowan, 235 N.C. 404, 70 S.E.2d 189 (1952).

Same—Reasons.—In the cases decided under the prior law three reasons are given for excluding as incompetent a comparison by an expert witness of a signature or writing, not admitted to be genuine or connected with the case on trial, with a signature or writing which has been offered in writing, where the genuineness of the latter is drawn in question: (1) There is danger of fraud in the selecting of writings offered as specimens for the occasion. (2) The genuineness of specimens offered may be contested, and thus numberless collateral issues may be raised to confuse the jury and divert their attention from the real issue. (3) The opposing party may be surprised by the introduction of specimens, not admitted to be genuine, and for want

of notice may fail to produce and offer evidence within his reach, tending to show their spurious character. Pope v. Askew, 23 N.C. 16 (1840); Outlaw v. Hurdle, 46 N.C. 150 (1853); Tuttle v. Rainey, 98 N.C. 513, 4 S.E. 475 (1887); Fuller v. Fox, 101 N.C. 119, 7 S.E. 589 (1888). This rule was recognized in the more recent cases. Martin v. Knight, 147 N.C. 564, 61 S.E. 447 (1908); Nicholson v. Eureka Lumber Co., 156 N.C. 59, 72 S.E. 86, 36 L.R.A. (n.s.) 162 (1911); Boyd v. Leatherwood, 165 N.C. 614, 81 S.E. 1025 (1914).

Genuine Writing Not Required to Be Introduced in Evidence to Permit Comparison.—Prior to the enactment of this section, in those cases where the comparison of handwriting was permissible under the law, a paper containing the admitted genuine signature was not required to be introduced in evidence to authorize its comparison by a qualified witness with a signature the genuineness of which was in issue. This section did not change the rule in this respect. However, it did change the rule of evidence so as to permit the comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, and to permit such writing and the evidence of witnesses respecting the same to be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. But the section does not prevent a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, unless such genuine writing is introduced in evidence. In re McGowan, 235 N.C. 404, 70 S.E.2d 189 (1952).

Expert and Nonexpert Distinguished. — A comparison of handwriting is in some states permitted to be made by the jury or experts, and in others only by experts in the presence of the jury. Where a witness has acquired a knowledge of the person's writing, he compares a disputed signature or writing with an exemplar in his own mind. But when he testifies as an expert he must first be furnished, as the basis of his testimony, with some specimen the genuineness of which may be insisted on before the jury. Tunstall v. Cobb, 109 N.C. 316, 14 S.E. 28 (1891).

Expert Testimony.—Where a witness, found by the court to be a handwriting expert, testifies that the signature on the release offered in evidence is identical with the signature on the last will and testament of plaintiffs' predecessor in title, the admission in evidence of a duly authenticated copy of the release is proper. Kaperonis v. North Carolina State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Not Essential to See Person Write. — When the contents of letters written by a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them. Universal Oil & Fertilizer Co. v. Burney, 174 N.C. 382, 93 S.E. 912 (1917).

Comparison by Jury. — Where payment of a note sued on is pleaded and the genuineness of the signature of the payee to a receipt for the amount is in dispute, and an expert in handwriting has given his opinion upon comparing with a magnifying glass the disputed signature with the genuine one, it is not error for the trial judge to permit the jury, while deliberating upon their verdict, to make the comparison with the magnifying glass for themselves, when it does not appear that it could have been to the prejudice of the appellant. As to whether this is otherwise permitted under the provisions of this section, quaere? Gooding v. Pope, 194 N.C. 403, 140 S.E. 21 (1927).

Prior to the enactment of this section it seems to have been settled law in North Carolina that an expert witness in the presence of the jury might be allowed to compare a disputed paper with other papers in the case, whose genuineness was not denied, and that the jury must pass upon its genuineness upon the testimony of witnesses, and that no comparison by the jury was permitted. In re Will of Gatling, 234 N.C. 561, 68 S.E.2d 301 (1951).

Analogy to Proof of Agency.—In Newton v. Newton, 182 N.C. 54, 108 S.E. 336 (1921), the court said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The court determines whether there is prima facie evidence of agency or of the genuineness of the writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writings' (in the plural) themselves are submitted to the jury." See In re Will of Gatling, 234 N.C. 561, 68 S.E.2d 301 (1951).

Handwriting Irrelevant — Exclusion as Harmless Error. — In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the

court in refusing to let the writing be submitted to the jury, to determine its genuineness, under the statute, was a harmless error. Newton v. Newton, 182 N.C. 54, 108 S.E. 336 (1921).

Cited in In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952); In re Will of Shemwell, 197 N.C. 332, 148 S.E. 469 (1929); In re Will of William, 215 N.C. 259, 1 S.E.2d 857 (1939).

§ 8-41. Bills of lading in evidence.—In all actions by or against common carriers or in the trial of any criminal action in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the State, and twenty days when the point of shipment is without the State. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; C. S., s. 1785; 1945, c. 97.)

§ 8-42. Book accounts under sixty dollars.—When any person shall bring an action upon a contract, or shall plead, or give notice of, a setoff or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars. (1756, c. 57, ss. 2, 6, 7, P. R.; R. C., c. 15, s. 1; Code, s. 591; Rev., s. 1622; C. S., s. 1786.)

Terms Construed.—In an early case, the words "to make out on his oath" and "to prove," used in the former statute, were construed to be synonymous terms. Kitchen v. Tyson, 7 N.C. 314 (1819).

Other Sections. — Notwithstanding the restrictions contained in § 8-51, in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted to testify under this section. Leggett v. Glover, 71 N.C. 211 (1874). See Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

This section is applicable only to actions brought under the "book-debt law," hence in an action on a contract for sawing timber, it is not necessary to set out the items in the pleadings. McPhail v. Johnson, 115 N.C. 298, 20 S.E. 373 (1894).

Swearing as to Price of Goods. — It is competent for a party under this section to swear to the price, as well as to the delivery of the articles stated in his account. Colbert v. Piercy, 25 N.C. 77 (1842).

Same—Cross-Examination.—It is competent for the opposite party to cross-examine the party, taking his oath as required by this section, both as to the article and the prices charged, with a view to contradict or discredit him, as he might do in regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause. Colbert v. Piercy, 25 N.C. 77 (1842).

Where Original Account Exceeds Sixty Dollars. — Under this section, a plaintiff may prove by his own oath a balance of sixty dollars, due to him, although his account produced appears to have been originally for more than sixty dollars, but is reduced by credits below that amount. McWilliams v. Cosby, 26 N.C. 110 (1843).

Same — Dismissal of Part for Jurisdictional Purposes. — Where divers dealings are included in an account, the aggregate of which exceeds sixty dollars, the plaintiff can omit, or give credit for any item he may choose, so as to bring the case within the jurisdiction of a single magistrate. But after thus obtaining jurisdiction the plaintiff cannot prove the account under this section for he is required to swear that the account rendered contains a true account of all the dealings. Joseph Waldo & Co. v. Jolly, 49 N.C. 173 (1856).

Proof of Setoff Allowed. — The defendant may, under this section, prove a setoff. Webber v. Webber, 79 N.C. 572 (1878).

Same — Book and Oath Not Exclusive Evidence.—The book and the oath under this section are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party. Alexander v. Smoot, 35 N.C. 461 (1852).

Books of Decedent Admissible.—Under this section it is admissible to the amount of sixty dollars to offer the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N.C. 372 (1871).

Unverified Entries on Own Book. — A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of this section and §§ 8-43 and 8-44, especially when it has not been made to appear that the person having made them is dead or cannot be had to give his sworn statement of the transaction. Branch v. Ayscue, 186 N.C. 219, 119 S.E. 201 (1923).

Cited in Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

§ 8-43. Book accounts proved by personal representative.—In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party. (1756, c. 57, s. 2, P. R.; 1796, c. 465, P. R.; R. C., c. 15, s. 2; Code, s. 592; Rev., s. 1623; C. S., s. 1787.)

An administrator may, under this section, offer in evidence the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N.C. 372 (1871).

Cited in Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

§ 8-44. Copies of book accounts in evidence.—A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trials; and in that case no such copy shall be admitted as evidence. (1756, c. 57, s. 33, P. R.; R. C., c. 15, s. 3; C. C. P., s. 343c; Code, s. 593; Rev., s. 1624; C. S., s. 1788.)

Production of Original after Notice.—In all cases under this section and §§ 8-42 and 8-43, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account when notice to that effect has been given to him by

the other party. Coxe v. Skeen, 25 N.C. 443 (1843).

A voluntary destruction of the original will not authorize the introduction of a copy. Coxe v. Skeen, 25 N.C. 443 (1843).

§ 8-45. Itemized and verified accounts.—In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness. (1897, c. 480; Rev., s. 1625; 1917, c. 32; C. S., s. 1789; 1941, c. 104.)

Purpose.—This section was designed to facilitate the collection of such accounts where there was no bona fide dispute, and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Verification Essential.—An itemized account to be prima facie evidence of its correctness must be properly verified and stated so as to show an indebtedness. Knight v. Taylor, 131 N.C. 84, 42 S.E. 537 (1902).

Competency of Witness Required.—Under the terms of this section, as now drawn, an affiant, verifying an account so as to make the same prima facie evidence, must be a competent witness to the facts, and when it appears on the face of the account that he has no personal knowledge of these facts, or it is established that he is otherwise an incompetent witness, the ex parte account so verified should not be received in evidence. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915). And it must appear that he is not excluded under the provision of § 8-51. See William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923).

An itemized, verified statement of an account is an ex parte statement and this section, governing its admission, must be strictly complied with, and the person who verifies the account, being treated as a witness pro tanto must be competent to testify as a witness in respect to the account if called upon at the trial, but where an itemized statement of account offered at the trial is verified by the treasurer of the plaintiff corporation who declares in his affidavit that "he is familiar with the books and business" of the plaintiff, it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915), cited and distinguished. Endicott-Johnson Corp. v. Schochet, 198 N.C. 769, 153 S.E. 403 (1930).

Subordinate to § 8-51.—In William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923), the court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C. S., 1795, [§ 8-51] under the principle announced in Cecil v. City of High Point, 165 N.C. 431, 81 S.E. 616 (1914)." See Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Prima Facie Case. — In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a prima facie case under this section. Claus v. Lee, 140 N.C. 552, 53 S.E. 433 (1906); Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914).

Same—Nonsuit.—Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a prima facie case, under the provision of this section, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Same — Burden of Proof. — Where a prima facie case has been made out by the plaintiff, in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contends that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact of agency, and of accounting thereon, which is for the determination of the jury upon the question of indebtedness. Carr v. Alexander, 169 N.C. 665, 86 S.E. 613 (1915).

Account of Mercantile Corporation. — This section applied in Wright Co. v. Green, 196 N.C. 197, 145 S.E. 16 (1928).

Husband as Agent of Wife. — Evidence held insufficient. Pitt v. Speight, 222 N.C. 585, 24 S.E.2d 350 (1943).

Applied in United States Leasing Corp. v. Hall, 264 N.C. 110, 141 S.E.2d 30 (1965).

Stated in Haines v. Clark, 230 N.C. 751, 55 S.E.2d 693 (1949).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

§ 8-45.1. **Photographic reproductions admissible; destruction of originals.**—If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original. (1951, c. 262, s. 1.)

Reproductions Are Primary Evidence.—Reproductions are made and kept among the records of many banks in due course of business. Their accuracy is not questioned. As proof of payment they constitute not secondary but primary evidence. State v. Shumaker, 251 N.C. 678, 111 S.E.2d 878 (1960).

§ 8-45.2. **Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it. (1951, c. 262, s. 2.)

§ 8-45.3. **Photographic reproduction of records of Department of Revenue.**—The State Department of Revenue is hereby specifically authorized to have photographed, photocopied, or microphotocopied all records of the Department, including tax returns required by law to be made to the Department, and said photographs, photocopies, or microphotocopies, when certified by the Department as true and correct photographs, photocopies, or microphotocopies, shall be as admissible in evidence in all actions, proceedings and matters as the originals thereof would have been. (1951, c. 262, s. 3.)

§ 8-45.4. **Title of article.**—This article may be cited as the "Uniform Photographic Copies of Business and Public Records as Evidence Act." (1951, c. 262, s. 4.)

ARTICLE 4B.

Evidence of Fraud, Duress, Undue Influence.

§ 8-45.5. **Statements, releases, etc., obtained from persons in shock or under the influence of drugs; fraud presumed.**—Any oral or written statement, waiver, release, receipt, or other representation of any kind by any person made or executed while a patient in any hospital and taken by any person in connection with any type of insurance coverage on or for the benefit of said patient which shall have been taken while such patient was in shock or appreciably under the influence of any drug, including drugs given primarily for sedation, shall be deemed to have been obtained by means of fraud, duress or undue influence on the part of the person or persons taking same, and the same shall be incompetent and inadmissible in evidence to prove or disprove any fact or circumstance relating to any claim for which any insurance company may be liable under any policy of

insurance issued to, or which may indemnify or provide coverage or protection for the person making or executing any such statement or other instrument while a patient in a hospital, nor may any such person making or executing the same be examined or cross-examined in regard thereto. (1967, c. 928.)

Editor's Note. — For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

Cited in Tate v. Golding, 1 N.C. App. 38, 159 S.E.2d 276 (1968).

Article 5.

Life Tables.

§ **8-46. Mortuary tables as evidence.**—Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	Expectation
0	64.94
1	66.85
2	66.15
3	65.31
4	64.43
5	63.52
6	62.60
7	61.67
8	60.73
9	59.78
10	58.83
11	57.88
12	56.94
13	55.99
14	55.06
15	54.12
16	53.19
17	52.27
18	51.34
19	50.42
20	49.50
21	48.59
22	47.67
23	46.75
24	45.84
25	44.92
26	44.01
27	43.10
28	42.19
29	41.29
30	40.39
31	39.48
32	38.59
33	37.69
34	36.80
35	35.92

Completed Age	Expectation
36	35.03
37	34.15
38	33.28
39	32.41
40	31.55
41	30.69
42	29.83
43	28.99
44	28.15
45	27.31
46	26.49
47	25.67
48	24.86
49	24.06
50	23.27
51	22.48
52	21.71
53	20.95
54	20.20
55	19.46
56	18.73
57	18.01
58	17.30
59	16.61
60	15.93
61	15.27
62	14.62
63	13.98
64	13.36
65	12.75
66	12.16
67	11.59
68	11.03
69	10.49
70	9.96
71	9.45
72	8.96
73	8.48
74	8.02
75	7.58
76	7.15
77	6.74
78	6.35
79	5.98
80	5.62
81	5.28
82	4.95
83	4.64
84	4.34
85	4.06
86	3.80
87	3.54
88	3.31
89	3.08

Completed Age	Expectation
90	2.87
91	2.67
92	2.49
93	2.31
94	2.15
95	2.00
96	1.86
97	1.72
98	1.60
99	1.49
100	1.38
101	1.27
102	1.17
103	1.05
104	.87

(1883, c. 225; Code, s. 1352; Rev., s. 1626; C. S., s. 1790; 1955, c. 870.)

Need Not Be Put in Evidence. — This section being a public act, the tables herein contained are competent as evidence without being specially put in evidence. Coley v. City of Statesville, 121 N.C. 301, 28 S.E. 482 (1897).

The mortuary table in this section is one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. Rea v. Simowitz, 225 N.C. 575, 35 S.E.2d 871, 162 A.L.R. 999 (1945).

The mortuary table is statutory and need not be introduced in evidence, but may receive judicial notice when facts are in evidence requiring or permitting its application. Chandler v. Moreland Chem. Co., 270 N.C. 395, 154 S.E.2d 502 (1967).

The table, being statutory, need not be introduced in evidence in order to make use of it upon the question of damages when other facts are in evidence permitting its application. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Mortuary table is competent evidence bearing upon life expectancy and future earning capacity of the injured person in actions for personal injuries resulting in permanent disability. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965).

But it is not admissible unless there is evidence of permanent injury. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965).

The expectancy of life is only material when the injury is shown to be one which will continue through life. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965).

Without evidence of permanent injury, the admission of the mortuary table to show the probable expectancy of life would be misleading and prejudicial. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965).

Tables Not Conclusive.—In an action to recover damages for a personal injury, the expectation of life tables contained in this section are not conclusive but merely evidential on the issue as to damages. Sledge v. Lumber Co., 140 N.C. 459, 53 S.E. 295 (1906); Odom v. Canfield Lumber Co., 173 N.C. 134, 91 S.E. 716 (1917); Young v. Wood, 196 N.C. 435, 146 S.E. 70 (1929). The tables must be considered in connection with the "other evidence as to the health, constitution and habits" of the deceased. Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E 191 (1900). See Wachovia Bank & Trust Co. v. Atlantic Greyhound Lines, 210 N.C. 293, 186 S.E. 320 (1936); Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937).

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, and an instruction making the expectancy set out in this section definitive and conclusive not only violates the evidence rule, but also § 1-180 prohibiting the expression of an opinion "whether a fact is fully or sufficiently proven." Starnes v. Tyson, 226 N.C. 395, 38 S.E.2d 211 (1946).

This section does not, like § 8-47, give a mathematical result which the court can apply. The table given is merely evidentiary. Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957).

Value of Life Tenancy. — When a life tenant and the remainderman sell the lands, the life tenant is entitled to the present cash value of her life estate in the purchase price, computed according to her life ex-

pectancy at the date of the execution of the deed, and the remainderman is entitled to the balance of the purchase price. Thompson v. Avery County, 216 N.C. 405, 5 S.E.2d 146 (1939).

Value of Dower.—Because the mortuary table is only evidentiary, it has been decided that the cash value of dower inchoate depends on the ages of husband and wife, and on their health, habits and all other circumstances tending to show the probabilities as to the length of life. And there is no reason for differing rules for determining life expectancy as between married women entitled to dower inchoate and widows entitled to dower consummate. Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957).

Where testimony tended to show that plaintiff's injuries were permanent in character, it was proper for the presiding judge to permit plaintiff to introduce and the jury to consider the mortuary tables formerly embodied in this section. Hunt v. Wooten, 238 N.C. 42, 76 S.E.2d 326 (1953).

The mortuary tables were properly introduced into evidence on the issue of damages over defendant's objection where plaintiff introduced evidence that he received permanently disfiguring scars from sulphuric acid burns as a result of defendant's negligence. Chandler v. Moreland Chem. Co., 270 N.C. 395, 154 S.E.2d 502 (1967).

Failure to Instruct Jury as to Life Expectancy of Plaintiff.—In the absence of a request, the judge did not commit reversible error in failing to instruct the jury in an action for personal injury that the plaintiff had a life expectancy of 15.27 years according to the mortuary table, which he had introduced in evidence, where, although the charge did not contain a direct reference to the plaintiff's life expectancy, the court did instruct the jury to take into consideration all the evidence bearing on the issue, including the plaintiff's age. Derby v. Owens, 245 N.C 591, 96 S.E.2d 851 (1957).

Erroneous Instruction.—Where the element of future damages figures largely in consideration of the issue, an instruction to the effect that the jury might take into consideration the mortuary tables as to the life expectancy of plaintiff, without reference to the evidence as to plaintiff's health prior and subsequent to the accident and without charging that the mortuary tables should be considered only as evidence together with other evidence as to the health, constitution and habits of plaintiff, is incomplete and erroneous. Harris v. Atlantic Greyhound Corp., 243 N.C 346, 90 S.E.2d 710 (1956).

Applied in Brenkworth v. Lanier, 260 N.C. 279, 132 S.E.2d 623 (1963); Kinsey v. Town of Kenly, 263 N.C. 376, 139 S.E.2d 686 (1965); Knight v. Seymour, 263 N.C. 790, 140 S.E.2d 410 (1965); Dolan v. Simpson, 269 N.C. 438, 152 S.E.2d 523 (1967).

Cited in Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241 (1960); Skidmore v. Austin, 261 N.C. 713, 136 S.E.2d 99 (1964); Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966); Mattox v. Huneycutt, 3 N.C. App. 63, 164 S.E.2d 28 (1968); Waddell v. United Cigar Stores of America, 195 N.C. 434, 142 S.E. 585 (1928); Farris v. Hendricks, 196 N.C. 439, 146 S.E. 77 (1929); White v. North Carolina R.R., 216 N.C. 79, 3 S.E.2d 310 (1939); McClamroch v. Colonial Ice Co., 217 N.C. 106, 6 S.E.2d 850 (1940); Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940).

§ 8-47. **Present worth of annuities.**—Whenever it is necessary to establish the present worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mortuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
1	$ 0.943
2	1.833
3	2.673
4	3.465
5	4.212
6	4.917

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
7	5.582
8	6.210
9	6.802
10	7.360
11	7.887
12	8.384
13	8.853
14	9.295
15	9.712
16	10.106
17	10.477
18	10.828
19	11.158
20	11.470
21	11.764
22	12.042
23	12.303
24	12.550
25	12.783
26	13.003
27	13.211
28	13.406
29	13.591
30	13.765
31	13.929
32	14.084
33	14.230
34	14.368
35	14.498
36	14.621
37	14.737
38	14.846
39	14.949
40	15.046
41	15.138
42	15.225
43	15.306
44	15.383
45	15.456
46	15.524
47	15.589
48	15.650
49	15.708
50	15.762
51	15.813
52	15.861
53	15.907
54	15.950
55	15.991
56	16.029
57	16.065
58	16.099
59	16.131
60	16.161

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
61	16.190
62	16.217
63	16.242
64	16.266
65	16.289
66	16.310
67	16.331

The present cash value of the annuity for a fraction of a year may be ascertained as follows: Multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year, computed at four and one half percent, may be considered as an annuity and the present cash value be ascertained as herein provided: Provided, the interest rate in computing the present cash value of a life interest in land shall be six percent (6%).

Whenever the mortuary tables set out in G.S. 8-46 are admissible in evidence in any action or proceeding to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the annuity tables herein set forth shall be evidence, but not conclusive, of the loss of income during the period of life expectancy of such person, (1905, c. 347; Rev., s. 1627; C. S., s. 1791; 1927, c. 215; 1943, c. 543; 1957, c. 497; 1959, c. 879, s. 3; 1965, c. 991.)

Interest Rate. — Annuities, under this section, must be computed at four and one-half percent and not at six percent. Smith v. Smith, 223 N.C. 433, 27 S.E.2d 137 (1943).

Applicable Only to Annuities.—This section is intended to apply strictly to annuities, and therefore, in an action to recover damages for injuries causing death, it is error to permit the jury to consider the provisions thereof for the purpose of ascertaining the present value of the intestate's life. Poe v. Railroad, 141 N.C. 525, 54 S.E. 466 (1906). See Brown v. Lipe, 210 N.C. 199, 185 S.E. 681 (1936).

The proviso in this section is not applicable to causes arising prior to the date of its ratification, March 6, 1943. Brenkworth v. Lanier, 260 N.C. 279, 132 S.E.2d 623 (1963).

By the specific language of the proviso in this section a widow is entitled to have her annuity computed at 6% when her dower (now life interest in lieu of an intestate share) is sold. Brenkworth v. Lanier, 260 N.C. 279, 132 S.E.2d 623 (1963).

Cited in Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Hunt v. Wooten, 238 N.C. 42, 76 S.E.2d 326 (1953); Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957); Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966); American Blower Co. v. MacKenzie, 197 N.C. 152, 147 S.E. 829 (1929).

ARTICLE 6.

Calendars.

§ 8-48. **Clark's Calendar; proof of dates.**—In any controversy or inquiry in any court or before any fact finding board, commission, administrative agency or other body, where it becomes necessary or pertinent to determine any information which may be established by reference to a calendar for any year between the years one thousand seven hundred and fifty-three and two thousand and two, anno domini, inclusive, it is permissible to introduce in evidence "Clark's Calendar, a Calendar Covering 250 Years, 1753 A.D. to 2002 A.D.," as supplemented, copyrighted, 1940, by E. D. Clark, Entry: Class AA, Number three hundred and twenty-eight thousand five hundred and seventy-three, Copyright Office of the United States of America, Washington, or any reprint of said one

thousand nine hundred and forty edition certified by the Secretary of State to be an accurate copy thereof; and such calendar or reprint, when so introduced, shall be prima facie evidence that the information disclosed by said calendar or reprint thereof is true and correct. (1941, c. 312.)

ARTICLE 7.

Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.—No person offered as a witness shall be excluded, by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills. (1866, c. 43, ss. 1, 4; C. C. P., c. 342; 1869-70, c. 177; 1871-2, c. 4; Code, ss. 589, 1350; Rev., ss. 1628, 1629; C. S., s. 1792.)

Cross References.—See also §§ 8-50, 8-51, 8-54, 8-56, and notes thereto. As to general treatment of application of the rule herein contained, see § 8-51 and note thereto.

Editor's Note. — This section abolishes the common-law rule which prevented a party who was interested in the result of the verdict and judgment from appearing as a witness. A similar enactment will be found in the statutes of practically all the states. The trend of the development of the rules of evidence has been to remove personal disqualification to testify. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

The provisions of this section must be considered in the light of those contained in § 8-51 which place certain restrictions on the general rule embodied in this section. In other words, the provisions of § 8-51 form exceptions to this section, and take them from the operation of its principle, leaving the parties falling within these exceptions to stand upon the same footing as they did prior to the enactment of this section. See Charlotte Oil & Fertilizer Co. v. Rippy, 124 N.C. 643, 32 S.E. 980 (1899).

The construction of this section should also be in connection with the provisions of §§ 8-50 and 8-56, since they all relate to the same subject—the competency of the witnesses. Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913).

Burden on Challenger to Show Disqualification. — The general rule established by this section and § 8-50 is that no person offered as a witness shall be excluded on account of interest or because a party to the action, except as otherwise provided. Hence, it is incumbent upon one who challenges the competency of the witness to show disqualification. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

Legatee under Will as Witness.—Under this section removing the disqualification on account of interest, the widow of the testator, who was named as a legatee and devisee in a will, is a competent witness to prove the fact that the script propounded was found among the papers of the deceased. Nor would the last provision of the section prevent the widow in this case from testifying, since this provision applies only to attesting witnesses to the execution of a will. Cornelius v. Brawley, 109 N.C. 542, 14 S.E. 78 (1891).

Beneficiary under Holograph Will.—Under this and the following section, one who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfeldt, 188 N.C. 702, 125 S.E. 531 (1924).

Executor as Witness. — An executor, named in a will, is a competent witness to testify as to the existence, probate and registration of a will, he being rendered competent by this section, and he is not disqualified by § 8-51, as to transactions occurring after the death of the testator, as they can in no sense be considered as transactions between the witness and the testator. Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899).

The widow of a deceased vendor, who was present at the sale of a mule by her husband to the plaintiff, is a competent witness under this section, and was not excluded under § 8-51, as she was not a party to the action and had no interest in the same. Little v. Ratliff, 126 N.C. 262, 35 S.E. 469 (1900).

Mortgagee. — Where he is not excluded under the provisions of § 8-51, the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as this section removes the disqualification formerly attaching to witnesses having an interest. Clark v. Hodge, 116 N.C. 761, 21 S.E. 562 (1895).

Fornication and Adultery. — In a trial for fornication and adultery a former defendant as to whom a nolle prosequi has been entered is a competent witness against the other defendant. State v. Phipps, 76 N.C. 203 (1877).

Party Testifying in Own Behalf. — The provisions of this section make it permissible for a party to testify in his own behalf. State v. McIntosh, 64 N.C. 607 (1870); Autry v. Floyd, 127 N.C. 186, 37 S.E. 208 (1900).

§ 8-50. Parties competent as witnesses.—(a) On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

(b), (c): Repealed by Session Laws 1967, c. 954, s. 4. (1866, c. 43, ss. 2, 3; Code, s. 1351; Rev., s. 1630; C. S., s. 1793; 1953, c. 885, s. 1; 1967, c. 954, s. 4.)

Editor's Note. — The 1967 amendment repealed subsections (b) and (c).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Cross Reference.—See also §§ 8-49, 8-51, 8-54, 8-56 and notes thereto.

In General.—This section and §§ 8-49 and 8-51 should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913).

At common law, neither the husband nor the wife is allowed to prove the fact of access or nonaccess; and as such rule is founded "upon decency, morality and public policy," it is not changed by this section, allowing parties to testify in their own behalf. Boykin v. Boykin, 70 N.C. 262 (1874).

Testimony of an Accomplice. — An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. State v. Perry, 210 N.C. 796, 188 S.E. 639 (1936). See N.C. Const., Art. I, § 11.

Testifying against Codefendant.—A defendant in a criminal case is, under this section, competent and compellable to testify for or against a codefendant, provided his testimony does not criminate himself. State v. Smith, 86 N.C. 705 (1882); State v. Medley, 178 N.C. 710, 100 S.E. 591 (1919).

Same—Practice Not Commendable. — The practice of sending codefendants to the grand jury to testify against each other, while allowable, is not commended. State v. Frizell, 111 N.C. 722, 16 S.E. 409 (1892).

Instructing Witness Not to Incriminate Himself.—In an indictment for an affray, it is not error for the presiding judge to caution the witness (a defendant) before the counsel for the other defendant cross-examines him, that he need not tell anything to incriminate himself. State v. Weaver, 93 N.C. 595 (1885).

Applied in Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965).

Cited in State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

§ 8-50.1. Competency of evidence of blood tests.—In the trial of any criminal action or proceedings in any court in which the question of paternity arises, regardless of any presumptions with respect to paternity, the court before whom the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person. Such evidence shall be competent to rebut any presumptions of paternity.

In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person. (1949, c. 51; 1965, c. 618.)

Editor's Note.—For a brief discussion of this section, see 27 N.C.L. Rev. 456.

Cited in State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967).

§ 8-51. A party to a transaction excluded, when the other party is dead.—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. Nothing in this section shall preclude testimony as to the identity of the deceased operator of a motor vehicle in any case brought against the deceased's estate arising out of the operation of a motor vehicle in which the deceased is alleged to have been the operator or one of the operators involved. (C. C. P., s. 343; Code, s. 590; Rev., s. 1631; C. S., s. 1795; 1967, c. 896, s. 1.)

I. General Consideration.
II. The Section Disqualifies Whom.
  A. Parties to the Action.
  B. Persons Interested in the Event of the Action.
    1. General Consideration.
    2. Applications.
  C. Persons Deriving Title or Interest Through Two Preceding Classes.
III. When the Disqualification Exists.
IV. Subject Matter of the Transaction.
V. Exceptions.
VI. Pleading and Practice.

Cross Reference.

See §§ 8-49, 8-50, 8-54, 8-56 and notes thereto.

I. GENERAL CONSIDERATION.

Editor's Note. — The 1967 amendment added the last sentence. Section 2, c. 896, Session Laws 1967, provides that the act shall not apply to pending litigation.

For note on personal transactions under this section, see 34 N.C.L. Rev. 362 (1956).

For case law survey on dead man's statute, see 41 N.C.L. Rev. 477 (1963).

Mr. Justice Clark in Bunn v. Todd, 107 N.C. 266, 11 S.E. 1043 (1890), gives the following analytical treatment to this section, which has been cited and approved in many of the cases coming within the principles of this section. See Seals v. Seals, 165 N.C. 409, 81 S.E. 613 (1914); Fidelity

Bank v. Wysong & Miles Co., 177 N.C. 284, 98 S.E. 769 (1919).

"It [this section] disqualifies—

"WHOM—1. Parties to the action.

2. Persons interested in the event of the action.

3. Persons through or under whom the persons in the first two classes derive their title or interest.

"A witness, although belonging to one of these three classes, is incompetent only in the following cases:

"WHEN—To testify in behalf of himself, or the person succeeding to his title or interest, against the representative or a deceased person, or committee of a lunatic, or any one deriving his title or interest through them.

"And the disqualification of such person, and in even such cases, is restricted to the following:

"SUBJECT MATTER.—As to a personal transaction or communication between the witness and the person since deceased or a lunatic.

"And even as to those persons and in those cases there are the following:

"EXCEPTIONS.—When the representative of, or person claiming through or under, the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction. Burnett v. Savage, 92 N.C. 10 (1885); Sumner v. Candler, 92 N.C. 634 (1885)."

This outline has been used as the basis of the analysis of the section in the following annotation.

In General.—This section does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer: (1) Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title? (2) Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest? (3) Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic? (4) Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic? Even in instances where these four things concur, the testimony of the witness is nevertheless admissible under an exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Purpose of Section. — The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event, as to a personal transaction or communication between the witness and the deceased person whose lips are sealed in death. Abernathy v. Skidmore, 190 N.C. 66, 128 S.E. 475 (1925).

The purpose of this section is to exclude evidence of a personal transaction or communication between the witness and a person who by reason of death or lunacy cannot be heard. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

The reasoning behind this section is succinctly stated: Death having closed the mouth of one of the parties (with respect to a personal transaction or communication), it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the legislature, in its wisdom, has declared that an ex parte statement of such matters shall not be received in evidence. Carswell v. Greene, 253 N.C. 266, 166 S.E.2d 801 (1960).

The law that an interested survivor to a personal transaction or communication cannot testify with respect thereto against the dead man's estate is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966); Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

When Testimony Is Incompetent under This Section.—The testimony of a witness is incompetent under the provisions of this statute when it appears (1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or

interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest. Collins v. Covert, 246 N.C. 303, 98 S.E.2d 26 (1957); Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963).

Testimony Competent as to Only One of Two Defendants Is Admissible.—When there is more than one defendant, testimony which is competent as to one party should not be excluded by virtue of this section because it is not competent against another party in the suit. Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959).

Courts are not disposed to extend the disqualification of a witness under this section to those not included in its express terms. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

This section applies to actions in tort as well as actions on contract. Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934). See Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

This section prohibits the surviving party from testifying in his own behalf with respect to personal transactions and communications between him and a deceased person in an action in which the survivor seeks to establish a claim, either in contract or in tort, against the estate of the deceased. Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960).

Reasons for Exclusion. — The exclusion of such testimony rests not merely upon the ground that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action. In re Will of Mann, 192 N.C. 248, 134 S.E. 649 (1926).

Province of Court to Decide What Testimony May "Come In."—When a personal representative "opens the door" by testifying to a transaction, it is not in his province, but that of the court, to decide what testimony favorable to the adverse party may "come in." Mansfield v. Wade, 208 N.C. 790, 182 S.E. 475 (1935), citing Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

Instruction as to Use of Section Cannot Be Obtained by Declaratory Judgment.—In an action instituted under the Declaratory Judgment Act the court has no authority to instruct a litigant whether to take advantage of the provision of this section, upon the hearing of the cause upon its merits, since such instructions upon a question of procedure do not fall within the purview of the act. Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

Testimony Not within Section.—Where a widow is entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and has died devising the total amount of the deposit: Held, testimony as to her receipt of the money from the crops is competent, not falling within the provisions of this section, and does not affect the title to other money owned by her husband at his death and given to her for life by his will. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Same—Conversations with Living Persons.—Where the widow under the terms of the will of her husband may only dispose of the moneys in the bank to her credit, and not such as may at her death have passed to the remainderman under his will, it may be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under this section based upon conversations with other living parties interested under the husband's will. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Independent Acts of Witness. — An interested party is not prohibited by this section from testifying concerning his independent acts. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

Testimony as to Independent Facts. — The disqualification of a party to the action to testify against the personal representative of a deceased person as to a transaction or communication with the deceased does not prohibit such interested party from testifying as to the acts and conduct of the deceased where the interested party is merely an observer and is testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955); Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960).

In this action for alienation of affections and criminal conversation against the administrators of the alleged tort-feasor, plaintiff's testimony that when he returned to his home at night he found the deceased standing in the living room of the unlighted house, and that on two other occasions he saw his wife and the deceased alone at farm cabins, is held competent as testimony of independent facts. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

This section does not preclude an interested party from testifying as to his own acts or the acts and conduct of the decedent when the witness is testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Record Evidence. — While testimony as to personal transactions with the deceased payee of a note would be incompetent to establish defenses to the note over the objection of the personal representative of the payee, record evidence tending to establish such defenses is not precluded by this section. Flippin v. Lindsey, 221 N.C. 30, 18 S.E.2d 824 (1942).

Rehearsal of Conversation Admissible.— Direct evidence of a conversation and understanding with the plaintiff's testator is, under this section, incompetent, but a rehearsal of that conversation is a part of the res gestae, and admissible. Gilmer v. McNairy, 69 N.C. 335 (1873).

Testimony of conversations with party to action wherein witness related statements of decedent is not in contravention of this section. Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938).

Personal letters written by decedent to his granddaughter, one of the propounders of his will, were held admissible over the objection that they constituted personal transactions with the deceased which are prohibited by the "dead man's statute." In re Will of McDowell, 230 N.C. 259, 52 S.E.2d 807 (1949).

Itemized and Verified Accounts. — Section 8-45 relating to itemized and verified accounts is subordinate to this section. See note of William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923), placed under § 8-45.

Testimony Admissible to Prove Time When Act Was Done.—Where the act of the widow's execution of dissent to the will and the delivery of such dissent by her to the court is established by evidence, an interested party may testify, after the death of the widow, as to the time she saw the widow file the dissent in the clerk's office, the testimony being offered not for the purpose of proving the widow's execution of the dissent but only to establish that the act was done within the time allowed. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

The provisions of this section may be waived by the adverse party. Andrews v. Smith, 198 N.C. 34, 150 S.E. 670 (1929).

Where an administrator brought proceedings under former § 1-569 et seq., to examine a defendant to discover assets of the estate of the deceased, the administrator waived the provisions of this section and the testimony thus taken could be introduced by the defendant in his own behalf. Andrews v. Smith, 198 N.C. 34, 150 S.E. 670 (1929).

If the plaintiffs at a former trial called the defendant as an adverse witness, examined her in detail about her relations with deceased, such examination would seem to be a waiver of this section and would open the door for the defendant to testify in another trial in respect to the matters about which the plaintiffs examined her. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

Where a party claiming under a deceased person examines the attorney for the deceased in respect to the execution and delivery of deeds to the land in controversy and the consideration therefor, such examination constitutes a waiver of this section in respect to communications or transactions with decedent, and the other party is entitled to cross-examine the attorney as to such transactions. However, the waiver does not apply to other and independent transactions. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

Where the plaintiffs adversely examined the defendant for the purpose of obtaining evidence for use in the trial as provided in former §§ 1-568.1 to 1-568.16, that examination is a waiver of the protection afforded by this section to the extent that either party may use it upon the trial. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

But adverse examinations of defendant in regard to transactions with decedent, which examinations were taken in prior actions nonsuited, do not operate as a waiver of this section so as to render competent defendant's testimony in subsequent trials in regard to such transactions. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Where an action to recover for injuries to one passenger is consolidated with two actions for wrongful deaths of two other passengers against the same defendant, the admission of testimony of plaintiff passenger in regard to a transaction between defendant and one of the deceased passengers does not constitute a waiver of this section in regard to the two actions for wrongful death. McCurdy v.

Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Under certain circumstances the personal representative can waive the protection afforded by this section, and when this is done, it is frequently referred to as "opening the door" for the testimony of the opposing party or interested survivor. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Applied in Elledge v. Welch, 238 N.C. 61, 76 S.E.2d 340 (1953); Heiland v. Lee, 207 F.2d 939 (4th Cir. 1953); Fesmire v. First Union Nat'l Bank, 267 N.C. 589, 148 S.E.2d 589 (1966); North Carolina State Bar v. Temple, 2 N.C. App. 91, 162 S.E.2d 649 (1968).

Stated in State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Cited in Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 904 (1955); Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968); Hinson v. Morgan, 225 N.C. 740, 36 S.E.2d 266 (1945); Bell v. Chatwick, 226 N.C. 598, 39 S.E.2d 743 (1946); Ballard v. Ballard, 230 N.C. 629, 55 S.E.2d 316 (1949).

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

A "next friend" is not a party to the suit. But his liability for costs renders him incompetent to testify to the transactions or conversations here under consideration. Mason v. McCormick, 75 N.C. 263 (1876). See McLeary v. Norment, 84 N.C. 235 (1881).

Testimony of Guardian. — Testimony of a guardian, suing an executor to establish a gift made by a testatrix to the guardian's ward, as to what occurred between the testatrix and executor, was admissible as against the objection that the guardian could not testify as to any communication or transaction between himself and testatrix. Zollicoffer v. Zollicoffer, 168 N.C. 326, 84 S.E. 349 (1915).

Testimony of Tenant.—In an action for goods sold and delivered to the intestate, a tenant of the intestate who was furnished with goods from the plaintiff's store, and who settled with the intestate, is competent to testify in the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness is not a party to the action. Sorrell v. McGhee, 178 N.C. 279, 100 S.E. 434 (1919).

Probate of Will.—In a proceeding for the probate of a will, both propounders and caveators are parties within the meaning and spirit of this section. In re Will of Brown, 194 N.C. 583, 140 S.E. 192 (1927).

Under this section the beneficiary under a will may not testify to transactions and communications with the deceased, but he may in proceedings of devisavit vel non give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with him as being a part of the basis of his opinion, when evidence of this character is properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine. In re Will of Brown, 194 N.C. 583, 140 S.E. 192 (1927).

A defendant executor cannot testify concerning a land transaction between himself and the intestate, in a suit brought by creditors of the estate to subject the land alleged to have been fraudulently conveyed to the defendant by the intestate. State ex rel. Bryant, & Bro. v. Morris 69 N.C. 444 (1873); Grier v. Cagle, 87 N.C. 377 (1882).

A member of the board of county commissioners is not a competent witness as to transactions with the defendant's intestate in a suit by the board. Commissioners of Forsyth v. Lash, 89 N.C. 159 (1883).

A principal debtor, who was a party to an action to foreclose a mortgage given by his sureties as security for the loan, was an incompetent witness to a contract with the deceased creditor. Benedict v. Jones, 129 N.C. 475, 40 S.E. 223 (1901).

Party Acting in Corporate Capacity. — One who is a party to a suit, though in his corporate capacity, is not competent to testify as to a transaction with a person deceased. Commissioners of Forsyth v. Lash, 89 N.C. 159 (1883).

In an action to recover for services rendered deceased, testimony by the plaintiff that plaintiff boarded deceased is incompetent under the provisions of this section. Price v. Pyatt, 203 N.C. 799, 167 S.E. 69 (1933).

Time and Place of Signing Receipt. — The defendant in an action for money demanded is disqualified by this section, to testify as to the time and place of signing a receipt by the plaintiff's intestate, in support of his plea of satisfaction. Sumner v. Candler, 86 N.C. 71 (1882).

Surviving Stockholders. — In an action by a corporation and the surviving principal stockholders against the widow of a deceased principal stockholder, involving the liability of the corporation under its contract for the purchase of the stock of

the deceased stockholder, the surviving stockholders are incompetent to testify as to conversations between the stockholders modifying the stock purchase agreement in favor of the corporation or the surviving stockholders. Collins v. Covert, 246 N.C. 303, 98 S.E.2d 26 (1957).

Surviving Occupant of Car.—Testimony of a surviving occupant in a car to the effect that he was not driving but that one of the other occupants killed in the accident was driving at the time of the accident, comes within the provisions of this section in actions against the surviving occupant for wrongful death. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Original Beneficiary of Life Insurance Policy.—In an action by the person substituted as beneficiary in a policy of life insurance to recover the policy and proceeds as against the original beneficiary after the death of the insured, the original beneficiary is precluded by this section from testifying to the effect that she had the policy in her possession and was holding same as security for a loan to insured and for premiums paid by her on the policy, since such testimony tends to establish an oral assignment of the policy to her as security, she being a party to the action and having a direct pecuniary interest in the outcome. Harrison v. Winstead, 251 N.C. 113, 110 S.E.2d 903 (1959).

Party May Testify as to Transaction with Deceased Agent of Opponent.—This section does not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent. Bailey v. Westmoreland, 251 N.C. 843, 112 S.E.2d 517 (1960); Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Hence, where a note is executed to two payees jointly and one of them thereafter acquires the interest of the other and sues the makers of the note, after the death of the other payee, testimony of the maker as to a contemporaneous agreement with the deceased payee, acting for himself and as agent of the other payee, that the note should not become a binding obligation until the happening of a stated contingency, is competent as to plaintiff payee's original share of the note, even though it is incompetent as to the share acquired by him as assignee of the deceased payee. Bailey v. Westmoreland, 251 N.C. 843, 112 S.E.2d 517 (1960).

But This Rule Applies Only Where Agent Was Not Personally Liable.—The rule that this section does not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent has been applied only in factual situations where the deceased agent was not personally liable in respect of the alleged cause of action. It has no application where the liability, if any, of the principal, rests solely on the alleged tortious acts of the agent under the doctrine of respondeat superior. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Testimony of the surviving occupant of a car tending to show that the other occupant, killed in the accident, was driving at that time is incompetent in an action by the survivor against the owner of the vehicle sought to be held liable under the doctrine of agency, since the owner, after having paid such liability, would have a right of action against the estate of the deceased, and therefore the transaction comes within the spirit if not the letter of this section. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Testimony by Agent of Adverse Party Admissible.—In an action on an insurance policy by the son of the deceased owner, testimony of insurer's agent that prior to his death the owner directed him to transfer the policy to the owner's son because the owner was giving the land to his son, is not precluded by this section. King v. National Union Fire Ins. Co., 258 N.C. 432, 128 S.E.2d 849 (1963).

B. Persons Interested in the Event of the Action.

1. General Consideration.

The Rule Stated.—To determine when such interests exists as to render a person incompetent, the following rule should be applied: The true test of the competency of a witness is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action; if not, he is not disqualified. Jones v. Emory, 115 N.C. 158, 20 S.E. 206 (1894); Henderson v. McLain, 146 N.C. 329, 59 S.E. 873 (1907).

The competency of the interested witness is limited to the same transaction as the one testified about by the administrator or the deceased, or elicited from the witness himself by the administrator. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Nature of Interest Involved.—This section does not disqualify every witness who, in the broadest sense of the term, is inter-

ested in the event of the action, but only such as have a direct and substantial or a direct legal or pecuniary interest in the result. Jones v. Emory, 115 N.C. 158, 20 S.E. 206 (1894); Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241 (1914); In re Gorham, 177 N.C. 271, 98 S.E. 717 (1919); Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

It follows that a mere sentimental interest will not suffice. Sutton v. Walters, 118 N.C. 495, 24 S.E. 357 (1896); Sanderson v. Paul 235 N.C. 56, 69 S.E.2d 156 (1952).

And it has been held that relationship of the parties alone does not constitute the direct, legal, pecuniary interest required. See Sutton v. Walters, 118 N.C. 495, 24 S.E. 357 (1896); Porter v. White, 128 N.C. 42, 38 S.E. 24 (1901); Bennett v. Best, 142 N.C. 168, 55 S.E. 84 (1906); Walston v. Lowry, 212 N.C. 23, 192 S.E. 877 (1937).

Present Interest.—In Isler v. Dewey, 67 N.C. 93 (1872), the court intimates that the interest necessary to disqualify is a present interest; that is, one retained by the party at the time of examination. In reaching this conclusion it was said: "Any other construction would make a statute, professedly for the removal of the incompetency of witnesses, the means of introducing new incompetencies unknown to the common law and opposed to its principles." See Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

In Bunn v. Todd, 107 N.C. 266, 11 S.E. 1043 (1890), it is said: "Originally this section disqualified a fourth class of persons, i. e. those who have had an interest in the subject matter of the suit, but whose interest has since ceased. This disqualification did not exist at common law, and was struck out of this section of the Code of 1883, except in the cases in which such persons still came under the third class of disqualified persons above [see the Editor's Note and analysis line I of this note] stated."

Witness Must Be Party in Interest.—The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, is not incompetent as falling within the provisions of this section, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action. Fort Worth & D.C. Ry. v. Hegwood, 198 N.C. 309, 151 S.E. 641 (1930).

In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted. Hager v. Whitener, 204 N.C. 747, 169 S.E. 645 (1933).

Not Confined to Parties to Action.—The provisions of this section are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action. Honeycutt v. Burleson, 198 N.C. 37, 150 S.E. 634 (1929).

Witness Having Dual or Alternative Interest. — To determine the competency of a witness who has a dual or alternative interest in the event of the action, the court must decide which of the two interests was the more immediately valuable. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

2. Applications.

No Interest in Recovery — Interest in Subject Matter. — In an action against an insane person for damages for breach of warranty in a deed, a witness who is not interested in the recovery is not disqualified by this section, though he may have an interest in the land. Lemly v. Ellis, 143 N.C. 200, 55 S.E. 629 (1906).

Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of this section and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial. Pitman v. Hunt, 197 N.C. 574, 150 S.E. 13 (1929).

Husband of Donee of Gift May Testify as to Declarations Made by Donor to Donee.—The husband of the donee of a gift may testify as to directions given and declarations made by the donor to the donee, since the testimony is not in behalf of the husband or in behalf of a party succeeding to his interest nor as to a transaction or communication between him and the deceased the testimony being as to a transaction between donor and donee. Scottish Bank v. Atkinson, 245 N.C. 563, 96 S.E.2d 837 (1957).

Neither Husband Nor Wife Is an Interested Party.—Where husband and wife instituted separate suits to recover, each respectively, for personal services rendered by them to defendant's testate, it was held that each was competent to testify for the other, since neither had a direct pecuniary interest in the action of the other, and was

not therefore an interested party in the other's action within the meaning of this section, the testimony not being as to a transaction between the witnesses, and the deceased, but between a third party and deceased. Burton v. Styers, 210 N.C. 230, 186 S.E. 248 (1936).

It has been consistently held by this court that the prohibition against the testimony of a "person interested in the event" extends only to those having a "direct legal or pecuniary interest," and not to the sentimental interest the husband or wife would naturally have in the lawsuit of the other. Burton v. Styers, 210 N.C. 230, 186 S.E. 248 (1936), citing Hall v. Holloman, 136 N.C. 34, 48 S.E. 515 (1904); Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241, L.R.A. 1917A, 1 (1914); Vannoy v. Stafford, 209 N.C. 748, 184 S.E. 482 (1936). See § 8-56 and note.

Where the blind husband of a grantee, in a deed reserving a life estate in the grantor, was present and heard the grantor acknowledge its execution and delivery, he was a competent witness to prove such execution and delivery, his wife having died prior to the grantor and the title therefore being vested in her son, in that his evidence disclosed no personal transaction or communication and he was not a party in interest within this section. Turlington v. Neighbors, 222 N.C. 694, 24 S.E.2d 648 (1943).

The Same Being True of Attorney Formerly Holding Note for Collection.—An attorney formerly holding a note for collection is not an interested party in an action on the note within the meaning of this section, prohibiting testimony by interested parties as to transactions with or declarations of a decedent. Vannoy v. Stafford, 209 N.C. 748, 184 S.E. 482 (1936).

And of Draftsman Who Failed to Insert Reversionary Clause in Deed.—In an action for reformation of a deed to a county board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement between the grantors and grantee, testimony of the draftsman relating to declarations of a deceased member of the board and of the superintendent of schools, tending to show that it was agreed that the reversionary clause should be inserted, was held not precluded by this section, the draftsman not being a party interested in the event as contemplated by the statute. Ollis v. Board of Educ., 210 N.C. 489, 187 S.E. 772 (1936).

Interest of Wife in Compensation Due Husband.—In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no interest in the event which would bar her testimony as to a transaction with the deceased, and it is competent for her to testify to the contract relied upon by her husband the plaintiff. Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241 (1914). See Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

In Linebarger v. Linebarger, 143 N.C. 229, 55 S.E. 709 (1906), the court had held that on an issue of devastavit vel non it was not competent to prove by a witness whose husband was one of the caveators and heirs at law of the testator, declarations of said testator offered for the purpose of showing undue influence, as such witness had an interest in the real estate, dependent upon the result of the action. This and the foregoing cases are distinguishable, however, upon the ground that in the Linebarger case the property in controversy was land, and the wife's inchoate dower attached immediately upon the recovery by her husband.—Ed. note.

The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of this section, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased. Honeycutt v. Burleson, 198 N.C. 37, 150 S.E. 634 (1929).

A husband has no vested interest in the real estate of his wife, and it would seem that he is not a "person interested in the event" within the contemplation of this section in an action involving his wife's title to realty. Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938).

Widower Has No Interest in Division of Wife's Lands among Children. — When a husband and wife, each owning certain lands, enter into an agreement to pool their lands for division among their children, and the wife dies intestate before her lands are deeded in accordance with the agreement the husband has a life estate in her lands as tenant by the curtesy regardless of the disposition of the lands among the children, and therefore has no direct pecuniary interest in an action by the children to whom deeds were not executed to declare the heirs of another child estopped to assert an interest in the lands of their mother, and his testimony of the agreement with his wife is not precluded by this

section. Coward v. Coward, 216 N.C. 506, 5 S.E.2d 537 (1939).

The mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, is not a party interested in the event of the action whose evidence on the trial is excluded under the provisions of this section. Conley v. Cabe, 198 N.C. 298, 151 S.E. 645 (1930).

Husband as Interested Party in Deed Drawn by Wife.—The husband is an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife is being attacked for the want of his joining therein; and upon the question of abandonment, his evidence, to the effect that his wife said to him, she would give him a horse if he would leave, was incompetent. The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with deceased," and also incompetent. Whitty v. Barham, 147 N.C. 479, 61 S.E. 372 (1908).

Husband as Interested Party in Check Given Wife.—When a check made payable to one of the intestate's daughters and signed by the intestate was introduced in evidence to show an advancement, the daughter's husband was held competent under this section to testify over objection that the check was given his wife as a wedding present, he having no interest in the event of the action. Likewise another daughter was permitted to testify for her sister, the transaction testified to not being between the witness and deceased, but between the witness's sister and deceased father. Vannoy v. Green, 206 N.C. 80, 173 S.E. 275 (1934).

Interest of Depositor's Son in Action to Recover Moneys Deposited.—In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under this section, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result. Donoho v. Wachovia Bank & Trust Co., 198 N.C. 765, 153 S.E. 451 (1930).

Sheriff as Witness. — A deputy collected a sum of money on account of taxes and deposited the same with G. with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sheriff the sum so collected; it was held, in an action to recover the amount, brought by the deputy against the administrator of G., that the sheriff had no interest in the event of the action, and was a competent witness under this section. Allen v. Gilkey, 86 N.C. 65 (1882).

A partner in intestate's firm may not testify as to transactions or communications with intestate in an action by brokers against the estate on a claim for commissions and advancements. Fenner v. Tucker, 213 N.C. 419, 196 S.E. 357 (1938).

Where one partner is (a) a party to the action, (b) is interested in the event of the action, and (c) the other partner is dead, because his lips are sealed in death the living partner is incompetent to testify in his own behalf to any transaction or communication between himself and the intestate concerning his relationship to the copartnership and to relate certain conversations he had with deceased about the assets of the partnership. Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943).

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, is clearly inadmissible under this section. Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943).

Testimony as to Partnership Transaction by Nonmember of Firm.—Where the defendant's liability depends upon whether he was a member of the defendant partnership at the time the firm contracted a debt, which is the subject of the action, with the plaintiff who has since died and whose administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of this section as to the payment to his own knowledge by the deceased of the partnership debts. Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

Stockholder's Interest in Recovery on Contract of Sale.—Where defendant's intestate made two separate contracts with the holders of stock in a corporation to

purchase their respective holdings, in an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. It was held the witness was not interested in the event, and his testimony as to transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent under this section. Winborne v. McMahan, 206 N.C. 30, 173 S.E. 278 (1934).

In caveat proceedings propounders and caveators are "parties interested in the event" within the meaning of this section. In re Will of Brown, 203 N.C. 347, 166 S.E. 72 (1932).

The interest of one who temporarily held the title to the lands in dispute prior to the defendant is a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. Dill-Cramer-Truitt Corp. v. Downs, 201 N.C. 478, 160 S.E. 492 (1931).

In this case, testimony of an endorser of a note, as to conversations with the payee's agent, now dead, showing the consideration which induced the endorsement, is not excluded under this section, the agent not being a party interested in the event within the meaning of the statute for, although the agent guaranteed all notes to the payee, if there was a failure of consideration the payee could hold neither of the guarantors and had the endorser been liable he could not have recovered from the agent. American Agricultural Chem. Co. v. Griffin, 204 N.C. 559, 169 S.E. 152 (1933).

Effect of Insolvency of Deceased.—In an action involving the validity of a deed of trust, where the trustor is dead and his estate insolvent, the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under this section is removed by the insolvency of his father's estate, for there is nothing for the children in any event of the action. Gidney v. Logan, 79 N.C. 214 (1878).

Holder of Insurance Policy. — A policy holder in a mutual life insurance company is not disqualified as "interested in the event of the action" to testify for the company suing to cancel another policy. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N.C. 534, 90 S.E. 574 (1916). See also Gwaltney v. Provident Sav. Life Assurance Soc'y, 132 N.C. 925, 44 S.E. 659 (1903); Gwaltney v. Provident Sav. Life Assurance Soc'y, 134 N.C. 552, 47 S.E. 122 (1904).

Agreement to Bequeath Property in Consideration of Services. — Where the plaintiff, in her own right and as administratrix of her mother, seeks to recover upon an alleged contract made by her mother and another person now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it is incompetent for the plaintiff to testify to communications or transactions between her mother and such other person tending to establish her demand, for she is a party interested, within the contemplation of the statute. Brown v. Adams, 174 N.C. 490, 93 S.E. 989 (1917).

Agreement as to Disputed Boundary.— Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication prohibited by this section. Poole v. Russell, 197 N.C. 246, 148 S.E. 242 (1929).

C. Persons Deriving Title or Interest Through Two Preceding Classes.

In General. — The words of this section "derives its interest or title by assignment or otherwise" mean—gets from a source—some person, through or under one or more persons, successively, directly or indirectly, immediately or mediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever nature, whether legal or equitable, acquired by assignment, or by any other means, or in any other manner. Carey v. Carey, 104 N.C. 171, 10 S.E. 156 (1889).

It should be noted, however, that interest must be present and not speculative. So it has been held that a husband is not disqualified by interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefited by her will or in case of her intestacy being too remote. McCurry v. Purgason, 170 N.C. 463, 87 S.E. 244 (1915).

When deceased has had no interest in lands, but was simply an assignee, evidence of his declarations is admissible as no claim of title is made under him. Condor v. Secrest, 149 N.C. 201, 62 S.E. 921 (1908).

The exclusion under this section applies to privies as well as parties. Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960).

Attorney.—The fact that an attorney has had an interest in the event of a suit on account of the fee taxed does not disqualify him under this section. Syme v. Broughton, 85 N.C. 367 (1881). Nor is an attorney of one of the parties precluded from testifying for his client concerning the agreement. Propst v. Fisher, 104 N.C. 214, 10 S.E. 295 (1889).

Testimony of Grantee of Deceased Debtor.—In an action in the nature of a creditor's bill, evidence of the brother of the immediate grantee of the deceased debtor was held incompetent as in favor of their sister, claiming title under the witness, the validity of which title was affected by the testimony. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917).

Suits by Plaintiff against Surety. — See post, this note, "When the Disqualification Exists," III.

Trustee.—In an action by trustors against a trustee to compel an accounting for the proceeds of a foreclosure sale the incompetency of the trustor to testify as to transactions between himself and the deceased cestui que trust must be predicated upon the assumption that trustee under the deed of trust derived his "title or interest from, through or under" the cestui, and furthermore that it is this interest which is attacked. Garrett v. Stadiem, 220 N.C. 654, 18 S.E.2d 178 (1942).

III. WHEN THE DISQUALIFICATION EXISTS.

Party Testifying against Interest. — Under this section a witness may testify against his own interest, even if thereby other parties to the suit are injuriously affected and the disqualification applies only when a witness testifies in his own behalf. In re Worth's Will, 129 N.C. 223, 39 S.E. 956 (1901); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after its execution which are competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, is not prohibited by this section. In re Worth's Will, 129 N.C. 223, 39 S.E. 956 (1901); In re Will of Fowler, 159 N.C. 203, 74 S.E. 117 (1912).

In an action to declare a deed void on the ground that it was never delivered to the grantee, since deceased, testimony offered by the grantor tending to show that the deed had not been delivered is not incompetent under this section. Gulley v. Smith, 203 N.C. 274, 165 S.E. 710 (1932).

When the witness is testifying not in his own behalf or interest, but against his interest, he is not disqualified by this section. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

Contradicting Former Witness. — A defendant having an interest in the event of an action is not permitted under this section to testify in his own behalf, for the purpose of contradicting a former witness whose testimony tended to show that the defendant fraudulently procured an assignment from a person deceased. Bushee v. Surles, 77 N.C. 62 (1877).

Testifying in Favor of Representative.—Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, it was held that such testimony does not fall within the inhibition of this section, which is intended to protect the deceased person's representative or assignee, who is suing or being sued. Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

Where the witness was testifying for, rather than against, the person deriving title or interest from, through or under a deceased person, such testimony does not come within the inhibitions of this section. Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951).

Representative Not a Party.—It is competent for a plaintiff, as a witness for himself, to testify where the representative of the deceased was not a party to the suit. Thomas v. Kelly, 74 N.C. 174 (1876).

Trustor as Witness. — Where a deed of trust was attacked for fraud, the trustee having died, and the property having been conveyed by a substituted trustee to the defendants, the trustor is not excluded by this section from being a witness for the plaintiff, who also claimed title through him. Isler v. Dewey, 67 N.C. 93 (1872).

Suits against Sureties. — The rule to be deduced from the authorities is that the surety, who comes not within the letter but within the intendment of the law, stands in the same position and is entitled

to the same protection as the representative of his deceased principal when sued. McGowan v. Davenport, 134 N.C. 526, 47 S.E. 27 (1904).

Conversation before Death of One of Contracting Parties Admissible. — A witness is not incompetent, under this section, to testify to a conversation had with two persons, one of whom is dead at the time of the trial, in reference to a contract made between them and the witness. Peacock v. Stott, 90 N.C. 518 (1884).

Partnership. — The death of one of the partners in a firm will not incapacitate the witness from proving a transaction with the firm while the other partner, who was present at the interview, is living. Peacock v. Stott, 90 N.C. 518 (1884).

Where the conversation is not strictly with the intestate, but is one held with him and two others who were associated with him in the transaction, then the provisions of this section do not incapacitate the party from testifying. Johnson v. Townsend, 117 N.C. 338, 23 S.E. 271 (1895).

Testimony of Third Parties Present.— This section makes no exception where other parties are present but leaves these witnesses to be called by either, and their testimony to come before the jury and be considered by itself, its credit unaffected by the testimony of the interested party. MacRae v. Molley, 90 N.C. 521 (1884).

The administrator of a deceased guardian is a competent witness to prove the execution to said guardian by a debtor of a bond for the payment of money, such testimony not being against the representatives of a deceased person. Thompson v. Humphrey, 83 N.C. 416 (1880).

Where Adverse Party Non Compos Mentis.—A party interested in the event of the action may not testify as a witness as to a transaction with the adverse party who at the time of trial has been adjudged non compos mentis. Price v. Whisnant, 232 N.C. 653, 62 S.E.2d 56 (1950).

Receipt of Money from Person Now Deceased.—Where, in an action to establish a claim against an estate, plaintiff introduces evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds is tantamount to testifying that decedent had not paid her any part thereof, and is incompetent under this section. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947).

Testimony by the maker of notes as to transactions with deceased payee tending to establish nonliability was properly excluded as coming within prohibition of this section. Perry v. First Citizens Nat'l Bank & Trust Co., 226 N.C. 667, 40 S.E.2d 116 (1946).

IV. SUBJECT MATTER OF THE TRANSACTION.

This section relates not only to "personal transactions" but also to "communications" with a deceased person. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Not Applicable unless Transaction Is Personal.—Under this section the parties in interest are disqualified from testifying only as to personal transactions with the deceased. McCall v. Wilson, 101 N.C. 598, 8 S.E. 225 (1888); Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899); Davidson v. Bardin, 139 N.C. 1, 51 S.E. 779 (1905).

This section does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal transactions between herself and the deceased. Collins v. Lamb, 215 N.C. 719, 2 S.E.2d 863 (1939).

Testimony of an interested witness as to independent facts and circumstances, within his own knowledge, or as to what he saw or heard take place between deceased and a third party, is not rendered incompetent by this section, since in such instances the testimony does not relate to a personal transaction or communication between the witness and deceased, and appellant's exceptions to the admission of such testimony are not sustained. Wilder v. Medlin, 215 N.C. 542, 2 S.E.2d 549 (1939).

Testimony of a witness as to what he himself did in regard to the transaction does not come within the prohibition of this section when it does not relate to acts or communications with the deceased person in regard to such transaction. Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957).

Test as to When Transaction Is "Personal."—A fair test in undertaking to ascertain what is a "personal transaction or communication" with the deceased is to inquire whether, in case the witness testifies falsely, the deceased, if living, could contradict it of his own knowledge. Sherrill v. Wilhelm, 182 N.C. 673, 110 S.E. 95 (1921).

A personal transaction or communication within the purview of this section is anything done or said between the witness

and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

A personal transaction or communication within the purview of this section is anything done or said between the witness and the deceased person tending to establish the claim being asserted against the personal representative of the deceased person. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

A personal transaction as used in this section includes that which is done by one person which affects the rights of another, and out of which a cause of action has arisen. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Driving of Car Is "Transaction" within Meaning of Statute.—Where the only evidence of negligence in an action by the wife of the driver to recover for injuries sustained in an automobile accident, was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car, the driving of the car was a transaction within the meaning of the term as used in this section and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under this section, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her. Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934).

Prior to the 1967 amendment to this section it was held that the surviving occupant of an automobile, in an action against the estate of the deceased occupant, was an incompetent witness as to the identity of the driver immediately preceding and at the time of the wreck. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962). See Davis v. Pearson, 220, N.C. 163, 16 S.E.2d 655 (1941).

Transaction Must Be Exclusive Source of Knowledge.—In order to exclude testimony under this provision, it must be made to appear that the knowledge of the witness was derived from a personal transaction with the deceased person. Thompson v. Onley, 96 N.C. 9, 1 S.E. 620 (1887). And it is proper to show whether the witness had knowledge of the fact testified to, from sources extraneous to his personal communications or relations with the deceased. Charlotte Oil & Fertilizer Co. v. Rippy, 123 N.C. 656, 31 S.E. 879 (1898).

Facts Occurring Out of Presence of Deceased.—A witness who offered to prove a fact which occurred out of the presence of, and which was in no sense a transaction with, a deceased person is not incompetent under this section. It is only when the transaction is between the deceased and the living party that the statute prohibits the latter from testifying. Lockhart v. Bell, 86 N.C. 443 (1882).

Substantive Facts.—In an action in the nature of a creditor's bill, testimony of the deceased debtor's grantee that the deceased grantor occupied the building part of the time after she got her deed to the land in litigation was held admissible as being to a substantive fact of which she had knowledge independently of any statement by the deceased. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917).

The rule may be deduced, therefore, that a party in interest may testify to any substantive fact which is independent of any transaction or communication with the deceased or is based upon independent knowledge not derived from such source. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917). See also In re Will of Saunders, 177 N.C. 156, 98 S.E. 378 (1919); Price Real Estate & Ins. Co. v. Jones, 191 N.C. 176, 131 S.E. 587 (1926).

Conversation of Deceased with Living Defendant.—This section does not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This is not testimony "concerning a personal transaction." Abernathy v. Skidmore, 190 N.C. 66, 128 S.E. 475 (1925).

Testimony Given in Former Trial.—It is competent for the plaintiff's witness to testify what the deceased maker of the note sued upon testified on a former trial as to its payment, such not being a personal transaction within the meaning of the provisions of this section. Costen v. McDowell, 107 N.C. 546, 12 S.E. 432 (1890); Worth v. Wrenn, 144 N.C. 656, 57 S.E. 388 (1907).

Proof of Handwriting.—A party interested in the event of a suit is not an incompetent witness, under this section, to prove the handwriting of the deceased person. Rush v. Steed, 91 N.C. 226 (1884); Hussey v. Kirkman, 95 N.C. 63 (1886); Armfield v. Colvert, 103 N.C. 147, 9 S.E.

461 (1889); Sawyer v. Grady, 113 N.C. 42, 18 S.E. 79 (1893); Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943).

The plaintiff on his examination-in-chief, in an action against an executor or administrator, is competent to testify to the handwriting of deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944). See State ex rel. Peoples v. Maxwell, 64 N.C. 313 (1870), decided prior to the insertion of the word "personal" before the word "transaction."

A husband, who has testified that he knows his wife's handwriting, is competent to testify after his wife's death, that her signature was on the note in question, and while his further testimony that she signed the instruments in question is technically incompetent under this section, such further testimony will not be held prejudicial when this fact is established by other competent testimony. Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957).

Conversations between Decedent and Third Person.—Testimony by a party as to a conversation between decedent and a third person did not concern a personal transaction or communication between the witness and the decedent, therefore it is not excluded by this section. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

A person seeking to recover for personal services rendered a decedent is precluded by this section from testifying that he expected to receive pay for his services "after she (the decedent) said go ahead" when such testimony tends to prove her agreement to pay for the services. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

Since personal services rendered by plaintiff to decedent are of necessity personal transactions between them, plaintiff may not testify, directly that he rendered such services nor establish this fact indirectly by testifying that he expected pay for such services or as to their value, or that he had not been paid for them. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

Will Cases.—In Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899), it is held that this section does not apply to wills, but that they are governed by §§ 31-9 and 31-10; this was placed on the ground that this section applies where there is necessarily a contract or agreement between the parties, and in the case of a will there is ordinarily no transactions between the parties.

The second paragraph under this catchline in the recompiled volume should read: By the same reasoning it is held that attesting a will is not a "personal transaction," the witness being of the law and not of the party. Vester v. Collins, 101 N.C. 114, 7 S.E. 687 (1888). But a beneficiary may not testify as to the leaving of a holograph will with her for safekeeping. McEwan v. Brown, 176 N.C. 249, 97 S.E. 20 (1918). A beneficiary may, however, testify that when a will was opened it contained certain erasures and that they were not made by him. In re Will of Saunders, 177 N.C. 156, 98 S.E. 378 (1919).

Circumstances may arise, however, in which the person interested as a beneficiary may attempt to testify as to personal transactions or conversations with the deceased and this testimony would, of course, be excluded. But the rule of exclusion does not apply, as may be inferred from the preceding cases, as to facts of which the witness had knowledge by means other than by personal transactions with the deceased. So the rule does exclude the witness from testifying as to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question. In re Will of Mann, 192 N.C. 248, 134 S.E. 649 (1926).

Under this section a party interested in the results of the action is incompetent to testify to declaration of the deceased, whose will is under attack, when the issue is as to undue influence. In re Will of Plott, 211 N.C. 451, 190 S.E. 717 (1937).

The rule prohibiting an interested party from testifying as to a transaction with a decedent does not preclude a caveator from testifying as to his opinion of the mental condition of testator. In re Will of Thompson, 248 N.C. 588, 104 S.E.2d 280 (1958).

A challenge to the testimony of a witness on the ground that any knowledge regarding a purported will and where it was located was obtained as the result of a personal transaction or communication with the testatrix was rejected. In re Will of Wilson, 258 N.C. 310, 128 S.E.2d 601 (1962).

This section applies to caveat proceedings notwithstanding that they are in rem, with the exception that beneficiaries under the will are competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity.

In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

Testimony Relating Solely to Issue of Mental Capacity.—A party interested in the event may testify as to transactions with a decedent when such testimony relates solely to the issue of mental capacity. Goins v. McLoud, 231 N.C. 655, 58 S.E.2d 634 (1950).

Where a witness testifies to the want of mental capacity in a grantor to take a deed, and that his opinion was formed from conversation and communication between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded, the provisions not applying as the subject was not a "transaction" within its meaning. McLeary v. Norment, 84 N.C. 235 (1881); Rakestraw v. Pratt, 160 N.C. 436, 76 S.E. 259 (1912).

Services of Physician.—Testimony by a physician, the plaintiff, that he attended the deceased as such, for which he had an account against him, of the number of visits, sum due therefor, etc., is incompetent as being "personal" transactions with the deceased, prohibited by this section. Dunn v. Currie, 141 N.C. 123, 53 S.E. 533 (1906); Knight v. Everett, 152 N.C. 118, 67 S.E. 328 (1910).

Sale of Property by Guardian.—It is competent for the plaintiff to prove the sale of his property by his guardian as this is not a personal transaction within the meaning of this section. State ex rel. Dobbins v. Osborne, 67 N.C. 259 (1872).

Testimony as to Placement of Deed.—This section does not exclude testimony that the witness saw the decedent place the deed, under which the witness claims, in a trunk as it does not involve a communication or transaction with him. Cornelius v. Brawley, 109 N.C. 542, 14 S.E. 78 (1891); Carroll v. Smith, 163 N.C. 204, 79 S.E. 497 (1913).

In a proceeding for dower, the decision of the question whether the plaintiff left her husband's home of her own volition or by reason of what the law will recognize as compulsion, is an inquiry that does not necessarily involve a transaction or communication with her husband which disqualifies her under this section. Hicks v. Hicks, 142 N.C. 231, 55 S.E. 106 (1906).

Claim That Intestate Was Holder in Due Course.—Where the administrator of the deceased claims that his intestate was a holder of a negotiable instrument in due course for value, and relies upon his intestate's possession to make out a prima facie case, it is not a personal transaction or communication with the deceased, prohibited by statute, for it may be shown in rebuttal that after maturity it was seen in the possession of another claimant of the title. Price Real Estate & Ins. Co. v. Jones, 191 N.C. 176, 131 S.E. 587 (1926).

Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon "balance on account" was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by this section. Walston v. Coppersmith, 197 N.C. 407, 149 S.E. 381 (1929).

Sale of Interest in Partnership.—This section does not apply to a transaction between living persons by which one of them sold to the other his interest in a firm of which the decedent was the other partner. Brantley v. Marshbourn, 166 N.C. 527, 82 S.E. 959 (1914).

Bailment.—The burden is on plaintiff to show the contract of bailment sued on, whether express or implied, by competent evidence, and the fact that the alleged bailee is dead, rendering incompetent testimony as to any transaction or communication with him to establish the bailment, is not a circumstance to be considered in passing upon the sufficiency of the evidence actually presented. Troxler v. Bevill, 215 N.C. 640, 3 S.E.2d 8 (1939).

Settlement of Estate.—Testimony relating to an agreement between administrator and distributee in regard to the settlement of an estate was incompetent in an action by distributee's administrator to recover assets. Wilder v. Medlin, 215 N.C. 542, 2 S.E.2d 549 (1939).

Possession of Stock. — See Jones v. Waldroup, 227 N.C. 178, 7 S.E.2d 366 (1940).

Loan and Instrument Evidencing Same.—In an action by the widow against the executor of her husband upon an acknowledgment of indebtedness executed by the husband to her, the widow is incompetent to testify that she had loaned her husband the sum or that she saw him sign the instrument and that he delivered it to her. McGowan v. Beach, 242 N.C. 73, 86 S.E.2d 763 (1955).

In a civil action for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards de-

fendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, is excluded by this section as personal transactions and communications with defendant's intestate. McMichael v. Pegram, 225 N.C. 400, 35 S.E.2d 174 (1945).

V. EXCEPTIONS.

Similar Evidence Previously Introduced. —This section does not apply where evidence, similar to that which is being introduced, has previously been introduced and the door has been opened to the objecting party. Davison v. West Oxford Land Co., 126 N.C. 704, 36 S.E. 162 (1900).

Testimony otherwise incompetent under this section is rendered admissible when the personal representative of a deceased person, or the committee of a lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony as to declarations of the deceased person or lunatic is given in evidence concerning the same transaction or communication. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

The door is opened, under this section, by the representative of deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opens the door as to one transaction, the other party cannot swing it wide in order to admit another independent transaction. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

Introduction by opposing party of evidence of transaction between plaintiff and decedent opens door to plaintiff's testimony in regard thereto. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966).

Where, in an action to recover upon a quantum meruit for personal services rendered deceased, defendant executor first testified as to his version of the services rendered, it did not violate this section for plaintiff to testify in rebuttal as to the services she rendered, since the "door had been swung wide" by defendant's prior testimony. Highfill v. Parrish, 247 N.C. 389, 100 S.E.2d 840 (1957).

But this section gives a personal representative no right to "open the door," over the other party's objection, by incompetent evidence. Gurganus v Guaranty Bank & Trust Co., 246 N.C. 655, 100 S.E.2d 81 (1957).

Similar Evidence Subsequently Introduced.—The rule is that when incompetent evidence is admitted over objection, the admission of such evidence is cured where the same evidence, or evidence of substantially the same import, is thereafter admitted without objection. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

The incompetence of the adverse party to testify may be removed by his being cross-examined as to the transaction in question by the personal representative of the deceased, but only as to the particular matters inquired about. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Grounds for Exceptions.—The rule of exclusion, if left absolute in form, might in certain cases, it was thought, work unequally, and therefore the exception was inserted to make it fair and just in its operation. There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication. It could not be otherwise without opening the door much wider than the necessity of the particular case justified. Pope v. Pope, 176 N.C. 283, 96 S.E. 1034 (1918). Where the testimony, of a deceased adverse party has been given and is available, the reason for the exclusion rule ceases. Phillips v. Interstate Land Co., 174 N.C. 542, 94 S.E. 12 (1917).

In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by this section, such evidence must relate to the particular subject matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy. Walston v. Coppersmith, 197 N.C. 407, 149 S.E. 381 (1929).

Limitation of Exception. — Where the door is opened to the opposing party to testify for himself, he can testify only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. Sumner v. Candler, 92 N.C. 634 (1885).

Testimony of Representative of Deceased. — When defendant, representative of deceased, is examined in behalf of himself and his corepresentative concerning a personal transaction between plaintiff and deceased, under this section, he thus opens the door and makes competent the testimony of his adversary concerning the same transaction. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

Illustrations. — Where the defendant executor has testified as to certain matters relating to the identification of certain letters the deceased had written up-

on the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify in the plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transaction, etc., with a deceased person, does not apply. Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

It is incompetent as a transaction with a deceased person for the plaintiff to testify as to personal services rendered to the deceased as coming within her demand for damages. Pulliam v. Hoge, 192 N.C. 459, 135 S.E. 288 (1926), wherein the court said: "We do not think the defendant 'opened the door' by asking the plaintiff for an explanation as to why she had changed the amount at her demand."

The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence relates solely to transactions with the deceased, and a beneficiary is competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

VI. PLEADING AND PRACTICE.

Admission. — Anything that a party to the action has said, if relevant to the issues and not subject to some specific exclusionary rule, is admissible against him as an admission. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Effect of Failure to Object.—Objections to the competency of testimony must be taken in due time; if not, they are waived. Therefore, where a party was allowed to testify, upon examination in chief, to a conversation between himself and the defendant's testator, and during the cross-examination the defendant objected to the competency of such testimony and asked that it might be excluded, it was held that, although incompetent, the objection to its reception came too late. Meroney v. Avery, 64 N.C. 312 (1870). Where a general objection as to witness' competency was overruled, and afterwards no specific objection was made to his testimony as to transactions with the decedent, the objection will be deemed waived. Norris v. Stewart, 105 N.C. 455, 10 S.E. 912, 18 Am. St. R. 917 (1890).

The objection will not be considered unless so specific as to show that the evidence is objectionable. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889). The incompetency must appear at the time of the objection to the evidence, so that the court may pass intelligently upon the objection. Harris v. Harris, 178 N.C. 7, 100 S.E. 125 (1919).

When Admission of Evidence Harmless.—The erroneous admission of evidence of transactions with deceased persons prohibited by this section becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them. Ray v. Ray, 175 N.C. 290, 95 S.E. 550 (1918).

Motion to Strike Out Incompetent Part of Answer.—The rule is that where a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Determination on Appeal of Relevancy of Testimony.—Where testimony of transactions or communications with a decedent is properly excluded as irrelevant to the issue, its competency or incompetency under this section will not be determined on appeal. Pendleton v. Spencer, 205 N.C. 179, 170 S.E. 637 (1933).

§ 8-52. Communications between attorney and client.—In cases where fraud upon the State is charged it shall not be a sufficient cause to excuse anyone from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same. (1874-5, c. 213; Code, s. 1349; Rev., s. 1620; C. S., s. 1797.)

Statutory Exception.—This section, providing that communications to counsel, in cases of fraud where the State is concerned, are not privileged, constitutes a

statutory exception to the general rule privileging communications made to an attorney where the relation of attorney and client exists. Hughes v. Boone, 102 N.C. 137, 9 S.E. 286 (1889).

§ 8-53. Communications between physician and patient.—No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the court, either at the trial or prior thereto, may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1885, c. 159; Rev., s. 1621; C. S., s. 1798; 1969, c. 914.)

Editor's Note. — The 1969 amendment substituted "court, either at the trial or prior thereto" for "presiding judge of a superior court" in the proviso.

See 13 N.C.L. Rev. 326, 16 N.C.L. Rev. 53.

For note on the discretion of the trial judge in compelling disclosure of privileged information when in the area of physician-patient privilege, see 41 N.C.L. Rev. 627 (1963).

For case law survey on evidence, see 43 N.C.L. Rev. 900 (1965).

In General. — The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

If the statements were privileged under this section, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded. Sawyer v. Weskett, 201 N.C. 500, 160 S.E. 575 (1931).

Common Law.—At common law no privilege existed as to the confidential relations between physician and patient. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Section Amends Common-Law Rule.—Under the common-law communications which passed between a patient and a physician in the confidence of the professional relation, and information acquired by the physician while attending or treating the patient were not privileged or protected from disclosure by the physician. This section as interpreted by the Supreme Court has the effect of amending this common-law rule. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

In its wisdom the General Assembly has seen fit to pass this section. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Legislative Intent.—The legislature intended this section to be a shield and not a sword. It was careful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial judge to compel disclosure. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Purpose of Section Must Be Carried Out at Superior Court Level.—If the spirit and purpose of this section is to be carried out, it must be at the superior court level. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The words "the presiding judge of a superior court," as used in this section before the 1969 amendment, referred to the superior court judge who presided at the trial. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964); Johnston v. United Ins. Co. of America, 262 N.C. 253, 136 S.E.2d 587 (1964).

Before the 1969 amendment, this section did not authorize a judge in a hearing pursuant to former § 50-16 to compel the examination of a physician who submitted affidavits in support of the wife. Gustafson v. Gustafson, 272 N.C. 452, 158 S.E.2d 619 (1968), commented on in 46 N.C.L. Rev. 956 (1968); 47 N.C.L. Rev. 265 (1968).

Only Patient or Court May Authorize Disclosure.—The law protects the patient's secrets, and makes it the duty of the doctor to keep them, a duty he cannot waive. The veil of secrecy can be drawn aside only by the patient or by court, and by him only when the ends of justice require it. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

Purpose of Section.—One of the objects of this statute is to encourage full and frank disclosure to the doctor. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

It is the purpose of statutes such as

this section to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The sole purpose of this section is to create a privileged relationship between physician and patient. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Construction. — In the construction of this section, the chief concern of the court is to ascertain the legislative intent. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

This section creates a privileged relationship between physician and patient. Johnston v. United Ins. Co. of America, 262 N.C. 253, 136 S.E.2d 587 (1964).

Privilege Is Statutory.—At common law communications from patients to physicians are not privileged. Such privilege is purely statutory. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

What Information Included.—It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). See Creech v. Sovereign Camp of the Woodmen of the World, 211 N.C. 658, 191 S.E. 840 (1937); Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960); Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Relationship of Physician and Patient Must Exist.—The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and this section is not applicable. State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928).

The relationship of patient and physician within the purview of this section, does not exist between a defendant and an alienist examining him in regard to his sanity. State v. Litteral, 227 N.C. 527, 43 S.E.2d 84 (1947).

Where doctor went to the jail to examine defendant to determine if he was drunk or under the influence of intoxicating liquor at the request of defendant's brother, not at the request of defendant, and not to perform any professional services for defendant, the relationship of patient and physician, under such circumstances, did not exist between defendant and the doctor within the purview of this section. State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964).

Effect of Marriage Between Physician and Patient.—If the relation of doctor and patient existed between plaintiff and her former husband, any information which he acquired while attending her in his professional character is protected by this section in the same manner as if they had not been married to each other. Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

Proviso Refers to Exceptional Situations.—In view of the primary purpose of this section to create a privileged relationship between physician and patient, it is clear the proviso is intended to refer to exceptional, rather than ordinary, factual situations. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Information Is No Less Privileged Because It Was Obtained in Hospital.—There is no difference in the application of the statute between examination and treatment of the patient by a physician or surgeon in a hospital and in the home. The information is no less privileged that it was obtained in a hospital. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

This section applies to hospital records offered in evidence in an action to recover death benefits under a policy of insurance, where insurer denies liability on the ground that the application contained false statements with respect to insured's health, insofar as the records contain entries made by physicians and surgeons, or under their direction, pertaining to communications and information obtained by them in attending the insured professionally, which information was necessary to enable them to prescribe for her. However, any other information contained in the records, if relevant and otherwise competent, is not privileged. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Application to Nurses, Technicians and Others.—The effect of this section is not extended to include nurses, technicians

and others, unless they were assisting, or acting under the direction of, a physician or surgeon. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The provisions of this section also apply to nurses, technicians, and others when they are assisting or acting under the direction of a physician or surgeon, if the physician or surgeon is at the time acting so as to be within the rule set out therein. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Privilege Is That of Patient.—A physician or surgeon may not refuse to testify; the privilege is that of the patient. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Privilege May Be Waived.—The privilege given by this section is for the benefit of the patient alone, and it may be insisted on or waived at his discretion, subject to the exceptions included in the section. Fuller v. Knights of Pythias, 129 N.C. 318, 40 S.E. 65 (1901); Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). See Creech v. Sovereign Camp of the Woodmen of the World, 211 N.C. 658, 191 S.E. 840 (1937); Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

That this purely statutory privilege may be waived is undisputed. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Since the privilege is that of the patient alone, it may be waived by him and cannot be taken advantage of by any other person. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

This section does not require express waiver. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Waiver of the privilege may be express or implied. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

The privilege may be expressly waived by contract in writing. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Where the patient consents that the physician be examined as a witness by the adverse party with respect to the communication, the privilege is expressly waived. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

The privilege is waived by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

A patient may surrender his privilege in a personal injury case by testifying to the nature and extent of his injuries and the examination and treatment by the physician or surgeon. Whether the testimony of the patient amounts to a waiver of privilege depends upon the provisions of the applicable statute and the extent and ultimate materiality of the testimony given with respect to the nature, treatment and effect of the injury or ailment. The question of waiver is to be determined largely by the facts and circumstances of the particular case on trial. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Plaintiff did not waive the physician-patient privileges in the allegations in his complaint as to his mental incapacity. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Where plaintiff used an affidavit of his physician for the purpose of obtaining a temporary restraining order pending the hearing of his case on the merits, by the use of this affidavit the plaintiff did not waive the physician-patient privilege. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

By Patient's Testimony Describing Nature of Injuries in Detail. — While a patient does not waive his right to assert that a communication between himself and his physician is privileged by merely testifying as to his own physical condition, where the patient voluntarily goes into detail regarding the nature of his injuries, he waives the privilege, and the physician is competent and compellable to testify in regard thereto, since the patient will not be allowed to close the mouth of the only witness in a position to contradict him and fully explain the facts. Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

The legislature intended this section to be a shield and not a sword. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The privilege is not absolute, but qualified. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Trial Judge May Compel Disclosure.—The legislature was careful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial judge to compel disclosure. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

It was intended that disclosure should be compelled only when the examination of the physician was conducted under the supervision of the trial judge. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

The judge, in the exercise of discretion and by the authority of the proviso in this section, may follow the procedure for the admission of testimony and admit hospital records in evidence. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

But Only as to Matters Necessary to Proper Administration of Justice. — The trial judge may ascertain from the physician the nature of the evidence involved and may determine what part, if any, should be disclosed as necessary to the proper administration of justice. Obviously, the proper administration of justice might require disclosure as to certain but not as to all matters under the privilege. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

The proviso in this section does not authorize a superior court judge to strike down the statutory privilege in respect of any and all matters concerning which the physician might be asked at a deposition hearing. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964); Gustafson v. Gustafson, 272 N.C. 452, 158 S.E.2d 619 (1968), commented on in 46 N.C.L. Rev. 956 (1968); 47 N.C.L. Rev. 265 (1968).

The superior court's finding, inserted in the record, that the evidence of a physician was necessary to a proper administration of justice, takes the physician's evidence out of the privileged communication rule provided in this section. State v. Howard, 272 N.C. 519, 158 S.E.2d 350 (1968).

The privilege established by this section is for the benefit of the patient alone. It is not absolute; it is qualified by this section itself. A judge of superior court at term may, in his discretion, compel disclosure of such communications if, in his opinion, it is necessary to a proper administration of justice and he so finds and enters such finding on the record. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

This section requires, and the decisions of the Supreme Court are to the effect, that the trial judge may admit communication between physician and patient if in his opinion such is necessary to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The trial judge may admit a confidential communication between a physician and patient if in his opinion such is necessary to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

And He Should Not Hesitate to Do So. —Judges should not hesitate to require disclosure where it appears to them to be necessary in order that the truth be known and justice be done. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

But Appellate Court Cannot Exercise Trial Judge's Authority. — The appellate court cannot exercise the authority and discretion vested in the trial judge by the proviso in this section, nor can it repeal or amend the statute by judicial decree. If the spirit and purpose of the law is to be carried out, it must be at the superior court level. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

In the absence of a finding by the trial court that, in its opinion, the admission of hospital records was necessary to a proper administration of justice, the appellate court is compelled to hold that their exclusion was not error. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Judge's Finding of Record That Testimony Necessary.—Before a physician may testify to matters arising in his confidential relationship with his patient, out statute requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. Metropolitan Life Ins. Co. v. Boddie, 194 N.C. 199, 139 S.E. 228 (1927). See Creech v. Sovereign Camp of the Woodmen of the World, 211 N.C. 658, 191 S.E. 840 (1937); Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

Where the presiding judge compels disclosure, as provided by this section, he shall enter upon the record his finding that the testimony is necessary to a proper administration of justice. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The judge shall enter upon the record his finding that the testimony is necessary

to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

In construing this section it is incumbent on the presiding judge to find the fact, and this should appear in the record in substance, that in his opinion, the disclosure is necessary to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Order in Chambers for Pretrial Examination of Physician. — Prior to the 1969 amendment to this section, it was held that the judge of the superior court had no authority to enter an order in chambers for the pretrial examination of a physician in regard to confidential communications of his patient. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

And defendants cannot take the deposition of plaintiff's physician because, under this section, he is disqualified to testify as to information he acquired in attending plaintiff in a professional capacity. Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959).

Cited in State v. Wade, 197 N.C. 571, 150 S.E. 32 (1929).

§ 8-53.1. When evidence of physician not privileged notwithstanding § 8-53.—Notwithstanding the provisions of G.S. 8-53, the physician-patient privilege shall not be a ground for excluding evidence regarding the abuse or neglect of a child under the age of sixteen years or regarding an illness of or injuries to such child or the cause thereof, in any judicial proceeding resulting from a report pursuant to §§ 14-318.2 and 14-318.3. (1965, c. 472, s. 2.)

§ 8-53.2. Communications between clergymen and communicants.— No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred. (1959, c. 646; 1963, c. 200; 1967, c. 794.)

Editor's Note.—The 1967 amendment rewrote this section.

For note on "Privileged Communications —The New North Carolina Priest-Penitent Statute," see 46 N.C.L. Rev. 427 (1968).

In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967), cited in the note below, was commented on in 45 N.C.L. Rev. 863, 884, 924 (1967).

Statutory Privilege. — Apart from this statute, there is no privilege with reference to communications between a clergyman, or other spiritual advisor, and his communicants or others who seek his advice and comfort. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967), decided prior to the 1967 amendment.

Section as Ground for Refusal to Be Sworn and to Testify.—Where no objection to the proposed testimony is advanced by the defendant on trial or by any "communicant" of the witness, this section does not afford justification for his refusal to be sworn and to testify. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967), decided prior to the 1967 amendment.

§ 8-53.3. Communications between psychologist and client. — No person, duly authorized as a practicing psychologist or psychological examiner, nor any of his employees or associates, shall be required to disclose any information which he may have acquired in rendering professional psychological services, and which information was necessary to enable him to render professional psychological services: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1967, c. 910, s. 18.)

Editor's Note.—Section 23, c. 910, Session Laws 1967, provides that the act shall become effective July 1, 1967.

§ 8-54. Defendant in criminal action competent but not compellable to testify.—In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself. (1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4; 1881, c. 89, s. 3; c. 110, ss. 2, 3; Code, ss. 1353, 1354; Rev., ss. 1634, 1635; C. S., s. 1799.)

Cross References.—See N.C. Const., Art. I, § 11. As to provision in preliminary examination, see § 15-89. As to exceptions, i.e., where witness is not excused from testifying on ground that testimony will tend to incriminate him, see §§ 1-357, 14-38, 14-354, 18-8, 18-27.

Editor's Note. — For article discussing the limits to self-incrimination, see 15 N.C.L. Rev. 229. For note concerning confessions, see 23 N.C.L. Rev. 364. As to compelling accused to speak so that witness may identify his voice, see note in 27 N.C.L. Rev. 262.

For note on "Constitutional Law—Is the Restricted Cross-Examination Rule Embodied in the Fifth Amendment?", see 45 N.C.L. Rev. 1030 (1967).

Historical Background.—To correctly interpret and apply this section, it should be remembered that at common law, both in England and in this country, parties were not competent witnesses and were not permitted to testify. Nonetheless, an admission of guilt by defendant was competent evidence just as it is competent today. Then as now the law applied and gave effect to the assumption that one charged with crime and wrongful conduct would not remain silent when he had an opportunity to speak. Such silence was evidence of guilt. Thus, when the barrier was removed, preventing the accused from testifying and according him a privilege, it was proper to provide that his failure to utilize the privilege so given should not be regarded as an implied admission. State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1960).

Common-law disqualification removed by this section. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Privilege and Not a Duty.—A defendant in a criminal matter can only be examined as a witness by his own request. State v. Ellis, 97 N.C. 447, 2 S.E. 525 (1887).

Distinction between This Section and § 15-89.—There is a distinction between the statement made by a prisoner on his preliminary examination before a magistrate under § 15-89 and his testimony given under this section as a witness on the trial of the cause. On the former he is advised of his rights, and such examination is not to be an oath. On the latter, the defendant, at his own request, but not otherwise, is competent but not compellable to testify, and his testimony thus given is received under the sanction of oath. State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944); State v. Sheffield, 251 N.C. 309, 111 S.E.2d 195 (1959).

Where the examining magistrate takes the preliminary statement of a prisoner under the compulsion of an oath, contrary to the provisions of § 15-89, and without the advice of counsel, such statement may not be used against him on the trial, because, being thus induced, it is deemed to be involuntary. But this has no application to the testimony of a defendant given voluntarily as a witness in his own behalf under this section. State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944).

Where a prisoner made certain confessions which were induced by hope, and therefore inadmissible, but a day or so after, upon his examination before a committee magistrate, he asked to be examined as a witness on his own behalf, when he admitted that he had made the confessions, but said that they were not true, it was held, that his evidence given before the magistrate was admissible against him, and it was for the jury to say whether they believed the confessions, or that part of his evidence declaring that the confessions were not true. State v. Ellis, 97 N.C. 447, 2 S.E. 525 (1887).

The word "presumption" as used in this section is equivalent to what is at present generally understood by the word "inference." State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

Defendant Treated as Other Witnesses.—When the defendant exercises this privi-

lege he is treated just as any other witness and thereby subjects himself to all the disadvantages of that position. State v. Efler, 85 N.C. 585 (1881); State v. Hawkins, 115 N.C. 712, 20 S.E. 623 (1894); State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943).

Where a defendant in a criminal prosecution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses. State v. Griffin, 201 N.C. 541, 160 S.E. 826 (1931).

Extent of Cross-Examination Permitted. — Cross-examination of a defendant under this section is not confined to matters brought out on direct examination, but questions are admissible to impeach, diminish or impair the credit of the witness. State v. Dickerson, 189 N.C. 327, 127 S.E. 256 (1925).

When a defendant voluntarily becomes a witness in his own behalf, he is subject to cross-examination and impeachment as any other witness, and it is proper for the solicitor to ask him questions concerning his prior criminal record for the purpose of impeaching him, provided the questions are based on information and are asked in good faith. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Denial of Impeaching Questions.—When defendant denies impeaching questions as to his prior criminal record, his answers are conclusive in the sense that they cannot be rebutted by other evidence, but the solicitor is not precluded from rephrasing his questions to include such details as the docket number of the case, the name of the court, the date of trial, the offense charged, and the sentence imposed. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Testimony May Be Used in Subsequent Trial. — Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subseqeuent trial. State v. Simpson, 133 N.C. 676, 45 S.E. 567 (1903).

Failure to Take Stand.—The failure of the prisoner charged with homicide to take the witness stand voluntarily will not create a presumption against him. State v. Bynum, 175 N.C. 777, 95 S.E. 101 (1918).

Court need not charge that failure of defendant to testify should not be considered against him in absence of request. State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939).

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940).

Same—How Far Subject to Comment.— The introduction or nonintroduction of a party as a witness in his own behalf should be the subject of comment only as the introduction or nonintroduction of any other witness might be. Goodman v. Sapp, 102 N.C. 477, 9 S.E. 483 (1889).

The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948); State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951); State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

It is the privilege, but not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all, certainly not unless under very peculiar circumstances, which must be necessarily passed upon by the judge presiding at the trial, as a matter of sound discretion. Gragg v. Wagner, 77 N.C. 246 (1877).

This section is interpreted as denying the right of counsel to comment on the failure of a defendant to testify. The reason for the rule is that extended comment from the court or from counsel for the State or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation that this section was intended to prevent. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951).

Where a defendant's wife and three other women, and several men testified in his behalf, but he did not testify, to say that the defendant was "hiding behind his wife's coat tail" is tantamount to comment on his failure to testify, which is not permitted by this section. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Statement by solicitor in the presence of the jury that he had not said a word about defendant not going to the witness stand violated this section. State v. Roberts, 243 N.C. 619, 91 S.E.2d 589 (1956).

Under the circumstances, it was not improper for the solicitor to say that no one had testified in contradiction of a certain witness. State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1960).

General Character Can Be Shown. — When a prosecutor or defendant in a criminal action goes upon the stand as a witness he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand. State v. Spurling, 118 N.C. 1250, 24 S.E. 533 (1896).

Same Not in Issue unless So Placed.— Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. State v. Foster, 130 N.C. 666, 41 S.E. 284 (1902); State v. Cloninger, 149 N.C. 567, 63 S.E. 154 (1908).

When defendant does not go upon the stand, and does not offer evidence of good character, his character is not in issue and it may not be impeached by the State. State v. Proctor, 213 N.C. 221, 195 S.E. 816 (1938).

Unless a defendant in a criminal prosecution testifies as a witness, thereby subjecting himself to impeachment, or produces evidence of his good character to repel the charge of crime, the State may not show his bad character for any purpose. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Same—Where Introduced by Defendant. —When the defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence, and may be considered by the jury as such. State v. Cloninger, 149 N.C. 567, 63 S.E. 154 (1908).

The right of the defendant to offer testimoney of his good character does not depend upon his having been examined as a witness in his own behalf. State v. Hice, 117 N.C. 782, 23 S.E. 357 (1895); State v. McKinnon, 223 N.C. 160, 25 S.E.2d 606 (1943).

"In declaring him to be 'a competent witness' we understand the statute to mean that he shall occupy the same position with any other witness, be under obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited . . . . But by availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness." State v. Efler, 85 N.C. 585 (1881); State v. Traylor, 121 N.C. 674, 28 S.E. 493 (1897).

Same—Put in Issue by State.—Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad, it was held that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. State v. Traylor, 121 N.C. 674, 28 S.E. 493 (1897).

Cross-Examination as to Conviction Subsequently Set Aside.—While it was improper for the solicitor to cross-examine defendant concerning a conviction for felonious assault when this conviction had been subsequently set aside and on retrial defendant had been convicted only of simple assault—if the solicitor knew such was the case—defendant was hardly prejudiced when he had admitted convictions for a large number of different criminal offenses committed over a long period of years. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Where There Are Two or More Defendants. — Even prior to the enactment of this section on a trial for an affray one defendant could not oppose the testifying of his codefendant for himself, the State's counsel not objecting. State v. Hamlett, 85 N.C. 520 (1881).

Testifying as to Confessions.—The defendant in a criminal action is competent as a witness in his own defense upon the preliminary hearing of the trial judge, as to whether confessions he had made to the officers of the law were voluntarily made or induced from him contrary to law. State v. Whitener, 191 N.C. 659, 132 S.E. 603 (1926).

Weight Given Testimony Is for Jury.— While the interpretations of this section

require defendant's testimony to be scrutinized, it is the province of the jury to determine from his demeanor and the attending circumstances the weight which they will accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., is held to impose a burden and cast a shadow upon his testimony greater than the law requires and to constitute reversible error. State v. Wilcox, 206 N.C. 691, 175 S.E. 122 (1934).

Constitutional Provision as to Self-Incrimination.—See N.C. Const., Art. I, § 11, and note thereto.

Prejudice Removed by Instruction. — If the defendant elects not to testify as a witness in his own defense any comment by the solicitor, calling attention to this failure, is improper; but where the presiding judge carefully instructs the jury that defendant's failure to testify in his own defense should not be construed in anywise to his prejudice, the presiding judge properly and effectively removes any prejudicial effect that might result from the solicitor's argument. State v. Lewis, 256 N.C. 430, 124 S.E.2d 115 (1962).

Erroneous Instructions. — While it is proper for the court to instruct the jury to scrutinize testimony of a defendant in a criminal prosecution because of his interest in the verdict, it is error for the court to fail to follow such instructions with a charge that if after such scrutiny the jury finds him worthy of belief they should give his testimony as full credit as they would that of any other witness. State v. Dee, 214 N.C. 509, 199 S.E. 730 (1938).

An instruction that the jury should scrutinize defendant's testimony in his own behalf because of his interest in the verdict, but if after doing so they were satisfied he told the truth, they should give his testimony the same weight they would give that of any "interested witness," perforce impeaches the testimony of defendant contrary to this section, and the pertinent decisions, and constitutes prejudicial error. State v. Dee, 214 N.C. 509, 199 S.E. 730 (1938).

A charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended. State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943).

An instruction that defendant had the prerogative not to testify and to rely on the weakness of the State's evidence, and by her plea of not guilty challenged the truthfulness and sufficiency of the testimony, is held incomplete and erroneous in failing to charge that her failure to take the stand did not create any presumption against her, but the error was not prejudicial in view of the record. State v. Rainey, 236 N.C. 738, 74 S.E.2d 39 (1953).

Proper Instruction. — The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, were held without error upon defendant's exception. State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936).

A charge to the effect that a defendant has a right not to testify and that his failure to testify should not be considered as a circumstance against him, will not be held for error on the ground that it called to the jury's attention the fact of defendant's absence from the stand. State v. Wood, 230 N.C. 740, 55 S.E.2d 491 (1949).

Applied in State v. Turner, 253 N.C. 37, 116 S.E.2d 194 (1960); State v. Stephens, 262 N.C. 45, 136 S.E.2d 209 (1964).

Quoted in State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968).

Cited in State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967); State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927); State v. McLeod, 198 N.C. 649, 152 S.E. 895 (1930); State v. Spivey, 198 N.C. 655, 153 S.E. 255 (1930); State v. Vernon, 208 N.C. 340, 180 S.E. 590 (1935); York v. York, 212 N.C. 695, 194 S.E. 486 (1938).

§ 8-55. Testimony enforced in certain criminal investigations; immunity.—If any justice, judge or magistrate of the General Court of Justice, or justice of the peace, or mayor of a town shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro bank, faro table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such faro bank, faro table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be, a sub-

poena, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, mayor or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro bank, faro table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate, mayor or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; Code, ss. 1050, 1215; 1889, c. 355; Rev., ss. 1637, 3721; 1913, c. 141; C. S., s. 1800; 1969, c. 44, s. 22.)

Cross Reference.—See also, § 18-27.

Editor's Note.—The 1969 amendment substituted "If any justice, judge or magistrate of the General Court of Justice, or justice of the peace, or mayor of a town" for "If any justice of the peace, magistrate of police, mayor of a town, or judge of the Supreme or superior courts" at the beginning of the section.

Section Constitutional. — This section is not unconstitutional by reason of the Fifth Amendment to the Constitution of the United States, because it does not apply to the State; nor does it violate N.C. Const., Art. I, § 11, for the reason that the said statute grants a pardon to the witness. In re Briggs, 135 N.C. 118, 47 S.E. 403 (1904).

Witness Compellable to Testify. — In a prosecution for gaming a witness may be compelled to testify, although his answer tends to criminate him, since he is pardoned for the offense. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Cited in State v. Foster, 228 N.C. 72, 44 S.E.2d 447 (1947).

§ 8-56. Husband and wife as witnesses in civil action.—In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband or wife shall be competent to prove, and may be required to prove, the fact of marriage. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (1866, c. 43, ss. 3, 4; C. C. P., s. 341; Code, s. 588; Rev., s. 1636; 1919, c. 18; C. S., s. 1801; 1945, c. 635.)

Cross References. — As to competency in criminal actions, see § 8-57 and note thereto. See also, § 8-50.

Editor's Note.—For note on privileged communications between husband and wife, see 15 N.C. L. Rev. 282. As to competency of husband and wife to testify in action for criminal conversation, see 26 N.C.L. Rev. 206.

Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967), cited in the note below, was commented on in 46 N.C.L. Rev. 643 (1968).

In General. — Husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases mentioned in the section. Barringer v. Barringer, 69 N.C. 179 (1873).

Common Law.—North Carolina recognized the common-law privilege attaching to confidential communications between

husband and wife before it was written in this section. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

At common law husband and wife were absolutely incompetent to testify in an action to which either was a party. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

Design of Section.—This legislation is based upon the gravest reasons of public policy and is designed, not only to prevent collusion where the same exists, but to remove the opportunity for it. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

This section was designed to remove the common-law disabilities, except in the instances therein set out. It disqualifies both spouses from testifying for or against the other in any action or proceeding in consequence of adultery or for divorce on account of adultery. The purpose of the exception is to prevent collusion in divorce actions. But it does not prevent the party charged with adultery from denying the charge. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

Exceptions. — This section makes husband and wife competent and compellable witnesses in all cases, except that in three cases named, i.e., in criminal actions, in any action for divorce on account of adultery, or action for criminal conversation, it is provided that the husband and wife shall not be competent or compellable "to give evidence for or against the other." Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

A confidential communication between husband and wife is privileged. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

And neither spouse may be compelled to disclose it when testifying as a witness. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Whatever is known by reason of that intimacy [marriage] should be regarded as knowledge confidentially acquired, and neither husband nor wife should be allowed to divulge it to the danger or disgrace of the other. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Section Does Not Render Voluntary Disclosure Incompetent. — This section means that neither shall be compelled to disclose any such confidential communication, but does not perforce render a voluntary disclosure thereof incompetent. Hagedorn v. Hagedorn, 211 N.C. 175, 189 S.E. 507 (1937), citing Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929).

While an act of intercourse between husband and wife is a confidential communication between them within the purview of this section, the statute does not preclude the husband from voluntarily denying the intercourse with the wife, asserted by her as condonation in his action for divorce on the ground of adultery, his testimony being otherwise competent, since the statute does not preclude the voluntary disclosure or confidential communications, but provides merely that neither spouse may be compelled to divulge such communications. Biggs v. Biggs, 253 N.C. 10, 116 S.E.2d 178 (1960). But see criticism relating to this holding in Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967), in which the court declined to follow this case.

Communications Not Protected.—Only confidential communications are within the rule; hence a communication made in the known presence of a third person, or one relating to business matters which in their nature might be expected to be divulged, is not protected. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

A tape recording, made by the husband without the wife's knowledge, of a conversation between them while alone, except for the presence of their eight-year-old child who was singing and playing at the time, was incompetent evidence over the wife's objection. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

By admitting a tape recording of the wife's conversation in evidence, the court enabled the husband to use mechanical means of repeating her words, thus accomplishing indirectly what he could not do directly under this section. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Evidence in Defense of Self. — Where two of plaintiff's witnesses said they had had intercourse with defendant wife since her marriage to the plaintiff and defendant denied the testimony of these witnesses, referring to the exceptions in this section, the Supreme Court said that if the intention had been to exclude the husband and wife absolutely as witnesses in such cases, the proviso would have been that the husband and wife were not competent or compellable as witnesses. The proviso merely disqualifies both spouses from testifying for or against the other. The court held that her testimony was not prohibited by the statute because she did not testify for the husband so as to enable him to obtain a collusive divorce, nor did she testify against him to prove anything against him. Her evidence was in defense of herself, and not for or against the other party, and the statute disqualifies neither as a witness in

his or her own behalf, except only when it is for or against the other. These words (for or against each other) mean something, and when given their natural significance simply prevent either party proving a ground of divorce against the other or for the other by his or her own testimony. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

Testimony as to Adultery of Wife to Explain Separation.—Where the wife sets up abandonment as a defense in the husband's action for divorce on the ground of two years' separation, the husband may testify as to the adultery of his wife in order to explain his separation from the wife and to establish his defense of recrimination, the husband's testimony being neither for nor against the wife on the issue of adultery and therefore does not come within the purview of this section or § 50-10. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

Divorce for Adultery. — In divorce for alleged adultery, neither the husband nor the wife is a competent witness. Horne v. Horne, 75 N.C. 101 (1876); Perkins v. Perkins, 88 N.C. 41 (1883); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964).

In the wife's action for criminal conversation with her husband and the alienation of his affections, testimony by the wife relative to statements made to her by her husband tending to show his illicit relationship with defendant are incompetent. Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947).

Contradiction by Wife.—Under this section, a wife, sued for divorce for adultery, is competent to deny the evidence of witnesses that she was guilty of adultery with them. Broom v. Broom, 130 N.C. 562, 41 S.E. 673 (1902); Biggs v. Biggs, 253 N.C. 10, 116 S.E.2d 178 (1960).

Same — Criminal Conversation. — In an action for criminal conversation wherein the husband has testified to immoral relations between his wife and the defendant, the wife is a competent witness for the defendant for the purpose of refuting the charges made against her character. Chestnut v. Sutton, 204 N.C. 476, 168 S.E. 680 (1933).

Confidential Communications — Defined. —The confidential communications made between husband and wife which neither will be compelled to disclose, are those which are communicated "during their marriage." Whitford v. North State Life Ins. Co., 163 N.C. 223, 79 S.E. 501 (1913).

Same — Protected. — The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action are properly excluded when the letters are obtained by a third party with the consent of the wife, the letters being privileged communications and inadmissible against either the husband or the wife. McCoy v. Justice, 199 N.C. 602, 155 S.E. 452 (1930).

Where a witness for the State has written a letter to his wife, and his wife, without his knowledge or consent, has given the letter to the defendant, the witness cannot be cross-examined relative to the letter in an attempt to prove bias. State v. Banks, 204 N.C. 233, 167 S.E. 851 (1933).

Applied in Rouse v. Creech, 203 N.C. 378, 166 S.E. 174 (1932) (action by husband for criminal conversation).

Cited in Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929).

§ 8-57. Husband and wife as witnesses in criminal actions. — The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for an assault upon the other spouse, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it

shall be lawful to examine a spouse in behalf of the State against the other spouse: Provided that this section shall not affect pending litigation relating to a criminal offense against a minor child. (1856-7, c. 23; 1866; c. 43; 1868-9, c. 209; 1881, c. 110; Code, ss. 588, 1353, 1354; Rev., ss. 1634, 1635, 1636; C. S., s. 1802; 1933, c. 13, s. 1; c. 361; 1951, c. 296; 1957, c. 1036; 1967, c. 116.)

Cross Reference.—As to competency in civil action, see § 8-56 and note thereto.

Editor's Note.—The 1967 amendment rewrote the last sentence.

In General.—Under this section the husband or wife is a competent witness for the defendant in all criminal actions or proceedings. But neither is competent or compellable to give evidence against the other in any criminal proceeding. State v. Harbison, 94 N.C. 885 (1886). See State v. Watson, 215 N.C. 387, 1 S.E.2d 886 (1939).

Under this section a wife is neither competent nor compellable to testify against her husband in a criminal proceeding, hence hearsay evidence of her declarations, not made in his presence or by his authority, which would be prejudicial to the husband, is inadmissible. State v. Reid, 178 N.C. 745, 101 S.E. 104 (1919). See State v. Cotton, 218 N.C. 577, 12 S.E.2d 246 (1940).

Common Law.—At common law the husband or wife of the defendant in a criminal case was incompetent to testify either for the State or for the defense. State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968).

Discretion of Trial Judge.—Where the defendant husband is alleged to have stolen certain property, it is competent for him to introduce his wife as a witness to prove from what source he got the money to pay for such property, but unless he introduces her in proper time it rests within the discretion of the trial judge whether her testimony will be received. State v. Lemon, 92 N.C. 790 (1885).

A wife cannot be compelled to testify against her husband in a criminal action; but when she takes the stand in his behalf, she is subject to cross-examination in the same manner and to the same extent as any other witness. State v. Tola, 222 N.C. 406, 23 S.E.2d 321 (1942).

Confidential Communication. — Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife with the contemplation of this section and may be testified to by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case. State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929).

The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

Competency of Divorced Parties. — A divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce. State v. Raby, 121 N.C. 682, 28 S.E. 490 (1897).

Divorced Spouse as Witness in Prosecution for Felony.—Where the former husband or wife is prosecuted for a felony, the divorced spouse is a competent witness to testify for the State as to what occurred during the subsistence of their marriage in his or her presence when the alleged felony was being committed. State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968).

Husband May Testify against Wife in Assault.—Conversely to the rule enunciated in this section, that a wife may testify against her husband in actions for assault against her, it appears that a husband may testify in assaults by the wife against him, and this was so held. State v. Davidson, 77 N.C. 522 (1877); State v. Alderman, 182 N.C. 917, 110 S.E. 59 (1921).

In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats is not inadmissible under the provisions of this section, but is admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and is distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. State v. Alderman, 182 N.C. 917, 110 S.E. 59 (1921).

The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. State v. French, 203 N.C. 632, 166 S.E. 747 (1932).

Effect of Marriage Subsequent to As-

sault.—The fact that subsequent to an assault the defendant marries the prosecuting witness does not render her an incompetent witness against him at the trial. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

A wife under this section is not competent to testify against her husband in a prosecution for felonious burning and the admission of her testimony entitles him to a new trial. State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934).

Failure of Wife to Appear and Testify. —The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense, is expressly excluded as evidence to the husband's prejudice by this section, though she is competent to testify. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

Where the trial judge has properly excluded from the consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, the prisoner may not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there has been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

Where a prisoner's wife, on his trial for a homicide, has failed to appear and be examined in her husband's defense, and a witness has testified to facts relating thereto, before the trial judge has had opportunity to rule upon the prisoner's objection, the reading of this section by the trial judge to the jury, and his telling them they must not consider this failure of the wife to appear as evidence to the prisoner's prejudice, renders the error harmless, if any was committed. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

During the absence of the judge, the solicitor in his argument to the jury called the jury's attention to the fact that defendant's wife had not testified in his behalf, and persisted in the argument after objection by defendant's counsel. Upon its return, the court sustained the objection, and near the conclusion of its charge to the jury stated that the law did not permit such comment and that the jury should not let the argument influence it. The solicitor's comment violated this section, and was prejudicial, and called for prompt peremptory and certain caution by the court not only that the argument should be disregarded but that the failure of defendant's wife to testify should not be considered to his prejudice, and the action of the court in merely sustaining the objection and the caution later given by the court near the conclusion of the charge was insufficient to free the case of prejudice. State v. Helms, 218 N.C. 592, 12 S.E.2d 243 (1940).

Threats. — In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. State v. Rice, 222 N.C. 634, 24 S.E.2d 483 (1943).

Abandonment of Wife. — Under this section the wife is a competent witness against her husband as to the fact of abandonment, or neglect to provide adequate support. State v. Brown, 67 N.C. 470 (1872).

Proof of Marriage.—The wife is competent to prove the fact of marriage under an indictment against her husband for abandonment. State v. Chester, 172 N.C. 946, 90 S.E. 697 (1916). The holding was otherwise under a former wording of the statute. State v. Brown, 67 N.C. 470 (1872).

Same—Bigamy.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897). See also State v. McDuffie, 107 N.C. 885, 12 S.E. 83 (1890).

By the express provisions of this section, defendant's legal wife was a competent witness before the grand jury, which was considering an indictment against him charging him with a violation of the provisions of § 14-183, "to prove the fact of marriage . . . ." State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54 (1965).

Same—Bigamous Cohabitation.—Prior to the 1957 amendment to this section, it was held, while in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife was competent to testify against the husband to prove the fact of marriage, her testimony was limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, was incompetent. State v. Setzer, 226 N.C. 216, 37 S.E.2d 513 (1946); State v. Hill, 241 N.C. 409, 85 S.E.2d 411 (1955).

Declarations of Wife Not Made in Husband's Presence.—Testimony of a State's

witness of a declaration of defendant's wife to the effect that if defendant had not been driving so slow "he wouldn't have been caught" entitles defendant to a new trial notwithstanding his failure to move to strike the answer, since testimony of the wife against the husband is forbidden by this section, and a fortiori her declarations against him not made in his presence or by his authority are precluded by the statute. State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952); State v. Dillahunt, 244 N.C. 524, 94 S.E.2d 479 (1956).

Adultery Prior to Marriage.—Where a man and woman are indicted for fornication and adultery, and a nol. pros. is entered as to the feme defendant, the husband of the woman is a competent witness to show adultery between the defendants committed before the marriage of the woman and the witness. State v. Wiseman, 130 N.C. 726, 41 S.E. 884 (1902).

Consolidation of Prosecutions against Husband and Wife.—Where husband and wife are separately indicted for the same homicide and the prosecutions are consolidated and tried together over their objections, and the wife's testimony, though admitted only as to her, is to the effect that her husband killed deceased and forced her, through fear, to confess and attempt to exculpate him, her testimony is necessarily inculpatory of the husband and impinges this section, and his motion for a mistrial and severance at the conclusion of the State's evidence should have been granted. State v. Cotton, 218 N.C. 577, 12 S.E.2d 246 (1940).

Where defendant's wife testifies in his behalf, she is subject to be cross-examined to the same extent as if unrelated to him. State v. Bell, 249 N.C. 379, 106 S.E.2d 495 (1959).

Failure to Exclude Incompetent Testimony.—When evidence rendered incompetent by this section was admitted, it became the duty of the trial judge to exclude the testimony, and his failure to do so must be held reversible error whether exception was noted or not. State v. Porter, 272 N.C. 463, 158 S.E.2d 626 (1968).

Applied in State v. Spain, 3 N.C. App. 266, 164 S.E.2d 486 (1968).

§ **8-58. Wife may testify in applications for peace warrants.**—The wife shall be competent to make affidavit and testify in applications for peace warrants against the husband. (1933, c. 13, s. 2.)

ARTICLE 8.

Attendance of Witness.

§ **8-59. Issue and service of subpoena.**—In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions. (1777, c. 115, s. 36, P. R.; R. C., c. 31, s. 59; Code, s. 1355; Rev., s. 1639; C. S., s. 1803; 1959, c. 522, s. 2; 1967, c. 954, s. 3.)

Local Modification.—Cumberland: 1957, c. 1324, s. 2.

Cross Reference.—As to duty of clerk to issue subpoena, see § 2-16.

Editor's Note. — The 1967 amendment substituted "subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions" for "the following rules shall be observed in practice, to wit," and deleted a former second and third paragraph, which contained rules for obtaining testimony of witnesses.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Rule 45 of the Rules of Civil Procedure (§ 1A-1) spells out in detail the rules for issuance and service of subpoenas. The 1967 amendment to this section makes the procedure the same in criminal cases.

§ **8-60:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **8-61. Subpoena for the production of documentary evidence.**—Subpoenas for the production of records, books, papers, documents, or tangible things may be issued in criminal actions in the same manner as provided for civil

actions in Rule 45 of the Rules of Civil Procedure. (1797, c. 476, P. R.; R. C., c. 31, s. 81; Code, s. 1372; Rev., s. 1641; C. S., s. 1805; 1967, c. 954, s. 3; c. 1168.)

Editor's note.—Session Laws 1967, c. 954, s. 3, rewrote this section. It was also rewritten by Session Laws 1967, c. 1168.

This section, as rewritten by c. 954, replaces the "subpoena duces tecum" statute, which applied to both criminal and civil cases.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-7.

The Rules of Civil Procedure are found in § 1A-1.

§ 8-62: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see § 1-87.

§ 8-63. Witnesses attend until discharged; effect of nonattendance.—Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and, subject to the provisions of G.S. 6-51, continue to attend from term to term until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the State, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (1777, c. 115, ss. 37, 38, 43, P. R.; 1799, c. 528, P. R.; 1801, c. 591, P. R.; R. C., c. 31, ss. 60, 61, 62; Code, s. 1356; Rev., s. 1643; C. S., s. 1807; 1965, c. 284.)

Cross Reference.—See also §§ 6-51, 6-62.

Duty to Attend.—When a subpoena has been served on a witness, he is required by this section to attend from term to term until discharged. State v. Gwynn, 61 N.C. 445 (1868).

Nonattendance Need Not Be Wilful. — This section does not require that the failure of the witness to attend should be "wilful." In re Pierce, 163 N.C. 247, 79 S.E. 507 (1913).

When Witness May Elect.—Where two subpoenas are served upon a witness, requiring his attendance on the same day at different places distant from each other, he is not bound to obey the writ which may have been first served, but may make his election between them. Icehour v. Martin, 44 N.C. 478 (1853).

Test of Inability to Attend.—In an early case, Eller v. Roberts, 25 N.C. 11 (1842), it was held that where a witness alleges that he was unable to attend court, this inability must be decided by reference to the modes of traveling which are in use in the community.

Where Service Had on Transient. — A witness, who is summoned in this State, while casually here, but who resides in

another state, cannot be required to pay a forfeiture for nonattendance, if he has returned to his own state and is there at his domicile. Kinzey v. King, 28 N.C. 76 (1845).

Attorney Not Exempt.—A witness who fails to appear when the case is called in which he has been subpoenaed to testify is not justified in his default because he is a practicing attorney at law and has cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpoenaed him can recover the penalty, with the costs of the motions. In re Pierce, 163 N.C. 247, 79 S.E. 507 (1913).

An issue in bastardy is not a "criminal prosecution" so as to subject a defaulting witness to the fine of eighty dollars, prescribed by this section. Ward v. Bell, 52 N.C. 79 (1859).

§ 8-64. **Witnesses exempt from civil arrest.**—Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence. (1777, c. 115, s. 44, P. R.; R. C., c. 31, s. 70; Code, s. 1367; Rev., s. 1644; C.S., s. 1808.)

Common-Law Rule Not Repealed. — This section does not serve to repeal the common-law rule of exemption of witnesses from civil arrest. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

Not Applicable to Criminal Proceeding. —The exemption of witnesses from civil arrest accorded by this section, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceedings. White v. Underwood, 125 N.C. 26, 34 S.E. 104 (1899).

Procedure for Claiming Exemption.— Where a party has not been granted the exemption from service of summons (which the courts seem to have placed on the same plane as the exemption from civil arrest), his remedy is not a motion to dismiss the action, but a motion, on special appearance, to set aside the return of service. Dell School v. Pierce, 163 N.C. 424, 79 S.E. 687 (1913). This is because the service is not void but voidable. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

Nonresident Attorney. — This section does not prevent service of summons on a nonresident attorney in this State to represent his clients in a matter pending in the federal court. Greenleaf v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

ARTICLE 9.

Attendance of Witnesses from without State.

§ 8-65. **Definitions.**—The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

"Witness" as used in this article shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. (1937, c. 217, s. 1.)

Editor's Note.—See 15 N.C.L. Rev. 345.

Cited in Hare v. Hare, 228 N.C. 740, 46 S.E.2d 840 (1948); White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948).

§ 8-66. **Summoning witness in this State to testify in another state.** —If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies, under the seal of such court, that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 2.)

Cross Reference. — As to effect of nonattendance of witness, see § 8-63.

§ 8-67. Witness from another state summoned to testify in this State.—If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence in this State, is a material witness in a prosecution pending in a court of record in this State, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court, stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this State he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this State a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 3.)

Cross References.—See also § 8-66. As to effect of nonattendance of witness, see § 8-63.

§ 8-68. **Exemption from arrest and service of process.**—If a person comes into this State in obedience to a summons directing him to attend and testify in this State he shall not, while in this State pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

If a person passes through this State while going to another state in obedience to a summons to attend and testify in that state, or while returning therefrom, he shall not while so passing through this State be subject to arrest or the services of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons. (1937, c. 217, s. 4.)

Cross Reference.—See also § 8-64.

Exemption from Service Is Personal Privilege. — The privilege of claiming an exemption from service of civil process granted by this section is personal. The service is not void. It is merely voidable, and, until the defendant elects to exercise his privilege by claiming his exemption and establishing his nonresidence, the service is binding. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

A nonresident defendant while in the State in compliance with conditions of a bail bond is not exempt from the service of process. Hare v. Hare, 228 N.C. 740, 46 S.E.2d 840 (1948).

Res Judicata.—In an action against the driver of a car upon whom service of summons was had while he was in the State in obedience to a summons from a coroner to testify at an inquest, motion to vacate the service was allowed upon the court's finding from the evidence that defendant was a nonresident and that therefore he was exempt from service of process in connection with matters which arose before his entrance into the State in obedience to the coroner's summons. In a subsequent action arising out of the same collision, brought in another county by the administrator of a party killed in the collision, service was had upon the defendant at the same time and in the same manner. It was held that the prior adjudication that defendant was a nonresident and was exempt from service under this section was in the nature of a judgment in rem and is res judicata as to the status and residence of the defendant, and is binding upon the administrator under the maxim res judicata pro veritate accipitur, and the holding of the court in the second action upon substantially the same evidence that defendant was a resident of this State and that the service of summons on him was valid must be reversed on appeal even though supported by evidence. Current v. Webb, 220 N.C. 425, 17 S.E.2d 614 (1941).

Applied in Bangle v. Webb, 220 N.C. 423, 17 S.E.2d 613 (1941).

§ 8-69. **Uniformity of interpretation.** — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1937, c. 217, s. 5.)

§ 8-70. **Title of article.** — This article may be cited as "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings." (1937, c. 217, s. 6.)

ARTICLE 10.

Depositions.

§§ 8-71 to 8-73: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 8-74. **Depositions for defendant in criminal actions.**—In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the

district, county or town in which such action is pending have ten days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. This section shall not apply to the taking of depositions in courts of justices of the peace. (Code, s. 1357; 1891, c. 522; 1893, c. 80; Rev., s. 1652; 1915, c. 251; C. S., s. 1812.)

Where there are several defendants in the same bill of indictment, it is not necessary to notify each of the others of the taking of a deposition by one for use as evidence on his behalf. State v. Finley, 118 N.C. 1161, 24 S.E. 495 (1896).

A deposition taken under this section is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant thus charged with the crime, but only as evidence in favor of the prisoner who offers it. State v. Finley, 118 N.C. 1161, 24 S.E. 495 (1896).

§ 8-75. **Depositions in justices' courts.**—Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action, and in order to do so may apply to the clerk of the superior court for a commission to take the same; or such deposition may be taken by a notary public of this or any other state, or of a foreign country, without a commission issuing from the court.

The proceedings in depositions in a civil action before a justice of the peace shall be in all respects as if such action were in the superior court.

When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court. (1872-3, c. 33; Code, s. 1359; Rev., s. 1646; C. S., s. 1813; 1947, c. 781.)

§ 8-76. **Depositions before municipal authorities.** — Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission, or such deposition may be taken by a notary public of this State or of any other state or foreign country without a commission issuing from the court; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or cannot after due diligence be found within this State, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition or by the notary taking such deposition, as the case may be; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court. (1889, c. 151; Rev., s. 1653; C. S., s. 1814; 1943, c. 543.)

§ 8-77. **Depositions in quo warranto proceedings.**—In all actions for the purpose of trying the title to the office of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court wherein the case is pending, or a notary public, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking

of depositions in other cases; and such depositions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination, by either party on the trial, of such witnesses as they may summon in their behalf. (1889, c. 428; Rev., s. 1654; C. S., s. 1815; 1943, c. 543.)

§ 8-78. Commissioner may subpoena witness and punish for contempt.—Commissioners to take depositions appointed by the courts of this State, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this State, are hereby empowered, they or the clerks of the courts respectively in this State, to which such commission shall be returnable, to issue subpoenas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it. (1777, c. 115, s. 42, P. R.; 1805, c. 685, ss. 1, 2, P. R.; 1848, c. 66; 1850, c. 188; R. C., c. 31, s. 64; Code, s. 1362; Rev., s. 1649; C. S., s. 1816.)

Cross Reference.—See also § 5-1, subdivision (6) under which refusal of witness to be sworn or answer questions amounts to contempt.

Power Not Exclusively in Commissioner.—The power to commit to jail a person refusing to testify before a commissioner, as provided for in this section, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defied. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

§ 8-79. Attendance before commissioner enforced.—The sheriff of the county where the witness may be shall execute all such subpoenas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpoenaed five days before the time of his required attendance, and shall fail to appear according to the subpoena and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the State, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpoenaed fifty dollars, and on the trial for such penalty the subpoena issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpoena, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended. (1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2; R. C., c. 31, s. 65; Code, s. 1363; Rev., s. 1650; C. S., s. 1817.)

§ 8-80. Remedies against defaulting witness before commissioner.—But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this State, then the same shall be certified under his hand, and returned with the subpoena to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to

show cause, if he can, against the issuing thereof. (1850, c. 188, s. 2; R. C., c. 31, s. 66; Code, s. 1364; Rev., s. 1651; C. S., s. 1818.)

§ 8-81. Objection to deposition before trial.—At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing. (1869-70, c. 227, ss. 13, 17; Code, s. 1361; 1895, c. 312; 1903, c. 132; Rev., s. 1648; C. S., s. 1819.)

Purpose of Section. — The purpose of this section is to settle the depositions as evidence before the trial or hearing and thus prevent surprise, misapprehension, confusion and delay on the trial. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

The purpose of this section is to give the party in whose behalf a deposition has been taken notice of any objection to the deposition and of the grounds for same before the trial. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Time and Manner of Objection. — As stated by the section exceptions to a deposition, especially those which relate to its regularity, should be disposed of, at the latest, before the trial is entered upon. Barnhardt v. Smith, 86 N.C. 473 (1882); Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887); Ivey v. Bessemer City Cotton Mills, 143 N.C. 189, 55 S.E. 613 (1906). Such objection must be made in writing. Brittain v. Hitchcock, 127 N.C. 400, 37 S.E. 474 (1900).

Objection to the incompetency of testimony and motion to reject the evidence must be made in writing before trial unless the parties shall consent to a waiver of this provision. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Same—When Allowed at Trial.—Where it appeared that no notice had been given to the adverse party of the taking of a deposition, and that it had not been passed upon by the clerk, it was held that an objection to its reception might be taken on the trial of the action. Bryan v. Jeffreys, 104 N.C. 242, 10 S.E. 167 (1889).

When Trial Begins.—Once the case is reached on the calendar and the jury called into the box, "the hurry of a trial" has begun and the time for deliberation and scrutiny of a deposition has passed. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

The purpose of this section would not be served by a holding that the trial did not begin until after the jury was impaneled. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Waiver of Formal Defects.—Where a party attends upon and takes part in taking depositions, he thereby waives all objections of a formal character, but a void process will not be vitalized unless there is an amendment without prejudice to third parties. McArter v. Rhea, 122 N.C. 614, 30 S.E. 128 (1898).

The failure to insert the name of the commissioner in the commission to take the deposition is waived by the objecting party appearing at the taking of the deposition and making no objection thereto until after the trial was begun. Womack v. Gross, 135 N.C. 378, 47 S.E. 464 (1904); Tomlinson Chair Mfg. Co. v. Townsend, 153 N.C. 244, 69 S.E. 145 (1910).

Where the provisions of this section as to making the objection before trial and in writing are not complied with, the objection to the deposition is waived. Woodley v. Hassell, 94 N.C. 157 (1886).

Cited in Hood System Indus. Bank v. Dixie Oil Co., 205 N.C. 778, 172 S.E. 360 (1934).

§ 8-82. Deposition not quashed after trial begun.—No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection. (1869-70, c. 227, s. 12; Code, s. 1360; Rev., s. 1647; C. S., s. 1820.)

Opportunity to Object before Trial. — Where a deposition was open and on file before the trial, and an objection thereto was made for the first time on the trial, it was held that the objection could not be sustained. Morgan v. Royal Fraternal Ass'n, 170 N.C. 75, 86 S.E. 975 (1915), citing Ivey v. Bessemer City Cotton Mills, 143 N.C. 189, 55 S.E. 613 (1906). And this is true whether the motion is to quash the deposition in whole or in part. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

Where deposition of a witness is duly taken with full opportunity of cross-examination by the adverse party, with no objection before trial, and the witness is out of the State at the time of trial, exception to the deposition at the trial is without merit. Fleming v. Atlantic Coast Line R.R., 236 N.C. 568, 73 S.E.2d 544 (1952).

Filing as Notice.—Where the deposition had been on file for two or three months before the trial, the appellant's counsel having notice and being present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they making no objections thereto, it was held that such deposition could not be quashed on oral objection made at the trial. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

As to failure to give notice to adverse party, see note of Bryan v. Jeffreys, 104 N.C. 242, 10 S.E. 167 (1889), under § 8-81.

Preservation of Exception. — Where a commissioner to take depositions has, over the objection and exceptions of a party litigant, denied him the right of cross-examination of a witness of his opponent, and the litigant has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken out. Sugg v. St. Mary's Oil Engine Co., 193 N.C. 814, 138 S.E. 169 (1927).

Incompetent Questions.—Since a deposition can be quashed only for irregularities in the taking or the incompetency of witnesses, objection should be taken to the questions and answers of the deponent by way of exception and not by motion to quash the depositions. Jeffords v. Albemarle Waterworks, 157 N.C. 10, 72 S.E. 624 (1911).

Stated in Gulf States Steel Co. v. Ford, 173 N.C. 195, 91 S.E. 844 (1917).

§ 8-83. When deposition may be read on the trial.—Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

(1) If the witness is dead, or has become insane since the deposition was taken.

(2) If the witness is a resident of a foreign country, or of another state, and is not present at the trial.

(3) If the witness is confined in a prison outside the county in which the trial takes place.

(4) If the witness is so old, sick or infirm as to be unable to attend court.

(5) If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

(6) If the witness is the Governor of the State, or the head of any department of the State government, or the president of the University, or the head of any other incorporated college in the State, or the superintendent or any physician in the employ of any of the hospitals for the insane for the State.

(7) If the witness is a justice of the Supreme Court, judge of the Court of Appeals, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.

(8) If the witness is a member of the Congress of the United States, or a member of the General Assembly, and the trial shall take place during a session of the body of which he is a member.

(9) If the witness has been duly summoned, and at the time of the trial is out of the State, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

(10) If the action is pending in a justice's court the deposition may be read on the trial of the action, provided the witness is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting.

(11) If the witness is a physician duly licensed to practice medicine in the State of North Carolina, and resides or maintains his office outside the county in which the action is pending. (1777, c. 115, ss. 39, 40, 41, P. R.; 1803, c. 633, P. R.; 1828, c. 24, ss. 1, 2; 1836, c. 30; R. C., c. 31, s. 63; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; Code, s. 1358; 1905, c. 366; Rev., s. 1645; 1919, c. 324; C. S., s. 1821; 1965, c. 675; 1969, c. 44, s. 23.)

Cross References.—As to manner, form, and time of taking exceptions, see §§ 8-81, 8-82 and notes thereto. As to depositions in criminal actions, see § 8-74 and note thereto.

Editor's Note.—The 1969 amendment inserted "judge of the Court of Appeals" in subdivision (7).

Selected Parts.—It is not permissible to introduce selected portions of depositions without offering the whole. Sternberg v. Crockon & Roden Co., 172 N.C. 731, 90 S.E. 935 (1916); Enloe v. Charlotte Coca-Cola Bottling Co., 210 N.C. 262, 186 S.E. 242 (1936).

Witness Unable to Talk.—The deposition of a witness adjudged to be unable to talk or remain in court is admissible in evidence under this section. Willeford v. Bailey, 132 N.C. 402, 43 S.E. 928 (1903).

Where Admissible in Subsequent Action. — In the trial of an action a deposition regularly taken in another action between the same parties and involving the same subject matter is admissible as substantive evidence. Hartis v. Charlotte Elec. Ry., 162 N.C. 236, 78 S.E. 164 (1913). It may be introduced whether the deponent was examined as a witness in the case being tried or not. Mabe v. Mabe, 122 N.C. 552, 29 S.E. 843 (1898).

Same—Where Action Survives.—Where the deposition de bene esse of the plaintiff in an action has been taken in accordance with law, and the plaintiff has since died, but the cause of action survives, the deposition may properly be read in evidence in behalf of those who survive him in interest, and have properly been made parties to the original action. Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926).

Meaning of "Duly Summoned". — By reasonable construction the ninth subdivision of this section means that where the deposition has been regularly taken, and where the witness is more than seventy-five miles from the place of trial without the consent of the party, and the presence of the witness cannot be procured, the deposition may be read if a subpoena has been duly issued—not necessarily served. Tomlinson Chair Mfg. Co. v. Townsend, 153 N.C. 244, 69 S.E. 145 (1910). See Sparrow v. Blount, 90 N.C. 514 (1884).

Applied in Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965).

Stated in Barnhardt v. Smith, 86 N.C. 473 (1882); Jeffords v. Albemarle Waterworks, 157 N.C. 10, 72 S.E. 624 (1911).

Cited in Norburn v. Mackie, 264 N.C. 479, 141 S.E.2d 877 (1965); Stern & Co. v. Herren, 101 N.C. 517, 8 S.E. 221 (1888).

§ 8-84. Depositions taken in the State to be used in another state.— (a) By Whom Obtained. — In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the State, either in the United States or any of the possessions thereof, or any foreign country, may obtain, by the proceedings prescribed by this section, the testimony of a witness and in connection therewith the production of books and papers within the State to be used in the action, suit or special proceeding.

(b) Application Filed.—Where a commission to take testimony within the State has been issued from the court in which the action, suit or special proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the State pursuant to the laws of the state or country wherein the court is located, or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, the person desiring such testimony, or the production of papers and documents, may present a verified petition to any justice of the Supreme Court, judge of the Court of Appeals, or judge of the superior court, stating generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is material to the issue presented in such action or proceeding, and he shall set forth the substance of or have annexed to his petition a copy of the commission, order, notice, consent or other authority under which the

deposition is taken. In case of an application for a subpoena to compel the production of books or papers, the petition shall specify the particular books or papers, the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken.

(c) Subpoena Issued.—Upon the filing of such petition, if the justice of the Supreme Court, judge of the Court of Appeals, or judge of the superior court is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall issue a subpoena to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the State, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper, by his title or office, at a time and place specified in the subpoena, to testify in the action, suit or special proceeding. Where the subpoena directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but such books and original papers shall not be taken from the witness. This subpoena must be served upon the witness at least two days, or, in case of a subpoena requiring the production of books or papers, at least five days before the day on which the witness is commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpoenaed to attend and give his testimony, may apply to the court issuing such subpoena to vacate or modify the same.

(d) Witness Compelled to Attend and Testify.—If the witness shall fail to obey the subpoena, or refuse to have an oath administered, or to testify or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the justice or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe punishment as in case of a recalcitrant witness. Upon proof by affidavit that a person to whom a subpoena was issued has failed or refused to obey such subpoena, to be duly sworn or affirmed, to testify or answer a question propounded to him, to produce a book or paper which he has been subpoenaed to produce, or to subscribe to his deposition when correctly taken down, the justice or judge shall grant an order requiring such person to show cause before him, at a time and place specified, why he should not appear, be sworn or affirmed, testify, answer a question propounded, produce a book or paper, or subscribe to the deposition, as the case may be. Such affidavit shall set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the justice or judge shall, upon such affidavit and upon the original petition and upon such other facts as shall appear, determine whether such person should be required to appear, be sworn or affirmed, testify, answer the question propounded, produce the books or papers, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the justice or judge shall make an order requiring such person to show cause before him, at a time and place therein specified, why such person should not be punished for the offense as for a contempt Upon the return of the order to show cause, the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the justice or judge before whom the order to show cause is made returnable, he shall enforce the order and prescribe the punishment as hereinbefore provided.

(e) Deposit for Costs Required.—The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking

to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior courts. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1903, c. 608; Rev., c. 1655; C. S., s. 1822; 1969, c. 44, s. 24.)

Editor's Note.—The 1969 amendment inserted "judge of the Court of Appeals" in the first sentence in subsection (b) and near the beginning of subsection (c).

ARTICLE 11.

Perpetuation of Testimony.

§§ 8-85 to 8-88: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 12.

Inspection and Production of Writings.

§ 8-89: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For present provisions as to discovery and production of documents for inspection, copying or photographing, see § 1A-1, Rule 34.

§ 8-89.1. Right of injured plaintiff to a copy of his statement.—(a) Any person sustaining bodily injury who shall give a written or recorded statement of the facts and circumstances surrounding his injury shall, upon his written request or the written request of an attorney acting in his behalf, be furnished a copy of all statements made by him in their entirety.

(b) Such copies as are furnished pursuant to this section shall be furnished at the expense of the person, firm or corporation at whose direction the statement was taken. If any person, firm or corporation taking the statement of any person sustaining bodily injury shall fail to comply with the requirements of subsection (a) of this section, then such statement or statements as have not been furnished shall be inadmissible in any court or administrative body for any purpose. In addition, no questions on cross-examination by the person, firm or corporation at whose direction the statement was taken shall be competent or otherwise admissible when based, in any manner, upon such statement or statements which have not been furnished in compliance with this provision.

(c) It is further declared that an injured person who has given such a statement should properly be furnished a copy thereof, without request, within ten days after a written statement has been taken or a recorded statement has been transcribed. (1969, c. 692, ss. 1-3.)

§§ 8-90, 8-91: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For present provisions as to discovery and production of documents for inspection, copying or photographing, see § 1A-1, Rule 34.

Chapter 8A.

Interpreters for Deaf Persons.

Sec.
8A-1. Appointment of interpreters for deaf parties or witnesses; costs.

§ 8A-1. Appointment of interpreters for deaf parties or witnesses; costs.—Whenever any deaf person is a party to any legal proceeding of any nature, or a witness therein, the court upon request of any party shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to and the testimony of such deaf person. In proceedings involving possible commitment of a deaf person to a mental institution, the court shall appoint such interpreter upon its own initiative. In criminal cases and commitment proceedings, the court shall determine a reasonable fee for all such interpreter services which shall be paid out of the general county funds, and in civil cases, the said fee shall be taxed as part of the court costs. (1965, c. 868.)

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Article 2.

Petit Jurors.

Article 3.

Peremptory Challenges.

Article 4.

Grand Jurors.

Revision of Chapter. — Session Laws 1967, c. 218, s. 1, rewrote all the provisions of this chapter of the General Statutes, replacing the former chapter, consisting of §§ 9-1 to 9-31, with a new chapter, comprising § 9-1 to 9-26.

Where the provisions of former sections are similar to new sections in the revised chapter, the historical citations of the former sections have been added to the new sections.

Former § 9-4 was amended by Session Laws 1967, cc. 118, 120 and 717, and former § 9-25 by Session Laws 1967, cc. 27 and 212.

Cases construing former sections are cited in the notes to present sections where it is believed that such citations will be helpful to the practitioner.

ARTICLE 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-1. Jury commission in each county; membership; selection; oath; terms.—Not later than October 1, 1967, there shall be appointed in each county a jury commission of three members. One member of the commission shall be appointed by the senior regular resident superior court judge, one member by the clerk of superior court, and one member by the board of county commissioners. The appointees shall be qualified voters of the county, and shall serve for terms of two years. Appointees may be reappointed to successive terms. A vacancy in the commission shall be filled in the same manner as the original appointment, for the unexpired term. Each commissioner shall take an oath or affirmation that,

without favor or prejudice, he will honestly perform the duties of a member of the jury commission during his term of service. The compensation of commissioners shall be fixed by the board of county commissioners, and shall be paid from the general fund of the county. The clerk of superior court shall furnish clerical assistance to the commission, as necessary. (1967, c. 218, s. 1.)

Editor's Note.—For case law survey as to jury composition and unfair tribunal, see 45 N.C.L. Rev. 927 (1967).

Cited in Bryant v. State Bd. of Assessment, 293 F. Supp. 1379 (E.D.N.C. 1968); State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968); State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56 (1968).

§ 9-2. Preparation of jury list; sources of names.—It shall be the duty of the jury commission at least 30 days prior to January 1, 1968, and each biennium thereafter, to prepare a list of prospective jurors qualified under this chapter to serve in the ensuing biennium. In preparing the list, the jury commission shall use the tax lists of the county and voter registration records, and, in addition, may use any other source of names deemed by it to be reliable, but it shall exercise reasonable care to avoid duplication of names. The commission may use less than all of the names from any one source if it uses a systematic selection procedure (e.g., every second name), and provided the list contains not less than two times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium.

The custodians of the appropriate property tax and election registration records in each county shall cooperate with the jury commission in its duty of compiling the list of jurors required by this section. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1969, c. 205, s. 1; c. 1190, s. 49½.)

Editor's Note. — The first 1969 amendment inserted "qualified under this chapter" between "jurors" and "to serve" in the first sentence and substituted "not less than two times and not more than three times" for "approximately three times" in the third sentence.

The second 1969 amendment added the second paragraph.

Opinions of Attorney General. — Mr. Fred P. Parker, Wayne County Attorney, 8/11/69.

Constitutionality of Former Chapter.—See State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

Provisions of Former § 9-1 as to Jury List Directory and Not Mandatory.—See State v. Brown, 233 N.C. 202, 63 S.E.2d 99 (1951); State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898); State v. Bonner, 149 N.C. 519, 63 S.E. 84 (1908); State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

Special Statute Allowing Other Method.—Where a statute creating a special criminal court for certain counties allows every facility to the accused for getting a fair and impartial jury, it is not unconstitutional because it does not follow the same methods of drawing the jury which are provided for by the superior courts. State v. Jones, 97 N.C. 469, 1 S.E. 680 (1887).

Jury List Not Discriminatory Because Made from Tax List.—A jury list is not discriminatory merely because it is made from the tax list. The tax list is perhaps the most comprehensive list available for the names of male citizens. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964), decided under former § 9-1.

But commissioners are not limited to use of tax list, and the use of other lists might result in the selection of more women jurors. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964), decided under former § 9-1.

Discrimination on Account of Race.—See State v. Brown, 233 N.C. 202, 63 S.E.2d 99 (1951); State v. Daniels, 124 N.C. 641, 46 S.E. 743 (1904); Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953); Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

As to discrimination against negroes in selection of jury, see 26 N.C.L. Rev. 185.

Where commissioners laid aside names of several persons, otherwise qualified, because they did not know whether they were residents of the county, and the jury list was completed by the names of other duly qualified persons, if there was any irregularity it did not affect the action of the jurors so drawn and summoned. State v. Wilcox, 104 N.C. 847, 10 S.E. 453 (1889), decided under former § 9-1.

Rejection of prospective jurors for want

of good moral character and sufficient intelligence was available to the county commissioners as a general objection only when the jury list was being prepared, and not after the names were in the box. State v. Speller, 229 N.C. 67, 47 S.E.2d 537 (1948); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964), decided under former § 9-1.

Merely Purging Jury List. — Merely purging the jury list of the names of those who had not paid their taxes, without adding any new names thereto, does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. State v. Dixon, 131 N.C. 808, 42 S.E. 944 (1902), decided under former § 9-1.

§ 9-3. **Qualifications of prospective jurors.**—All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are twenty-one years of age or over, who are physically and mentally competent, who have not been convicted of a felony or pleaded nolo contendere to an indictment charging a felony, and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1.)

The law guarantees the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law. It was the manifest purpose of the legislature that all those and only those citizens who possess the proper qualifications of character and intelligence should be selected to serve on juries. State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1953).

Alienage. — Alienage is disqualification of a juror. Hinton v. Hinton, 196 N.C. 341, 145 S.E. 615 (1928).

That a juror has forfeited his citizenship by reason of conviction of a criminal offense was ground for challenge of the juror for cause under former § 9-1. Young v. Southern Mica Co., 237 N.C. 644, 75 S.E.2d 795 (1953).

Challenges in Particular Actions, for Bias, etc.—Former § 9-1, providing that good and lawful men, required by the Constitution to serve on juries, should be men found by the county commissioners to have paid taxes for the preceding year, and of good moral character and of sufficient intelligence, did not abolish challenges to jurors, in particular actions, for bias, interest, kinship, etc. State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903).

§ 9-4. **Preparation and custody of list.**—As the jury list is prepared, the name and address of each qualified person selected for the list shall be written on a separate card. The cards shall then be alphabetized and permanently numbered, the numbers running consecutively with a different number on each card. These cards shall constitute the jury list for the county. They shall be filed with the register of deeds of the county, together with a statement of the sources used and procedures followed in preparing the list. The list shall be kept under lock and key, but shall be available for public inspection during regular office hours. (1967, c. 218, s. 1; **1969, c. 205, s. 2.**)

Editor's Note.— The 1969 amendment inserted "qualified" preceding "person" in the first sentence.

§ 9-5. **Procedure for drawing panel of jurors; numbers drawn.**—The board of county commissioners in each county shall provide the clerk of superior court with a jury box, the construction and dimensions of which shall be prescribed by the administrative officer of the courts. At least 30 days prior to January 1 of any year for which a list of prospective jurors has been prepared, a number of discs, squares, counters or markers equal to the number of names on the jury list shall be placed in the jury box. The discs, squares, counters, or markers shall be uniform in size, weight, and appearance, and may be made of any suitable material. They shall be numbered consecutively to correspond with the numbers on the jury list. The jury box shall be of sufficient size to hold the discs, squares, counters or markers so that they may be easily shaken and mixed, and the box shall have

a hinged lid through which the discs, squares, counters or markers can be drawn. The lid shall have a lock, the key to which shall be kept by the clerk of superior court.

At least 30 days prior to any session or sessions of superior or district court requiring a jury, the clerk of superior court or his assistant or deputy shall, in public, after thoroughly shaking the box, draw therefrom the number of discs, squares, counters, or markers equal to the number of jurors required for the session or sessions scheduled. For each week of a superior court session, the senior regular resident superior court judge shall specify the number of jurors to be drawn. For each week of a district court jury session, the chief district judge shall specify the number of jurors to be drawn. Pooling of jurors between or among concurrent sessions of various courts is authorized in the discretion of the senior regular resident superior court judge. When pooling is utilized, the senior regular resident superior court judge, after consultation with the chief district judge when a district court jury is required, shall specify the total number of jurors to be drawn for such concurrent sessions. When grand jurors are needed, nine additional numbers shall be drawn.

As the discs, squares, counters, or markers are drawn, they shall be separately stored by the clerk until a new jury list is prepared.

The clerk of superior court shall deliver the list of numbers drawn from the jury box to the register of deeds, who shall match the numbers received with the numbers on the jury list. The register of deeds shall within three days thereafter notify the sheriff to summon for jury duty the persons on the jury list whose numbers are thus matched. The persons so summoned may serve as jurors in either the superior or the district court, or both, for the week for which summoned. Jurors who serve each week shall be discharged at the close of the weekly session or sessions, unless actually engaged in the trial of a case, and then they shall not be discharged until their service in that case is completed. (1806, c. 694, P. R.; 1868-9, c. 9, ss. 5, 6; c. 175; Code, ss. 1726, 1727, 1731; 1889, c. 559; 1897, c. 117; 1901, c. 28, s. 3; c. 636; 1903, c. 11; 1905, c. 38; c. 76, s. 4; c. 285; Rev., ss. 1958, 1959; C. S., ss. 2313, 2314; 1967, c. 218, s. 1; 1969, c. 205, s. 3.)

Editor's Note. — The 1969 amendment rewrote the former fourth sentence of the second paragraph to appear as the present fourth and fifth sentences of that paragraph.

Former § 9-3 Partly Mandatory and Partly Directory.—See Moore v. Navassa Guano Co., 130 N.C. 229, 41 S.E. 293 (1902); State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898); State v. Banner, 149 N.C. 519, 63 S.E. 84 (1908); State v. Watson, 104 N.C. 735, 10 S.E. 705 (1889).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.—(a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.

(b) Pursuant to the foregoing policy, the chief district judge of each district shall promulgate procedures whereby he or any district judge designated by him, prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. Until the district court has been established in a county, the senior regular resident superior court judge of the district shall promulgate the procedures to carry out the policy set forth in this section, and shall designate himself or another superior court judge or judges to hear and pass on applications. The procedure shall provide for the time and place, publicly announced, at which applications for excuses will be heard, and prospective jurors who have been summoned for service shall be so informed.

(c) A prospective juror excused by a judge in the exercise of the discretion conferred by subsection (b) may be required by the judge to serve as a juror in a

subsequent session of court. If required to serve subsequently, the juror shall be considered on such occasion the same as if he were a member of the panel regularly summoned for jury service at that time.

(d) A judge hearing applications for excuses from jury duty shall excuse any person disqualified under § 9-3.

(e) The judge shall inform the clerk of superior court of persons excused under this section, and the clerk within ten days shall so notify the register of deeds, who shall note the excuse on the juror's card and file it separately from the jury list.

(f) The discretionary authority of a presiding judge to excuse a juror at the beginning of or during a session of court is not affected by this section. (1967, c. 218, s. 1; 1969, c. 205, ss. 4, 5.)

Editor's Note. — The 1969 amendment added the last sentence in subsection (c) and inserted "within ten days" near the middle of subsection (e).

§ 9-7. Removal of names of jurors who have served from jury list; retention.—As persons are summoned for jury service, the cards upon which their names appear shall be withdrawn from the jury list and filed separately. The date for which each juror serves shall be noted on his card.

All cards removed from the jury list because of service, or having been excused from service, or because of disqualification, shall be retained for reference in compiling the next jury list. When the succeeding list has been prepared, the list of persons who have served shall be retained for a period of two years. (1967, c. 218, s. 1.)

§ 9-8: See Supplement.

§ 9-9: Repealed by Session Laws 1967, c. 218, s. 1.

Editor's Note.—Section 9-9, which derived from Session Laws 1967, c. 218, s. 1, was repealed effective Jan. 1, 1968, by its own terms.

ARTICLE 2.

Petit Jurors.

§ 9-10. Summons to jurors.—The register of deeds shall, within three days after the receipt of numbers drawn, deliver the list of prospective jurors to the sheriff of the county, who shall summon the persons named therein. The summons shall be served personally, or by leaving a copy thereof at the place of residence of the juror, or by telephone or first-class mail, at least 15 days before the session of court for which the juror is summoned. Service by telephone, or by first-class mail if mailed to the correct current address of the juror on or before the fifteenth day before the day the court convenes, shall be valid and binding on the person served, and he shall be bound to appear in the same manner as if personally served. The summons shall contain information as to the time, place, and authority before whom applications for excuses from jury service may be heard. (1779, c. 157, ss. 4, 6, P. R.; R. C., c. 31, s. 29; 1868-9, c. 9, s. 12; Code, s. 1733; Rev., s. 1976; C. S., s. 2320; 1967, c. 218, s. 1.)

Cross Reference.—As to penalty for disobeying summons, see § 9-13.

§ 9-11. Supplemental jurors; special venire. — (a) If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire. Jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. If the presiding judge finds that service of summons by the sheriff is not suitable because of his direct or indirect interest in the action to be tried, the judge may appoint some suitable person in place of the sheriff to summon supplemental jurors. The clerk of superior court shall furnish the register of deeds the names of those additional jurors who are so summoned and who report for jury service.

(b) The presiding judge may, in his discretion, at any time before or during a session direct that supplemental jurors or a special venire be selected from the jury list in the same manner as is provided for the selection of regular jurors. Jurors summoned under this subsection may be discharged by the court at any time during the session and are subject to the same challenges as regular jurors, and to no other challenges. (1779, c. 156, s. 69, P. R.; 1830, c. 27; R. C., c. 31, s. 29; c. 35, ss. 30, 31; Code, ss. 1733, 1738, 1739, 1740; 1887, c. 53; 1889, c. 441; 1897, c. 364; Rev., ss. 1967, 1968, 1973, 1974, 1975, 3265, 3602; 1911, c. 15; 1913, c. 31, ss. 1, 2; 1915, c. 210; C. S., ss. 2321, 2322, 2338, 2339, 2340, 4635; 1967, c. 218, s. 1; 1969, c. 205, s. 6.)

Cross Reference.—As to qualification of jurors, see § 9-3.

Editor's Note. — The 1969 amendment added the last sentence of subsection (a).

Discretion of Judge.—See State v. Brogden, 111 N.C. 656, 16 S.E. 170 (1892); State v. Casey, 212 N.C. 352, 193 S.E. 411 (1937); State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948); State v. Levy, 187 N.C. 581, 122 S.E. 386 (1924).

A motion for a change of venue or for a special venire from another county, upon the ground that the minds of the residents in the county in which the crime was committed had been influenced against the defendant, is addressed to the sound discretion of the trial court. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

Special Venire Selected without Partiality.—A challenge to the array on the ground that the sheriff and his deputies, under instructions by the sheriff, selected for the special venire freeholders of good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, was properly refused, the action of the sheriff and the deputies showing no partiality, misconduct and irregularity in making out the list. State v. Dixon, 215 N.C. 438, 2 S.E.2d 371 (1939).

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Order Substantially a Special Writ of Venire Facias.—A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to appear on a specified date to act as jurors in the case, is in substance a special writ of venire facias. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Accessory May Be Tried by Special Venire.—Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. State v. Register, 133 N.C. 746, 46 S.E. 21 (1903).

Challenge for Cause.—Under this section where a special venire has been ordered by the court for the trial of a capital felony, the veniremen, being selected by the sheriff in his discretion, not from the jury box, are subject to the same challenges for cause as tales jurors. State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932).

Special Venire Exhausted.—When a special venire is exhausted without completing the jury, the court may order a further venire to be summoned at once from the bystanders. State v. Stanton, 118 N.C. 1182, 24 S.E. 536 (1896).

§ 9-12. Supplemental jurors from other counties.—(a) On motion of any party or the State, or on his own motion, any judge of the superior court, if he is of the opinion that it is necessary in order to provide a fair trial in any case, and regardless of whether he will preside over the trial of that case, may order as many jurors as he deems necessary to be summoned from any county or counties in the same judicial district as the county of trial or in any adjoining judicial district. These jurors shall be selected and shall serve in the manner provided for selection and service of supplemental jurors selected from the jury list. These jurors shall be subject to the same challenges as other jurors, except challenges for nonresidence in the county of trial.

(b) Transportation may be furnished in lieu of mileage.

(c) The county of trial shall pay jurors summoned under this section at the rate provided by law for the county from which they are summoned. When a

district court is established in the county of trial, the jurors shall be compensated by the State as provided in G.S. 7A-312. (1913, c. 4, ss. 1, 2; C. S., s. 473; 1931, c. 308; 1933, c. 248; 1961, c. 110; 1967, c. 218, s. 1.)

Order Tantamount to Denial of Motion to Remove.—When the judge entered an order directing that venire of jurors be drawn from another county to serve as jurors, in the trial, it was tantamount to a denial of a motion to remove the cases to another county for trial. State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962), decided under former § 1-86.

Discretion of Court.—The granting of a solicitor's motion that the jury be drawn from the body of another county is within the court's discretion. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors summoned from any adjoining county, or from any county in the same judicial district, or have jurors drawn from the jury box of such county. State v. Kincaid, 183 N.C. 709, 110 S.E. 612 (1922); State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935), decided under former § 1-86.

A motion for change of venue or, in the alternative, that a jury be summonsed from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, is addressed to the discretion of the trial court, and where the record discloses that the trial judge conducted a hearing, read all the affidavits, and examined the press releases, that each juror selected stated that he could render a verdict uninfluenced by the publicity, and that defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion is not disclosed. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967), decided under former § 1-86.

The motion of the defendants that a jury be summoned from another county was addressed to the sound discretion of the presiding judge. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

A motion for change of venue or for a special venire may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable in the Court of Appeals unless gross abuse of discretion is shown. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

Review.—A judge's order, entered by virtue of authority vested in him by this section, is not reviewable, unless there has been a manifest abuse of his discretion. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), decided under former § 1-86 and holding that no abuse of discretion appeared.

§ 9-13. Penalty for disobeying summons.—Every person summoned to appear as a juror who has not been excused, and who fails to appear and attend until duly discharged, shall be subject to a fine of not more than fifty dollars ($50.00), to be imposed by the court, unless he renders an excuse deemed sufficient. The forfeiture so imposed if not paid forthwith shall be entered as a judgment against the defaulting juror, and the clerk of superior court shall issue an execution against his estate. (1779, c. 157, s. 4, P. R.; 1783, c. 189, P. R.; 1806, c. 694, P. R.; R. C., c. 31, s. 30; Code, ss. 405, 1734; Rev., s. 1977; C. S., s. 2323; 1967, c. 218, s. 1.)

§ 9-14. Jury sworn; judge decides competency.—The clerk shall, at the beginning of court, swear all jurors who have not been selected as grand jurors. Each juror shall swear or affirm that he will truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before him and render true verdicts according to the evidence. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any juror; and if by reason of such challenge any juror is withdrawn from a jury being selected to try a case, his place on that jury shall be taken by another qualified juror. The presiding judge shall decide all questions as to the competency of jurors. (1790, c. 321, P. R.; 1822, c. 1133, s. 1, P. R.; R. C., c. 31, s. 34; Code, s. 405; Rev., s. 1966; C. S., s. 2324; 1967, c. 218, s. 1.)

Editor's Note. — For note on allowing challenge for cause to a prospective juror opposed to capital punishment, see 45 N.C.L. Rev. 1070 (1967).

For comment on constitutional restrictions on the imposition of capital punishment, see 5 Wake Forest Intra. L. Rev. 183 (1969).

The question of whether a juror is competent is one for the trial judge to determine in his discretion, and his rulings thereon are not reviewable on appeal unless accompanied by some imputed error of law. State v. Blount, 4 N.C. App. 561, 167 S.E.2d 444 (1969).

A defendant is not entitled to a jury of his selection or choice but only to a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial group of the community from which the jury panel is drawn. He has no vested right to a particular juror. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Challenges for Cause. — The causes of challenge to the juror are so numerous as to be described by Lord Coke as "infinite." It has been held in many cases that the right is given to afford a litigant fair opportunity to remove objectionable jurors, and was not intended to enable him to select a jury of his own choosing. See Blevins v. Mills, 150 N.C. 493, 64 S.E. 428 (1909). A few of the most common grounds for challenge will be set out. Chief of these, perhaps, is expression of opinion. This is sometimes ground for challenge, but is not if the juror states that the opinion could be eliminated and a fair and impartial verdict rendered. State v. Bailey, 179 N.C. 724, 102 S.E. 406 (1920); State v. Winder, 183 N.C. 776, 111 S.E. 530 (1922). The challenge for this cause can be made only by that party against whom the opinion was formed and expressed. State v. Benton, 19 N.C. 196 (1836).

A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality, or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself. State v. Benton, 19 N.C. 196 (1836); State v. Mills, 91 N.C. 581 (1884).

Other grounds for challenge, briefly enumerated, are relation within the ninth degree of affinity (State v. Potts, 100 N.C. 457, 6 S.E. 657 (1888)); opposition to capital punishment (State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903)); nonresidence (State v. Bullock, 63 N.C. 570 (1869); State v. Upton, 170 N.C. 769, 87 S.E. 328 (1915)); employment by party (Oliphant v. Atlantic Coast Line R.R., 171 N.C. 303, 88 S.E. 425 (1916)). But in an indictment for illegal sale of liquor, challenges for cause, in that the jurors belonged to the Anti-Saloon League, were properly disallowed, where the jurors had taken no part in prosecuting or aiding in the prosecution of the defendant. State v. Sultan, 142 N.C. 569, 54 S.E. 84 (1906).

Time of Challenge.—The court may, in its discretion, permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is impaneled. State v. Green, 95 N.C. 611 (1886).

Excusing Unchallenged Juror.—The trial judge may excuse a juror, before the jury is impaneled, although the solicitor has passed him to the prisoner and has not challenged him for cause. State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903).

It is the right and duty of the court to see that a competent, fair and impartial jury is empaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. It is immaterial that this is done as the result of information voluntarily disclosed by the prospective juror without questioning. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. This is especially true where the adverse party did not exhaust his peremptory challenges. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Method of Taking Advantage of Error.—The action of a trial judge in determining the qualifications of a juryman, if erroneous, is ground for a challenge to the array by a motion to quash and set aside the entire panel, and in the absence of such challenge a defendant cannot be allowed to take advantage of the alleged error after trial and judgment. State v. Moore, 120 N.C. 570, 26 S.E. 697 (1897).

Review. — The rulings of the judge on questions as to the competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law. State v. DeGraffenreid, 224 N.C. 517,

31 S.E.2d 523 (1944); State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947); State v. Suddreth, 230 N.C. 239, 52 S.E.2d 924 (1949).

A juror during homicide trial had sister of deceased as one of his passengers in a four-mile automobile trip. Defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. It was held that exception to refusal of motion was not reviewable. State v. Suddreth, 230 N.C. 239, 52 S.E.2d 924 (1949).

The trial court's findings, upon supporting evidence, that persons of defendant's race were not excluded from the petit jury on account of race or color, are conclusive on appeal, and defendant's exception to the overruling of his challenge to the array on that ground presents no reviewable question of law. State v. Reid, 230 N.C. 561, 53 S.E.2d 849 (1949).

Defendant moved for a new trial on the ground that during the trial he discussed the case with one of the jurors before recognizing him as a juror. The court found that the defendant had not shown that he was in anywise prejudiced by the occurrence, and denied defendant's motion for a new trial. The ruling of the court was not reviewable. State v. Scott, 242 N.C. 595, 89 S.E.2d 153 (1955).

§ 9-15. Questioning jurors without challenge; challenges for cause. —(a) The court, or any party to an action, civil or criminal, shall be allowed, in selecting the jury, to make inquiry as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.

(b) It shall not be a valid cause for challenge that any juror, regular or supplemental, is not a freeholder or has not paid the taxes assessed against him.

(c) If any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge. (1806, c. 694, P. R.; 1868-9, c. 9, s. 7; Code, s. 1728; Rev., s. 1960; 1913, c. 31, ss. 5, 6, 7; C. S., ss. 2316, 2325, 2326; 1933, c. 130; 1967, c. 218, s. 1.)

Suit Pending but Not at Issue. — See State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897), decided under former § 9-6.

Suit Not Triable at Same Term.—See State v. Spivey, 132 N.C. 989, 43 S.E. 475 (1903), decided under former § 9-6.

Indictment Quashed When Section Violated. — An indictment was properly quashed where one of the grand jurors who found the bill was a party to an action pending and at issue in the superior court. State v. Lilies, 77 N.C. 496 (1877); State v. Smith, 80 N.C. 410 (1879), decided under former § 9-6.

§ 9-16. Exemption from civil arrest. — No sheriff or other officer shall arrest under civil process any juror during his attendance at or going to and returning from any session of the superior or district court. Any such arrest shall be invalid, and the defendant on motion shall be discharged. (1779, c. 157, s. 10, P. R.; R. C., c. 31, s. 31; Code, s. 1735; Rev., s. 1979; C. S., s. 2328; 1967, c. 218, s. 1.)

Section Does Not Repeal Common-Law Exemption.—This section does not by implication repeal the common-law exemption of nonresidents from service of process while in the State in attendance in court either as witnesses or as suitors. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898). See Greenlief v. Peoples Bank, 133 N.C. 292, 45 S.E. 638 (1903).

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors. — A jury, impaneled to try any cause, shall be put in charge of an officer of the court and shall be furnished with such accommodations as the court may order, and the accommodations shall be paid for by the parties or by the State, as ordered by the presiding judge.

The presiding judge, in his discretion, may direct any jury to be sequestered while it has a case or issue under consideration. (1876-7, c. 173; Code, s. 1736; 1889, c. 44; Rev., s. 1978; C. S., s. 2327; 1947, c. 1007, s. 2; 1967, c. 218, s. 1.)

Effect on Verdict of Refusal to Furnish Refreshments. — Where a jury retired at 11 A.M., to consider their verdict, which was returned at 3 P.M. such verdict can-

not be impeached because the sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the judge should tell him to take them to dinner. Gaither v. Hascall-Richards Steam Generator Co., 121 N.C. 384, 28 S.E. 546 (1897).

§ 9-18. Alternate jurors.—Whenever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial panel of jurors in the case, but after the regular jury has been duly impaneled. Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have left after the selection of the regular trial panel. Alternate jurors shall be sworn and seated near the jury with equal opportunity to see and hear the proceedings and shall attend the trial at all times with the jury and shall obey all orders and admonitions of the court to the jury. When the jurors are ordered kept together in any case, the alternate jurors shall be kept with them. An alternate juror shall receive the same compensation as other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. If more than one alternate juror has been selected, they shall be available to become a part of the jury in the order in which they were selected. (1931, c. 103; 1939, c. 35; 1951, cc. 82, 1043; 1967, c. 218, s. 1.)

Editor's Note. — In 9 N.C.L. Rev. 378, former § 9-21 (similar to this section) and its background are discussed.

Constitutional. — The essential attributes of trial by jury guaranteed by N.C. Const., Art. I, § 13, are the number of jurors, their impartiality and a unanimous verdict, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the verdict being finally returned by the unanimous verdict of twelve good and lawful men. State v. Dalton, 206 N.C. 507, 174 S.E. 422 (1934).

ARTICLE 3.

Peremptory Challenges.

§ 9-19. Peremptory challenges in civil cases.—The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the prospective jurors in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court. (1796, c. 452, s. 2, P. R.; 1812, c. 833, P. R.; R. C., c. 31, s. 35; Code, s. 406; Rev., s. 1964; C. S., s. 2331; 1935, c. 475, s. 1; 1965, c. 1182; 1967, c. 218, s. 1.)

Peremptory Challenge Defined. — A peremptory challenge is a challenge which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or being required to assign a reason therefor. State v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Not a Right to Select Jurors.—As in the case of challenges for cause, the right is given to challenge but such right does not constitute the right to select jurors. Ives v. Atlantic & N.C.R.R., 142 N.C. 131, 55 S.E. 74 (1906); Medlin v. Simpson, 144 N.C. 397, 57 S.E. 24 (1907).

Reasons for Challenge Need Not Be Given. — A party's reason for peremptorily challenging cannot be inquired into. Dupree v. Virginia Home Ins. Co., 92 N.C. 418 (1885).

A litigant cannot exercise more peremptory challenges than the number allowed to him by law. State v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Number of Plaintiffs or Defendants Immaterial.—Whether there are one or more plaintiffs or defendants, only eight peremptory challenges to the jury on either side are allowable. Bryan v. Harrison, 76 N.C. 360 (1877); State v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

In a quo warranto proceeding, the gen-

eral statutory right to eight peremptory challenges devolving upon the relators as all the parties on one side of the case was not annulled or impaired by their assertion that justice lay with one of the defendants or by the latter's concurrence in that assertion. State v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Challenge After Accceptance. — Where a juror has been accepted it is error to permit a peremptory challenge. Dunn v. Wilmington & W.R.R., 131 N.C. 446, 42 S.E. 862 (1902).

§ 9-20. Civil cases having several defendants; challenges apportioned; discretion of judge. — When there are two or more defendants in a civil action, the presiding judge, if it appears that there are antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law, or he may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final. (1905, c. 357; Rev., s. 1965; C. S., s. 2332; 1967, c. 218, s. 1.)

Decision of Trial Judge is Final.—This section, which creates the exception to the general rule laid down by § 9-19 regarding peremptory challenges, clothes with finality the decision of the trial judge as to how many challenges the several defendants will be allowed. State v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

§ 9-21. Peremptory challenges in criminal cases. — (a) In all capital cases each defendant may challenge peremptorily without cause 14 jurors and no more. In all other criminal cases each defendant may challenge peremptorily six jurors without cause and no more. To enable defendants to exercise this right, the clerk shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury is impaneled.

(b) In all capital cases the State may challenge peremptorily without cause six jurors for each defendant and no more. In all other criminal cases the State may challenge peremptorily without cause four jurors for each defendant and no more. The State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant. The State does not have the right to stand any jurors at the foot of the panel. (22 Hen. VIII, c. 14, s. 6; 33 Edw. I, c. 4; 1777, c. 115, s. 85, P. R.; 1801, c. 592, s. 1, P. R.; 1812, c. 833, P. R.; 1826, c. 9; 1827, c. 10; R. S., c. 35, ss. 19, 21; R. C., c. 35, ss. 32, 33; 1871-2, c. 39; Code, ss. 1199, 1200; 1887, c. 53; Rev., ss. 3263, 3264; 1907, c. 415; 1913, c. 31, ss. 3, 4; C. S., ss. 4633, 4634; 1935, c. 475, ss. 2, 3; 1967, c. 218, s. 1; 1969, c. 205, s. 7.)

Editor's Note. — The 1969 amendment inserted "for each defendant" in the first and second sentences of subsection (b).

See 11 N.C.L. Rev. 219.

In General. — Every criminal, charged with a crime affecting his life, has a right to challenge a certain number of jurors, without assigning any cause, and as many more as he can assign a good cause for. State v. Patrick, 48 N.C. 443 (1856).

Purpose. — The legislative intent in the enactment of former § 15-163 was to secure a reasonable and impartial verdict. State v. Ashburn, 187 N.C. 717, 122 S.E. 833 (1924).

Section 9-15 (a) Not Affected.—Former § 15-164, relating to peremptory challenges by the State in criminal cases, did not affect the application of former § 9-15 (now subsection (a) of § 9-15) to the trial of capital felonies. State v. Ashburn, 187 N.C. 717, 122 S.E. 833 (1924).

Judge Determines Competency of Jurors. —Triers are now dispensed with, and the judge determines the facts as well as the legal sufficiency of the challenge based upon them. State v. Kilgore, 93 N.C. 533 (1885).

The right of peremptory challenge is not a right to select but to exclude. State v. Smith, 24 N.C. 402 (1842); State v. Banner, 149 N.C. 519, 63 S.E. 84 (1908).

When Challenge Should Be Made.—The time for a prisoner to make his challenge, is when the juror is tendered, and before the juror is sworn, or the oath is com-

menced. State v. Patrick, 48 N.C. 443 (1856).

A person charged with crime may, when called upon to plead to the bill of indictment, challenge the array; or he may, after his plea, challenge individual jurors for cause or peremptorily. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

A defendant cannot wait until the jury has returned a verdict of guilty to challenge the competency of the jury to determine the question. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

Judge Cannot Extend Time. — The discretionary power of the trial judge in respect to challenges is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by this section than he has to allow more than four [now six] of such challenges. State v. Fuller, 114 N.C. 885, 19 S.E. 797 (1894).

Peremptory Challenges Limited in Number.—A defendant, in an indictment for an offense other than capital, having only four peremptory challenges to jurors, could not challenge a fifth juror peremptorily although he had first challenged one of the four for cause, which was properly disallowed. State v. Hargrave, 100 N.C. 484, 6 S.E. 185 (1888). A defendant is now allowed six peremptory challenges. — Ed. note.

Where several defendants are tried together for a crime other than a capital felony each is entitled to four [now six] peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has allowed but four [now six] peremptory challenges for all the defendants, a new trial will be granted upon appeal. State v. Burleson, 203 N.C. 779, 166 S.E. 905 (1932).

In a prosecution of two defendants jointly for offenses less than capital, the State is entitled to challenge peremptorily four [now six] jurors for each defendant. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

Where Bills of Indictment Are Consolidated.—Where several bills of indictment against a defendant are consolidated for trial, the defendant is entitled to but four [now six] peremptory challenges to the jury as provided by this section and not to four [now six] peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. State v. Alridge, 206 N.C. 850, 175 S.E. 191 (1934).

Number of Challenges When Verdict of Manslaughter Asked. — Where, upon the trial of an indictment for murder, the solicitor states that he will ask only for a verdict of manslaughter, no special venire was necessary, and the defendant is not entitled to more than four [now six] peremptory challenges. State v. Hunt, 128 N.C. 584, 38 S.E. 473 (1901); State v. Caldwell, 129 N.C. 682, 40 S.E. 85 (1901).

Waiver of Objection to Rejection of Juror.—If a juror is rejected upon an improper ground of challenge, made by the State, the prisoner cannot assign if for error, if a jury is obtained before he has exhausted his peremptory challenges. State v. Potts, 100 N.C. 457, 6 S.E. 657 (1888); State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906).

Article 4.

Grand Jurors.

§ 9-22. How grand jury drawn.—(a) At the first jury session of superior court for the trial of criminal cases in each county after January 1, 1968, the presiding judge shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat. The clerk of court or his assistant or deputy shall draw out the names of 18 persons who shall serve as grand jurors. Of these 18, the first nine drawn shall serve for a period of six months and until their replacements are selected and sworn, and the next nine for a period of 12 months and until their replacements are selected and sworn. Thereafter, beginning with the first criminal session of superior court after July 1, 1968, and continuing with the first criminal session of superior court after January 1 and July 1 of each year, nine new grand jurors shall be selected in the manner provided above to replace the jurors whose terms have expired. All new grand jurors so selected shall serve for a period of 12 months, and until their replacements are selected and sworn. In the event of a vacancy occurring in the membership of the grand jury,

the superior court judge holding the next criminal session in the county shall order a new juror drawn in the manner provided above to fill the vacancy.

(b) The presiding judge at any criminal session of superior court may at any time order the grand jury to be assembled for the purpose of hearing his charge. The presiding judge at any criminal session of superior court may at any time discharge the grand jury and order a new grand jury to be selected and qualified, as provided in this section. The first nine new grand jurors selected shall serve out the terms of the former grand jurors with six months or less to serve, and the next nine selected shall serve out the terms of those with more than six months to serve. (1779, c. 157, s. 11, P. R.; R. C., c. 31, s. 33; Code, s. 404; Rev., s. 1969; C. S., s. 2333; 1967, c. 218, s. 1.)

Opinions of Attorney General.—Mr. Amsey A. Boyd, Tax Supervisor of Richmond County, 7/29/69.

Always Eighteen Grand Jurors Serving.—Nine grand jurors are drawn in January of each year and nine grand jurors are drawn in July of each year, but there are always eighteen grand jurors serving. State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

Discrimination against Negroes in Selecting Jurors Forbidden. — The Fourteenth Amendment to the federal Constitution forbids any discrimination against negroes in the selection of a grand jury, and the burden is on the defendants to establish the discrimination against their race. State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963).

§ 9-23. Exceptions to qualifications of grand jurors.—All exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, because any member of the grand jury finding such bills of indictment had not paid his taxes or was a party to any suit pending and at issue. (Code, s. 1741; Rev., s. 1970; 1907, c. 36, s. 1; C. S., s. 2335; 1967, c. 218, s. 1.)

A party litigant does not have the right to select jurors, but only to challenge or reject them. State v. Peacock, 220 N.C. 63, 16 S.E.2d 452 (1941).

Qualifications Judged at Time of Service. — The fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served. State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898).

Grand Juror also Member of Petit Jury.—The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was committed, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror. State v. Wilcox, 104 N.C. 847, 10 S.E. 453 (1889).

Son of Prosecutor Member of Grand Jury.—The fact that the son of the prosecutor, in an indictment for larceny, was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground. State v. Sharp, 110 N.C. 604, 14 S.E. 504 (1892).

Failure to Pay Taxes.—Formerly, it was discretionary with the trial judge to allow or refuse a motion to quash because a grand juryman had not paid his taxes after entry of plea until the petit jury was sworn and impaneled, and a motion to quash after entry of plea was made too late as a matter of right. This is changed by the amendment of 1907 adding the last sentence of this section. State v. Banner, 149 N.C. 519, 63 S.E. 84 (1908).

The passage of the amendment immediately following the decision in the case of Breese v. United States, 143 F. 250 (4th Cir. 1906), was evidently for the purpose of removing the disqualification of grand jurors, based upon failure to pay taxes for the preceding year, in cases where they actually serve upon the grand jury and pass upon bills of indictment; and there is no reason why it should not be given this interpretation. Davis v. United States, 49 F.2d 269 (4th Cir. 1931).

Complete Exclusion of Class from Eligibility. — Even the complete exclusion, by State law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such State law, so long as there is no reason-

able basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

Absence of Negroes from Grand Jury.—See N.C. Const., Art. I, § 17, and note thereto.

Member of Grand Jury Summoned by Mistake.—While, generally, the provisions of the statute for drawing and summoning jurors are directory, the grand jury is illegally constituted when one whose name was not drawn from the boxes was summoned by mistake, and served by mistake. State v. Paramore, 146 N.C. 604, 60 S.E. 502 (1908).

Objection Must Be Taken by Motion to Quash. — An objection to an indictment based on defects or irregularities in the drawing or organization of the grand jury must be taken by a motion to quash the indictment. It cannot be urged in arrest of judgment. Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953); State v. Gales, 240 N.C. 319, 82 S.E.2d 80 (1954).

And the motion to quash must be seasonably made. These rules regulate the time for the motion: (1) An accused may make the motion to quash the indictment as a matter of right up to the time when he is arraigned and enters his plea; (2) the presiding judge has the discretionary power to permit the accused to make the motion to quash the indictment as a matter of grace after his plea is entered and until the petit jury is sworn and impaneled to try the case on its merits; and (3) the presiding judge has no power to entertain a motion to quash the indictment at all after the petit jury is sworn and impaneled to try the case on its merits. Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953); State v. Gales, 240 N.C. 319, 82 S.E.2d 80 (1954).

Matters which go to the incompetency of a grand jury may be excepted to after the bill is found, if it is done at the earliest opportunity afterwards, which clearly is upon the arraignment, when the defendant is first called upon to answer. State v. Griffice, 74 N.C. 316 (1876).

A motion to quash an indictment, made upon arraignment and before pleading, for that the grand jury was improperly constituted, is in apt time. State v. Paramore, 146 N.C. 604, 60 S.E. 502 (1908).

Waiver.—A failure to assert disqualifications of grand jurors is waived if not taken before the petit jury is sworn and impaneled. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

An accused waives any objection to the grand jury which indicts him on the ground of defects or irregularities in its drawing or organization unless he takes the objection by a motion to quash the indictment before entering a plea to the merits. State v. Gales, 240 N.C. 319, 82 S.E.2d 80 (1954); State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

Where a defendant aptly moves to quash indictments on the ground that they were returned by a grand jury from which members of his race were intentionally excluded, the defendant has not by his subsequent pleas of guilty, waived his objection. State v. Covington, 258 N.C. 501, 128 S.E.2d 827 (1963).

The right of a negro defendant to object to a grand jury upon the ground of discrimination against members of his race in the selection of such jury is waived by failing to pursue the proper remedy. Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953).

Cited in State v. White, 274 N.C. 220, 162 S.E.2d 473 (1968).

§ 9-24. Judge to appoint foreman; acting foreman.—The foreman of the grand jury shall be appointed by the presiding judge of a superior court session in which grand jurors are chosen. The foreman shall serve for a term of six months, and until his successor has been appointed and qualified, and he may be reappointed for a second term. He shall be sworn according to law. In the absence of the foreman, or if the foreman is unable to serve, the presiding judge shall appoint an acting foreman, who shall have all the powers of the foreman. (1879, c. 12; Code, s. 1742; Rev., s. 1971; C. S., s. 2336; 1929, c. 228; 1967, c. 218, s. 1.)

§ 9-25. Foreman may administer oaths to witnesses. — The foreman of every grand jury duly sworn and impaneled in any of the courts has power to administer oaths and affirmations to persons to be examined before it as witnesses. The foreman shall mark on the bill the names of the witnesses sworn and examined before the jury. (1879, c. 12; Code, s. 1742; Rev., s. 1971; C. S., s. 2336; 1929, c. 228; 1967, c. 218, s. 1.)

Section Directory Merely. — The provision of the section, providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses

sworn and examined before the jury, is directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. State v. Hines, 84 N.C. 810 (1881). See State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932); State v. Lancaster, 210 N.C. 584, 187 S.E. 802 (1936); State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

This section requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the jury is directory, and the fact that it does not appear by indorsement on a bill that the witness had been sworn and examined is no ground for quashing the indictment or arresting the judgment. State v. Hollingsworth, 100 N.C. 535, 6 S.E. 417 (1888).

This section, authorizing the foreman of the grand jury to swear witnesses to be examined before the jury, is directory merely. The fact that witnesses are sworn by the clerk of court rather than by the foreman is not grounds for arresting judgment or quashing an indictment. State v. Allen, 83 N.C. 680 (1880); State v. White, 88 N.C. 698 (1883).

No Indorsement Necessary. — No indorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906), overruling State v. McBroom, 127 N.C. 528, 37 S.E. 193 (1900).

The mere absence of an indorsement on a bill of indictment is not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as "a true bill." State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Return of New Bill as "True Bill" without Reexamination of Witnesses.—Where an indictment upon which witnesses had been examined was returned by the grand jury "a true bill," and quashed because it did not sufficiently charge the offense intended, and thereupon a new bill for the offense was sent and returned into court, "a true bill," without a reexamination of the witnesses, this bill should be quashed. State v. Ivey, 100 N.C. 539, 5 S.E. 407 (1888).

§ 9-26. Grand jury to visit county home and jail.—Every grand jury, while the court is in session, shall inspect the county home for the aged and infirm, the workhouse, if there is one, and the jail, and report to the court the condition of the facilities and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties.

It is not necessary for any grand jury in any county to make any inspections or submit any reports with respect to any county offices or agencies other than those required by this section, nor for any judge of the superior court to charge the grand jury with respect thereto. (1816, c. 911, s. 3, P. R.; R. C., c. 30, s. 3; Code, s. 785; Rev., s. 1972; C. S., s. 2337; 1949, c. 208; 1967, c. 218, s. 1.)

Cited in Parker v. State, 2 N.C. App. 27, 162 S.E.2d 526 (1968).

§§ 9-27 to 9-31: Repealed by Session Laws 1967, c. 218, s. 1.

Revision of Chapter.—See same catchline in note following analysis to chapter 9.

Chapter 10.

Notaries.

§ 10-1. Appointment and commission; term of office; revocation of commission.—The Governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public and shall issue to each a commission. The commission shall show that it is for a term of five years and shall show the effective date and date of expiration. The term of the commission shall be computed by including the effective date and shall end at midnight of the day preceding the anniversary of the effective date, five years thereafter. The commission shall be sent to the register of deeds of the county in which the appointee lives and a copy of the letter of transmittal to the register of deeds shall be sent to the appointee concerned. The commission shall be retained by the register of deeds until the appointee has qualified in the manner provided by G.S. 10-2.

Any commission so issued by the Governor or his predecessor, shall be revocable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission. Whenever the Governor shall have revoked the commission of any notary public appointed by him, or his predecessor in office, it shall be his duty to file with the register of deeds in the county of such notary public a copy of said order and mail a copy of same to said notary public.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Governor, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1.)

Cross References. — As to validating acknowledgments before notaries under age, see § 10-10. As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-102.

Editor's Note. — The first 1969 amendment substituted "five" for "two" in the second and third sentences.

The second 1969 amendment also substituted "five" for "two" in the second and third sentences and substituted "register of deeds" for "clerk of the superior court" and "clerk" in the fourth and fifth sentences of the first paragraph and "register of deeds" for "clerk of court" in the second paragraph.

Opinions of Attorney General. — Mrs. Susan Lobinger, Governor's Office, 9/3/69.

Origin.—The office of notary public has

long been known both to the civil and to the common law. State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

In Loan Co. v. Turrell, 19 Ind. 469, it was said: "The office originated in the early Roman jurisprudence, and was known in England before the Conquest." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Present Status. — The office of notary public is in most of the states a state office, although in few states it has been regarded as a county office, and its functions, once simple, have now a wider scope. State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Who Eligible.—It has been said that "at common law a minor is eligible to the position of notary public." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

§ 10-2. To qualify before register of deeds; record of qualification.—Upon exhibiting their commissions to the register of deeds of the county in which they are to act, the notaries shall be duly qualified by taking before the register an oath of office, and the oaths prescribed for officers. Following the administration of the oaths of office, the notary shall place his signature in a book designated as "The Record of Notaries Public." The Record of Notaries Public shall contain the name of the notary, the signature of the notary, the effective date and expiration date of the commission, the date the oath was administered, and the date of revocation if the commission is revoked by the Governor. The information contained in The Record of Notaries Public shall constitute the official record of the qualification of notaries public, and all documents relative to the qualification of notaries shall be delivered to the qualifying notary public or destroyed. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3173; 1969, c. 912, s. 2.)

Cross References.—As to the oath prescribed for officers, see § 11-11. As to when an attorney is disqualified, see § 47-8.

Editor's Note. — The 1969 amendment rewrote this section.

Opinions of Attorney General. — Mrs. Susan Lobinger, Governor's Office, 9/3/69.

§ 10-3. Clerks notaries ex officio; may certify own seals.—The clerks of the superior court may act as notaries public, in their several counties, by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts. (1833, c. 7, ss. 1, 2; R. C., c. 75, s. 3; Code, s. 3306; Rev., s. 2349; C. S., s. 3174.)

A clerk of the superior court, is, by virtue of his office, a notary public, and the taking of acknowledgments must be referred to the exercise of his notarial authority. Lawrence v. Hodges, 92 N.C. 672 (1885).

§ 10-3.1. Register of deeds notary ex officio with respect to certain instruments; to use seal of office.—With respect to instruments offered for registration in their county, the register of deeds and his assistants and deputies may act as notaries public by virtue of their office, and may certify their notarial acts under the seal of the office of the register of deeds. (1969, c. 664, s. 1.)

§ 10-4. Powers of notaries public.—(a) Subject to the exception stated in subsection (c), a notary public commissioned under the laws of this State acting anywhere in this State may—

(1) Take and certify the acknowledgment or proof of the execution or signing of any instrument or writing except a contract between a husband and wife governed by the provisions of G.S. 52-6;

(2) Take affidavits and depositions;

(3) Administer oaths and affirmations, including oaths of office, except when such power is expressly limited to some other public officer;

(4) Protest for nonacceptance, or nonpayment, notes, bills of exchange and other negotiable instruments; and

(5) Perform such acts as the law of any other jurisdiction may require of a notary public for the purposes of that jurisdiction.

(b) Any act within the scope of subsection (a) performed in another jurisdiction by a notary public of that jurisdiction has the same force and effect in this State as fully as if such act were performed in this State by a notary public commissioned under the laws of this State.

(c) A notary public who, individually or in any fiduciary capacity, is a party to any instrument, cannot take the proof or acknowledgment of himself in such fiduciary capacity or of any other person thereto.

(d) A notary public who is a stockholder, director, officer, or employee of a corporation is not disqualified to exercise any power, which he is authorized by this section to exercise, with respect to any instrument or other matter to which such corporation is a party or in which it is interested unless he is individually a party thereto. (1866, c. 30; 1879, c. 128; Code, s. 3307; Rev., s. 2350; C. S., s. 3175; 1951, c. 1006, s. 1; 1967, c. 24, s. 22.)

Cross References.—As to the taking of affidavits to be used before a court, see § 3-8. As to attorney probating papers to be used in proceedings in which he appears as attorney, see § 47-8.

Editor's Note. — The 1967 amendment substituted "52-6" for "52-12" at the end of subdivision (1) of subsection (a). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

Scope of Powers. — A notary public is recognized by the universal law of civilized and commercial nations; but his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like. Benedict, Hall & Co. v. Hall, 76 N.C. 113 (1877).

By statute in this State the powers of notaries public have been extended beyond those which were incident to the office by the universal law merchant, and pertained to the presentment of bills of exchange for acceptance or payment and the protest thereof for nonpayment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, etc. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Duty in Taking Acknowledgments.—The notary is required "to take and certify the acknowledgment or proof" and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed; (2) that they acknowledge the execution of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto. Young v. Jackson, 92 N.C. 144 (1885); Darden v. Neuse & Trent River Steamboat Co., 107 N.C. 437, 12 S.E. 46 (1890); State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Acknowledgment Quasi Judicial Act.—An acknowledgment of a deed, taken before a notary public, is a judicial, or at least a quasi judicial, act. Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893).

Protest as Evidence.—The protest of a notary establishes the facts stated in it in respect to each and all of these points to the full extent the notary could do it if he were examined as a witness and were believed. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

This was for convenience of commerce and to dispense with the necessity of bringing witnesses from a distance or of taking depositions to prove the facts certified to in the protest, the certificate being prima facie true. Elliott v. White, 51 N.C. 98 (1858); McNeal Pipe & Foundry Co. v. Woltman Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Certificate Prima Facie Evidence.—The certificate of the notary establishes prima facie that electors were sworn as required by statute when they signed the affidavits accompanying their absentee ballots. State ex rel. Owens v. Chaplin, 229 N.C. 797, 48 S.E.2d 37 (1948).

With the extension of the powers of notaries to take probate of deeds, the same quality attaches to their certificates of probate or acknowledgment; it is prima facie evidence of the truth of its pertinent recitals. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Not Disqualified to Act because Employee of Grantee.—A notary public is not disqualified to take acknowledgment of grantors and privy examination of married women to conveyances of land when he is an employee of the grantee, without any interest in the land conveyed. Smith v. Ayden Lumber Co., 144 N.C. 47, 56 S.E. 555 (1907).

Incurable Incompetency. — Where a notary public was interested in a deed of trust, he was disqualified to take the ac-

knowledgment, his attempted action was a nullity, and such defect could not be cured by probate upon such acknowledgment before the clerk and registration. Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893).

§ 10-5: Repealed by Session Laws 1951, c. 1006, s. 3.)

§ 10-6. May exercise powers in any county.—Notaries public have full power and authority to perform the functions of their office in any and all counties of the State, and full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done. (1891, c. 248; Rev., s. 2351; C. S., s. 3176.)

A notary public resident out of the State has no authority to take affidavits to be used in the courts of this State. Benedict, Hall & Co. v. Hall, 76 N.C. 113 (1877).

§ 10-7. Expiration of commission to be stated after signature. — Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts. (Rev., s. 2351a; C. S., s. 3177.)

Cited in Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945).

§ 10-8. Fees of notaries.—Notaries public and other persons acting as such shall be allowed the sum of fifty cents for protesting for nonacceptance or for nonpayment, or for both when done at the same time, any order, draft, note, bond or bill or any other thing necessary to be protested, and the sum of ten cents for each notice sent in connection therewith. For other necessary services, where no fee is fixed, they shall be allowed twenty cents for every ninety words. Cases of protest concerning vessels or other cargoes shall not be affected by this section. (Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734; Rev., s. 2800; C. S., s. 3178.)

Fees Created by Statute.—The fees of notaries public are created and regulated by statute. Price & Lucas Cider & Vinegar Co. v. Carroll, 124 N.C. 555, 32 S.E. 959 (1899).

§ 10-9. Official acts of notaries public; signatures; appearance of names; notarial stamps or seals.—Official acts of notaries public in the State of North Carolina shall be attested

(1) By their proper signatures,

(2) The readable appearance of their names, either from their signatures or otherwise, and

(3) By the clear and legible appearance of their notarial stamps:

Provided, that after an instrument bearing the official act of a notary public has been properly recorded in the office of the register of deeds subdivision (2) above shall be conclusively presumed to have been complied with and, provided further, that where a clear and legible impression of a notarial seal appears on an instrument, the same shall be deemed as valid as if a notarial stamp were used. (Rev., s. 2352; C. S., s. 3179; 1953, c. 836; 1961, c. 733; 1967, c. 984.)

Local Modification. — Guilford: 1955, c. 1057.

Cross Reference. — As to validation of deeds and probate and registration thereof where notarial seals have been omitted, see §§ 47-102 and 47-103.

Editor's Note. — The 1967 amendment inserted "in the State of North Carolina" near the beginning of the section, rewrote subdivision (3) and added the last proviso in the section.

Courts Take Judicial Notice. — It was said in Pierce v. Indseth, 106 U.S. 546, 1 S. Ct. 418, 27 L. Ed. 254 (1882): "The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Name in Seal.—The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the

fact of the execution of deed by a notary public is adjudged to have been proved by such seal and certificate, it is not rebutted by the mere fact that the notary signs his name, "Geo. Theo. Somner" and the seal has on it the name of "Theo. Somner." Deans v. Pate, 114 N.C. 194, 19 S.E. 146 (1894).

Failure to Attest by Seal.—A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." added thereto, but without an official seal. Tucker v. Inter-States Life Ass'n, 112 N.C. 796, 17 S.E. 532 (1893).

The acknowledgment of a deed before a notary public in due form is not defective because not attested by his notarial seal. Peel v. Corey, 196 N.C. 79, 144 S.E. 559 (1928).

§ 10-10. Acts of minor notaries validated.—All acts of notaries public for the State of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

Cross References. — For similar provision, see § 47-108. As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-102.

§ 10-11. Acts of certain notaries prior to qualification validated.—All acknowledgments taken and other official acts done by any person who has heretofore been appointed as a notary public, but who at the time of acting had failed to qualify as provided by law, shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowledgments were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby. (1945, c. 665.)

§ 10-12. Acts of notaries public in certain instances validated.—(a) The acts of any person heretofore performed after appointment as a notary public and prior to qualification as a notary public:

(1) In taking any acknowledgment, or
(2) In notarizing any instrument, or
(3) In performing any act purportedly in the capacity of a notary public

are hereby declared to be valid and of the same legal effect as if such person had qualified as a notary public prior to performing any such acts.

(b) All instruments with respect to which any such person as is described in subsection (a) of this section has purported to act in the capacity of a notary public shall have the same legal effect as if such person acting as a notary public had in fact qualified as a notary public prior to performing any acts with respect to such instruments. (1947, c. 313; 1949, c. 1; 1965, c. 37; 1969, c. 716, s. 1.)

Editor's Note. — Session Laws 1969, c. 716, s. 1 reenacted this section without change. Section 2 of the 1969 act provides that it shall not apply to pending litigation.

§ 10-13. Validation of acknowledgment wherein expiration of notary's commission erroneously stated. — All deeds, deeds of trust, mortgages, conveyances, affidavits, and all other paper writings similar or dissimilar to those enumerated herein, whether or not permitted or required to be recorded or filed under the laws of this State heretofore or hereafter executed, bearing an official act of a notary public in which the date of the notary's commission is erroneously stated, are, together with all subsequent acts or actions taken thereon, including but not limited to probate and registration, hereby declared in all respects to be valid to the extent as if the correct expiration date had been stated and shall be binding on the parties of such paper writings and their privies; and such

paper writings, together with their certificates may, if otherwise competent, be read in evidence as a muniment of title for all intents and purposes in any of the courts of this State: Provided, that at the date of such official act the notary's commission was actually in force. (1953, c. 702; 1961, c. 734.)

§ 10-14. Validation of instruments which do not contain readable impression of notary's name.—All deeds, deeds of trust, mortgages, conveyances, affidavits and all other paper writings similar or dissimilar to those enumerated herein, whether or not permitted or required to be recorded or filed under the laws of this State heretofore executed, bearing the official act of a notary public as attested by his notarial seal, but which seal does not contain a readable impression of the notary's name are, together with all subsequent acts or actions taken thereon, including but not limited to probate and registration, hereby declared in all respects to be valid to the same extent as if a seal containing a readable impression of the notary's name had been affixed thereto, and shall be binding on the parties of such paper writings and their privies; and such paper writings, together with their certificates, if otherwise competent, may be read in evidence as a muniment of title for all intents and purposes in any of the courts of this State. (1961, c. 483.)

§ 10-15. Acts of notaries with seal containing name of another state validated.—The notarial acts of any person heretofore duly commissioned as a notary public in this State, who used in performing such acts a seal correctly containing the name of the notary and the proper county but mistakenly containing the abbreviation for the state of Georgia instead of North Carolina, are hereby validated and given the same legal effect as if such misprint or incorrect designation of the State had not appeared on the seal or seal imprint so used. (1969, c. 83.)

§ 10-16. Validation of certain instruments acknowledged prior to January 1, 1945.—Where any person has taken an acknowledgment as a notary public of a person acting through another by virtue of the execution of a power of attorney and by said person acting in his individual capacity and said notary public has failed to include within his certificate the acknowledgment of said person in his capacity as attorney in fact, and such acknowledgment has been otherwise duly probated and recorded, then such acknowledgment is hereby declared to be sufficient and valid: Provided, this section shall apply only to those deeds and other instruments acknowledged prior to January 1, 1945. (1969, c. 951, s. 1.)

Editor's Note. — Session Laws 1969, c. 951, s. 3, provides that the act shall not affect pending litigation.

Chapter 11.

Oaths.

Article 1.

General Provisions.

Article 2.

Forms of Official and Other Oaths.

ARTICLE 1.

General Provisions.

§ 11-1. Oaths to be administered with solemnity.—Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Rev., s. 2353; C. S., s. 3188.)

Object of Statutes.—It is manifest, by a perusal of the statutes, that they were not intended to alter any rule of law, but the sole object was to prescribe forms for the sake of convenience and uniformity. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

This "solemnity" applies not only to the substance of the oath, but to the form and manner of taking it and of administering it. State v. Davis, 69 N.C. 383 (1873).

Double Sanction to Oath of Witness. — The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. Shaw v. Moore, 49 N.C. 25 (1856).

Sufficiency of Belief. — A person who believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in this world, all violators of his law, and that the sinner will inevitably be punished in this world for each and every sin committed; but there will be no punishment after death, and that in another world all will be happy and equal to the angels, is competent to be sworn. Shaw v. Moore, 49 N.C. 25 (1856).

In Omychund v. Barker, 1 Atk. 19, and Wiles, 538, it was decided that a Gentoo, who was an infidel, who did not believe in either the Old or New Testament, but who believed in a God, as the Creator of the Universe, and that he is a rewarder of those who do well, and an avenger of those who do ill, according to the common law, may be sworn in that form which is the most sacred and obligatory upon his religious sense. The case establishes the rule to be, that an infidel is competent to be sworn, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. Shaw v. Moore, 49 N.C. 25 (1856).

It is laid down by Lord Hale to be the common law, that a Jew is competent to be sworn, and may be sworn on the Old Testament, and such has ever since been taken to be the law. Shaw v. Moore, 49 N.C. 25 (1856).

Finding of the Judge Conclusive.—The finding of the judge as to the competency of a witness to take oath is conclusive, and not reviewable. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

At Common Law. — In Shaw v. Moore, 49 N.C. 25 (1856), Pearson, J., said that "in the old cases it was held to be common law that no infidel (in which class Jews were included) could be sworn as a witness in the courts of England." He then

proceeds to say that the reason for this as given by Lord Coke, "to say the least of it, is narrowminded, illiberal, bigoted, and unsound." State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Objection to Oath of Incompetent after Verdict.—Where a juror is incompetent to be sworn because an atheist (State v. Davis, 80 N.C. 422 (1879) and the objection is not discovered till after verdict, setting aside the verdict rests in the discretion of the trial judge. State v. Lambert, 93 N.C. 618 (1885); State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

Objection to Manner of Administering after Verdict.—Where a juror was sworn in the presence of the prisoner, and his counsel let him acquiesce in the manner in which the oath was taken, to object after the verdict would simply make a trial not a decision upon the merits but a series of pitfalls for the State. Not having spoken when he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. State v. Ward, 9 N.C. 443 (1823); Briggs v. Byrd, 34 N.C. 377 (1851); State v. Patrick, 48 N.C. 443 (1856); State v. Boon, 82 N.C. 637 (1880); State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

Failure to Administer.—In State v. Gee, 92 N.C. 756 (1885), where a witness was not sworn at all, the court held that this was not ground of objection after verdict. State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

§ 11-2. Administration of oath upon the Gospels.—Judges and justices of the peace, and other persons who may be empowered to administer oaths, shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Code, s. 3309; Rev., s. 2354; C. S., s. 3189; 1941, c. 11.)

Cross References.—As to exceptions to this section, see § 11-3 for administration of oath with uplifted hand, and § 11-4 for affirmation of Quakers and others. As to forms of oaths, see § 11-11. As to perjury, see § 14-209.

Application to Witnesses. — After this manner, every witness, except as otherwise provided, must be sworn. State v. Davis, 69 N.C. 383 (1873).

Sufficiency of Juror's Oath. — An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God." State v. Paylor, 89 N.C. 539 (1883).

Ministerial Act.—The administration of an oath is a ministerial act and may be done by anyone in the presence and by the direction of the court, but is the act of the court. State v. Knight, 84 N.C. 789 (1881).

Partially Directory.—As to the form of the oath, when it is prescribed by statute, the statute is to be construed in some sense directory only, so far at least that a departure from the words, in matter not of substance but of form merely, does not exempt the person taking it from the pains of perjury. State v. Mazon, 90 N.C. 676 (1884).

Same—Validity of Irregular Oath.—To hold invalid an oath that did not follow the very words of the statute might prove disastrous to the public interests. State v. Mazon, 90 N.C. 676 (1884).

Same—Same—Juror's Oath in Capital Cases. — Although the omission of the words "you swear" at the commencement of the oath of jurors in a capital case looks awkward and mars the comeliness of judicial proceedings, it does not vitiate the oath. State v. Owen, 72 N.C. 605 (1875).

The manner of swearing is merely a form adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Presumption.—The administration of an oath to a witness is an official act of the court; and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, a presumption arises that it was rightly done. State v. Mace, 86 N.C. 668 (1882).

The maxim omnia presumuntur rite esse acta applies in no case with greater effect than to official acts of this nature, the minute and particular details of which, while important, are not likely to attract such attention as to insure their being accurately remembered. State v. Mace, 86 N.C. 668 (1882).

Willful Violation.—A willful violation of such an oath in a material matter is perjury, and no other is. This is the general rule. State v. Davis, 69 N.C. 383 (1873).

When Deputy Clerk May Administer.—The deputy of the clerk of the superior court is authorized to take the affidavit of

the plaintiff in an action of claim and delivery. Jackson v. Buchanan, 89 N.C. 74 (1883).

A deputy sheriff is not authorized to administer oath to homestead appraisers. Oates v. Munday, 127 N.C. 439, 37 S.E. 457 (1900).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ **11-3. Administration of oath with uplifted hand.**—When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be). (1777, c. 108, s. 3, P. R.; R. C., c. 76, s. 2; Code, s. 3310; Rev., s. 2355; C. S., s. 3190.)

Cross Reference.—As to forms of oaths, see § 11-11.

Conscientious Scruples. — If the usual form of oaths upon the Holy Evangelists is dispensed with and an "appeal" or "affirmation" is substituted, it must appear that the person sworn had conscientious scruples, else the "appeal" or "affirmation" is invalid. State v. Davis, 69 N.C. 383 (1873); Pearre v. Folb, 123 N.C. 239, 31 S.E. 475 (1898).

Presumption as to Manner. — Where it appears that the registrar administered the prescribed oath to electors, but that he did not swear them on the Bible, it will be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified by the section, and was accepted as a valid mode of administering it, by both the registrar and the elector. Administering the oath in such manner is sufficient to meet the requirements of the election law. State ex rel. DeBerry v. Nicholson, 102 N.C. 465, 9 S.E. 545 (1889).

Presumption as to Witness. — When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury. State v. Whisenhurst, 9 N.C. 458 (1823).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ **11-4. Affirmation of Quakers and others.**—The solemn affirmation of Quakers, Moravians, Dunkers and Mennonites, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the Constitution of the State, or of the United States, or an oath of office, they shall make their solemn affirmation in the words of the oath beginning after the word "swear"; which affirmation shall be effectual to all intents and purposes. (1777, c. 108, s. 4, P. R.; c. 115, s. 42, P. R.; 1819, c. 1019, P. R.; 1821, c. 1112, P. R.; R. C., c. 76, s. 3; Code, s. 3311; Rev., s 2356; C. S., s. 3191.)

In General.—Quakers and some others who have conscientious scruples about swearing at all, are permitted to "affirm." State v. Davis, 69 N.C. 383 (1873).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ **11-5. Oaths of corporations.**—In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corporation by and through any officer or agent of said corporation who is authorized by law to verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the

manner aforesaid in behalf of a corporation as such fiduciary is hereby validated as the oath of such corporation. (1919, c. 89, ss. 1, 2; C. S., s. 3192.)

Cross Reference.—As to verification of pleadings by corporations, see § 1-147.

§ 11-6. Oath to support Constitution of United States; all officers take.—All members of the General Assembly, and all officers who shall be elected or appointed to any office of trust or profit within the State, shall, agreeably to act of Congress, take the following oath or affirmation:

I, A.B., do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States; so help me, God.)

Which oath shall be taken before they enter upon the execution of the duties of the office. (1791, c. 342, s. 2, P. R.; R. C., c. 76, s. 5; Code, s. 3313; Rev., s. 2357; C. S., s. 3193.)

Cross References. — As to what constitutes an office or place of trust or profit within the meaning of this section, see §§ 128-1, 128-13. See also, N.C. Const., Art. VI, § 7, for oaths required of public officers.

Officers and Placemen.—Officers are required to take an oath to support the Constitutions of the State and of the United States, while placemen are not. Worthy v. Barrett, 63 N.C. 199 (1869).

Oath Incidental.—The oath required of public officers is merely incidental to and constitutes no part of the office. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872).

Failure to Take Oath. — Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices. Wiley v. Worth, 61 N.C. 171 (1867).

§ 11-7. Oath or affirmation to support State Constitution; all officers to take.—Every member of the General Assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the State, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A.B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonites or Dunkers, he shall take and subscribe the following affirmation:

I, A.B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the Constitution of the State and Constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the State, by any means, in any conspiracy whatever, against the State; that I will disclose and make known to the legislative, executive or judicial powers of the State all treasonable conspiracies which I shall know to be made or intended against the State. (1781, c. 342, s. 1, P. R.; R. C., c. 76, s. 4; Code, s. 3312; Rev., s. 2358; C. S., s. 3194.)

Cross References.—As to oath with uplifted hand, see § 11-3. As to affirmation by Quakers and others, see § 11-4. As to public officers, see § 11-6 and N.C. Const., Art. VI, § 7.

§ 11-7.1. Who may administer oaths of office.—(a) Except as otherwise specifically required by statute, an oath of office may be administered by:

(1) A justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice;

(2) The Secretary of State;

(3) A judge or clerk of a court inferior to the superior court, including justices of the peace;

(4) A notary public;
(5) A register of deeds;
(6) A mayor of any city, town, or incorporated village.

(b) The administration of an oath by any judge of the Court of Appeals prior to March 7, 1969, is hereby validated. (1953, c. 23; 1969, c. 44, s. 25; c. 499; c. 713, s. 1.)

Editor's Note.—The first 1969 amendment rewrote this section. The second 1969 amendment added subdivision (5) in subsection (a) and the third 1969 amendment added subdivision (6).

Session Laws 1969, c. 713, s. 2, provides: "Any and all oaths of office administered by any mayor of any city, town or incorporated village prior to the date of the ratification of this act, which would be valid hereunder if administered after ratification are hereby confirmed, ratified and validated." The act was ratified June 5, 1969, and made effective on ratification.

§ **11-8. When deputies may administer.**—In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing. (1836, c. 27, s. 2; R. C., c. 76, s. 7; Code, s. 3316; Rev., s. 2359; C. S., s. 3195.)

Cross References.—As to administration of homestead appraiser's oath, see § 1-371 and annotations. See also note to § 11-2.

§ **11-9. Administration by certain officers.**—The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards. (1889, c. 529; 1899, c. 89; Rev., s. 2362; C. S., s. 3196.)

Cross Reference.—As to power of sheriff to administer oath to homestead appraisers, see § 1-371.

Cited in Royal Cotton Mill Co. v. Textile Workers Union of America, 234 N.C. 545, 67 S.E.2d 755 (1951).

§ **11-10. When county surveyors may administer oaths.** — The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in establishing boundaries and in surveying vacant lands under warrants. (1881, c. 144; Code, s. 3314; Rev., s. 2361; C. S., s. 3197; 1959, c. 879, s. 4.)

Article 2.

Forms of Official and Other Oaths.

§ **11-11. Oaths of sundry persons; forms.**—The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney General, State Solicitors and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of Attorney General (solicitor for the State or attorney for the State in the county of .....); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Clerk of the Supreme Court

I, ..., do solemnly swear that I will discharge the duties of the office of clerk of the Supreme Court without prejudice, affection, favor, or partiality, according to law and to the best of my skill and ability, so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of .....; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the State; and I do further swear that I will execute the office of clerk of the superior court for the county of ..... without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Commissioner of Wrecks

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of ....., in the county of ....., according to law; so help me, God.

Constable

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of constable; I will see and cause the peace of the State to be well and truly preserved and kept, according to my power; I will arrest all such persons as, in my sight, shall ride or go armed offensively, or shall commit or make any riot, affray or other breach of the peace; I will do my best endeavor, upon complaint to me made, to apprehend all felons and rioters or persons riotously assembled, and if any such offenders shall make resistance with force, I will make hue and cry, and will pursue them according to law, and will faithfully and without delay execute and return all lawful precepts to me directed; I will well and truly, according to my knowledge, power and ability, do and execute all other things belonging to the office of constable, so long as I shall continue in office; so help me, God.

Cotton Weigher for Public

I, ..., public weigher for the city of ..... (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

Entry-Taker

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of .... according to law; so help me, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave anyone unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Oath for Petit Juror

You do solemnly swear (affirm) that you will truthfully and without prejudice or partiality try all issues in civil or criminal actions that come before you and give true verdicts according to the evidence, so help you, God.

Justice, Judge, or Magistrate of the General Court of Justice

I, ..., do solemnly swear (affirm) that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of ..... of the ..... Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God.

Justice of the Peace

I, A. B., do solemnly swear (or affirm) that as justice of the peace of the county of ....., in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the State; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me; the fines and amercements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment; I will not wittingly or willingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will not delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or the other officers or ministers of the State, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of ....., in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of Secretary of State of the State of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of ..... county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible,

agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of State Treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of ....., according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of ....., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the State and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the State and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

General Oath

Any officer of the State or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of

the office of ..... according to the best of my skill and ability, according to law; so help me, God. (R. C., c. 76, s. 6; 1874-5, c. 58, s. 2; Code, ss. 3057, 3315; 1903, c. 604; Rev., s. 2360; C. S., s. 3199; 1947, c. 71; 1959, c. 879, s. 5; 1967, c. 218, s. 2; 1969, c. 1190, ss. 50, 51.)

Cross Reference. — As to oath of members of finance committee of county, see § 153-45.

Editor's Note. — The 1969 amendment substituted the present oath of "Justice, Judge, or Magistrate of the General Court of Justice" for the former oaths of "Judge of the Supreme Court" and "Judge of the Superior Court" and rewrote the oath of the "Clerk of the Supreme Court."

The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Jury Need Not Be Resworn for Prosecution of Less than Capital Offense. — Where, upon an indictment charging homicide, the solicitor announces that he is not seeking a higher verdict than murder in the second degree, the prosecution is no longer for a capital offense, and it is not required that the jury be again sworn to try the particular prosecution, but under the provisions of this section it is sufficient that the jurors and all others summoned as jurors for the session of court were administered oath to truly try all issues which shall come before the jury during the term. State v. Smith, 268 N.C. 659, 151 S.E.2d 596 (1966), decided prior to the 1967 amendment.

Disclosures Not Prohibited by Grand Jurors' Oath.—The grand jurors' oath of secrecy does not prohibit the disclosure in court of proceedings before the grand jury whenever the ends of justice require it. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. This is especially true where the adverse party did not exhaust his peremptory challenges. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Cited in In re Will of Covington, 252 N.C. 551, 114 S.E.2d 261 (1960).

Chapter 12.

Statutory Construction.

§ 12-1: Repealed by Session Laws 1957, c. 783, s. 3.

§ 12-2. Repeal of statute not to affect actions.—The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (1830, c. 4; R. C., c. 108, s. 1; 1879, c. 163; 1881, c. 48; Code, s. 3764; Rev., s. 2830; C. S., s. 3948.)

Section Not Obligatory. — As the laws of our legislature do not bind another, except insofar as they may be absolute contracts, this section must be taken as merely a rule of construction having no application where the intention of the legislature clearly and explicitly appears to the contrary. Dyer v. Ellington, 126 N.C. 941, 36 S.E. 177 (1900).

Repeal after Services Rendered.—Where a statute was in force when certain services were rendered, it was held that the plaintiff's right had become absolute, and no subsequent repeal could invalidate it. Copple v. Commissioners, 138 N.C. 127, 50 S.E. 574 (1905).

Action Commenced before Repeal.—By express terms of the section, the repeal of a statute does not affect an action theretofore commenced under it. Smith v. Morganton Ice Co., 159 N.C. 151, 74 S.E. 961 (1912).

Same—For Penalty or Forfeiture.—Under the provisions of the section a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); Epps v. Smith, 121 N.C. 157, 28 S.E. 359 (1897); Grocery Co. v. Railroad, 136 N.C. 396, 48 S.E. 801 (1904).

Subject Matter Destroyed by Statute Pending Appeal.—Where, pending an appeal, the subject matter of the action is destroyed or a statute giving the cause of action is repealed, the appellate court will not go into consideration of the abstract question as to which party ought to have prevailed, in order to adjudicate the costs but the judgment below as to costs will be allowed to stand. Wikel v. Board of Comm'rs, 120 N.C. 451, 27 S.E. 117 (1897); Brinson v. Duplin County, 173 N.C. 137, 91 S.E. 708 (1917).

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against interferences. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away. Williams v. Atlantic Coast Line R.R., 153 N.C. 360, 69 S.E. 402 (1910).

Right of Informer. — An informer has, in a certain sense, an inchoate right when he brings his suit, but he has no vested right to the penalty until judgment. Hence, until his right becomes vested, it can be destroyed by the legislature. Dyer v. Ellington, 126 N.C. 941, 36 S.E. 177 (1900).

Action to Recover Arrearages of Taxes. —An action pending to recover arrearages of taxes, brought under an act authorizing the collection of unpaid taxes for past years, is not affected by the repeal of such statute. City of Wilmington v. Cronly, 122 N.C. 388, 30 S.E. 9 (1898).

Changing Rules of Evidence. — An act of the legislature changing the rules of evidence cannot be construed as operating retrospectively so as to affect existing rights. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893).

Modes of Procedure. — Statutes which change modes of procedure may govern suits pending at the time of their enactment. Sumner v. Miller, 64 N.C. 688 (1870).

A retrospective law is one that in some way affects the rights and liabilities of parties incident to and growing out of a transaction that has passed. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Maxim "Leges Posteriores Priores Contrarias Abrogant".—To give operation to the maxim, leges posteriores priores contrarias abrogant, the latter law must be in conflict with the former; therefore, when a later statute is almost in ipsissimis verbis with a former one, there is no repeal of the former. Kesler v. Smith, 66 N.C. 154 (1872).

General Rule—Prospective Effect.—The general rule is that a statute will be given

prospective effect only unless the law in question clearly forbids such a construction. Corporation of Elizabeth City v. Commissioners of Pasquotank, 146 N.C. 539, 60 S.E. 416 (1908); Mann v. Allen, 171 N.C. 219, 88 S.E. 235 (1916); Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Remedial Legislation.—In case of a remedial legislation, the general rule is not so insistent, and such statutes are not infrequently given retrospective effect where the language permits and such a construction will best promote the meaning and purpose of the legislature. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Mere Court Procedure.—The rule that statutes may be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitution or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Limitation of Actions.—While the legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened a reasonable time must be given for the commencement of an action before the statute works a bar. Strickland v. Draughan, 91 N.C. 103 (1884). The action in the instant case having been instituted before the passage of the act, is not affected by it. Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897).

General Rule in Criminal Actions.—The repeal of a statute pending a prosecution for an offense which it creates arrests the prosecution and withdraws all authority to pronounce judgment, even after conviction. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889).

Same—Legislative Authority to Increase Punishment.—The legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more severe, than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the federal Constitution, which forbids the enactment by a state of any ex post facto law, could, in either event, be invoked for the protection of the person charged. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); State v. Ramsour, 113 N.C. 642, 18 S.E. 707 (1893).

§ 12-3. Rules for construction of statutes.—In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:

(1) Singular and Plural Number, Masculine Gender, etc.—Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

(2) Authority, to Three or More Exercised by Majority.—All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

(3) "Month" and "Year".—The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

(4) Leap Year, How Counted.—In every leap year the increasing day and the day before, in all legal proceedings, shall be counted as one day.

(5) "Oath" and "Sworn".—The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed."

(6) "Person" and "Property".—The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendable to heirs at law. The word "property" shall include all property, both real and personal.

(7) "Preceding" and "Following".—The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

(8) "Seal".—In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

(9) "Will".—The term "will" shall be construed to include codicils as well as wills.

(10) "Written" and "in Writing".—The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

(11) "State" and "United States".—The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

(12) "Imprisonment for One Month," How Construed.—The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

(13) "Governor," "Senator," "Solicitor," "Elector," "Executor," "Administrator," "Collector," "Juror," and "Auditor".—The words "Governor," "Senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," "auditor," and any other words of like character shall when applied to the holder of such office, or occupant of such position, be words of common gender, and they shall be a sufficient designation of the person holding such office or position, whether the holder be a man or woman. (21 Hen. III; R. S., c. 31, s. 113; R. C., c. 31, s. 108; c. 108; Code, s. 3765; Rev., s. 2831; C. S., s. 3949; 1921, c. 30.)

I. GENERAL CONSIDERATION.

Specific Words Followed by General Words. — Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by a proper interpretation, be confined to acts and things of the same kind. State v. Craig, 176 N.C. 740, 97 S.E. 400 (1918).

Words Given Ordinary Meaning. — When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915).

When Court May Interpolate Necessary Words. — When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently omitted, as appears from the context, or silently understand them to be incorporated in it. Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905); Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915).

In Palms v. Shawano, 61 Wis. 217, the words "south" used in the legislative act defining the boundaries of a county was read "north"; in Stoneman v. Whaley, 9 Iowa 390, a subsequent act purported to repeal the sixteenth section of another act, and it was held that the repealing act referred to the sixth section; and in a case from Utah a subsequent act referred to § 162 of a prior act, and it was construed to mean § 151. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Proviso.—As a general rule in the construction of statutes, a proviso will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the proviso will be ascertained by the language used in it. Traders Nat'l Bank v. Lawrence Mfg. Co., 96 N.C. 298, 3 S.E. 363 (1887).

Words Cannot Be Construed Away. — The court has no power or right to strike out words or to construe them away. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

When laws have been codified, it is permissible to examine the original legislation as an aid to correct interpretation. Rodgers, McCabe & Co. v. Bell, 156 N.C. 378, 72 S.E. 817 (1911); Morganton Mfg. & Trading Co. v. Andrews, 165 N.C. 285, 81 S.E. 418 (1914).

The maxim cessante ratione legis, cessat et ipsa lex has no application in the construction of statutes. State v. Eaves, 106 N.C. 752, 11 S.E. 370 (1890).

Void for Vagueness.—If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void. State v. Partlow, 91 N.C. 550 (1884).

II. DETERMINATION OF INTENT AND MEANING.

A. In General.

When Statute Is Clear.—It is not allowable to interpret what has no need of interpretation, or, where the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908); State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917); Hamilton v. Rathbone, 175 U.S. 414, 20 S. Ct. 155, 44 L. Ed. 219 (1899).

Where Language Is of Doubtful Meaning. — In interpreting the statute where the language is of doubtful meaning, the court will reject an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

Meaning First Sought in Language Used. — In Caminetti v. United States, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917), the court said: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917).

Law Existing at Time of Enactment.—To discover the true meaning of a statute, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question. Kendall v. Stafford, 178 N.C. 461, 101 S.E. 15 (1919).

But the meaning must be ascertained from the statute itself, and the means and signs of which, as appears upon its face, it has reference. State v. Partlow, 91 N.C. 550 (1884).

Objects Embraced.—The meaning of a statute in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means. State v. Partlow, 91 N.C. 550 (1884).

Misdescription or Misnomer. — The question was fully considered by the Supreme Court in Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905), and the court there says: "A misdescription

or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing." Under this rule we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

The title of a statute is no part thereof. State v. Welsh, 10 N.C. 404 (1824). But it may be construed when the meaning is doubtful. State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896).

It cannot control the text when it is clear. Blue v. McDuffie, 44 N.C. 131 (1852); Jones v. Hartford Ins. Co., 88 N.C. 499 (1883); Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886); State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896) Especially is this true as to the headings of a section in the Code. Cram v. Cram, 116 N.C. 288, 21 S.E. 197 (1895); In re Chisholm's Will, 176 N.C. 211, 96 S.E. 1031 (1918).

B. Legislative Intent.

Motive and Purpose of Legislature.—If the language of a statute is doubtful, and the intention of the legislature is clear, the former will be construed in the latter; but where the language is plain, the courts cannot look into the motive or purpose of the legislature in the enactment of the law. State v. Eaves, 106 N.C. 752, 11 S.E. 370 (1890).

Same — Understanding of Individual.— Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. State v. Boon, 1 N.C. (Taylor) 103 (1801); Drake v. Drake, 15 N.C. 110 (1833); Adams v. Turrentine, 30 N.C. 147 (1847); State v. Melton, 44 N.C. 49 (1852); Blue v. McDuffie, 44 N.C. 131 (1852); State v. Partlow, 91 N.C. 550 (1884).

Same—Same—Affidavit of Legislators.— In interpreting a statute it is not permissible to show its intent and meaning by affidavit of legislators, for such must be gathered from the act itself. Goins v. Trustees Indian Training School, 169 N.C. 736, 86 S.E. 629 (1915).

Harmonizing Context. — It is the duty of the court to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

Effectuation of Purpose. — Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its objects. State v. Partlow, 91 N.C. 550 (1884); Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905).

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the legislature can be gathered from the context or from the general purpose and tenor of the enactment. Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905).

Mistakes or Omissions.—Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the legislature can be collected from the whole statute. If the mistake renders the intention doubtful, the courts will look to the title and preamble as well as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Impossible Requirements. — In the construction of a statute the court will avoid attributing to the legislature the intention to punish the failure to do an impossible thing. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

Proviso Prevails over Purview. — When a proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the legislature. Orinoco Supply Co. v. Masonic & E. Star Home, 163 N.C. 513, 79 S.E. 964 (1913).

As to Whether Statute Mandatory or Directory.—There is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory. The meaning and intention of

the legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. Spruill v. Davenport, 178 N.C. 364, 100 S.E. 527 (1919).

III. SIMILAR AND RELATED ACTS

A. In General.

Words and Phrases in One Statute Read in a Subsequent Act. — That words and phrases, the meaning of which, in a statute, has been ascertained, are, when read in a subsequent statute, to be understood in the same sense. And where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or county, or by that of another, that construction is to be given to the later statute. It is presumed that the legislature which passed the latter statute knew the judicial construction which had been placed on the former one, and such a construction becomes a part of the law. Bridgers v. Taylor, 102 N.C. 86, 8 S.E. 893 (1889).

Permissible to Look at Other Statutes.— To ascertain the mischief which an act of the legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to one under construction. Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915); In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation. State Bd. of Agriculture v. White Oak Buckle Drainage Dist., 177 N.C. 222, 98 S.E. 597 (1919).

B. Statutes in Pari Materia.

Statutes relating to the same subject matter should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the legislation may be considered in the effort to ascertain the uniform and consistent purpose of the legislature. Allen v. Town of Reidsville, 178 N.C. 513, 101 S.E. 267 (1919).

Where a former act has been repealed, or has expired by its limitation when it is in pari materia, it must be considered in connection with the last act and if necessary, a part of it. Walser v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

Where there are different statutes in pari materia, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other. Walser v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

Same—Apparent Conflict.—Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act. Peoples Bank v. Loven, 172 N.C. 666, 90 S.E. 948 (1916); State Bd. of Agriculture v. White Oak Buckle Drainage Dist., 177 N.C. 222, 98 S.E. 597 (1919).

Acts of Same Session of Legislature.— All acts of the same session of the legislature upon the same subject matter are considered as one act, and must be construed together, under the doctrine of "in pari materia." They should be considered in pari materia, whether passed at the same session or not. Walser v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

Act Declaratory of Intent of Previous Act.—An act of the legislature declaratory of the intent of a previous act will not control the judiciary in the construction of the first act in actions prior to the declaratory act. Rodwell v. Harrison, 132 N.C. 45, 43 S.E. 540 (1903).

Private and Local Acts.—Private as well as local acts are, as a whole, and in every clause, unaffected by any repugnant provision of the general law. State v. Womble, 112 N.C. 862, 17 S.E. 491 (1893).

C. Amendatory and Repealing Acts.

When Act Purports to Be Amendatory. —Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act. Toomey v.

Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Amended and Amending Acts Construed Together. — Where an amendment to an existing statute is enacted the proper method of arriving at their true intent and meaning is by construing together. Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916); Township Rd. Comm'n v. Board of Comm'rs, 178 N.C. 61, 100 S.E. 122 (1919).

When Amendatory Act Refers to Wrong Section.—If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Erroneous Statement of Date. — An act of the legislature subsequent to and in amendment of a former act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amended act is erroneously stated, provided it sufficiently appears beyond cavil, what prior act is referred to. State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896).

Summary of Rules of Construing Repealing Acts.—In Winslow v. Morton, 118 N.C. 486, 24 S.E. 417 (1896), it was said: Upon a perusal of the authorities it appears that the courts have universally given their sanction to the following rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. State ex rel. County Trustee v. Woodside, 30 N.C. 104 (1847); Simonton v. Lanier, 71 N.C. 498 (1874). (2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except insofar as the latter plainly appears to have been intended by the legislature as a substitute. State v. Custer, 65 N.C. 339 (1871). (3) Where a later or revising statute clearly covers the whole subject matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by a necessary implication.

Repeal of Act Giving Forfeiture.—The repeal of an act of assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. Governor v. Howard, 5 N.C. 465 (1810).

Repeal of Repealing Act.—The repeal of a statute repealing a former statute leaves the latter in force. Brinkley v. Swicegood, 65 N.C. 626 (1871).

Implied Repeal by Lessening Degree of Crime.—It is perfectly settled as a rule of construction that if, by the common or statute law, an offense, for example, be a felony, and subsequent statute by an enactment merely affirmatively lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. State v. Upchurch, 31 N.C. 454 (1849).

When Acts Irreconcilably Inconsistent. —A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889).

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

In Derogation of Common Law. — A statute in derogation of the common law must be strictly construed. Swift & Co. v. Tempelos, 178 N.C. 487, 101 S.E. 8 (1919).

Acts Limiting Rights to Contract. — Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed. W.C. Marriner & Bro. v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906 (1893).

Mandatory Act.—No provision, it would seem, could be more mandatory, in form or substance, than one which declares that noncompliance with it shall make void the act of the body required to observe its requirements. Spruill v. Davenport, 178 N.C. 364, 100 S.E. 527 (1919).

Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be

met before the court will yield its jurisdiction. State v. Sullivan, 110 N.C. 513, 14 S.E. 796 (1892).

Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed. Skinner v. Thomas, 171 N.C. 98, 87 S.E. 976 (1916).

Acts Restricting Private Acts.—Statutes which restrict the private rights of persons or the use of property in which the public have no concern should be strictly construed. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

Local Lien Law. — In Orinoco Supply Co. v. Masonic & E. Star Home, 163 N.C. 513, 79 S.E. 964 (1913), it was held that a lien law applicable to certain counties only, was local in its nature, and being contrary to the general lien laws of the State, must be strictly construed.

A remedial statute should be liberally construed, according to its intent, so as to advance the remedy and repress the evil. Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914).

B. Criminal Statutes.

Rule for Construction of Penal Statutes. —It is familiar learning that penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They must be construed sensibly, as all other instruments, but not liberally, so as to stretch their meaning beyond what the words will warrant. Coble v. Schoffner, 75 N.C. 42 (1876); State v. Godfrey, 97 N.C. 507, 1 S.E. 779 (1887); Sears v. Whitaker, 136 N.C. 37, 48 S.E. 517 (1904); Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907); Hamlet Grocery Co. v. Southern Ry., 170 N.C. 241, 87 S.E. 57 (1915).

Rule Explained.—The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is a reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

This rule is, however, never to be applied so strictly as to defeat the clear intention of the legislature, and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Supplying Omission and Strained Constructions.—In State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889), it was announced that as a policy it is more dangerous for the appellate court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminal should go unpunished.

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

General Rule.—Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the court. State v. Pool, 74 N.C. 402 (1876).

Valid and Invalid Portions of Same Act. —Where there are distinct and valid provisions of a statute, with unconstitutional provisions, the two portions of the law being separate and it appearing from a perusal of the statute that the legislature intended the valid portion to be effective independently of the invalid part, the valid provisions may be enforced. Archer v. Joyner, 173 N.C. 75, 91 S.E. 699 (1917).

If the invalid portions can be separated from the rest, and if, after their excision, their remains a complete, intelligible, and valid statute capable of being executed, and conforming to the general purpose and intent of the legislature as shown in the act, the same will not be adjudged unconstitutional in toto, but sustained to that extent. Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916).

The position, however, is not allowed to prevail when the parts of the statute are so connected and dependent the one upon the other that to eliminate one will work substantial change to the portion which remains. If the unconstitutional clause cannot be rejected without causing the statute to enact what the legislature did not intend, the whole statute must fall. Riggsbee v. Town of Durham, 94 N.C. 800 (1886); Greene v. Owen, 125 N.C. 212, 34 S.E. 424 (1899); Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916). See State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

Resort to Implication. — Courts may resort to an implication to sustain an act, but not to destroy it. Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

Presumption in Favor of Validity. — Every presumption is in favor of the validity of an act of the legislature and all doubts are resolved in support of the act. Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

It is never to be presumed that the legislature intends an infringement of the Constitution, even when the infringement is palpable; but it is to be set down to inadvertence or mistake, or unconscious bias from pressing circumstances. Jacobs v. Smallwood, 63 N.C. 112 (1869).

When Object Is Valid and Effect Invalid.—A statute, while its object may be legitimate and altogether praiseworthy, is, nevertheless, invalid if its effect is unconstitutional. Jacobs v. Smallwood, 63 N.C. 112 (1869).

B. Effect.

Liability of Public Officer under Unconstitutional Act.—An individual officeholder is not required to be wiser than the whole people represented in their General Assembly; therefore, he is not indictable for obeying an unconstitutional legislative act (unless it required the commission of a crime, which is not for a moment to be supposed); nor is he indictable for refusing to perform certain duties under a former law repealed by a subsequent unconstitutional statute, until at least after a decision by competent authority. State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

When Court Reverses Itself Decision Not Retroactive. — Where property rights are acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect. S.W. Fowle & Son v. Ham, 176 N.C. 12, 96 S.E. 639 (1918).

VI. DEFINITIONS.

Purpose.—Subdivision (1) of this section was intended to avoid the very awkward expressions, "such person or persons," "he, she, or they," "himself or themselves," to be met with in some badly drawn statutes. Von Glahn v. Harris, 73 N.C. 323 (1875).

"Person" Extends to "Persons". — The word "person" is construed to extend to "persons" under the authority of subdivision (1) of this section. State v. Wilkerson, 98 N.C. 696, 3 S.E. 683 (1887); State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

The words "twelve months," in the absence of any legislative definition of the word "month" and the word "year," will be interpreted to mean twelve calendar, not lunar, months. Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891); Green v. Patriotic Order Sons of America, 242 N.C. 78, 87 S.E.2d 14 (1955).

Twelve months, in the absence of a legislative definition of the word "month," must be interpreted, according to the ordinary popular understanding, as meaning twelve calendar (not lunar) months. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

Month.—The lunar month, when spoken of in statutes, consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one. State v. Upchurch, 72 N.C. 146 (1875). In this respect our statute has adopted the computation of the civil instead of the common law. Satterwhite v. Burwell, 51 N.C. 92 (1858); Adcock v. Town of Fuquay Springs, 194 N.C. 423, 140 S.E. 24 (1927).

At early common law the term "month" meant a lunar month of twenty-eight days, but in the United States the common-law rule was followed in only the early days of the republic. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

Unless an intention to the contrary is expressed, the word "month" signifies a calendar month, regardless of the number of days it contains. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

The popular sense of the word "month" is, in America, a calendar, not a lunar, month. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

In the United States the term "month" is now universally computed by the calendar, unless a contrary meaning is indicated by the statute or contract under construction. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

The word "month" in a contract, without explanation or addition, means a calendar month. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

"Thirty days," as used in Art. IV of the Constitution, is not synonymous with "one month": it may be more or less. State v. Upchurch, 72 N.C. 146 (1875).

The term "thirty days" and the term "one month" are not synonymous, although where the particular calendar month is composed of exactly thirty days the number of days involved happen to be the same. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

Does Not Affect Constitution.—The provisions of subdivision (6) of this section could not affect the meaning of the terms employed in the Constitution; indeed, it purports to apply only to statutes, and to

them, when the meaning is manifestly otherwise than as therein provided and defined. Redmond v. Commissioners of Town of Tarboro, 106 N.C. 122, 10 S.E. 845 (1890).

"Property" Used in Limited Sense. — While the term "property," in its broadest and most general signification, embraces all kinds of property, including choses in action, rights and credits, and the like things, it is very often and conveniently used in its limited sense, and this is so notwithstanding the statutory provision. Redmond v. Commissioners of Town of Tarboro, 106 N.C. 122, 10 S.E. 845 (1890).

A chose in action is property, and embraced in the terms of subdivision (6) of this section. Winfree v. Bagley, 102 N.C. 515, 9 S.E. 198 (1889).

A promissory note or due bill being an "evidence of debt" is embraced in the term "personal property." State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Money.—While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not intended, that interpretation will be given it by the court with which the testator had evidently employed it. Patterson v. Wilson, 101 N.C. 584, 8 S.E. 229 (1888).

The word "estate" has a broader meaning than the word "property." The latter word could not include choses in action, unless there be something in the context which would require it to receive this interpretation, except by force of the definition contained in this section. Vaughan v. Town of Murfreesboro, 96 N.C. 317, 2 S.E. 676 (1887).

Words Giving Joint Authority to Three or More Persons.—See Ballard v. City of Charlotte, 235 N.C. 484, 70 S.E.2d 575 (1952).

§ 12-4. Construction of amended statute.—Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment. (1868-9, c. 270, s. 22; 1870-1, c. 111; Code, s. 3766; Rev., s. 2832; C. S., s. 3950.)

Editor's Note.—See 12 N.C.L. Rev. 262.

Amending Act Presumed Not to Repeal. — Where a statute only undertakes to amend one already on the statute books, it will be presumed that it did not intend to repeal it, unless there is an express repealing clause. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887); State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Nonconflicting Portions of Original Act Remain in Force. — Where a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in force with the same meaning and effect that they had before the amendment. Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963).

Time of Enactment of New Provision. — By this section when a part of the statute is amended, a new proviso is considered as having been enacted at the time of the amendment. Leak v. Gay, 107 N.C. 468, 12 S.E. 312 (1890).

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. Nichols v. Board of Councilmen, 125 N.C. 13, 34 S.E. 71 (1899).

Reenactment Contemporaneous with Repeal.—It was held in State v. Williams, 117 N.C. 753, 23 S.E. 250 (1895), that: "The reenactment by the legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a reaffirmance of the former law, whose provisions are thus continued without any intermission." State v. Sutton, 100 N.C. 474, 6 S.E. 687 (1888); State ex rel. Walser v. Bellamy, 120 N.C. 212, 27 S.E. 113 (1897); State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899).

Bill of Indictment.—If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887).

Misdemeanor Made Punishable by Fine or Imprisonment. — A public-local law making an act a misdemeanor is not repealed by a statute making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense, the later statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforce-

ment, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense has been committed prior to the enactment of the latter act, it is punishable under the prior law. State v. Mull, 178 N.C. 748, 101 S.E. 89 (1919).

Cited in State v. Pardon, 272 N.C. 72, 157 S.E.2d 698 (1967).

Chapter 13.

Citizenship Restored.

§ 13-1. Petition filed.—Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship. (1840, c. 36, s. 4; R. C., c. 58, ss. 1, 3; Code, ss. 2938, 2940; Rev., s. 2675; C. S., s. 385.)

Cross References. — As to infamous crimes generally, see §§ 14-1, 14-2, 14-3. See also N.C. Const., Art. II, § 11; Art. VI, § 8.

Loss of citizenship does not form a part of the judgment of the court, but follows as a consequence of such judgment. State v. Jones, 82 N.C. 685 (1880).

Cited in Young v. Southern Mica Co., 237 N.C. 644, 75 S.E.2d 795 (1953).

§ 13-2. When and where petition filed.—At any time after the expiration of two years from the date of discharge of the petitioner, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found. (1840, c. 36, s. 3; R. C., c. 58, ss. 3, 4; Code, ss. 2940, 2941; 1897, c. 110; Rev., s. 2676; C. S., s. 386; 1933, c. 243.)

§ 13-3. Notice given.—Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard. (1840, c. 36; R. C., c. 58, s. 1; Code, s. 2938; Rev., s. 2677; C. S., s. 387.)

§ 13-4. Hearing and evidence.—The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition or by anyone who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this State for three years next preceding the filing of the petition. (1840, c. 36; R. C., c. 58, ss. 1, 2; Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; Rev., s. 2678; C. S., s. 388.)

§ 13-5. Decree.—At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of

the applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto. (1840, c. 36; R. C., c. 58, s. 1; Code, s. 2938; Rev., s. 2679; C. S., s. 389.)

§ 13-6. Procedure in case of pardon or suspension of judgment.—Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the Governor, or the court suspended judgment on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the Governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement thereof be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket: Provided, that in all cases where the court suspended judgment it shall not be necessary to allege or prove that pardon has been granted by the Governor, and in such cases the petition may be made and the forfeited rights of citizenship restored at any time after conviction. (1899, cc. 44, 249; 1905, c. 547; Rev., s. 2680; C. S., s. 390.)

Application.—This section is not applicable where one has been convicted of an infamous crime, imprisoned, and pardoned by the Governor. In re Petition of Jones, 160 N.C. 15, 75 S.E. 1007 (1912).

§ 13-7. Restoration of rights of citizenship to persons committed to certain training schools.—Any person convicted of any crime whereby any rights of citizenship are forfeited, and the judgment of the court pronounced provides a sentence, and such sentence is suspended upon the condition that such person be admitted to and remain at one of the following schools: Eastern Carolina Industrial Training School for Boys, the Stonewall Jackson Manual Training and Industrial School, the Morrison Training School for Negro Boys, or the Samarkand Manor, until lawfully discharged, and upon payment of costs, such person may be restored to such forfeited rights of citizenship upon application and petition to the judge presiding at any term of the superior court held in the county in which the conviction was had, at any time after one year from the date of the lawful discharge from any such school. (1937, c. 384; s. 1; 1969, c. 837, s. 4.)

Editor's Note. — The 1969 amendment substituted "Samarkand Manor" for "State Home and Industrial School for Girls."

The Eastern Carolina Industrial Training School for Boys is now known as the Richard T. Fountain School. See § 134-67.

The Stonewall Jackson Manual Training and Industrial School is now known as the Stonewall Jackson School. See 1969 Session Laws, c. 901.

The Morrison Training School for Negro Boys is now known as the Cameron Morrison School. See 1969 Session Laws, c. 901.

§ 13-8. Contents of petition; affidavits of reputable citizens; hearing; decree of restoration.—The petition provided for in § 13-7 shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and shall recite that the costs of suit have been paid, the lawful discharge of the applicant from the school to which he or she was admitted, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten

reputable citizens of the county in which said conviction took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1937, c. 384, s. 2.)

§ 13-9. Restoration of citizenship to persons convicted, etc., of involuntary manslaughter.—Any person who has been convicted of, or confessed guilt to, the crime of involuntary manslaughter and is not actually serving a term in the State prison or on the roads of the State may, at any subsequent term of the superior court of the county in which the conviction was had, or the confession of guilt made, make application and petition the court for a restoration of all forfeited rights of citizenship. (1941, c. 184, s. 1.)

Cross Reference.—As to punishment for involuntary manslaughter, see § 14-18.

§ 13-10. Contents of petition; supporting affidavits; hearing and decree.—The petition provided for in § 13-9 shall set out the nature of the crime committed, the time of conviction or confession of guilt, the judgment of the court, and shall recite that the costs of suit have been paid, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten reputable citizens of the county in which said conviction or confession of guilt took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall have the authority to decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1941, c. 184, s. 2.)

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Criminal Law.

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SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.—A felony is a crime which:

(1) Was a felony at common law;
(2) Is or may be punishable by death;
(3) Is or may be punishable by imprisonment in the State's prison; or
(4) Is denominated as a felony by statute.

Any other crime is a misdemeanor. (1891, c. 205, s. 1; Rev., s. 3291; C. S., s. 4171; 1967, c. 1251, s. 1.)

Cross Reference.—As to statute of limitations for misdemeanors, see § 15-1.

Editor's Note.—Prior to the 1967 amendment the first sentence of this section read:

"A felony is a crime which is or may be punishable by either death or imprisonment in the State's prison."

For a brief comparison of criminal law sanctions in two civil rights cases, see 43 N.C.L. Rev. 667 (1965).

For case law survey as to criminal law and procedure, see 44 N.C.L. Rev. 970 (1966); 45 N.C.L. Rev. 910 (1967).

Common-Law Provisions. — Up to the time this section was passed the somewhat arbitrary common-law rule was followed as to what crimes were felonies, and what were misdemeanors and under that, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899); State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910). See State v. Hill, 91 N.C. 561 (1884).

For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205.

Section Constitutional. — This section is held to be constitutional in State v. Lytle, 138 N.C. 738, 51 S.E. 66 (1905).

Punishment Determines Classification of Offenses.—By this section, North Carolina adopted the rule, now almost universally prevalent, by which the nature of the punishment determines the classification of offenses; those which may be punished capitally or by imprisonment in the penitentiary are felonies (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899).

The measure of punishment is the test of the nature of a crime, whether felony or misdemeanor. State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913); Jones v. Brinkley, 174 N.C. 23, 93 S.E. 372 (1917).

It should be noted that there are exceptions to this general rule. The legislature has the power to style any offense a misdemeanor, notwithstanding it is punishable in the State's prison. An example of this appears in § 14-280 where the offense is specifically declared to be a misdemeanor although punishable in the State's prison. See State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910). See also Editor's note under § 14-3.

Offense Need Not Be Specified.—It is not necessary to prescribe that an act is a misdemeanor or felony, as the punishment affixed determines that. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

Indictment Must Use Word "Feloniously".—Since all criminal offenses punishable with death or imprisonment in a State prison were by this section declared felonies, indictments wherein there has been a failure to use the word "feloniously," as characterizing the charge in the latter class of cases, have been declared fatally defective. State v. Skidmore, 109 N.C. 795, 14 S.E. 63 (1891); State v. Bryan, 112 N.C. 848, 16 S.E. 909 (1893); State v. Caldwell, 112 N.C. 854, 16 S.E. 1010 (1893); State v. Wilson, 116 N.C. 979, 21 S.E. 692 (1895); State v. Shaw, 117 N.C. 764, 23 S.E. 246 (1895); State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910). See State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937). But this principle does not hold good where the legislature otherwise expressly provides.

In § 15-145 the legislature has prescribed a form of indictment for perjury (which is by § 14-209 a felony) and left out the word "feloniously." And in State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907) the court held that in the case of perjury it was unnecessary that the word appear. See State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

Same—New Bill Obtained.—But the bill should not be quashed; the defendant should be held until a new bill is obtained. State v. Skidmore, 109 N.C. 795, 14 S.E. 63 (1891).

Penitentiary Unknown to Common Law. —The penitentiary, being a modern device, unknown to the common law, punishment in the penitentiary could not be imposed by the common law. State v. McNeill, 75 N.C. 15 (1876).

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute has the same legal significance as the words "State's prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922).

Concurrence of General and Local Laws. —Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law except where otherwise provided by law; and where the local law applicable makes the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder is guilty of a felony, by this section, and the two-year statute of limitations is not a bar to the prosecution. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922).

Thus in the case of a public-local law the fact that the offense is declared a misdemeanor does not govern where the punishment prescribed is confinement in the State prison. In such cases, by this section the offense is a felony. See above catchline "Punishment Determines Classification of Offenses."—Ed. note.

Conspiracy.—A conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941), holding that a conspiracy to interfere with election officials in the discharge of their duties is a misdemeanor.

An assault with intent to commit rape is a felony. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

Suicide. — At common law suicide was a felony, and attempted suicide was a misdemeanor, punishable by fine and imprisonment. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Since, under N.C. Const., Art. XI, § 1, suicide may not be punished in North Carolina, it has perhaps been reduced to the grade of misdemeanor by reason of this section. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

An attempt to commit suicide is an indictable misdemeanor in North Carolina. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Applied in State v. Miller, 237 N.C. 427, 75 S.E.2d 242 (1953); State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947).

Cited in State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968); State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943); State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946).

§ 14-2. Punishment of felonies. — Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court. (R. C., c. 34, s. 27; Code, s. 1096; Rev., s. 3292; C. S., s. 4172; 1967, c. 1251, s. 2.)

Editor's Note.—The 1967 amendment rewrote that portion of this section following the words "prescribed by statute shall be."

The cases cited in the note below were decided prior to the 1967 amendment.

For case law survey as to excessive punishment, see 45 N.C.L. Rev. 910 (1967).

In General.—It is only felonies where no specific punishment is prescribed, and offenses that are infamous, or done in secrecy and malice, or with deceit and intent to defraud, that may be punished with imprisonment in the penitentiary. State v. Powell, 94 N.C. 920 (1886). See Editor's note under § 14-3.

Where Section Applies. — This section applies only where an act is made a felony without the nature of punishment being specified. State v. Rippy, 27 N.C. 516, 37 S.E. 148 (1900).

Section Places Ceiling on Court's Power to Punish. — The maximum provided in this section and § 14-3 places a ceiling on the court's power to punish by imprisonment when a ceiling is not otherwise fixed by law. Jones v. Ross, 257 F. Supp. 798 (E.D.N.C. 1966).

Specific Punishment.—A provision in a criminal statute "that the punishment shall be in the discretion of the court and the defendant may be fined or imprisoned or both," is the prescribing of a "specific punishment" within this section. State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942).

A provision in a statute to the effect that punishment shall be in the discretion of the court and the defendant may be fined or imprisoned, or both, is not equivalent to a "specific punishment" within the meaning of this section, and such punishment is controlled by this section. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963), modifying State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942) and overruling State v. Swindell, 189 N.C. 151, 126 S.E. 417 (1925), and State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936).

Punishment "in the discretion of the court" is not specific punishment and hence is governed by the limits (ten years for felonies and two years for misdemeanors) prescribed in this section and § 14-3. State v. Adams, 266 N.C. 406, 146 S.E.2d 505 (1966).

A statutory penalty of fine or imprisonment in the discretion of the court is not a specific punishment, and therefore in the case of felonies the punishment is limited by this section to not more than ten years imprisonment. State v. Grice, 265 N.C. 587, 144 S.E.2d 659 (1965).

Section 14-55 Does Not Prescribe a Specific Punishment. — Section 14-55 prescribing punishment "by fine or imprisonment in the State's prison, or both, in the discretion of the court," does not prescribe

"specific punishment" within the meaning of that term as used in this section. State v. Thompson, 268 N.C. 447, 150 S.E.2d 781 (1966).

Nor Does § 14-177.—The punishment of a fine or imprisonment in the discretion of the court prescribed by § 14-177, is not a "specific punishment" within the meaning of this section, and the maximum lawful imprisonment is ten years. State v. Thompson, 268 N.C. 447, 150 S.E.2d 781 (1966).

The felony defined in § 14-26 is not one "for which no specific punishment is prescribed," within this section. The punishment is expressly left to the discretion of the court, which takes the case out of this section. State v. Swindell, 189 N.C. 151, 126 S.E. 417 (1925). See further under § 14-3, catchline "Meaning of Specific Punishment."

Punishment for carnal knowledge of a female child over twelve and under sixteen years of age by a male person over eighteen years of age cannot exceed ten years imprisonment. State v. Grice, 265 N.C. 587, 144 S.E.2d 659 (1965).

Conspiracy to Murder. — Upon defendant's plea of guilty to a conspiracy to murder, he is subject to a judgment of imprisonment for a term not to exceed ten years under this section. State v. Alston, 264 N.C. 398, 141 S.E.2d 793 (1965).

Possession of Implements of Housebreaking.—The punishment for possession of the implements of housebreaking is limited to a maximum of ten years imprisonment, since punishment by fine or imprisonment, or both, in the discretion of the court, as prescribed by § 14-55, is not a specific punishment and therefore comes within the purview of this section. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963).

Robbery.—Common-law robbery is punishable by imprisonment in the State's prison for a term not to exceed ten years under this section. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

The distinction between robbery and highway robbery, as to punishment and otherwise, is no longer recognized in this jurisdiction; the punishment is imprisonment in the State's prison for a term not to exceed ten years. State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964).

Attempt to Commit Common-Law Robbery.—While at common law an attempt to commit a felony was a misdemeanor, the Supreme Court has held that an attempt to commit the offense of common-law robbery is an infamous crime, and by virtue of § 14-3 (b) has been converted into a felony punishable as prescribed in this section. State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

The punishment for larceny from the person may include imprisonment for a term of ten years. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Larceny from the person as at common law is a felony without regard to the value of the property stolen, and the punishment for larceny from the person may be for as much as ten years in State's prison. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Defendant's plea of nolo contendere to three felony counts charging felonious breaking and entering, larceny, and larceny of an automobile permitted the judge to impose sentences totaling thirty years. State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967).

Excessive Sentence Cannot Be Sustained.—See In re Sellers, 234 N.C. 648, 68 S.E.2d 308 (1951).

Excessive Judgment Vacated and Remanded.—See State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951).

Applied in State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967).

Quoted in State v. Efird, 271 N.C. 730, 157 S.E.2d 538 (1967).

Cited in State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969); State v. Ritter, 199 N.C. 116, 154 S.E. 62 (1930); State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.—

(a) Except as provided in subsection (b), every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court.

(b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor,

be guilty of a felony and punishable as prescribed in § 14-2. (R. C., c. 34, s. 120; Code, s. 1097; Rev., s. 3293; C. S., s. 4173; 1927, c. 1; 1967, c. 1251, s. 3.)

Cross References.—As to uttering worthless check, see §§ 14-106 and 14-107. As to statute of limitations for misdemeanors, see § 15-1.

Editor's Note.—The 1967 amendment rewrote this section.

For case law survey as to excessive punishment, see 45 N.C.L. Rev. 910 (1967).

Section Places Ceiling on Court's Power to Punish.—The maximum provided in this section and § 14-2 places a ceiling on the court's power to punish by imprisonment when a ceiling is not otherwise fixed by law. Jones v. Ross, 257 F. Supp. 798 (E.D.N.C. 1966).

Infamous Offense. — A statute, which names the punishment for all misdemeanors, where no specific punishment is prescribed, and provides that if the offense be "infamous," it shall be punished as a felony, necessarily refers to the degrading nature of the offense, and not to the measure of punishment. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

For lack of clear test as to what constitutes infamous offense, see 28 N.C.L. Rev. 103.

The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, under this section, and is a felony. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

When Section Applies.—This section applies only where an act is prohibited or is made unlawful, without the nature of the punishment being specified. State v. Rippy, 127 N.C. 516, 37 S.E. 148 (1900); State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963).

If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, notwithstanding the fact that no punishment is prescribed in the statute. State v. Bloodworth, 94 N.C. 918 (1886).

Meaning of Specific Punishment.—It cannot be said that all the crimes in the Code fall within the scope of this and the preceding sections, because "no specific punishment" is prescribed. The punishment is specific (i.e., specified as fine, or imprisonment in jail or in State's prison), though the extent of the specified punishment is left in the discretion of the court, or in its discretion not exceeding a limit stated. State v. Rippy, 127 N.C. 516, 37 S.E. 148 (1900).

Same — Assault Not Punishable under Section.—Upon the ruling in State v. Rippy, 127 N.C. 516, 37 S.E. 148 (1900), § 14-33, bearing directly on the case of assaults, with or without intent to kill, making provision for punishment of such offenses, is to be regarded as specific, within the meaning of this section, and entirely withdraws the case of assault from the operation of this section. State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

The maximum punishment for a general misdemeanor is two years. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

Punishment "in the discretion of the court" is not specific punishment and, hence, is governed by the limits (ten years for felonies and two years for misdemeanors) prescribed in this section and § 14-2. State v. Adams, 266 N.C. 406, 146 S.E.2d 505 (1966).

A misdemeanor punishable in the discretion of the court means a maximum of two years. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

This section has reference to misdemeanors other than those created by article 3 of chapter 20 of the General Statutes, which relates to motor vehicles. State v. Massey, 265 N.C. 579, 144 S.E.2d 649 (1965).

This section does not mean that the court may not place offenders on probation, or make use of other State facilities and services in proper cases. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

An attempt to commit common-law robbery is an infamous crime. State v. McNeely, 244 N.C. 737, 94 S.E.2d 853 (1956).

While at common law an attempt to commit a felony was a misdemeanor, the Supreme Court has held that an attempt to commit the offense of common-law robbery is an infamous crime, and by virtue of subsection (b) has been converted into a felony punishable as prescribed in § 14-2. State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

An attempt to commit robbery with firearms is an infamous offense. State v.

Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

Common-Law Punishment.—Misdemeanors made punishment as at common law, or punishable by fine or imprisonment, or both, can be punished by fine, or imprisonment in the county jail, or both. State v. McNeill, 75 N.C. 15 (1876); State v. Powell, 94 N.C. 920 (1886); State v. Brown, 253 N.C. 195, 116 S.E.2d 349 (1960).

Fornication and Adultery.—Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the court. State v. Manly, 95 N.C. 661 (1886).

Conspiracy to Charge with Infanticide.—A conspiracy to charge one with infanticide, being only a common-law misdemeanor, is not punishable by imprisonment in the penitentiary. State v. Jackson, 82 N.C. 565 (1880).

Conspiracy to violate the liquor law is a misdemeanor and punishable as at common law, that is, by fine or imprisonment, or both. State v. Brown, 253 N.C. 195, 116 S.E.2d 349 (1960).

An attempt to commit suicide is an indictable misdemeanor in North Carolina. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Receiving Stolen Goods.—Although the offense of receiving stolen goods is declared to be a misdemeanor by § 14-71, the same section authorizes the court to punish the offense in the same manner as larceny is punished; that is, confinement in the State's prison or county jail for not less than four months, nor more than ten years. State v. Brite, 73 N.C. 26 (1875).

An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the State prison for a term not in excess of ten years, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Attempt to Commit Crime against Nature.—While an attempt to commit a felony is a misdemeanor, when such misdemeanor is infamous, or done in secrecy and malice, or with deceit and intent to defraud, it is punishable by imprisonment in the State's prison, and is made a felony by this section, and an attempt to commit the crime against nature is infamous and is punishable by imprisonment in the State's prison as a felony within the definition of this section. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938); State v. Mintz, 242 N.C. 761, 89 S.E.2d 463 (1965).

An attempt to commit the crime against nature is an infamous act within the meaning of this section and is punishable as a felony. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Where an indictment charges larceny of property of the value of two hundred dollars or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

What Amounts to Confession of Felony.—A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, is a confession of a felony under this section, although § 14-76 designates such offense as a misdemeanor. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Discretion of Trial Judge.—Where the extent of the punishment is referred to the discretion of the trial judge, his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Willer, 94 N.C. 904 (1886); State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

Excessive Punishment.—The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. And so where a statute provides that a party guilty of the offense created by it shall be fined or imprisoned, the court has no power to both fine and imprison. State v. Walters, 97 N.C. 489, 2 S.E. 539 (1887).

In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea and found as a fact that the female referred to was a child nine years of age and defendant was thirty-four years of age, and also, that the assault was aggravated, shocking and outrageous, the accepted plea is for a misdemeanor under § 14-33, and judgment that the defendant be confined to the State's prison for not less than eight nor more than ten years, is a violation of N.C. Const., Art. I, § 14, and this section. State v. Tyson, 223 N.C. 492, 27 S.E.2d 113 (1943).

Same—Example.—A sentence of imprisonment for five years in the county jail and a recognizance of $500 to keep the peace for five years after the expiration thereof upon a defendant convicted of assault and battery, is excessive and therefore unconstitutional. State v. Driver, 78 N.C. 423 (1878).

Same — Two Years Not Cruel or Unusual.—It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. State v. Driver, 78 N.C. 423 (1878); State v. Miller, 94 N.C. 904 (1886); State v. Farrington, 141 N.C. 844, 53 S.E. 954 (1906).

Effect of Consent of Defendant.—No consent of the defendant can confer a jurisdiction which is denied to the court by the law, and any punishment imposed, other than that prescribed for the offense, is illegal. In re Schenck, 74 N.C. 607 (1876).

Where Common-Law Offense Altered by Statute.—Where the grade of a common-law offense has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated, it may conclude at common law. State v. Lawrence, 81 N.C. 522 (1879).

Where Statute Repealed before Judgment.—Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed. State v. Cress, 49 N.C. 421 (1857); State v. Nutt, 61 N.C. 20 (1866); State v. Long, 78 N.C. 571 (1878); State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889); State v. Biggers, 108 N.C. 760, 12 S.E. 1024 (1891); State v. Perkins, 141 N.C. 797, 53 S.E. 735 (1906).

Applied in State v. Thompson, 3 N.C. App. 231, 164 S.E.2d 391 (1968); State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946).

Cited in State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968); State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); In re Wilson, 3 N.C. App. 136, 164 S.E.2d 56 (1968); State v. Cleaves, 4 N.C. App. 506, 166 S.E.2d 861 (1969); State v. Wilson, 216 N.C. 130, 4 S.E.2d 440 (1939); State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945).

§ 14-4. Violation of local ordinances misdemeanor.—If any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars ($50.00), or imprisoned for not more than thirty days. (1871-2, c. 195, s. 2; Code, s. 3820; Rev., s. 3702; C. S., s. 4174; 1969, c. 36, s. 2.)

Cross Reference.—As to ordinances, see § 160-52 et seq.

Editor's Note. — The 1969 amendment inserted "county" near the beginning of the section, substituted "not more than" for "not exceeding" following "fined" and substituted "for not more than" for "not exceeding" following "imprisoned."

In General.—While the town or city government has no right to make criminal law, the legislature has made the violation of ordinances a criminal offense. Board of Educ. v. Town of Henderson, 126 N.C. 689, 36 S.E. 158 (1900); State v. Higgs, 126 N.C. 1014, 35 S.E. 473 (1900); State v. Barrett, 243 N.C. 686, 91 S.E.2d 917 (1956).

Section makes violation of municipal ordinance a criminal offense. Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964).

The violation of a valid municipal ordinance is a misdemeanor. Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964).

Prior to Section Violation Not Punishable.—Prior to the passage of this section there was no way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. State v. Parker, 75 N.C. 249 (1876); School Dirs. v. City of Asheville, 137 N.C. 503, 50 S.E. 279 (1905).

Jurisdiction.—The mayor, or other chief officer of towns or cities, has jurisdiction of offenses under this section. State v. Wood, 94 N.C. 855 (1886); State v. Cainan, 94 N.C. 880 (1886); State v. Smith, 103 N.C. 403, 9 S.E. 435 (1889).

Same—Concurrent with Justice.—A justice of the peace has concurrent jurisdiction with the mayor of a city or town, of violation of ordinances, which are made misdemeanors. State v. Cainan, 94 N.C. 880 (1886).

Same—Superior Court Excluded.—The superior court has no original jurisdiction to try indictments for violation of town ordinances. State v. White, 76 N.C. 15 (1877); State v. Threadgill, 76 N.C. 17 (1877).

Ordinance Must Conform to State Law. —It is uniformly held that a town ordi-

nance in violation of a valid State statute appertaining to the question is void. Shaw v. Kennedy, 4 N.C. 591 (1817); State v. Austin, 114 N.C. 855, 19 S.E. 919 (1894); State v. Beacham, 125 N.C. 652, 34 S.E. 447 (1899); State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

Violation of Invalid Ordinance No Offense.—The violation of a valid ordinance is, under the provision of this section, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority. State v. Hunter, 106 N.C. 796, 11 S.E. 366 (1890); State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890).

Acting contrary to the provisions of a municipal ordinance is made a misdemeanor by this section. Notwithstanding the all-inclusive language of the statute, guilt must rest on the violation of a valid ordinance. If the ordinance is not valid, there can be no guilt. State v. McGraw, 249 N.C. 205, 105 S.E.2d 659 (1958).

Unconstitutional Ordinance May Be Enjoined.—Equity will enjoin the actual or threatened enforcement of an alleged unconstitutional statute or municipal ordinance, when it plainly appears that otherwise there is danger that property rights or the rights of person will suffer irreparable injury which is both great and immediate. Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964).

Failure to Prescribe Penalty.—The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor is untenable. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1920).

Where Fine Provided It Must Be Certain.—An ordinance which imposes a fine is invalid if it is not certain as to the amount of the fine. State v. Irvin, 126 N.C. 989, 35 S.E. 430 (1900).

Provision in Ordinance for Arrest Void.—When a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined twenty-five dollars upon conviction thereof," it was held that so much of the ordinance as provided for the arrest was void, but the other provisions were valid. State v. Earhardt, 107 N.C. 789, 12 S.E. 426 (1890).

Personal Notice to Offender Sufficient.—The requirement of the charter of a city or town that its ordinances shall be printed and published, is to bring such ordinances to the attention of the public, and where personal notice has been given to an offender thereunder who afterwards commits the offense prohibited, the requirement of publication, etc., is not necessary for a conviction. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1920).

State Must Show Violation of Valid Ordinance.—Upon the prosecution of a criminal action for the violation of a city ordinance, under this section the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. State v. Hunter, 106 N.C. 796, 11 S.E. 366 (1890); State v. Snipes, 161 N.C. 242, 76 S.E. 243 (1912); State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

And where the State fails to show that the original act of incorporation authorized the enactment of an ordinance, it fails to make out the case, for the legislature never intended to make the violation of a void ordinance an indictable misdemeanor. State v. Threadgill, 76 N.C. 17 (1877).

Defects in Warrant May Be Waived.—Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants. State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

Form of Indictment.—It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such indicia, as point it out with sufficient certainty. State v. Merritt, 83 N.C. 677 (1880); State v. Cainan, 94 N.C. 880 (1886).

In an indictment under an ordinance for loud and boisterous swearing, it is not necessary to set out the words used by the defendant. State v. Cainan, 94 N.C. 880 (1886).

No Removal under § 7-147.—In a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal, under § 7-147. State v. Joyner, 127 N.C. 541, 37 S.E. 201 (1900).

Costs of Prosecutions under Section.—Whether the criminal offenses created by the violation of town ordinances under this section are tried before the mayor, or before a justice of the peace, they are State prosecutions, in the name of the State, or for violation of the criminal law of the State, and at the expense of the State (State v. Higgs, 126 N.C. 1014, 35 S.E. 473 (1900)), and the city cannot be charged with the costs of such prosecutions. Board of Educ. v. Town of Henderson, 126 N.C. 689, 36 S.E. 158 (1900).

Conviction for Fighting No Bar to Prosecution for Assault.—A conviction of violating a city ordinance punishing the dis-

turbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the State for an assault. State v. Taylor, 133 N.C. 755, 46 S.E. 5 (1903).

Applied in State v. Walker, 265 N.C. 482, 144 S.E.2d 419 (1965).

Quoted in part in State v. Wilkes, 233 N.C. 645, 65 S.E.2d 129 (1951).

Stated in Eastern Carolina Tastee Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

Cited in State v. Fox, 262 N.C. 193, 136 S.E.2d 761 (1964); Walker v. North Carolina, 262 F. Supp. 102 (W.D.N.C. 1966); USW v. Bagwell, 383 F.2d 492 (4th Cir. 1967); Bell v. Page, 271 N.C. 396, 156 S.E.2d 711 (1967).

ARTICLE 2.

Principals and Accessories.

§ 14-5. Accessories before the fact; trial and punishment.—If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. The offense of the person so counseling, procuring or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the State. In case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of any other county, the last-mentioned offense may be inquired of, tried, determined, and punished in either of such counties: Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense. (1797, c. 485, s. 1, P. R.; 1852, c. 58; R. C., c. 34, s. 53; Code, s. 977; Rev., s. 3287; C. S., s. 4175.)

Cross Reference.—See note to § 14-7.

Editor's Note.—For note on presence as a factor in aiding and abetting, see 35 N.C.L. Sev. 284 (1957).

In General.—It is a well-established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. State v. Simmons, 51 N.C. 21 (1858).

Common-Law Provision.—At common-law an accessory before the fact could only be convicted when tried at the same time with the principal, and after conviction of the principal, or after the principal had been tried, convicted and sentenced. State v. Duncan, 28 N.C. 98 (1845); State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888).

But the rule that an accessory could not be tried and convicted before the principal had no application as between two principals in first and second degrees. State v. Jarrell, 141 N.C. 722, 53 S.E. 137 (1906).

"Accessory before Fact" Is a Substantive Felony.—This section made the facts which formerly had been called "accessory before the fact" a substantive felony (whether in murder or any other felony). State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917).

By this section the facts which formerly had been called "accessory before the fact" are made a substantive felony. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

Elements of Crime.—There are several things that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2)

That he was not present when the offense was committed. (3) That the principal committed the crime. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

To render one guilty as an accessory before the fact to a felony, he must counsel, incite, induce, procure or encourage the commission of the crime, so as to participate therein, in some way, by word or act. It is not necessary that he shall be the originator of the design to commit the crime; it is sufficient if, with knowledge that another intends to commit a crime, he encourages and incites him to carry out his design. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

Prior Conviction of Principals Unnecessary.—Under the provisions of this section it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888); State v. Walton, 186 N.C. 485, 119 S.E. 886 (1923).

One indicted as accessory before the fact cannot complain that his cause was tried before that of the alleged principal, and before the alleged principal had even been called on to plead. State v. Reid, 178 N.C. 745, 101 S.E. 104 (1919).

It is not necessary to first convict principals in order to convict an accessory to a crime. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

Same—What Indictment Must Aver.—Where the principal felon is not amenable to the process of the law, it is necessary to aver that in the indictment. State v. Groff, 5 N.C. 270 (1809); State v. Ives, 35 N.C. 338 (1852).

Who Are Principals.—All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime. State v. Gaston, 73 N.C. 93 (1875); State v. Jarrell, 141 N.C. 722, 53 S.E. 127 (1906).

Without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. State v. Peeden, 253 N.C. 562, 117 S.E.2d 398 (1960).

A defendant may be tried and convicted as a principal where he either counsels, procures or commands another to commit a felony as an accessory before the fact, or aids and abets in the commission of the crime. State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967).

A principal in a crime must be actually or constructively present, aiding and abetting the commission of the offense. It is not necessary that he do some act at the time in order to constitute him a principal, but he must encourage its commission by acts or gestures, either before or at the time of the commission of the offense, with full knowledge of the intent of the persons who commit the offense. He must do some act at the time of the commission of the crime that is in furtherance of the offense. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

Same—Second Degree.—Persons present assisting in doing a criminal act are principals in the second degree, not accessories. State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910); State v. Skeen, 182 N.C. 844, 109 S.E. 71 (1921).

In Misdemeanors All Are Principals.—In a misdemeanor all aiders, abettors, and accessories, whether before or after the fact, are principals. State v. Barden, 12 N.C. 518 (1828); State v. Cheek, 35 N.C. 114 (1851); State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895); State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910); State v. Grier, 184 N.C. 723, 114 S.E. 622 (1922). For an example of "first degree" and "second degree" in misdemeanors, see § 14-207.

Accessory Tried as Principal.—An accessory before the fact can be tried and convicted as principal, under this section. State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917).

One Charged with Murder May Be Convicted as Accessory.—Under § 15-170 the charge of the principal crime includes the crime of accessory before the fact and hence one charged with murder may be convicted as accessory before the fact. State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917), overruling on this point State v. Denver, 65 N.C. 572 (1871). See State v. Simons, 179 N.C. 700, 103 S.E. 5 (1920).

Principal in Assault Cannot Be Convicted as Accessory.—A defendant charged as principal in an indictment for an assault with intent to kill cannot be convicted as accessory. State v. Green, 119 N.C. 899, 26 S.E. 112 (1896).

No Conviction of Accessory Where Principal Acquitted. — This section does not change the common-law rule that an acquittal of the principal is an acquittal of the accessory. State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888).

Effect of Acquittal of One of Several Principals.—Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the

jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder. State v. Walton, 186 N.C. 485, 119 S.E. 886 (1923).

Accessory Tried by Special Veniremen. —Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. State v. Register, 133 N.C. 746, 46 S.E. 21 (1903).

What Constitutes Counseling, Procuring and Commanding. — At a meeting of a board of commissioners of a town, at which the mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties, who had taken lots in the town cemetery and had not paid for them, should pay the amount due within sixty days on notice, the bodies buried in such lots should be removed to the free part of such cemetery. And, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the mayor said: "The way is open, go ahead and remove them." It was held, that the mayor was individually guilty of counseling, procuring and commanding an act within the meaning of this section, the committing of which afterwards was a felony. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

The meaning of the word "command," as applied to the case of principal and accessory is, where a person, having a control over another, as a master over his servant, orders a thing to be done. State v. Mann, 2 N.C. 4 (1791).

One Present Not Bound to Interfere.—One who is present, and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. State v. Hildreth, 31 N.C. 440 (1849).

What Constitutes One a Party to an Offense.—A person is a party to an offense if he either actually commits the offense or does some act which forms a part thereof, or if he assists in the actual commission of the offense or of any act which forms part thereof, or directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. To constitute one a party to an offense it has been held to be essential that he be concerned in its commission in some affirmative manner, as by actual commission of the crime or by aiding and abetting in its commission and it has been regarded as a general proposition that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

"Aider and Abettor". — An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

Effect of Aiding Continues until Common Purpose Is Renounced.—Where the perpetration of a felony has been entered on, one who had aided or encouraged its commission cannot escape criminal responsibility by quietly withdrawing from the scene. The influence and effect of his aiding or encouraging continues until he renounces the common purpose and makes it plain to the others that he has done so and that he does not intend to participate further. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

Ceasing to Act in Complicity Essential to Defense.—Where nonliability as aider and abettor is based on the ground that accused had no prior knowledge of any plan to commit a crime and that his assistance after acquiring such knowledge was under duress, it is essential that he cease to act in complicity with others as soon as he acquires knowledge of the criminal character of their actions. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

Sufficiency of Indictment. — An indictment charging defendant with being an accessory before the fact to an armed robbery committed by named persons on a specified date, without any factual averments as to the identity of the victim, the property taken or the manner or method in which defendant counseled, incited, induced or encouraged the principal felons, is fatally defective, since such indictment is too indefinite to protect defendant from a prosecution for any other armed robbery which might have been committed by the principal felons on the same day. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

An indictment charging the defendant with being an accessory before the fact in the slaying of a named person is not rendered invalid in carrying, in addition to the requirements of this section, the words "did incite, move, aid, counsel, hire," since such words do not contradict the essential averments of the indictment. State v. Parker, 271 N.C. 414, 156 S.E.2d 677 (1967).

Evidence Admissible. — The record of the conviction of a principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal, and prima facie evidence of his guilt. State v. Chittem, 13 N.C. 49 (1828).

But the conviction of the principal is not admissible evidence until judgment has been rendered on the verdict. State v. Duncan, 28 N.C. 98 (1845).

Same—Sufficient for Conviction.—Testimony that the accused had asked the one convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards, at the place she designated, is sufficient for a conviction of murder, as an accessory before the fact. State v. Jones, 176 N.C. 702, 97 S.E. 32 (1918).

Sufficient Evidence to Submit Question to Jury.—Evidence tending to show that defendant knew of and participated in the plans or preparations made for the killing of deceased, that defendant procured a coat for the killer and furnished an automobile as a means of flight after the murder had been committed is held sufficient to be submitted to the jury on an indictment drawn under this section. State v. Williams, 208 N.C. 707, 178 S.E. 131 (1935).

Applied in State v. Holland, 211 N.C. 284, 189 S.E. 761 (1937).

Cited in State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934); State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934); State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936); In re Malicord, 211 N.C. 684, 191 S.E. 730 (1937); State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938).

§ 14-6. Punishment of accessories before the fact.—Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape shall be imprisoned for life in the State's prison. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned in the State's prison for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact in any other felony shall be punished by imprisonment in the State prison or county jail for not more than ten years, or may be fined in the discretion of the court. (1868-9, c. 31, s. 2; 1874-5, c. 212; Code, s. 980; Rev., s. 3290; C. S., s. 4176.)

Life Sentence for Accessory to Murder Valid.—Upon conviction of murder in the second degree, and sentence to twenty years in the State's prison, upon an indictment for murder, when it appears from the evidence that the accused was only an accessory, the case will not be remanded to the superior court for resentence, as the statute provides a sentence for life. State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917).

Sufficiency of Evidence to Go to Jury.—Evidence that defendant, for the purpose of freeing himself of competition in the illegal sale of intoxicating liquors, procured another to kill deceased by shooting him from ambush while lying in wait, is sufficient to be submitted to the jury in a prosecution as an accessory before the fact to the crime of murder under this section. State v. Monzingo, 207 N.C. 247, 176 S.E. 582 (1934).

Cited in State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938).

§ 14-7. Accessories after the fact; trial and punishment.—If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years, and may also be fined in the discretion of the court. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the State; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been

committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicted or tried for the same offense. (1797, c. 485, s. 1, P. R.; 1852, c. 58; R. C., c. 34, s. 54; Code, s. 978; Rev., s. 3289; C. S., s. 4177.)

In General. — See in connection with this section the annotations under § 14-5, many of which apply equally to this section.

An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment knowing, at the time, the person so aided has committed a felony. State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942).

Elements of Crime.—On a charge of accessory after the fact the State must show: (1) robbery, (2) the accused knew of it and (3) possessing that knowledge, he assisted the robber in escaping detection, arrest and punishment. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

One cannot become an accessory after the fact until the offense has become an accomplished fact. Thus, a person cannot be convicted as an accessory after the fact to a murder because he aided the murderer to escape, when the aid was rendered after the mortal wound was given but before death ensued, as a murder is not complete until the death results. State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948).

The crime of accessory after the fact has its beginning after the principal offense has been committed. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

"Accessory after Fact" Is a Substantive Crime.—A comparison of § 14-5, defining accessory before the fact, and this section, accessory after the fact, clearly indicates the necessity of holding the latter is a substantive crime. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

Armed robbery under § 14-87 differs in fact and in law from accessory after the fact under this section. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

And Not a Lesser Degree of the Principal Crime. — See State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

Hence, Participant in Felony Cannot Be Accessory.—A participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

Nor Can Acquittal as Accessory Bar Prosecution for Principal Crime.—An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

Receiver of Stolen Goods Not Accessory. — All felonious stealing being now reduced by § 14-70 to the grade of petit larceny, a receiver of stolen goods is not an accessory after the fact. State v. Tyler, 85 N.C. 569 (1881).

Husband of Accessory Not Competent Witness.—The husband of one charged as an accessory is not a competent witness in favor of the one charged as the principal felon. State v. Ludwick, 61 N.C. 401 (1868).

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.—Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this article. For the purposes of this article, felonies committed before a person attains the age of 21 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this article unless it is committed after the conviction

of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this article unless it is committed after the conviction of or plea of guilty to the second felony. Pleas of guilty to or convictions of felony offenses prior to July 6, 1967, shall not be felony offenses within the meaning of this article. Any felony offense to which a pardon has been extended shall not for the purpose of this article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon. (1967, c. 1241, s. 1.)

§ **14-7.2. Punishment.**—When any person is charged by indictment with the commission of a felony under the laws of the State of North Carolina and is also charged with being an habitual felon as defined in § 14-7.1, he must, upon conviction, be sentenced and punished as an habitual felon, as in this chapter provided, except in those cases where the death penalty is imposed. (1967, c. 1241, s. 2.)

§ **14-7.3. Charge of habitual felon.**—An indictment which charges a person who is an habitual felon within the meaning of § 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place. No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period. (1967, c. 1241, s. 3.)

§ **14-7.4. Evidence of prior convictions of felony offenses.**—In all cases where a person is charged under the provisions of this article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A judgment of a conviction or plea of guilty to a felony offense certified to a superior court of this State from the custodian of records of any state or federal court under the same name as that by which the defendant is charged with habitual felon shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified. (1967, c. 1241, s. 4.)

§ **14-7.5. Verdict and judgment.** — When an indictment charges an habitual felon with a felony as above provided and an indictment also charges that said person is an habitual felon as provided herein, the defendant shall be tried for the principal felony as provided by law. The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged. If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. Except that the same jury may be used, the proceedings shall be as if the issue of habitual felon were a principal charge. If the jury finds that the defendant is an habitual felon, the trial judge shall enter judgment according to the provisions of this article. If the jury finds that the defendant is not an habitual felon, the trial judge shall pronounce judgment on the principal felony or felonies as provided by law. (1967, c. 1241, s. 5.)

§ **14-7.6. Sentencing of habitual felons.**—When an habitual felon as defined in this chapter shall commit any felony under the laws of the State of North Carolina, he must, upon conviction or plea of guilty under indictment in form as herein provided (except where the death penalty is imposed) be sentenced as an habitual felon; and his punishment must be fixed at a term of not less than 20 years in the State prison nor more than life imprisonment; and such offender shall not be eligible for parole until he has actually served seventy-five percent (75%) of the prison sentence so imposed. Said sentence imposed under the terms of this article shall not be reduced for good behavior, for other cause, or by any means below seventy-five percent (75%) of the prison sentence so imposed, nor shall the same be suspended. For the purposes of determining the eligibility for parole for a person sentenced to life imprisonment under the provisions of this article, the life sentence shall be considered as a sentence of 40 years. Nothing in this chapter shall be construed or considered as seeking or tending to impair the pardoning powers of the Governor of the State of North Carolina. (1967, c. 1241, s. 6.)

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

ARTICLE 3.

Rebellion.

§ **14-8. Rebellion against the State.**—If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the State of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and, shall be punished by imprisonment in the State's prison for not more than fifteen years and by a fine of not more than ten thousand dollars. (Const., art. 4, s. 5; 1861, c. 18; 1866, c. 64; 1868, c. 60, s. 2; Code, s. 1106; Rev., s. 3437; C. S., s. 4178.)

§ **14-9. Conspiring to rebel against the State.**—If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of the State, or to oppose by force the authority of such government, or by force or threats to intimidate, or to prevent, hinder or delay the execution of any law of the State, or by force or fraud to seize or take possession of any firearms or other property of the State, against the will or contrary to the authority of such State, every person so offending in any of the ways aforesaid shall be guilty of a felony and shall be imprisoned not more than ten years in the State's prison and be fined not exceeding five thousand dollars. (1868, c. 60, s. 1; Code, s. 1107; Rev., s. 3438; C. S., s. 4179.)

Editor's Note.—For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

In General. — It is a rule well established that all who engage in a conspiracy, as well as those who participate after it is formed, are equally liable, and the acts and declarations of each in furtherance of the common illegal design are admissible against all. State v. Jackson, 82 N.C. 565 (1880).

§ **14-10. Secret political and military organizations forbidden.** — If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or shall form or organize or combine and agree with any other person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise what-

soever for the advancement of its object, and shall take or administer any extrajudicial oath or other secret, solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extrajudicial oath or other secret, solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court. (1868-9, c. 267; 1870-1, c. 133; 1871-2, c. 143; Code, s. 1095; Rev., s. 3439; C. S., s. 4180.)

Cross Reference.—For subsequent statute relating to prohibited secret societies and activities, see §§ 14-12.2 through 14-12.15.

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

Article 4.

Subversive Activities.

§ 14-11. Activities aimed at overthrow of government; use of public buildings.—It shall be unlawful for any person, by word of mouth or writing, willfully and deliberately to advocate, advise or teach a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the State, owned by the State of North Carolina, any political subdivision thereof, or by any department or agency of the State or any institution supported in whole or in part by State funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof should be overthrown by force, violence or any other unlawful means. (1941, c. 37, s. 1.)

Editor's Note.—For comment on this section, see 19 N.C.L. Rev. 466.

§ 14-12. Punishment for violations. — Any person or persons violating any of the provisions of this article shall, for the first offense, be guilty of a misdemeanor and be punished accordingly, and for the second offense shall be guilty of a felony and punished accordingly. (1941, c. 37, s. 2.)

§ 14-12.1. Certain subversive activities made unlawful.—It shall be unlawful for any person to:

(1) By word of mouth or writing advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning the government of the United States or a political subdivision of the United States by force or violence; or,

(2) Print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or a political sub-

division of the United States should be overthrown by force, violence or any unlawful means; or,

(3) Organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means.

Any person violating the provisions of this section shall be guilty of a felony and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, shall be guilty of a felony and punishable by a fine or imprisonment, or both in the discretion of the court.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known.

No person shall be employed by any department, bureau, institution or agency of the State of North Carolina who has participated in any of the activities described in this section, and any person now employed by any department, bureau, institution or agency and who has been or is engaged in any of the activities described in this section shall be forthwith discharged. Evidence satisfactory to the head of such department, bureau, institution or agency of the State shall be sufficient for refusal to employ any person or cause for discharge of any employee for the reasons set forth in this paragraph. (1947, c. 1028; 1953, c. 675, s. 2.)

ARTICLE 4A.

Prohibited Secret Societies and Activities.

§ **14-12.2. Definitions.**—The terms used in this article are defined as follows:

(1) The term "secret society" shall mean any two or more persons organized, associated together, combined or united for any common purpose whatsoever, who shall use among themselves any certain grips, signs or password, or who shall use for the advancement of any of their purposes or as a part of their ritual any disguise of the person, face or voice or any disguise whatsoever, or who shall take any extrajudicial oath or secret solemn pledge or administer such oath or pledge to those associated with them, or who shall transact business and advance their purposes at secret meeting or meetings which are tiled and guarded against intrusion by person not associated with them.

(2) The term "secret political society" shall mean any secret society, as hereinbefore defined, which shall at any time have for a purpose the hindering or aiding the success of any candidate for public office, or the hindering or aiding the success of any political party or organization, or violating any lawfully declared policy of the government of the State or any of the laws and constitutional provisions of the State.

(3) The term "secret military society" shall mean any secret society, as hereinbefore defined, which shall at any time meet, assemble or engage in a venture when members thereof are illegally armed, or which shall at

any time have for a purpose the engaging in any venture by members thereof which shall require illegal armed force or in which illegal armed force is to be used, or which shall at any time muster, drill or practice any military evolutions while illegally armed. (1953, c. 1193, s. 1.)

Editor's Note. — For comment on this article, see 31 N.C.L. Rev. 401 (1953).

§ **14-12.3. Certain secret societies prohibited.** — It shall be unlawful for any person to join, unite himself with, become a member of, apply for membership in, form, organize, solicit members for, combine and agree with any person or persons to form or organize, or to encourage, aid or assist in any way any secret political society or any secret military society or any secret society having for a purpose the violating or circumventing the laws of the State. (1953, c. 1193, s. 2.)

§ **14-12.4. Use of signs, grips, passwords or disguises or taking or administering oath for illegal purposes.**—It shall be unlawful for any person to use, agree to use, or to encourage, aid or assist in the using of any signs, grips, passwords, disguise of the face, person or voice, or any disguise whatsoever in the furtherance of any illegal secret political purpose, any illegal secret military purpose, or any purpose of violating or circumventing the laws of the State; and it shall be unlawful for any person to take or administer, or agree to take or administer, any extrajudicial oath or secret solemn pledge to further any illegal secret political purpose, any illegal secret military purpose, or any purpose of violating or circumventing the laws of the State. (1953, c. 1193, s. 3.)

§ **14-12.5. Permitting, etc., meetings or demonstrations of prohibited secret societies.** — It shall be unlawful for any person to permit or agree to permit any members of a secret political society or a secret military society or a secret society having for a purpose the violating or circumventing the laws of the State to meet or to hold any demonstration in or upon any property owned or controlled by him. (1953, c. 1193, s. 4.)

§ **14-12.6. Meeting places and meetings of secret societies regulated.**—Every secret society which has been or is now being formed and organized within the State, and which has members within the State shall forthwith provide or cause to be provided for each unit, lodge, council, group of members, grand lodge or general supervising unit a regular meeting place in some building or structure, and shall forthwith place and thereafter regularly keep a plainly visible sign or placard on the immediate exterior of such building or structure or on the immediate exterior of the meeting room or hall within such building or structure, if the entire building or structure is not controlled by such secret society, bearing upon said sign or placard the name of the secret society, the name of the particular unit, lodge, council, group of members, grand lodge or general supervising unit thereof and the name of the secretary, officer, organizer or member thereof who knows the purposes of the secret society and who knows or has a list of the names and addresses of the members thereof, and as such secretary, officer, organizer or member dies, removes, resigns or is replaced, his or her successor's name shall be placed upon such sign or placard; any person or persons who shall hereafter undertake to form and organize any secret society or solicit membership for a secret society within the State shall fully comply with the foregoing provisions of this section before forming and organizing such secret society and before soliciting memberships therein; all units, lodges, councils, groups of members, grand lodge and general supervising units of all secret societies within the state shall hold all of their secret meetings at the regular meeting place of their respective units, lodges, councils, group of members, grand lodge or general supervising units or at the regular meeting place of some other unit, lodge, council, group of members, grand lodge or general supervising

unit of the same secret society, and at no other place unless notice is given of the time and place of the meeting and the name of the secret society holding the meeting in some newspaper having circulation in the locality where the meeting is to be held at least two days before the meeting. (1953, c. 1193, s. 5.)

§ 14-12.7. Wearing of masks, hoods, etc., on public ways.—No person or persons over sixteen years of age shall, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, be or appear upon any lane, walkway, alley, street, road, highway or other public way in this State. (1953, c. 1193, s. 6.)

§ 14-12.8. Wearing of masks, hoods, etc., on public property.—No person or persons shall in this State, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, or appear upon or within the public property of any municipality or county of the State, or of the State of North Carolina. (1953, c. 1193, s. 7.)

§ 14-12.9. Entry, etc., upon premises of another while wearing mask, hood or other disguise.—No person or persons over sixteen years of age shall, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, demand entrance or admission, enter or come upon or into, or be upon or in the premises, enclosure or house of any other person in any municipality or county of this State. (1953, c. 1193, s. 8.)

§ 14-12.10. Holding meetings or demonstrations while wearing masks, hoods, etc.—No person or persons over sixteen years of age shall while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, hold any manner of meeting, or make any demonstration upon the private property of another unless such person or persons shall first obtain from the owner or occupier of the property his or her written permission to do so, which said written permission shall be recorded in the office of the register of deeds of the county in which said property is located before the beginning of such meeting or demonstration. (1953, c. 1193, s. 9.)

§ 14-12.11. Exemptions from provisions of article. — The following are exempted from the provisions of §§ 14-12.7, 14-12.8, 14-12.9, 14-12.10 and 14-12.14:

(1) Any person or persons wearing traditional holiday costumes in season;
(2) Any person or persons engaged in trades and employment where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade or profession;
(3) Any person or persons using masks in theatrical productions including use in Mardi Gras celebrations and masquerade balls;
(4) Persons wearing gas masks prescribed in civil defense drills and exercises or emergencies; and
(5) Any person or persons, as members or members elect of a society, order or organization, engaged in any parade, ritual, initiation, ceremony, celebration or requirement of such society, order or organization, and wearing or using any manner of costume, paraphernalia, disguise, facial makeup, hood, implement or device, whether the identity of such person or persons is concealed or not, on any public or private street, road, way or property, or in any public or private building, provided permission shall have been first obtained therefor by a representative of such society, order or organization from the governing body of the municipality in which the same takes place, or, if not in a municipality, from the board of county commissioners of the county in which the same takes place.

Provided, that the provisions of this article shall not apply to any preliminary meetings held in good faith for the purpose of organizing, promoting or forming a labor union or a local organization or subdivision of any labor union nor shall the provisions of this article apply to any meetings held by a labor union or organization already organized, operating and functioning and holding meetings for the purpose of transacting and carrying out functions, pursuits and affairs expressly pertaining to such labor union. (1953, c. 1193, s. 10.)

§ 14-12.12. Placing burning or flaming cross on property of another or on public street or highway.—(a) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

(b) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State or on a public street or highway, a burning or flaming cross or any manner of exhibit in which a burning or flaming cross real or simulated, is a whole or a part, with the intention of intimidating any person or persons or of preventing them from doing any act which is lawful, or causing them to do any act which is unlawful. (1953, c. 1193, s. 11; 1967, c. 522, ss. 1, 2.)

Editor's Note.—The 1967 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

§ 14-12.13. Placing exhibit with intention of intimidating, etc., another.—It shall be unlawful for any person or persons to place or cause to be placed anywhere in this State any exhibit of any kind whatsoever, while masked or unmasked, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. (1953, c. 1193, s. 12.)

§ 14-12.14. Placing exhibit while wearing mask, hood, or other disguise.—It shall be unlawful for any person or persons, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, to place or cause to be placed at or in any place in the State any exhibit of any kind whatsoever, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. (1953, c. 1193, s. 13; 1967, c. 522, s. 3.)

Editor's Note.—The 1967 amendment added at the end of the section "with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful."

§ 14-12.15. Punishment for violation of article.—All persons violating any of the provisions of this article, except for §§ 14-12.12 (b), 14-12.13, and 14-12.14, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. All persons violating the provisions of §§ 14-12.12 (b), 14-12.13, and 14-12.14 shall be guilty of a felony and shall be punished by confinement in the State prison for not less than one nor more than five years. (1953, c. 1193, s. 14; 1967, c. 602.)

Editor's Note.—The 1967 amendment rewrote this section, which formerly made any violation of this article a misdemeanor, punishable by fine or imprisonment in the discretion of the court.

ARTICLE 5.

Counterfeiting and Issuing Monetary Substitutes.

§ 14-13. Counterfeiting coin and uttering coin that is counterfeit.—If any person shall falsely make, forge or counterfeit, or cause or procure to be

falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the State; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the State from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years. (1811, c. 814, s. 3, P. R.; R. C., c. 34, s. 64; Code, s. 1035; Rev., s. 3422; C. S., s. 4181.)

Cross Reference.—As to forgery, see § 14-119 et seq.

§ 14-14. Possessing tools for counterfeiting.—If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the State, and shall be duly convicted thereof, the person so offending shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years, or be fined not more than five hundred dollars. (1811, c. 814, s. 4, P. R.; R. C., c. 34, s. 65; Code, s. 1036; Rev., s. 3423; C. S., s. 4182.)

Indictment Sufficient. — An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge, with sufficient certainty, the offense designated in this section. State v. Collins, 10 N.C. 191 (1824).

§ 14-15. Issuing substitutes for money without authority.—If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense the sum of fifty dollars; and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor. (R. C., c. 36, s. 5; Code, s. 2493; 1895, c. 127; Rev., s. 3711; C. S., s. 4183.)

Local Modification.—Cumberland: 1933, c. 33; Currituck: 1933, c. 328.

Editor's Note.—In State v. Humphreys, 19 N.C. 555 (1837), the act of 1816, c. 900, which was very similar to this section, is discussed. It is there held that the act is constitutional and that the intent in so issuing the notes, etc., is an essential ingredient of the offense.

§ 14-16. Receiving or passing unauthorized substitutes for money.—If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in § 14-15, whether the same be issued within or without the State, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section shall for every such offense forfeit and pay five dollars, and shall be guilty of a misdemeanor. (R. C., c. 36, s. 6; Code, s. 2494; 1895, c. 127; Rev., s. 3712; C. S., s. 4184.)

Editor's Note. — In State v. Bank of Fayetteville, 48 N.C. 450 (1856), it was held that this section, making it an offense to "pass and receive" bank notes, did not apply to a bank, but that the bank should be penalized under another section which made it unlawful to make and issue notes of a less denomination than three dollars.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON

Article 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment. —A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. (1893, cc. 85, 281; Rev., s. 3631; C. S., s. 4200; 1949, c. 299, s. 1.)

I. In General.
II. Murder in General.
III. Murder in the First Degree.
IV. Murder in the Second Degree.
V. Pleading and Practice.

Cross References.

As to accomplices, see § 14-5 et seq. As to assault in this State, but death in another, see § 15-131.

I. IN GENERAL.

Editor's Note.—The statutes where murder is divided into two degrees have not, as a general rule, added to or taken away any ingredient of murder at common law, and every murder at common law is murder under the statutes. See State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899); State v. Delton, 178 N.C. 779, 101 S.E. 548 (1919); State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

History.—For a brief history of this section in connection with sufficiency of indictment for murder in the first degree, see State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947).

For case law survey as to homicide, see 45 N.C.L. Rev. 918 (1967).

For comment on homicide by fright, see 44 N.C.L. Rev. 844 (1966). For comment on the felony-murder doctrine, see 3 Wake Forest Intra. L. Rev. 20 (1967).

The repeal of § 15-162.1 leaving this section intact, shows the 1969 legislature's intent for this section to stand alone. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Definitions.—Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation, murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation, and manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960).

Death Penalty Expressly Authorized.—The imposition of the death penalty upon a conviction of murder is expressly authorized by N.C. Const., Art. XI, § 2. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

But Provisions for Imposition of Death Penalty Are Unconstitutional. — In the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional, and hence capital punishment may not, under United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), be imposed under any circumstances. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

The death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

A prisoner is entitled to relief if he can demonstrate that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

Voluntary drunkenness is not a legal excuse for crime; but where a specific intent, or premeditation and deliberation, is essential to constitute a crime or a degree of a crime, the fact of intoxication may negative its existence. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Misadventure or accident is not an affirmative defense but merely a denial that defendant intentionally shot the deceased.

State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

A defendant's assertion of accidental killing is not an affirmative defense. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Self-Defense.—The right to kill in self-defense, or in defense of one's family or habitation, rests upon necessity, real or apparent. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

One may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

One may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, **if he** believes it to be necessary and has a reasonable ground for the belief. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Culpable Negligence. — Culpable negligence from which death proximately ensues makes the actor guilty of manslaughter, and under some circumstances guilty of murder. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

Burden of Proof Where Defendant Asserts Killing Was Accidental.—See State v. Fowler, 268 N.C. 430, 150 S.E.2d 731 (1966).

Proof of Unlawful Homicide. — In a prosecution for unlawful homicide, the burden is always upon the State to prove an unlawful slaying. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

If the State is unable to prove an intentional shooting, no presumption of malice arises, and, in order to convict this defendant of unlawful homicide, the State must satisfy the jury beyond a reasonable doubt that defendant's culpable negligence proximately caused the death of his wife. Otherwise, defendant would be entitled to an acquittal. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Applied in State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951); State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. Gales, 240 N.C. 319, 82 S.E.2d 80 (1954); State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963); State v. Johnson, 261 N.C. 727, 136 S.E.2d 84 (1964); State v. Phillips, 262 N.C. 723, 138 S.E.2d 626 (1964); State v. Matthews, 263 N.C. 95, 138 S.E.2d 819 (1964); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); State v. Brown, 263 N.C. 327, 139 S.E.2d 609 (1965); Crawford v. Bailey, 234 F. Supp. 700 (E.D.N.C. 1964); State v. Howard, 274 N.C. 186, 162 S.E.2d 495 (1968).

Quoted in Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Cited in State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952).

II. MURDER IN GENERAL.

Effect of Section Dividing Murder into Degrees. — This section, dividing murder into two degrees, does not give any new definition of murder, but the same remains as it was at common law before the enactment. State v. Delton, 178 N.C. 779, 101 S.E. 548 (1919).

Purpose. — This section intended to select out of all murders denounced those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders deemed less heinous as murder in the second degree, punished by imprisonment. State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942).

Principal May Be Prosecuted under This Section and Accessory under § 14-6. —Section 14-6 prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time this section was enacted and the principal may therefore be convicted and punished under this section for murder in the second degree, while the accessory before the fact receives life under § 14-6. State v. Mozingo, 207 N.C. 247, 176 S.E. 582 (1934).

Malice—Definition.—Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922).

Malice is not only hatred, ill will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Malice exists as a matter of law whenever there has been unlawful and intentional homicide without excuse or mitigating circumstance. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Same—Necessity.—Malice is always a necessary ingredient of murder. State v. Baldwin, 152 N.C. 822, 68 S.E. 148 (1910).

Same—Express.—But it is not necessary to a conviction for murder that the State prove express malice. State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907).

The manner of the killing by defendant, his acts and conduct attending its commission, and his declaration immediately connected therewith, were evidence of express malice. State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961), citing State v. Robertson, 166 N.C. 356, 81 S.E. 689 (1914); State v. Cox, 153 N.C. 638, 69 S.E. 419 (1910).

Same—Implied. — For this intentional killing of a human being with a deadly weapon implies malice. State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907); State v. Brinkley, 183 N.C. 720, 110 S.E. 783 (1922); State v. Pasour, 183 N.C. 793, 111 S.E. 779 (1922).

Same—Implied from Use of Deadly Weapon.—Malice is implied in law from the killing with a deadly weapon. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

The presumptions that a homicide was unlawful and done with malice do not arise against the slayer in a prosecution for homicide, unless he admits, or the State proves, that he intentionally killed the deceased with a deadly weapon. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Same—Evidence.—Malice may be shown by evidence of hatred, ill will, or dislike. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Provocation never disproves malice, it only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. State v. Johnson, 23 N.C. 354 (1840).

Intent—Necessity. — Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown. Sometimes the intent may be imputed by reason of the killing with a deadly weapon, or by circumstances which indicate a reckless indifference to human life, but it must always exist before a charge of murder can be sustained. State v. Stitt, 146 N.C. 643, 61 S.E. 566 (1908).

Same—Must Coexist with Killing. — The act of killing, and the guilty intent, must concur to constitute the offense. State v. Scates, 50 N.C. 420 (1858).

Same—Defenses. — When it is proved that one has killed intentionally with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

The claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Same—Presumption.—At common law, the intentional killing of a human being with a deadly weapon, nothing more appearing, was murder, malice being presumed from the facts. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899). The common-law rule has been followed and it is now also presumed that a killing with a deadly weapon is unlawful and malicious. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922); State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927).

If the accused previously procured a weapon for the purpose of using it, and does use it, the offense is ordinarily murder. State v. Johnson, 172 N.C. 920, 90 S.E. 426 (1916).

The expression "intentional killing" is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Same—Burden of Proof.—It is the duty of the State to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Same—Jury Question.—The jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Motive—Necessity.—It is not necessary to a conviction of murder that the State prove motive. State v. Adams, 136 N.C. 617, 48 S.E. 589 (1904); State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907).

Same—To Strengthen State's Case. — But the case of the State may be strengthened by the showing of a motive when the evidence is circumstantial. State v. Turner, 143 N.C. 641, 57 S.E. 158 (1907); State v. Stratford, 149 N.C. 483, 62 S.E. 882 (1908).

Same—To Identify Prisoner or Establish Malice. — And it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. State v. Adams, 138 N.C. 688, 50 S.E. 765 (1905);

State v. Wilkins, 158 N.C. 603, 73 S.E. 992 (1912).

Attempt to Kill.—An attempt only, to kill, with the most diabolical intent, may be moral, but cannot be legal, murder. State v. Scates, 50 N.C. 420 (1858).

Applied in State v. Hodgin, 210 N.C. 371, 186 S.E. 495 (1936); State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946); State v. Lampkin, 227 N.C. 620, 44 S.E.2d 30 (1947); State v. Parrott, 228 N.C. 752, 46 S.E.2d 851 (1948).

Quoted in State v. Hudson, 218 N.C. 219, 10 S.E.2d 730 (1940).

Cited in State v. Evans, 198 N.C. 82, 150 S.E. 678 (1929); State v. Macon, 198 N.C. 483, 152 S.E. 407 (1930); State v. Cooper, 205 N.C. 657, 172 S.E. 199 (1934); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936); State v. Linney, 212 N.C. 739, 194 S.E. 470 (1938); State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Ewing, 227 N.C. 107, 40 S.E.2d 600 (1946); Fuquay v. Fuquay, 232 N.C. 692, 62 S.E.2d 83 (1950); State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951).

III. MURDER IN THE FIRST DEGREE.

Effect of Statute Dividing Murder into Degrees.—By the act of 1893, c. 85 (this section), the crime of murder has been divided into two degrees, first and second. The common-law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree—the killing must be wilful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899).

Definition.—Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. State v. Starnes, 220 N.C. 384, 17 S.E.2d 346 (1941); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

Murder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938).

This section does not give any new definition of murder, but permits that to remain as it was at common law. The section simply selects out of all murders denounced by common law those deemed more heinous on account of the mode of their perpetration, classifies them as murder in the first degree, and provides a greater punishment for them than that prescribed for "all other kinds of murder," which it denominates murder in the second degree. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

Death Sentence Is Mandatory. — Upon conviction of murder in the first degree the law commands the sentence of death. State v. Nash, 226 N.C. 608, 39 S.E.2d 596 (1946); State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Deliberation and Premeditation.—Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased; (4) the dealing of lethal blows after deceased has been felled and rendered helpless. State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

Same—Premeditation. — Premeditation means thought of beforehand, for some length of time, however short. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961). It is a prior determination to do the act. State v. Cameron, 166 N.C. 379, 81 S.E. 748 (1914); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938).

Same — Deliberation. — Deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v.

Benson, 183 N.C. 795, 111 S.E. 869 (1922); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

Same—Necessity.—And before a conviction for murder in the first degree can be had, the State must show that the prisoner had formed, prior to the killing, with deliberation and premeditation, a purpose to kill deceased. State v. Terry, 173 N.C. 761, 92 S.E. 154 (1917); State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922). See 5 N.C.L. Rev. 364.

Same — Length of Time Immaterial.— The killing of a human being after the fixed purpose to do so has been formed, for however short a time, is sufficient for the conviction of murder in the first degree. State v. Walker, 173 N.C. 780, 92 S.E. 327 (1917). No particular period of time is necessary to constitute premeditation and deliberation for a conviction of murder in the first degree under this section. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. State v. Cogey, 174 N.C. 814, 94 S.E. 416 (1917); State v. Holdsclaw, 180 N.C. 731, 105 S.E. 181 (1920). And deliberation and premeditation need not be of any perceptible length of time. State v. Bynum, 175 N.C. 777, 95 S.E. 101 (1918); State v. Burney, 215 N.C. 598, 3 S.E.2d 24 (1939); State v. Hammonds, 216 N.C. 67, 4 S.E.2d 439 (1939).

Same—Sufficiency.—Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution at a future period, no matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. State v. Dowden, 118 N.C. 1145, 24 S.E. 722 (1896).

Same—Willful. — For a conviction of murder in the first degree the killing must be done with willful premeditation and determination. State v. McKay, 150 N.C. 813, 63 S.E. 1059 (1909); State v. Baldwin, 152 N.C. 822, 68 S.E. 148 (1910).

Same—Instruction.—The trial judge gave the following instruction: "Premeditation means to think beforehand, and when we say that the killing must be accompanied by deliberation and premeditation, it is meant that there must be a fixed purpose to kill which preceded the act of killing for some length of time, however short. Although the manner and length of time in which the purpose is formed, is not material If, however, the purpose to kill is formed simultaneously with the killing, then there is no premeditation and deliberation, and in that event the homicide would not be murder in the first degree." This is a correct statement of the law. State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

Same—What Jury May Consider. — In determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the defendant, before and after, as well as at the time of, the homicide, and all attending circumstances. State v Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

Same — Presumption and Burden of Proof.—When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. State v. Dunheen, 224 N.C. 738, 32 S.E.2d 322 (1944).

A murder committed in the perpetration or attempt to perpetrate a robbery or any felony is murder in the first degree, and in such instance the State is not put to proof of premeditation and deliberation. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949).

Premeditation and deliberation necessary to constitute murder in the first degree are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949). See State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958).

The intentional use of a deadly weapon as a weapon is necessary to give rise to presumptions of unlawfulness and of malice. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

The presumptions arising from a killing proximately caused by the intentional use of a deadly weapon does not relieve the State of the burden to establish beyond a reasonable doubt the additional elements of premeditation and deliberation which are necessary to constitute murder in the first

degree. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Concurrence of Essential Elements.—If defendant resolved in his mind a fixed purpose to kill his wife and thereafter, because of that previously formed intention, and not because of any legal provocation on her part, he deliberately and intentionally shot her, the three essential elements of murder in the first degree—premeditation, deliberation, and malice—concurred. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Malice.—For a conviction of murder in the first degree the killing must be done with malice aforethought, express or implied. State v. McKay, 150 N.C. 813, 63 S.E. 1059 (1909).

But a charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held correct, since "aforethought" as so used does not connote premeditation and deliberation but the preexistence of malice. State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942).

In criminal prosecution charging murder, failure of the court to use adjective "aforethought" in defining murder in the first degree, was not error. "Malice aforethought" was a term used in defining murder prior to the time of the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in C.S., 4200, now this section, the term "premeditation and deliberation" is more comprehensive and embraces all that is meant by "aforethought," and more. Therefore, the use of "aforethought" is no longer required. State v. Hightower, 226 N.C. 62, 36 S.E.2d 649 (1946).

Formed Design to Take Life. — If the circumstances of the killing show a formed design to take life of deceased, the crime is murder in the first degree. State v. Walker, 173 N.C. 780, 92 S.E. 327 (1917); State v. Cain, 178 N.C. 724, 100 S.E. 884 (1919).

Lying in Wait.—Defendants who lay in wait and killed deceased from ambush are guilty of murder in first degree. State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916). See State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934); State v. Mozingo, 207 N.C. 247, 176 S.E. 582 (1934).

Killing Wrong Person by Mistake.—Where defendant, intending to kill a certain person, by mistake inflicts fatal injuries on another, he is guilty in the same degree as though he had killed the person intended, and therefore an instruction that if the jury should be satisfied beyond a reasonable doubt that defendant intended to kill a certain person with malice and with premeditation and deliberation and that by mistake he shot and killed deceased, defendant would be guilty of murder in the first degree, is without error. State v. Burney, 215 N.C. 598, 3 S.E.2d 24 (1939).

A murder perpetrated by means of poison is murder in the first degree. State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950).

In a prosecution for murder by means of poison, the burden is on the State to prove beyond a reasonable doubt that the deceased died from poison and that defendant administered the poison with criminal intent. State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950).

Killing in Perpetration of Robbery.—A homicide committed in the perpetration of, or in attempt to perpetrate, a robbery will be deemed murder in the first degree. State v. Lane, 166 N.C. 333, 81 S.E. 620 (1914). See State v. Glover, 208 N.C. 68, 179 S.E. 6 (1935); State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938); State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944).

Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, under this section, and the failure of the trial court to submit the issue of guilty of murder in the second degree is not error. State v. Donnell, 202 N.C. 782, 164 S.E. 352 (1932). See State v. Brown, 231 N.C. 152, 56 S.E.2d 441 (1949).

Where upon a trial for murder all the evidence and inferences therefrom unquestionably tend to show that the deceased was killed by one lying in wait and for the purpose of robbery, with evidence tending to establish that the defendant had perpetrated the crime, and there is no evidence in mitigation of the offense, the evidence establishes the crime of murder in the first degree under this section, and an instruction to the jury either to convict the defendant of murder in the first degree, or to acquit him is not error. State v. Myers, 202 N.C. 351, 162 S.E. 764 (1932).

Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery is sufficient to be submitted to the jury on the issue of first degree murder, the credibility and probative force of the evidence being for the jury. State v.

Langley, 204 N.C. 687, 169 S.E. 705 (1933).

Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, as defined by this section, under proper instructions from the court thereon upon conflicting evidence. State v. Sterling, 200 N.C. 18, 156 S.E. 96 (1930).

Where murder is committed in the perpetration of a robbery from the person, it is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. State v. Alston, 215 N.C. 713, 3 S.E.2d 11 (1939); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958).

A homicide committed in the perpetration or an attempt to perpetrate a robbery is murder in the first degree, notwithstanding the absence of any fixed intent to kill or any previous purpose, design or plan. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

When a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, this section pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. State v. Bailey, 254 N.C. 380, 119 S.E.2d 165 (1961).

A homicide committed in the perpetration of a robbery is declared by this section to be murder in the first degree. When a homicide is thus committed, the State is not put to the proof of premeditation and deliberation. In such event the law presumes premeditation and deliberation. State v. Bunton, 247 N.C. 510, 101 S.E.2d 454 (1958).

Killing in Perpetration of Rape.—Proof that a homicide was committed in the perpetration or attempted perpetration of rape makes the crime murder in the first degree and dispenses with the necessity of proof of premeditation and deliberation. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. King, 226 N.C. 241, 37 S.E.2d 684 (1946).

A homicide committed in the perpetration of the capital offense of rape is murder in the first degree, irrespective of premeditation and deliberation. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Death Need Not Be Intended. — It is evident under this section a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958).

Accident will be no defense to a homicide committed in the perpetration of or in the attempt to perpetrate a felony. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

All Conspirators Are Guilty Regardless of Who Actually Committed Crime.— Where a conspiracy is formed to rob a bank, and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree, under this section, and it is immaterial which one of them fired the fatal shot. State v. Green, 207 N.C. 369, 177 S.E. 120 (1934); State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

Thus, where defendants conspire to rob a certain place, and a murder is committed by one or more of them in the attempt to perpetrate the robbery, each of them is guilty of murder in the first degree. State v. Stefanoff, 206 N.C. 443, 174 S.E. 411 (1934); State v. Miller, 219 N.C. 514, 14 S.E.2d 522 (1941); State v. Bennett, 226 N.C. 82, 36 S.E.2d 708 (1946); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949).

Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. State v. Bell, 205 N.C. 225, 171 S.E. 50 (1933).

Right of Jury to Recommend Life Imprisonment.—The sole purpose of the proviso is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison. No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error sufficient to set aside a verdict where no recommendation is made. State v. McMillan, 233 N.C. 630, 65 S.E.2d 212 (1951); State v. Simmons, 234 N.C. 290, 66 S.E.2d 897 (1951). See State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952); State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959); Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968).

In a prosecution for murder in the first degree, the right of the jury to recommend life imprisonment rests in its unbridled discretion and should be determined by the jury on the basis that imprisonment for life means imprisonment for life in the State's prison, without considerations of parole or eligibility therefor the power of parole being vested exclusively in the executive branch of the State government. State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955).

The 1949 amendment to this section does not create a separate crime of "murder in the first degree with recommendation of mercy," but merely gives the jury, in the event it convicts defendant of murder in the first degree, the unbridled discretion to recommend that the punishment should be life imprisonment rather than death, and therefore a charge, pursuant to statement of the solicitor to the effect that the charge of murder in the first degree was no longer in the case, but that the charge of murder in the first degree with recommendation of mercy was in the case, is prejudicial. State v. Denny, 249 N.C. 113, 105 S.E.2d 446 (1958).

In a prosecution for murder in the first degree the solicitor may not, in the selection of the jury, state to prospective jurors that the sole purpose of the trial is to obtain the death penalty, nor state to such jurors that the State is seeking a verdict of guilty of murder in the first degree without recommendation of life imprisonment, since such statements violate the intent of this section to give the jury the unbridled discretion to recommend life imprisonment upon conviction of a defendant of the capital offense. State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959).

Same—Effect of Such Recommendation.—Since the 1949 amendment, it is not enough for the judge to instruct the jury that they may recommend life imprisonment. The statute now requires that he go further and tell the jury what the legal effect of such recommendation will be, i.e., that if they make the recommendation, it will mitigate the punishment from death to imprisonment for life in the State's prison, and failure to so instruct is prejudicial error. State v. Carter, 243 N.C. 106, 89 S.E.2d 789 (1955).

Instructions as to Right to Recommend Life Imprisonment.—A clause in an instruction reading "if they (the jury) feel that under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making a recommendation" for life imprisonment imposes an unauthorized restriction upon the discretion vested in the jury. State v. McMillan, 233 N.C. 630, 65 S.E.2d 212 (1951).

The jury were erroneously instructed as follows: "And in the event, if you should return a verdict of guilty of murder in the first degree, it would be your duty to consider whether or not under the statute, you desire and feel that it is your duty to recommend that the punishment of the defendant shall be imprisonment for life in the State's prison." The error in this instruction is that it imposes upon the jury a duty not imposed by this section. State v. Simmons, 234 N.C. 290, 66 S.E.2d 897 (1951).

Where the court enumerates the possible verdicts without including the right of the jury to return a verdict of guilty of murder in the first degree with recommendation of life imprisonment, and later charges the jury that upon certain facts it would be its duty to "return" a verdict of guilty of murder in the first degree, rather than that defendant would be guilty of murder in the first degree, must be held for prejudicial error, and such error is not cured by a later charge that if the jury should find the defendant guilty of murder in the first degree the jury could recommend life imprisonment. State v. Simmons, 236 N.C. 340, 72 S.E.2d 743 (1952).

An instruction that in case the jury should return a verdict of guilty of murder in the first degree, "You may for any reason and within your discretion add to that the recommendation, if you desire to do so, that he be imprisoned for life, in which event that disposition will be made of the case" was not error where the court had previously instructed the jury that if they should render a verdict of murder in the first degree, then "You may, if you so determine, in your own discretion add to that the verdict a recommendation of life imprisonment." State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951).

When the trial court, after giving correct instructions as to the right of the jury to recommend life imprisonment if they should find defendant guilty of murder in the first degree, instructed the jury that the State contended that the jury should not recommend that the punishment should be imprisonment for life, this was prejudicial error. State v. Oakes, 249 N.C. 282, 106 S.E.2d 206 (1958).

In a prosecution for murder in the first degree it is prejudicial error for the court, after giving correct instructions on the

discretionary right of the jury to recommend life imprisonment, to charge further on the contentions of the State that in view of the manner in which the offense was committed the jury should not recommend life imprisonment. State v. Pugh, 250 N.C. 278, 108 S.E.2d 649 (1959).

Instruction as to Right to Consider Eligibility to Parole.—When, in a prosecution for murder in the first degree, the question of eligibility for parole arises spontaneously during the deliberations of the jury and is brought to the attention of the court by independent inquiry of the jury and request for information, the court should instruct the jury that the question of eligibility for parole is not a proper matter for the jury to consider and should be eliminated entirely from their deliberations, and the action of the court is merely telling the jury that it cannot answer the inquiry must be held for prejudicial error upon appeal from conviction of the capital felony without recommendation of life imprisonment. State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955).

Argument of Counsel or Comment of Court as to Possible Parole. — It may be conceded as an established rule of law that where a jury is required to determine a defendant's guilt and also to fix the punishment as between death and life imprisonment, to permit factors concerning the defendant's possible parole to be injected into the jurors' deliberations by argument of counsel or comment of the court is considered erroneous as being calculated to prejudice the jury and influence them against a recommendation of life imprisonment. State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953); State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955).

For brief comment on the argument of counsel as to the death penalty, see 32 N.C.L. Rev. 438 (1954). For note as to improper court response to spontaneous jury inquiry as to pardon and parole possibilities, see 33 N.C.L. Rev. 665 (1955).

Instruction as to Murder in Commission of Kidnapping Not Justified by Evidence. —Where the evidence is sufficient to be submitted to the jury on the theory of defendant's guilt of murdering his victim in an attempt to commit the crime of rape under this section, but is insufficient to show defendant's guilt of the crime of kidnapping, an instruction that defendant would be guilty of murder in the first degree if the jury should find that the murder was perpetrated in the attempt to commit the crime of rape or in the commission of the felony of kidnapping, must be held prejudicial as permitting the jury to rest its verdict on a theory not supported by the evidence. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

IV. MURDER IN THE SECOND DEGREE.

Definition.—Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922); State v. Starnes, 220 N.C. 384, 17 S.E.2d 346 (1941); State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962); State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

By this section the crime of murder in the second degree is as at common law. State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942).

An unlawful killing with malice is murder in the second degree. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

Effect of Statute Dividing Murder into Degrees.—At common law, when the intentional killing by a deadly weapon was shown, the law presumed malice aforethought, and the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse devolved upon the prisoner. The statute dividing murder into two degrees (under this section) contains no reference to this rule, but the Supreme Court of North Carolina in State v. Fuller, 114 N.C. 885, 19 S.E. 797 (1894), held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the State to aggravate the offense to murder in the first degree, as it was on the prisoner, to reduce it. But this applies only to cases of homicide in which premeditation must be shown and not when the homicide is shown or admitted to have been committed by lying in wait, poisoning, starvation, imprisonment or torture. As to these, when intentionally done, the law still raised the presumption of murder in the first degree. But nonetheless if the jury convict of a less offense, it is within their power so to do under the statute. Nor is intentional homicide by poisoning necessarily always murder in the first degree. The presumption may be rebutted. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906).

Same — Presumption.—Since the act of 1893, the killing being proved, and nothing else appearing, the law presumes malice,

but not premeditation and deliberation, and the killing is murder in the second degree. State v. Hicks, 125 N.C. 636, 34 S.E. 247 (1899).

The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. State v. Miller, 197 N.C. 445, 149 S.E. 590 (1929); State v. Floyd, 226 N.C. 571, 39 S.E.2d 598 (1946).

Malice as an essential characteristic of the crime of murder in the second degree may be either express or implied. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

And an intent to inflict a wound which produces a homicide is an essential element of murder in the second degree. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

But Not a Specific Intent to Kill. — A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Bright, 215 N.C. 537, 2 S.E.2d 541 (1939); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

To convict a defendant of murder in the second degree, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Intent Formed Simultaneous with Act of Killing.—Where this intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree. State v. Dowden, 118 N.C. 1145, 24 S.E. 722 (1896); State v. Barrett, 142 N.C. 565, 54 S.E. 856 (1906).

Burden of Proof.—Murder in the second degree is the unlawful killing of a human being with malice, and the burden is on the State to satisfy the jury from the evidence beyond a reasonable doubt of the presence of each essential element of the offense. State v. Adams, 241 N.C. 559, 85 S.E.2d 918 (1955).

The law (after the State makes out a prima facie case of murder in the second degree) casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Presumption. — When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased and thereby proximately caused his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice. State v. Adams, 241 N.C. 559, 85 S.E.2d 918 (1955); State v. Revis, 253 N.C. 50, 116 S.E.2d 171 (1960).

When an intentional killing of a person with a deadly weapon is admitted judicially in court by a defendant, or is proven by the State's evidence, the law raises two presumptions against the killer: (1) that the killing was unlawful; and (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

If the State has satisfied the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased and thereby proximately caused her death, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and, nothing else appearing, the defendant would be guilty of murder in the second degree. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased with a pistol and thereby proximately caused his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice, constituting the offense of murder in the second degree.

State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

A killing with a deadly weapon raises the presumption that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree, it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936).

Evidence Sufficient for Jury.—See State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961).

V. PLEADING AND PRACTICE.

Form of Indictment. — Nothing contained in the act of 1893 requires any alteration or modification of the existing form of indictment for murder. Therefore, it is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the said act of 1893. State v. Covington, 117 N.C. 834, 23 S.E. 337 (1895).

This section does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth. State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943).

Remedy for Alternative Indictment Held to Be by Motion for Bill of Particulars.—After the return of a verdict of guilty of murder in the first degree, defendant moved in arrest of judgment for that the indictment was alternative, indefinite, and uncertain. It was held that although the indictment was alternative, either charge constituted murder in the first degree under this section, informing defendant of the crime charged, and defendant's remedy, if he desired greater certainty, was by motion for a bill of particulars under § 15-143. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Defendant may rely on more than one defense. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

The defendant's plea of not guilty entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both; election is not required. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

The plea of accidental homicide, if indeed it can be properly called a plea, is certainly not an affirmative defense, and therefore does not impose the burden of proof upon the defendant, because the State cannot ask for a conviction unless it proves that the killing was done with criminal intent. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Plea of Not Guilty.—Defendant's plea of not guilty puts in issue every essential element of the crime of first degree murder, and the State must satisfy the jury from the evidence beyond a reasonable doubt that defendant unlawfully killed the deceased with malice and in execution of an actual, specific intent to kill formed after premeditation and deliberation. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Pleading and Proof of Legal Provocation.—The legal provocation that will rob the crime of malice and thus reduce it to manslaughter, and self-defense, are affirmative pleas, with the burden of satisfaction cast upon the defendant. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Effect of Alleging Offense Committed in Perpetration of Rape.—By specifically alleging the offense is committed in the perpetration of rape the State confines itself to that allegation in order to show murder in the first degree. Without a specific allegation, the State may show murder by any of the means embraced in the statute. State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960).

Evidence of Intentionally Inflicted Injuries.—Evidence that, on various occasions during approximately three and one-half years prior to her death, defendant had intentionally inflicted personal injuries upon his wife was admissible as bearing on intent, malice, motive, premeditation and deliberation on the part of the prisoner. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Evidence of Premeditation and Deliberation.—In determining the question of premeditation and deliberation, the conduct of defendants, before and after, as well as at the time of, the homicide, and all attendant circumstances, are competent. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950).

It is said in State v. Watson, 222 N.C. 672, 24 S.E.2d 540 (1943), that "premeditation and deliberation are not usually susceptible of direct proof, and are, therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred. That these essential ele-

ments of murder in the first degree may be proven by circumstantial evidence has been repeatedly held by this court." State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

Evidence of Accidental Discharge of Weapon.—When it is made to appear that death was caused by a gunshot wound, testimony tending to show that the weapon was fired in a scuffle or by some other accidental means is competent to rebut an intentional shooting. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Evidence of Killing in Perpetration of Robbery.—Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery, is expressly made competent by this section, and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. State v. Westmoreland, 181 N.C. 590, 107 S.E. 438 (1921).

Evidence of Killing in Perpetration of Rape.—In a prosecution for murder in the first degree, testimony that in his voluntary confession defendant stated he entered deceased's house to rape her was competent to show that killing was done in perpetration or attempt to perpetrate rape, which constitutes murder in first degree without proof of premeditation and deliberation. State v. King, 226 N.C. 241, 37 S.E.2d 684 (1946).

Evidence of Facts Succeeding Homicide.—Testimony of facts and circumstances which occurred after the commission of a homicide which tends to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, is competent upon the question of deliberation and premeditation, under the evidence in this case, to sustain a verdict of murder in the first degree. State v. Westmoreland, 181 N.C. 590, 107 S.E. 438 (1921).

Evidence of threats is admissible and may be offered as tending to show premeditation and deliberation, and previous express malice, which are necessary to convict of murder in the first degree. State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961), citing State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938).

If Given Individuation.—General threats to kill not shown to have any reference to deceased are not admissible in evidence, but a threat to kill or injure someone not definitely designated is admissible in evidence where other facts adduced give individuation to it. State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961), citing State v. Shouse, 166 N.C. 306, 81 S.E. 333 (1914); State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938).

Beyond Reasonable Doubt. — The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938).

If upon a consideration of all the testimony, including the testimony of the defendant, the jury is not satisfied beyond a reasonable doubt that the defendant intentionally killed deceased, it should return a verdict of not guilty of murder in the second degree. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Long Continued Course of Brutal Conduct. — Ordinarily, the eye of suspicion cannot turn upon the husband as the murderer of his wife; and when charged upon him, in the absence of positive proof, strong and convincing evidence—evidence that leaves no doubt on the mind that he had towards her that mala mens which alone could lead him to perpetrate the crime—is always material. How else could this be done than by showing his acts toward her, the manner in which he treated her, and the declarations of his malignity? In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings. A single expression and a single act of violence are most frequently the result of temporary passion, as evanescent as the cause producing them. But a long continued course of brutal conduct shows a settled state of feeling inimical to the object. Malice may be proved as well by previous acts as by previous threats, and often much more satisfactorily. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Photographs of Scene of Crime.—In a prosecution under this section, where photographs are identified as accurate representations of the scene of the crime by the witness, the photographs are competent in evidence for the purpose of enabling the witness to explain his testimony, and a general objection to the admission of the photographs in evidence cannot be sus-

tained. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961).

Where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

If a photograph is relevant and material, the fact that it is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

In a prosecution for homicide, photographs showing the condition of the body when found, the location where found, and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Determination of Voluntary Character of Confession.—See State v. Outing, 255 N.C. 468, 121 S.E.2d 847 (1961).

Determination of Degree of Murder.—Under this section, distinguishing murder into two degrees, the jury, on conviction, must determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895); State v. Truesdale, 123 N.C. 696, 34 S.E. 646 (1898).

Charge—Willful Premeditation and Deliberation.—The law is fixed by the statute, that the killing must be willful, upon premeditation and with deliberation, and where there is no evidence tending to prove this, the jury should be so instructed, and the question of guilt on the charge of murder in the first degree ought not to be submitted to them. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899).

Same — Burden of Proof of Unlawful Killing.—Where the prisoner is on trial for murder in the first degree, burglary and rape, and there is evidence to support a verdict for each of these offenses, an instruction is proper, and in keeping with the language of this section, when construed as a whole, that the burden of proof was on the State to show beyond a reasonable doubt an unlawful killing with malice and with premeditation and deliberation or murder committed in the perpetration, or attempt to perpetrate, other felonies named. State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927).

Same—Sufficiency of Charge.—The court charged fully as to what was reasonable doubt, circumstantial evidence, presumption of innocence, etc. In absence of a request to do so, it was not error for the court to fail to define robbery in detail. State v. Godwin, 216 N.C. 49, 3 S.E.2d 347 (1939).

Same — Not Affecting Jury's Discretion.—Where, in the preliminary portion of the charge, the court instructs the jury that it is the sole province of the jury to find the facts and return its verdict, and to exercise a discretion in regard to the punishment as the court would thereafter instruct the jury, and that the jury should arrive at the facts without sympathy or prejudice toward any person, and the court thereafter, in instructing the jury as to the possible verdicts, fully charges the jury that in the event the jury found defendant guilty of murder in the first degree, the jury had the unbridled discretion to recommend that the punishment should be life imprisonment, the charge is without error, since, construed contextually, the cautionary instruction that the jury should arrive at their verdict without sympathy or prejudice toward any person could not have been misunderstood by the jury as affecting its unbridled discretion to recommend life imprisonment. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Same — Self-Defense. — As the defense of self-defense was a substantial and essential feature of the case arising on defendant's evidence, no special prayers for instructions were required, and the judge's failure to charge with respect thereto was prejudicial error, and entitled defendant to a new trial. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Sufficient Showing of Provocation So as to Reduce the Crime.—A defendant who has intentionally killed another with a deadly weapon, in order to rebut the presumption arising from such showing or admission, must establish to the satisfaction of the jury the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or excuse it altogether, but if there is no evidence of mitigation or provocation sufficient to reduce the offense to manslaughter it is proper to withhold this issue from the jury's consideration. State v. Keaton, 206 N.C. 682, 175 S.E. 296 (1934).

Instructions.—See note under § 15-172.

Instruction held reversible error. State v. Clark, 225 N.C. 52, 33 S.E.2d 245 (1945).

When Jury May Be Instructed as to Lesser Degree of Homicide.—Although it is rarely the case where the felony-murder statute applies that the jury should be permitted to consider a lesser degree of homicide than murder in the first degree, if, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court, under appropriate instructions, to submit that view to the jury. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

Where any view of the evidence would justify a verdict of guilty of manslaughter, it is error if the court does not submit to the jury an instruction on this lesser degree of the crime. State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959).

While the evidence in the instant case was sufficient to support the theory of murder committed in the attempted perpetration of the felony of rape and also supported the inference that defendant did not intend to commit rape but sought to have intercourse with his victim on a voluntary basis and that his assault upon her was precipitated when she struck at him while she was trying to drive him from the house, it was the duty of the court upon such evidence to submit the question of defendant's guilt of murder in the second degree, in addition to the question of defendant's guilt of murder in the first degree, or not guilty. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

Evidence Sufficient to Support Instruction as to Murder in First Degree.—Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, is sufficient to support an instruction to the jury on the question of murder in the first degree. State v. Brooks, 206 N.C. 113, 172 S.E. 879 (1934).

Where Jury May Be Instructed to Return First Degree Verdict or Not Guilty.—It is only in cases where all of the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936).

Where there was abundant evidence tending to establish that homicide was committed in the perpetration of capital felony rape, and that defendant was the one who committed the offense, and no element of murder in the second degree or manslaughter was made to appear, court properly limited the possible verdicts to guilty of murder in first degree or not guilty. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

Where all the evidence is to the effect that a murder was committed in the perpetration of a robbery, it is not error for the court to limit the jury to a verdict of guilty of murder in the first degree or not guilty under this section. State v. Gosnell, 208 N.C. 401, 181 S.E. 323 (1935).

Where evidence tends to show murder committed in the perpetration of robbery pursuant to a conspiracy and that both defendants were present and participated in the crime, the court properly limited the jury to verdicts of guilty of murder in the first degree or not guilty. State v. Matthews, 226 N.C. 639, 39 S.E.2d 819 (1946).

A murder committed in the perpetration or attempted commission of the felony of kidnapping or holding a human being for ransom constitutes murder in the first degree and an instruction to this effect upon supporting evidence cannot be held for error. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

Instructing Jury as to Their Right to Recommend Life Imprisonment. — In a prosecution for murder in the first degree, it is required that the trial judge instruct the jury not only as to their right to recommend life imprisonment, but he must also instruct the jury as to the effect of such recommendation, namely, that such verdict would require that the court pronounce thereon a judgment of life imprisonment. State v. Cook, 245 N.C. 610, 96 S.E.2d 842 (1957).

The following instruction concerning the proviso of this section was upheld: "Therefore, the court specifically instructs you, members of the jury, that it is patent that the sole purpose of this act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have reached the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison. No conditions are attached to and no qualifications or limitations are imposed upon the right of you the jury to so recommend. It is

an unbridled discretionary right and it is incumbent upon the court to so instruct the jury and court does so instruct you." State v. Christopher, 258 N.C. 249, 128 S.E.2d 667 (1962).

State's evidence sufficient to justify overruling motion for judgment of nonsuit and submitting to the jury the question as to whether or not defendant killed the deceased with malice and premeditation and deliberation. See State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

Sufficiency of Evidence for Submission to Jury.—Evidence tending to show that the defendant on trial for a homicide drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station and that deceased was killed by a shot from a gun fired from the outside, is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree as stated in this section. State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934).

Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house, and thereby proximately caused the deaths of the occupants, is sufficient to be submitted to the jury on the charge of murder in the first degree. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Evidence tending to show that defendants conspired to rob deceased and that they killed him with deadly weapons in the perpetration of the robbery, is sufficient to take the issue of their guilt of murder in the first degree to the jury. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949).

The confession of defendant that while he was having sexual intercourse with an eight-year-old child, she started to scream and that he put his hand over her mouth; that when he took his hand off her mouth she spoke once and said nothing more; that he believed her to be dead and carried away and hid her body; with corroborating evidence that deceased was last seen with defendant, and that her body was found at the place where defendant said he placed it; with expert medical testimony of the use of force and violence in the penetration of deceased's vagina; and that death resulted from suffocation from the bursting of air sacs in deceased's lungs, is held sufficient to be submitted to the jury and sustain a conviction of murder in the first degree. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

When all of the evidence tended to show that defendant killed deceased in the perpetration of rape, without evidence of guilt of a less degree of the crime, the court correctly refrained from submitting the question of defendant's guilt of murder in the second degree. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Verdict.—For a conviction of murder in the first degree under this section and § 15-172, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under constitutional mandate, N.C. Const., Art. I, §§ 13, 17, which right may not be waived. State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

Proper Verdict.—A verdict of guilty of murder in the first degree with recommendation of mercy is not in accord with law, the proper verdict being, in such instance, guilty of murder in the first degree with recommendation of imprisonment for life in the State prison. State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961).

Harmless Error.—Where the jury convicts the defendant of murder in the second degree, asserted error in submitting the question of defendant's guilt of murder in the first degree is rendered harmless. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961).

§ 14-18. Punishment for manslaughter.—If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both. (4 Hen. VII, s. 13; 1816, c. 918, P. R.; R. C., c. 34, s. 24; 1879, c. 255; Code, s. 1055; Rev., s. 3632; C. S., s. 4201; 1933, c. 249.)

Editor's Note.—For case law survey as to homicide, see 45 N.C.L. Rev. 918 (1967).

Constitutionality. — Sentence within the discretionary limits of this section was not cruel or unusual punishment. State v. Brooks, 260 N.C. 186, 132 S.E.2d 354 (1963).

Definitions.—Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962); State v. Benge, 272 N.C. 261, 158 S.E.2d 70 (1967).

Voluntary manslaughter is the intentional killing of a person without malice. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962), citing State v. Baldwin, 152 N.C. 822, 68 S.E. 148 (1910).

Involuntary manslaughter is the unintentional killing of a person without malice. Stout v. Grain Dealers Mut. Ins. Co. 307 F.2d 521 (4th Cir. 1962), citing State v. Honeycutt, 250 N.C. 229, 108 S.E.2d 485 (1959); State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930).

Involuntary homicide is also "manslaughter." United Servs. Auto. Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965).

Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances, guilty of murder. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

Wanton or Reckless Use of Firearms.—With few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Evidence that defendant was handling gun in a culpably negligent manner at the time it fired and killed another was sufficient to support a conviction of involuntary manslaughter. State v. Brooks, 260 N.C. 186, 132 S.E.2d 354 (1963).

One who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Homicide Must Have Been Unintentional and without Malice.—To constitute involuntary manslaughter, the homicide must have been without intention to kill or inflict serious bodily injury, and without either express or implied malice. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Section Does Not Constitute Involuntary Manslaughter a Misdemeanor.—The amendment to this section by ch. 249, Public Laws of 1933, which added a proviso that in cases of involuntary manslaughter the defendant shall be punishable by fine or imprisonment, or both, in the discretion of the court, does not constitute involuntary manslaughter a misdemeanor instead of a felony, the effect of the proviso being to mitigate punishment in cases of involuntary manslaughter, and not to set up involuntary manslaughter as a separate offense. State v. Dunn, 208 N.C. 333, 180 S.E. 708 (1935). See Orinoco Supply Co. v. Masonic & E. Star Home, 163 N.C. 513, 79 S.E. 964 (1913); State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942).

Thus the superior court has jurisdiction of a prosecution under the statute although the fatal accident occurred within the territorial jurisdiction of a city court having exclusive original jurisdiction of misdemeanors. State v. Leonard, 208 N.C. 346, 180 S.E. 710 (1935).

The proviso of this section did not purport to create a new crime of involuntary manslaughter. This proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter and to commit such punishment to the sound discretion of the trial judge. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963).

Defendant's contention that involuntary manslaughter is a misdemeanor for which punishment cannot exceed two years was not sustained in State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967); State v. Efird, 271 N.C. 730, 157 S.E.2d 538 (1967).

The proviso to this section does not purport to create a new crime, to wit, that of involuntary manslaughter. State v. Lilley, 3 N.C. App. 276, 164 S.E.2d 498 (1968).

Purpose of Proviso.—The proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter. State v. Adams, 266 N.C. 406, 146 S.E.2d 505 (1966).

The proviso to this section was intended and designed to mitigate the punishment in cases of involuntary manslaughter, and to commit such punishment to the sound discretion of the trial judge. State v. Lilley, 3 N.C. App. 276, 164 S.E.2d 498 (1968).

Before the proviso to this section, the punishment prescribed for a conviction of manslaughter was without any consideration of whether it was voluntary or involuntary manslaughter. State v. Lilley, 3 N.C. App. 276, 164 S.E.2d 498 (1968).

The proviso prescribes a "specific punishment," and a sentence of imprisonment in the State prison for a term of seven years upon defendant's plea of guilty of involuntary manslaughter will be upheld, the punishment being in the sound discretion of the trial court, limited only by the prohibition against cruel and unusual punishment. State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942).

Punishment by fine or imprisonment, or both, in the discretion of the court, is not a specific punishment and therefore comes within the purview of § 14-2. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963), modifying State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942).

Punishment "in the discretion of the court" is not specific punishment and hence is governed by the limits (ten years for felonies and two years for misdemeanors) prescribed in §§ 14-2 and 14-3. State v. Adams, 266 N.C. 406, 146 S.E.2d 505 (1966).

Charge as to Less Degrees of Same Crime.—While under the provisions of § 15-170 the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. State v. Lutterloh, 188 N.C. 412, 124 S.E. 752 (1924).

Punishment for involuntary manslaughter may be by fine or imprisonment or both in the discretion of the court. The imprisonment, however, may not exceed ten years. State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967).

Punishment Not Reviewable on Appeal.—The question of the imposition of a sentence on the prisoner convicted of manslaughter within the maximum and minimum allowed by this section, is within the discretion of the trial court and is not reviewabale on appeal. State v. Fleming, 202 N.C. 512, 163 S.E. 453 (1932).

A plea of guilty or nolo contendere to automobile manslaughter does not establish intentional homicide. United Servs. Auto. Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965).

Notwithstanding evidence that defendant shot in self-defense, a plea of nolo contendere permits the court to impose a sentence of not more than ten years for involuntary manslaughter. State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967).

Evidence Requiring Instruction on Proximate Cause.—In a prosecution of a motorist for manslaughter in the deaths of two small boys who were struck by defendant's car as defendant was attempting to pass another vehicle traveling in the same direction, evidence that the children were walking on the hard surface when they were struck and that the preceding car speeded up as defendant attempted to pass it, requires the court to instruct the jury upon the conduct of the children in walking on the hard surface and the conduct of the other driver in increasing his speed, as bearing upon the question of whether defendant's negligence was a proximate cause of the deaths. State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963).

Evidence Sufficient to Sustain Conviction.—Evidence that a nephew badly beat his uncle with a stove-lid lifter and, at the instance of a third person, desisted and left, that the uncle stated that if the nephew came back he was going to shoot him, and that when the nephew returned the uncle shot the unarmed nephew as the nephew stepped in the door, inflicting fatal injury, was sufficient to sustain conviction of manslaughter. State v. Dunlap, 268 N.C. 301, 150 S.E.2d 436 (1966).

Applied in State v. Phillips, 262 N.C. 723, 138 S.E.2d 626 (1964); State v. Matthews, 263 N.C. 95, 138 S.E.2d 819 (1964); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); State v. Howard, 272 N.C. 144, 157 S.E.2d 665 (1967); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968).

§ 14-19. Punishment for second offense of manslaughter. — If any person, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of the like nature, he shall be imprisoned in the State prison not less than five nor more than sixty years; and in every such case of conviction for such second offense, the prior conviction of the same person and sentence thereon may be shown to the court. (R. C., c. 34, s. 25; Code, s. 1056; Rev., s. 3633; C. S., s. 4202.)

§ 14-20. Killing adversary in duel; aiders and abettors declared accessories.—If any person fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall be punished by imprisonment for life in the State's prison. All their aiders and abettors shall be considered accessories before the fact.

Any person charged with killing an adversary in a duel may enter a plea of guilty to said charge in the same way and manner and under the conditions and

restrictions set forth in G.S. 15-162.1 relating to pleas of guilty for first degree murder, first degree burglary, arson and rape. (1802, c. 608, s. 2, P. R.; R. C., c. 34, s. 3; Code, s. 1013; Rev., s. 3629; C. S., s. 4203; 1955, c. 1198; 1965, c. 649.)

Cross References.—As to sending, accepting or bearing a challenge to fight a duel, or aiding and abetting a duel, see § 14-270. As to penalty for fighting a duel, see N.C. Const., Art. XIV, § 2.

Definition. — Webster's International Dictionary defines "duel" to be a combat between two persons, fought with deadly weapons by agreement. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Offense at Common Law.—Dueling was an offense at common law, 4 Bl. Com., 145; State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Deadly Weapons. — In 2 Bishop New Criminal Law, § 313(2), it is doubted whether the use of deadly weapons is essential to a duel, but the fighting must at least be upon such mutual agreement as permits one combatant to take the life of the other. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

When Offense Complete.—Both at common law and under the North Carolina statute the offense is complete although no casualty results. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Challenge to Fight with Fists and Hands.—Challenge to fight a fair fight with fists and hands, without the use of any deadly weapons, is not dueling within the statute. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Challenge to Fight Out of State.—Challenge to fight duel out of State is indictable under this section. State v. Farrier, 8 N.C. 487 (1821).

Indictments.—An indictment for sending a challenge, in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. State v. Farrier, 8 N.C. 487 (1821).

Punishment.—Where a person is tried in the superior court for violation of the provisions of this section, but is convicted of a lesser offense, of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

ARTICLE 7

Rape and Kindred Offenses.

§ 14-21. Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. (18 Eliz., c. 7; R. C., c. 34, s. 5; 1868-9, c. 167, s. 2; Code, s. 1101; Rev., s. 3637; 1917, c. 29; C. S., s. 4204; 1949, c. 299, s. 4.)

Cross References.—As to conviction for assault when defendant not guilty of rape, see § 15-169. As to exclusion of bystanders during trial for rape, see § 15-166. As to prosecution for rape not barring subsequent prosecution for carnal knowledge, see note to § 14-26.

Editor's Note. — At common law rape was a felony, but the offense was afterwards changed to a misdemeanor before the statute of Westminster 1. By that statute the punishment, which then was castration and loss of eyes, was mitigated. State v. Dick, 6 N.C. 388 (1818). But by the statute of Westminster 2, the offense was again changed to a felony, and hence its present existence as a felony is in virtue of that statute. State v. Dick, 6 N.C. 388 (1818); State v. Jesse, 20 N.C. 95 (1838).

Rape, under these and later statutes, was the "carnal knowledge of a female forcibly and against her will." This definition left out the elements of age altogether. But as the instances of children below the age of discretion being enticed to yield without knowledge of the act and its consequences multiplied, it became necessary to fix an age under which it should be presumed, not that the act could not be consummated, but that consent could not be given. And so it came to be provided that the consummation of the act upon a female under ten years of age, with or without her consent, should be the same as if consum-

mated upon a female over ten years of age without her consent or against her will. And the object of 18 Eliz., conclusively presuming lack of consent of a female under ten years of age, was not to create a new offense distinct from rape, but it was to make such carnal knowledge and abuse rape. The reason why the act does not call it rape in so many words is because of the seeming incongruity of calling an act rape when it is by consent, whereas the established meaning of rape is "against her will." So that now the definition of rape of a female over ten years of age is as it always has been, "carnal knowledge against her will." But since 18 Eliz. and under the North Carolina statute rape of a female under ten years of age is simply carnal knowledge; or in other words, carnal knowledge of a female under ten years of age is rape. State v. Johnston, 76 N.C. 209 (1877).

By the 1917 amendment the age of consent, below which it is conclusively presumed that a female child could not consent to sexual intercourse, was raised from ten to twelve years.

The 1949 amendment added the proviso to this section. Prior to the amendment a verdict of guilty of rape made punishment by death imperative. But now the jury may render a verdict of guilty of rape with a recommendation of life imprisonment. The clause "and the court shall so instruct the jury," merely directs the court to instruct the jury that such verdict may be returned. State v. Shackleford, 232 N.C. 299, 59 S.E.2d 825 (1950). For brief comment on amendment, see 27 N.C.L. Rev. 449. For propriety of arguing parole law in urging jury to withhold recommendation, see 28 N.C.L. Rev. 342.

For comment on constitutional restrictions on the imposition of capital punishment, see 5 Wake Forest Intra. L. Rev. 183 (1969).

For note on United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) and its impact upon State capital punishment legislation, see 47 N.C.L. Rev. 421 (1969).

Provisions for Imposition of Death Penalty Declared Unconstitutional. — In the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional, and hence capital punishment may not, under United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), be imposed under any circumstances. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

But in State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968), the court said that the Jackson case was not authority for holding that the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. And in State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967), the court held that the imposition of the death penalty upon conviction of the crime of rape is not unconstitutional per se.

The death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

A prisoner is entitled to relief if he can demonstrate that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

Removal from Jury of Persons Opposed to Capital Punishment.—The rule that a death sentence cannot constitutionally be executed if imposed by a jury from which have been removed for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty does not require reversal of a conviction under this section where the jury recommended a sentence of life imprisonment. Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).

The 1949 amendment made no change in the elements of the crime or in the rules of evidence applicable in the trial on a charge of rape. State v. Shackleford, 232 N.C. 299, 59 S.E.2d 825 (1950).

Rape Defined. — Rape is the carnal knowledge of a female, forcibly and against her will. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963); State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Carnal knowledge of a female forcibly and against her will is rape. State v. Sneeden, 274 N.C. 498, 164 S.E.2d 190 (1968).

Rape is the carnal knowledge of a female person by force and against her will. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969).

The "abusing" construed with the "carnally knowing" means the imposing upon, deflowering, degrading, ill-treating, debauching and running socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences and of her right and power to resist. If the act be committed forcibly and against her will, it would be rape without reference

to the statute. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

"Injury" of her genital organs might have occurred from the effort to penetrate, or in some other way; but the statute does not declare it to be an element of the crime to injure or abuse the organs. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

Same—Not Endeavoring to Penetrate.—To have injured the organs in some way other than by endeavoring to penetrate with his person, if done with her consent, though it would be abusing her, would not be a crime, because there was no act of carnal knowledge. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

Same—Against Her Will.—But if the injury occurred against her will and intentionally, then it, the injury, would be embraced in the assault charged, for which he could be convicted. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

"By Force".—"By force" is not necessarily meant by actual physical force. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

The force necessary to constitute rape need not be actual physical force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969).

Fear, fright, or duress, may take the place of force. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Fear, fright, or coercion may take the place of force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969).

Presumption of Force.—Under this section, force is conclusively presumed in the case of carnal knowledge of a female under the age of ten (now twelve). State v. Dancy, 83 N.C. 608 (1880).

Age of Consent.—It is a settled construction of the latter clause of this section that to carnally know and abuse any child under ten (now twelve) years of age, whether she consents to such carnal knowledge or not, is rape. State v. Storkey, 63 N.C. 7 (1868); State v. Goldston, 103 N.C. 323, 9 S.E. 580 (1889).

But it in no way affects the guilt of one who carnally knows a female above that age against her will. State v. Storkey, 63 N.C. 7 (1868).

Carnally knowing any female of the age of twelve years or more by force and against her will is rape; and carnally knowing and abusing any female child under the age of twelve years is also rape. State v. Johnson, 226 N.C. 671, 40 S.E.2d 113 (1946).

Under the second clause of this section relating to unlawfully and carnally knowing and abusing any female child under the age of twelve years, neither force nor lack of consent need be alleged or proven, and such child is by virtue of this section presumed incapable of consenting. State v. Johnson, 226 N.C. 266, 37 S.E.2d 678 (1946).

The act of "carnally knowing and abusing any female child under the age of twelve years" is rape. Neither force nor intent is an element of this offense. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

Carnal knowledge of any female child under the age of twelve years, regardless of consent, is rape. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

By virtue of the second clause of this section a child under the age of twelve years is presumed incapable of consenting. State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965).

Consent of prosecutrix is no defense in a prosecution for carnal knowledge of a female child under the age of twelve years. State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967).

Consent Induced by Fear and Violence Is Void.—Consent of prosecutrix which is induced by fear and violence is void and is no legal consent. State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965).

While consent by the female is a complete defense, consent which is induced by fear of violence is void and is no legal consent. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969).

Consent of the woman from fear of personal violence is void. Even though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969).

Penetration without Emission of Seed Sufficient. — In rape the least penetration of the person is sufficient, and the emission of seed is unnecessary. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

Before the passage of the act of 1860-'61, c. 30 (now § 14-23), it was decided in State v. Gray, 53 N.C. 170 (1860), that in an indictment under this section, for carnally knowing and abusing an infant female under the age of ten (now twelve) years, there must be proof of the emission of seed, as well as of penetration, in order to convict the offender. Immediately after that decision, and probably in consequence of it, the act of 1860-'61, c. 30 was

passed, providing that it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon the proof of penetation only. State v. Hodges, 61 N.C. 231 (1867).

The slightest penetration of the sexual organ of the female by the sexual organ of the male amounts to carnal knowledge in a legal sense. State v. Sneeden, 274 N.C. 498, 164 S.E.2d 190 (1968).

Offense Complete on Proof of Penetration.—It shall not be necessary upon the trial of any indictment for the offense of rape, carnally knowing and abusing any female child under 10 (now 12) years of age, . . . to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

Indictment Need Not Allege Abuse. — An indictment charging defendant with ravishing and carnally knowing a female child under the age of twelve years, need not allege that the child was abused. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967).

Upon Whom Rape May Be Committed. —For a conviction of rape under this section it is not always essential that this offense be committed upon a virtuous woman or actual physical force be used. The circumstances of this case may do away with the necessity of all the elements of the crime and yet constitute rape, as in the following cases.—Ed. note.

Same—Common Strumpet. — One may be guilty of rape on a common strumpet or a woman shown to have been his mistress previously. State v. Long, 93 N.C. 542 (1885).

Capacity of Infant to Commit Rape.—An infant under the age of 14 cannot commit the crime of rape or assault with intent to commit rape. State v. Pugh, 52 N.C. 61 (1859); State v. Gray, 53 N.C. 170 (1860); State v. Sam, 60 N.C. 293 (1864).

Same—Two or More Persons.—Two or more persons may be guilty of the single crime of rape by being present, aiding and abetting in its commission. State v. Jordan, 110 N.C. 491, 14 S.E. 752 (1892).

One who is present, aiding and abetting, in a rape actually perpetrated by another, is equally guilty with the actual perpetrator of the crime. Upon this ground even a woman may be convicted of rape, and a husband of the rape of his wife. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Same—Aiding and Abetting.—One holding the husband of prosecutrix while another is perpetrating the crime of rape is guilty as principal in the offense. State v. Jordan, 110 N.C. 491, 14 S.E. 752 (1892).

Same—Female Aiding Man to Commit Crime.—A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897).

Necessary Allegations—Intent.—By this section, rape is the ravishing and carnally knowing any female of the age of twelve or older by force and against her will, and for conviction of a burglarious entry into a dwelling, presently occupied by a female as a sleeping apartment, with intent to commit rape upon her person, it is necessary to charge in the indictment, and support it with evidence, that at the time of the entry into the dwelling the prisoner had this specific intent, whether he accomplished his purpose, notwithstanding any resistance on her part, or not. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923).

Intent is not an element of the offense of carnally knowing or abusing a female child under the age of twelve years, and a motion to quash an indictment therefor on the ground that it failed to allege "intent" is properly denied. State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942).

Same — "By Force and against Her Will". — An indictment for rape must use the words "by force" or their equivalent in describing the manner in which the assault was accomplished. State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946).

An indictment for rape of a female twelve years of age or more which charged that defendants did violently and feloniously ravish and carnally know but failed to charge that offense was committed forcibly and against her will is fatally defective, it being necessary in order to support the death penalty that both elements be alleged and proven. State v. Johnson, 226 N.C. 266, 37 S.E.2d 678 (1946); State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

When indictment charging rape is insufficient for failure to allege that offense was committed "forcibly" and "against her will," the allowance of motion in arrest of judgment does not preclude subsequent trial of defendants upon proper bills. State v. Johnson, 226 N.C. 266, 37 S.E.2d 678 (1946).

"Forcibly" Can Be Supplied by Any

Equivalent Word. — The absence of both "forcibly" and "against her will" in the indictment is fatal, but "forcibly" can be supplied by any equivalent word. It is not supplied by the use of the word "ravish," but is sufficiently charged by the words "feloniously and against her will." State v. Johnson, 226 N.C. 266, 37 S.E.2d 678 (1946).

Contributory negligence by the victim is no bar to prosecution by the State for the crime of rape. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Hence, the fact that a woman goes, without proper escort, to a place where men of low morals might reasonably be expected to congregate does not establish her consent to have sexual relations with them, although it is competent evidence to be considered by the jury on that question. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Five-Year-Old Child as Witness.—Whether a five-year-old child is competent to testify in a rape prosecution under this section is a matter resting in the sound discretion of the trial judge, and where the evidence upon the voir dire as well as the child's testimony upon the trial negates abuse of discretion the ruling of the trial court that the child was a competent witness will not be disturbed on appeal. State v. Merritt, 236 N.C. 363, 72 S.E.2d 754 (1952).

Testimony of Female under 12 as to Prior Acts of Intercourse.—In a prosecution for carnal knowledge of a female under 12 years of age, her testimony to the effect that defendant had repeatedly had intercourse with her during the prior several years is competent in corroboration of the offense charged, and the first such occasions will not be held too remote when the evidence discloses that such acts were repeated with regularity up to the date specified in the indictment. State v. Browder, 252 N.C. 35, 112 S.E.2d 728 (1960).

Taking Testimony of Child in Absence of Jury.—In a prosecution for rape of an eight-year-old child, it was error to have the court reporter take the testimony of the child in the absence of the jury and then read to the jury the examination which had been conducted in its absence. State v. Payton, 255 N.C. 420, 121 S.E.2d 608 (1961).

Unchastity May Be Shown to Attack Credibility of Prosecutrix.—In a prosecution for rape, the general character of the prosecutrix for unchastity may be shown both to attack the credibility of her testimony and as bearing upon the likelihood of consent. State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959).

But testimony of specific acts of unchastity with person other than defendant is properly excluded. State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959).

Corroborative Evidence.—In a prosecution for carnally knowing a female child under the age of twelve years, testimony of the prosecuting witness that the defendant had made improper advances to her approximately four years prior to the offense charged is competent in evidence in corroboration of the offense charged. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967).

Testimony by prosecutrix' grandmother as to statements of the prosecutrix that the defendant had intercourse with her on the date of the offense and had made improper advances approximately four years prior to the offense is competent for the purpose of corroborating the testimony of prosecutrix to like effect. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967).

In a prosecution for carnally knowing a female child under the age of twelve years, the admission of testimony of prosecutrix' aunt that prosecutrix had stated that the defendant had had intercourse with her many times prior to the date of the offense charged, even though technically incompetent as corroborative evidence in that it exceeded the scope of prosecutrix' testimony, held not prejudicial under the facts of this case. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967).

Evidence Sufficient to Carry Question of Rape to Jury.—See State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952); State v. Orr, 260 N.C. 177, 132 S.E.2d 334 (1963); State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967).

This section attaches no limitation, conditions or qualifications to the jury's right to recommend life imprisonment, and neither the court nor counsel for the State may argue to the jury that it should not exercise its unbridled discretion in making this recommendation. Case v. North Carolina, 315 F.2d 743 (4th Cir. 1963).

Conviction of Assault and Assault on Female in Trial for Kidnapping.—The argument that assault and assault on a female are essential elements of rape and since the defendants were convicted of assault and assault on a female, respectively, when tried under the indictment for kidnapping, they have been formerly in jeopardy with reference to the offenses now charged in the indictments for rape, is in-

genious but without merit. In the first place, a simple assault is probably not, and an assault on a female is certainly not, an essential element of the crime of kidnapping, since the victim of a kidnapping need not be a female and may be enticed away by fraud rather than forced by violence or threat to accompany the abductor. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Instructions.—An instruction which fails to charge that the carnal knowledge of the prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held for reversible error. State v. Simmons, 228 N.C. 258, 45 S.E.2d 121 (1947).

In a prosecution against two defendants for rape of prosecutrix, at different times on the same night, where the State's evidence tended to show that the assaults were made separately, without evidence that either defendant aided and abetted the other, there was reversible error in a charge that, if the intent to ravish and carnally know prosecutrix existed in the mind of one of defendants, or both of them, at any time during the assault, they would be guilty of an assault with intent to commit rape. State v. Walsh, 224 N.C. 218, 29 S.E.2d 743 (1944).

Where the indictment charges that defendant did ravish and carnally know prosecutrix by force and against her will, she being a child under twelve years of age, it is not error for the court to present to the jury, as applicable to the evidence in the case, both the question of carnal knowledge of prosecutrix when she was under twelve years of age, and carnal knowledge of prosecutrix when she was over twelve years of age by force and against her will. State v. Johnson, 213 N.C. 389, 196 S.E. 327 (1938).

Sufficiency of Evidence. — In State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944), it was held that all the evidence showed carnal knowledge and abuse of a female child under the age of twelve years.

In State v. Brown, 227 N.C. 383, S.E.2d 402 (1947), the court held that there was sufficient evidence to sustain the verdict of guilty of rape.

For ample evidence to support convictions for rape, see State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969).

Applied in State v. Anderson, 262 N.C. 491, 137 S.E.2d 823 (1964); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966); State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968); State v. Jackson, 211 N.C. 202, 189 S.E. 510 (1937); State v. Wagstaff, 219 N.C. 15, 12 S.E.2d 657 (1941); State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948).

Quoted in part in Speller v. Crawford, 99 F. Supp. 92 (E.D.N.C. 1951); State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966); State v. Speller, 231 N.C. 549, 57 S.E.2d 759 (1950).

Cited in State v. Shull, 268 N.C. 209, 150 S.E.2d 212 (1966); State v. Spence, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Jones, 222 N.C. 37, 21 S.E.2d 812 (1942); State v. Swink, 229 N.C. 123, 47 S.E.2d 852 (1948).

§ 14-22. Punishment for assault with intent to commit rape.—Every person convicted of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the State's prison not less than one nor more than fifteen years. (1823, c. 1229, P. R.; R. C., c. 107, s. 44; 1868-9, c. 167, s. 3; Code, s. 1102; Rev., s. 3638; 1917, c. 162, s. 1; C. S., s 4205.)

Editor's Note. — The offense of "assault with intent to commit rape" is a separate and distinct crime in and by itself and is not an "attempt to commit rape," as it is, sometimes, falsely designated. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape." See State v. Hewett, 158 N.C. 627, 74 S.E. 356 (1912); State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

In General.—This section should be construed as if it read as follows: If any person shall attempt to commit rape specified in § 14-21, that is to say, to carnally know a female over ten (now twelve) years of age against her will, or to carnally know and abuse a female under ten (now twelve) years of age, with or against her will, he shall be punished, etc. State v. Johnson, 76 N.C. 209 (1877).

The offense defined by this section is an assault on a female with intent to commit rape, the "intent" to commit this offense being inclusive of an "attempt" to commit it. State v. Adams, 214 N.C. 501, 199 S.E. 716 (1938).

In order to convict a defendant on the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the

woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. State v. Jones, 222 N.C. 37, 21 S.E.2d 812 (1942), quoting State v. Masey, 86 N.C. 658, 41 Am. R. 478 (1882); State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944); State v. Overcash, 226 N.C. 632, 39 S.E.2d 810 (1946); State v. Moore, 227 N.C. 326, 42 S.E.2d 84 (1947); State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963); State v. Shull, 268 N.C. 209, 150 S.E.2d 212 (1966).

Assault with intent to commit rape is not the same as an attempt to commit rape, but is an assault with the requisite felonious attempt. State v. Randolph, 232 N.C. 382, 61 S.E.2d 87 (1950).

A jury may not convict an accused of assault with intent to commit rape without evidence and findings, upon proper instructions, that defendant committed an assault upon the person of prosecutrix with intent at the time to ravish and carnally know her, by force and against her will, notwithstanding any resistance she might make. State v. Walsh, 224 N.C. 218, 29 S.E.2d 743 (1944).

What Constitutes Offense. — Upon a charge of assault with intent to commit rape of a female person above the age of twelve years, the State is required to show that the defendant actually committed an assault with intent to force the female to have sexual relations with him, notwithstanding any resistance she might make; however, since a child under the age of twelve years cannot give her consent, the requirement of force is not necessary to constitute the offense. The vast majority of the states subscribe to the doctrine that an assault upon a female under the age of consent with intent to have intercourse, constitutes the crime of assault with intent to commit rape. State v. Lucas, 267 N.C. 304, 148 S.E.2d 130 (1966); State v. Hartsell, 272 N.C. 710, 158 S.E.2d 785 (1968).

Where one touches or handles or takes hold of the person of a female under the age of consent with the present intent of having sexual intercourse with her, then and there he commits the offense of assault with intent to rape; and, when nothing but actual intercourse remains to follow acts done with intent to have intercourse with a girl under the age of consent, the crime is committed. State v. Hartsell, 272 N.C. 710, 158 S.E.2d 785 (1968).

Where a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection is an assault with intent to commit rape, the consent of the child being wholly immaterial; since the consent of such an infant is void as to the principal crime, it is equally so in respect to the incipient advances of the offender. State v. Hartsell, 272 N.C. 710, 158 S.E.2d 785 (1968).

Intent.—It is not necessary to complete the offense of an assault to commit rape that the defendant retain the intent throughout the assault; but if he, at any time during the assault. have any intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963); State v. Shull, 268 N.C. 209, 150 S.E.2d 212 (1966).

To constitute an assault with intent to commit rape, it is not necessary that the assailant retain such intent throughout the assault. It is sufficient if he at any time during the assault has an intent to gratify his passion upon the prosecutrix at all events, notwithstanding any resistance on her part. State v. Goines, 273 N.C. 509, 160 S.E.2d 469 (1968).

The intent is necessarily an inference to be drawn from the defendant's acts, and it must be drawn by the jury and not by the judge when there is any evidence. State v. Goines, 273 N.C. 509, 160 S.E.2d 469 (1968).

Neither penetration nor an attempt thereof is necessary to constitute the crime of assault with intent to rape a female under the age of consent. State v. Hartsell, 272 N.C. 710, 158 S.E.2d 785 (1968).

Age of Female.—This section in the act of 1868 followed immediately after the second section (1-21) of that act, and had direct reference to it, and was intended to include assaults upon females, whether of the age of ten years (now twelve) or more. It uses the words "any female," which embrace females of all ages. State v. Dancy, 83 N.C. 608 (1880).

Who May Be Guilty of Offense. — At common law, rape was a felony, and all persons who were present, aiding and abetting a man to commit the offense, whether men or women, were principal offenders and might be indicted as such. In this regard the law is not different today, so that a woman as well as a man can be found guilty as a principal in the offense. See State v. Jones, 83 N.C. 605 (1880).

Same—Husband upon Wife.—A husband who, by threats to kill in event of refusal, compels his wife to submit to, and a man to attempt, sexual connection, is guilty of

an assault with intent to commit a rape upon his wife. State v. Dowell, 106 N.C. 722, 11 S.E. 525 (1890).

Same—Females.—A female who aids and abets a male assailant in an attempt to commit a rape becomes thereby a principal in the offense. State v. Jones, 83 N.C. 605 (1880).

Same—Infant under 14.—An infant under the age of 14 years cannot be guilty of an assault with intent to commit rape. State v. Sam, 60 N.C. 293 (1864).

Withdrawal of Consent before Perpetration of Offense. — If the prosecutrix consented to have connection with the prisoner upon certain terms, which the defendant refused, and attempted by force to carnally know her without her consent, he is guilty of rape if he succeeds, and of an assault with intent to commit rape, if he does not succeed. State v. Long, 93 N.C. 542 (1885).

Effect of Subsequent Consent.—It seems that this offense is complete, if the defendant attempts to force the prosecutrix against her will, although she afterwards consents. State v. Long, 93 N.C. 542 (1885).

Consent by female victim obtained by use of force or fear due to threats of force is void and no consent. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966).

Felonies under This Section and § 14-26 Are Distinct and Separate.—The felony set forth in this section is not a less degree of the felony set forth in § 14-26. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966).

The felony set forth in § 14-26 (carnal knowledge of female virgins between twelve and sixteen years of age) is a distinct and separate felony from the felony set forth in this section (assault with intent to commit rape). The essential elements of this section and § 14-26 are not identical. In § 14-26 former virginity of the female child is an essential element of the charge, and her consent is not a defense. Punishment for a violation of § 14-26 shall be a fine or imprisonment in the discretion of the court, and imprisonment cannot exceed ten years. Punishment for a violation of this section shall be imprisonment in the State's prison for not less than one nor more than fifteen years. In a prosecution for a violation of this section if the female victim is over twelve years of age (see § 14-21), her virginity is not an essential element of the offense, and in order to convict the State must show by evidence beyond a reasonable doubt not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966).

Nonsuit Does Not Entitle Defendant to Discharge.—In a prosecution of a defendant for assault with intent to commit rape, nonsuit of the felony does not entitle the defendant to his discharge, but the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963).

Instruction that the mere touching of prosecutrix, without regard to her consent, would be an assault with intent to commit rape if the defendant at the time intended to ravish in the event it became necessary to do so to accomplish his purpose, was erroneous for disregarding the essential element of unlawfulness, rudeness or violence which makes the taking hold of a female an assault. State v. Overcash, 226 N.C. 632, 39 S.E.2d 810 (1946).

Instruction Held Reversible Error. — In a prosecution for an assault with intent to commit rape, a repeated instruction defining the offense as an assault with an intent to have sexual intercourse with prosecutrix "without her conscious express permission" must be held for reversible error notwithstanding that in other portions of the charge the jury was instructed that the intent must be to accomplish the act "forcibly and against her will," and notwithstanding that the question of consent or permission was not mooted. State v. Randolph, 232 N.C. 382, 61 S.E.2d 87 (1950).

Evidence held sufficient to be submitted to the jury in a prosecution under this section. State v. Mabry, 269 N.C. 293, 152 S.E.2d 112 (1967).

Evidence of defendants' guilt of assault with intent to commit rape held sufficient to support convictions. State v. Miller, 268 N.C. 532, 151 S.E.2d 47 (1966).

Evidence Held Insufficient. — In State v. Moore, 227 N.C. 326, 42 S.E.2d 84 (1947), the court held that the evidence was insufficient to sustain a verdict of assault with intent to commit rape.

Punishment. — Unlawfully to carnally know and abuse a female under the age of ten years (now twelve) constitutes a crime of rape; therefore, one convicted of an assault with intent to commit such offense is liable to the punishment prescribed in this section. State v. Dancy, 83 N.C. 608 (1880).

Sentence Vacated.—When the court sentenced petitioner, who had been indicted for a violation of § 14-26 (carnal knowledge of female virgins between twelve and

sixteen years of age), to imprisonment for a term of not less than twelve nor more than fifteen years upon his plea of guilty to a violation of this section (assault with intent to commit rape) when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, it would seem to be without precedent, and the sentence of imprisonment was a nullity, and violates petitioner's rights as guaranteed by N.C. Const., Art. I, § 17, and by § 1 of the Fourteenth Amendment to the United States Constitution, and must be vacated in post conviction proceedings. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966).

Applied in State v. Faison, 246 N.C. 121, 97 S.E.2d 447 (1957); State v. Allison, 256 N.C. 240, 123 S.E.2d 465 (1962); State v. Inman, 260 N.C. 311, 132 S.E.2d 613 (1963); State v. Anderson, 262 N.C. 491, 137 S.E.2d 823 (1964); State v. Ward, 263 N.C. 93, 138 S.E.2d 779 (1964); State v. Thompson, 268 N.C. 447, 150 S.E.2d 781 (1966); State v. Dawson, 268 N.C. 603, 151 S.E.2d 203 (1966); Davis v. State, 273 N.C. 533, 160 S.E.2d 697 (1968); State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947).

Cited in Harding v. Logan, 251 F. Supp. 710 (E.D.N.C. 1966); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).

§ 14-23. Emission not necessary to constitute rape and buggery.—It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old, and buggery, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. (1860-1, c. 30; Code, s. 1105; Rev., s. 3639; 1917, c. 29; C. S., s. 4206.)

The terms carnal knowledge and sexual intercourse are synonymous. There is carnal knowledge or sexual intercourse in a legal sense if there is any slightest penetration of the sexual organ of the female by the sexual organ of the male. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Burell, 252 N.C. 115, 113 S.E.2d 16 (1960); State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967).

Evidence Held Sufficient as to Penetration.—See State v. Burell, 252 N.C. 115, 113 S.E.2d 16 (1960).

Cited in State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952); State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950).

§ 14-24. Obtaining carnal knowledge of married woman by personating husband.—If any person shall have carnal knowledge of any married woman by fraud in personating her husband, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison at hard labor for not less than ten nor more than twenty years. (1881, c. 89, s. 1; Code, s. 1103; Rev., s. 3624; C. S., s. 4207.)

Misrepresentation by Words or Conduct Sufficient. — A person who, either by his acts or by his conduct, induces a woman to believe he is her husband and has intercourse with her, is guilty of a felony under this section. State v. Williams, 128 N.C. 573, 37 S.E. 952 (1901).

Offense Does Not Constitute Rape.—An intercourse, obtained with such fraud, is not rape for lack of force, except in those cases where the prisoner has been instrumental in disabling the prosecutrix to make resistance. State v. Brooks, 76 N.C. 1 (1877).

§ 14-25. Attempted carnal knowledge of married woman by personating husband.—Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her husband, shall be punished by imprisonment in the State's prison at hard labor for not less than five nor more than fifteen years. (1881, c. 89, s. 2; Code, s. 1104; Rev., s. 3625; C. S., s. 4208.)

Violation of this section is not tantamount to assault with intent to commit rape. State v. Brooks, 76 N.C. 1 (1877).

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.—If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and

shall be fined or imprisoned in the discretion of the court; and any female person who shall carnally know any male child under the age of sixteen years shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: Provided, that if the offenders shall be married or shall thereafter marry, such marriage shall be a bar to further prosecution. (1895, c. 295; Rev., s. 3348; 1917, c. 29; C. S., s. 4209; 1923, c. 140, s. 1.)

Cross Reference.—See note to § 14-22.

Editor's Note.—Prior to 1917 the protection of this section extended only to a female child over ten and under fourteen years of age. The same act (1917) that raised the age of consent for the criminal offense of rape to twelve, limited this section by making it applicable to females over twelve and under fourteen years of age only. The radical change in the provisions of the section as it now stands was, however, effected by the acts of 1923, ch. 140. As a result of this plausible amendment, the crime under this section is committed if the female child is over twelve and under sixteen, thus raising the age of consent for this particular offense to sixteen years.

The section was further amended by making it a misdemeanor for any female to carnally know any male child under the age of sixteen, a new criminal offense, hitherto unguarded against, and one that seems only fair and reasonable in an age that recognizes the equal rights of men and women.

Lastly, the new section makes the marriage of the offenders a bar to further prosecution. See 1 N.C.L. Rev. 286.

Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3 provides that its provisions shall in nowise affect this section.

This section is designed to protect chaste girls between the specified ages from predatory males who would rob them of their virtue. State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950).

Essentials of Crime.—The essentials of the crime in this case are (1) carnally know or abuse a female child; (2) over twelve and under sixteen years of age; (3) the female child never before having had sexual intercourse with any person. State v. Swindell, 189 N.C. 151, 126 S.E. 417 (1925); State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950); State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

"Carnal knowledge" and "sexual intercourse" are synonymous, and exist in a legal sense where there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950); State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

Rape and Carnal Knowledge under This Section Are Distinct Offenses. — The offenses of rape of a female over 12 years of age and carnal knowledge of a female over 12 and under 16 years of age are separate and distinct. In the first, the female's chastity is immaterial and her consent is a complete defense; in the second her former chastity is a material part of the charge and her consent is not a defense. State v. Barefoot, 241 N.C. 650, 86 S.E.2d 424 (1955).

And Prosecution for Rape Will Not Bar Subsequent Prosecution for Carnal Knowledge.—A prosecution for rape of a female over 12 years of age will not bar a subsequent prosecution for carnal knowledge of a female over 12 and under 16 years of age. State v. Barefoot, 241 N.C. 650, 86 S.E.2d 424 (1955).

Leading Questions.—Because of the delicate nature of the subject of inquiry many courts have recognized and held that rape and carnal abuse cases, and other cases involving inquiry into delicate subjects of a sexual nature, constitute an exception to the general rule against leading questions and that in such cases the permitting of leading questions of the prosecutrix, particularly if she is of tender years, is a matter within the sound discretion of the trial judge. State v. Pearson, 258 N.C. 188, 128 S.E.2d 251 (1962).

The State need not charge or prove that accused knew female child was under age of consent. One having carnal knowledge of such a child, does so at his peril, and his opinion as to her age, is immaterial. State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944).

Injuring Genital Organs Not Sufficient. —In an indictment under this section, for carnally knowing a girl between the ages of 10 and 14 (now 12 and 16), it is error to charge that the crime would be complete "if the jury should find that the defendant injured and abused her genital organs." State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

Aiding and Abetting.—One who accompanies in an automobile another who accomplishes his purpose of having carnal knowledge of a female child over twelve and under sixteen years of age, in violation of this section, and with knowledge of

this purpose leaves them together in the automobile at night until the purpose has been accomplished, though the female consents, is guilty as an aider or abetter in the commission of the offense, and punishable as a principal therein. State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923).

Joinder of Offenses.—A charge of rape and that of carnally knowing a female person between the ages of twelve and sixteen years, under this section, can be properly joined in separate counts in one indictment, under § 15-152, since they are related in character and grow out of the same transaction, and are properly left to the jury under the general plea of not guilty, without any requirement on the part of the State to make an election. State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

Responsiveness of Verdict. — Defendant was charged in the first count with rape and in the second count with having carnal knowledge of a female child over twelve and under sixteen years of age. The solicitor announced he would not ask for a conviction of the capital offense of rape and the court correctly charged the jury as to the verdicts permissible upon the first count, and charged that upon the second count they might find defendant guilty or not guilty. The jury returned the verdict of not guilty upon the first count and guilty of assault upon a female upon the second count. The court thereupon instructed the jury again as to the verdicts it might render upon the respective counts, and upon the coming in of the jury the second time, it returned a verdict of guilty of assault upon a female upon the first count and guilty upon the second count. Held: Even conceding that the first verdict of not guilty upon the first count precluded the jury from again considering that charge and rendered ineffective the second verdict of guilty of an assault upon a female, its first verdict upon the second count was not responsive to the indictment and was not a verdict permitted by law, and therefore the court properly instructed it to reconsider its verdict upon the second count, and the verdict finally rendered thereon is consistent with law and was properly accepted by the court. State v. Wilson, 218 N.C. 556, 11 S.E.2d 567 (1940).

Evidence of Conversation. — Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under fourteen (now sixteen) years of age, her testimony in answer to the questions of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony. State v. Winder, 183 N.C. 776, 111 S.E. 530 (1922).

Evidence of Age. — Prosecuting witness may give competent testimony as to her age. State v. Trippe, 222 N.C. 600, 24 S.E.2d 340 (1943).

Family Bible Entries Evidence of Child's Age. — Authenticated entries in family Bible constitute competent evidence to prove age of child. State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897).

Expression of Opinion by Court. — In prosecution under this section, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age." Held: The instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by § 1-180, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age if they believed the uncontradicted testimony. State v. Wyont, 218 N.C. 505, 11 S.E.2d 473 (1940).

Use of term "statutory rape" in the charge was not prejudicial error where charge contained correct definition, and properly placed burden of proof on the State, as to each essential element of the offense. State v. Bullins, 226 N.C. 142, 36 S.E.2d 915 (1946).

Failure to give a correct charge on the element of age is error in a prosecution under this section. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Or Chastity. — Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of § 1-180, and an exception thereto will be sustained. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Instruction Held Prejudicial.—In a prosecution under this section, where defendant offered evidence of the immoral character of the prosecutrix and her sister and aunt, a charge that such testimony was not competent upon the question of guilt or innocence, but that it was material as bearing

upon the likelihood of defendant indulging in such conduct, was prejudicial error. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Evidence of Relations with Other Men.—In a prosecution under this section, it is not error to exclude evidence of improper relations between the prosecuting witness and another several months after the alleged crime of the defendant. State v. Houpe, 207 N.C. 377, 177 S.E. 20 (1934).

Evidence of Improper Advances of Similar Nature.—In a prosecution under this section allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. State v. Edwards, 224 N.C. 527, 31 S.E.2d 516 (1944).

Evidence Sufficient for Jury.—See State v. Barefoot, 241 N.C. 650, 86 S.E.2d 424 (1955).

Evidence that prosecutrix at the time alleged was an innocent, virtuous woman, under sixteen years of age, and that defendant is the father of her illegitimate child, which was born shortly after she arrived at the age of sixteen, is sufficient to be submitted to the jury in a prosecution under this section. State v. Wyont, 218 N.C. 505, 11 S.E.2d 473 (1940).

Testimony by prosecutrix that defendant had "intercourse" with her and "raped" her is sufficient evidence of carnal knowledge to be submitted to the jury in a prosecution under this section. State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950).

Evidence held sufficient to support conviction in a prosecution under this section. State v. Bryant, 228 N.C. 641, 46 S.E.2d 847 (1948).

Plea of Guilty May Not Be Withdrawn.—Upon the trial under this section of carnally knowing a female child over twelve and under sixteen years of age, the defendant may not enter a plea of guilty and thereafter withdraw the plea and enter a defense as a matter of right, and the sentence will be sustained in the absence of abuse of the court's discretion. State v. Porter, 188 N.C. 804, 125 S.E. 615 (1924).

Variance as to Time.—It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material. State v. Trippe, 222 N.C. 600, 24 S.E.2d 340 (1943).

Time is not of the essence of the offense denounced by this section, and on trial of an indictment for carnal knowledge of a female under 16 years of age a variance between allegation and proof as to the date is not material, the statute of limitations not being involved. State v. Baxley, 223 N.C. 210, 25 S.E.2d 621 (1943).

Punishment.—The felony defined in this section is not one "for which no specific punishment is prescribed" within § 14-2, and the discretion of the court in fixing the punishment is limited only by N.C. Const., Art. I, § 14. A sentence of 30 years and hard labor is not a "cruel and unusual punishment" for an offense under this section. State v. Swindell, 189 N.C. 151, 126 S.E. 417 (1925).

Punishment by fine or imprisonment or both, in the discretion of the court is not a specific punishment and therefore comes within the purview of § 14-2. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963), **overruling State v. Swindell**, 189 N.C. 151, 126 S.E. 417 (1925); State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936).

Punishment for carnal knowledge of a female child over twelve and under sixteen years of age by a male person over eighteen years of age cannot exceed ten years' imprisonment. State v. Grice, 265 N.C. 587, 144 S.E.2d 659 (1965).

Applied in State v. Lynn, 246 N.C. 80, 97 S.E.2d 451 (1957).

§ 14-27. Jurisdiction of court; offenders classed as delinquents.—All persons charged with a violation of § 14-26 under the age of sixteen years shall be subject to the jurisdiction of the juvenile court and such other courts as may hereafter exercise such jurisdiction, and shall be classed as delinquents and not as felons: Provided, that where the offenders agree to marry, the consent of the parent shall not be necessary: Provided further, that any male person convicted of the violation of § 14-26 who is under eighteen (18) years of age, shall be guilty of a misdemeanor only. (1923, c. 140, s. 2; C. S., s. 4209 (a).)

Editor's Note.—This section is summarized and a brief history of the law given in 1 N.C.L. Rev. 286.

Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3, provides that its provisions shall in no wise affect this section.

ARTICLE 8

Assaults

§ 14-28. Malicious castration. — If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the State's prison for not less than five nor more than sixty years. (1831, c. 40, s. 1; R. C., c. 34, s. 4; 1868-9, c. 167, s. 6; Code, s. 999; Rev., s. 3627; C. S., s. 4210.)

Cross Reference.—See notes under §§ 14-29 and 14-30.

Elements of the offense of maliciously maiming a privy member as condemned by this section are: (1) The accused must act with malice aforethought, (2) the act must be done on purpose and unlawfully, (3) the act must be done with intent to maim or disfigure a privy member of the person assaulted, and (4) there must be permanent injury to the privy member of the person assaulted. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Intent.—An intent to maim or disfigure a privy member is prima facie to be inferred from an act which does in fact disfigure, unless the presumption be repelled by evidence to the contrary. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

The offense of maiming a privy member condemned by § 14-29 is a lesser included offense of this section, proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member, not being necessary to conviction under § 14-29. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Nonsuit Denied Where Evidence Sufficient to Show Maiming without Malice.—In a prosecution upon an indictment charging a malicious maiming of a privy member in violation of this section, defendant's motion for nonsuit of the "felony charge" is properly denied where there is sufficient evidence to support conviction under § 14-29 of maiming a privy member without malice aforethought, both offenses being felonies, and the offense condemned by § 14-29 being a lesser included offense of this section. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Appeal from Sentence for Punishment.—Upon conviction of the criminal offense inhibited by this section, sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of N.C. Const., Art. I, § 14, or discriminatory against the principal actor in committing the crime, when the others participating therein to a less extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal. State v. Griffin, 190 N.C. 133, 129 S.E. 410 (1925).

Cited in State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

§ 14-29. Castration or other maiming without malice aforethought. —If any person shall, on purpose and unlawfully, but without malice aforethought, cut, or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be imprisoned in the county jail or State's prison not less than six months nor more than ten years, and fined, in the discretion of the court. (1754, c. 56, P. R.; 1791, c. 339, ss. 2, 3, P. R.; 1831, c. 40, s. 2; R. C., c. 34, s. 47; Code, s. 1000; Rev., s. 3626; C. S., s. 4211.)

Cross Reference.—See note under § 14-30.

History of Section.—See State v. Bass 255 N.C. 42, 120 S.E.2d 580 (1961).

The words "without malice aforethought" were included in this section to differentiate it from § 14-30, and make it clear and definite that allegation and proof of premeditation (prepense) are not a requirement in the prosecution of offenses under this section. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

Proof of Malice Aforethought Not Necessary.—Proof of malice aforethought, or of a preconceived intention to commit the maiming, is not necessary. State v. Girkin, 23 N.C. 121 (1840).

Consent of Victim No Defense. - Under

this section the elements of the offense of mayhem are the same as under the common law, and the consent of the victim does not constitute a defense in a prosecution under the statute. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

Lesser Included Offense of § 14-28.—The offense of maiming a privy member condemned by this section is a lesser included offense of § 14-28, proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member not being necessary to conviction under this section. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Nonsuit Denied Where Evidence Sufficient to Show Maiming without Malice.— In a prosecution upon an indictment charging a malicious maiming of a privy member in violation of § 14-28, defendant's motion for nonsuit of the "felony charge" is properly denied where there is sufficient evidence to support conviction under this section of maiming a privy member without malice aforethought, both offenses being felonies, and the offense condemned by this section being a lesser included offense of § 14-28. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

§ 14-30. **Malicious maiming.**—If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall, for the first offense, be punished by imprisonment in the State's prison or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offense shall be imprisoned in the State's prison not less than five nor more than sixty years. (22 and 23 Car. II, c. 1 (Coventry Act); 1754, c. 56, P. R.; 1791, c. 339, s. 1, P. R.; 1831, c. 12; R. C., c. 34, s. 14; Code, s. 1080; Rev., s. 3636; C. S., s. 4212.)

History of Section.—See State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

When Corpus Delicti Complete.—Under this section the corpus delicti is complete, if the maim be committed on purpose, and with intent to disfigure, although without malice prepense. State v. Crawford, 13 N.C. 425 (1830).

"Malice Aforethought" Construed.— The words "malice aforethought" do not mean an actual, express or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids. State v. Crawford, 13 N.C. 425 (1830).

Malicious Intent Express or Implied. — The malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Irwin, 2 N.C. 112 (1794).

Proof of Grudges or Threatenings Not Necessary. — And proof of antecedent grudges, threatenings or an express design is not necessary. State v. Irwin, 2 N.C. 112 (1794).

Presumptions.—An intent to disfigure is prima facie to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. State v. Girkin, 23 N.C. 121 (1840).

What Constitutes Maiming.—To constitute maiming under this statute, by biting off an ear, it is not necessary that the whole ear shall be bitten off—it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. State v. Girkin, 23 N.C. 121 (1840).

"To wound" is distinguished from "to maim" in that the latter implies a permanent injury to a member of the body or renders a person lame or defective in bodily vigor. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

Where there was no evidence of permanent injury to the privy parts of the prosecuting witness, it was error for the court to submit to jury the question of the guilt of defendant under this section. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

Conviction for Loss of Eye. — Construing this section in connection with the history of legislation on the subject, it is held that thereunder the loss of an eye is not included in the offense of mayhem, and though the infliction thereof without malice may neither be sustained as provided by § 14-29, nor under the common law, requiring that the offense should have been committed with malice, yet upon proper evidence a conviction may be had of an assault with a deadly weapon and an assault with serious damages, as a less degree of the crime charged under the pro-

visions of § 14-29. State v. Wilson, 188 N.C. 781, 125 S.E. 612 (1924).

First Blow or Sudden Affray. — The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. State v. Crawford, 13 N.C. 425 (1830).

Same—Accident or Self-Defense.—When the act is proved, the law presumes that it was done on purpose. The burden is therefore upon defendant to show that it was done accidentally or in self-defense. State v. Evans, 2 N.C. 281 (1796); State v. Skidmore, 87 N.C. 509 (1882).

Indictment — Necessary Allegations. — An indictment, for biting off ear, must state the offense to be done on purpose, as well as unlawfully. State v. Ormond, 18 N.C. 119 (1834).

Same—Unnecessary Allegations. — But it need not be alleged whether it was the right or left ear. State v. Green, 29 N.C. 39 (1846).

Same—Sufficient Allegations.—An indictment charging the defendant with unlawfully, wilfully, feloniously and with malice aforethought putting out the right eye of named person with her thumbs with intent to maim and disfigure named person charges a violation of this section. State v. Atkins, 242 N.C. 294, 87 S.E.2d 507 (1955).

§ 14-30.1. Malicious throwing of corrosive acid or alkali.—If any person shall, of malice aforethought, knowingly and wilfully throw or cause to be thrown upon another person any corrosive acid or alkali with intent to murder, maim or disfigure and inflicts serious injury not resulting in death, he shall be guilty of a felony and shall be punished by imprisonment in the State prison for a term of not less than four (4) months nor more than ten (10) years. (1963, c. 354.)

§ 14-31. Maliciously assaulting in a secret manner.—If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony punishable by a fine or imprisonment for not less than one nor more than twenty years, or both such fine and imprisonment. (1887, c. 32; Rev., s. 3621; 1919, c. 25; C. S., s. 4213; 1969, c. 602, s. 1.)

Cross Reference. — As to an assault in this State injuring person in another state, see § 15-132.

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

The felony described in this section is often referred to as malicious secret assault and battery with a deadly weapon. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968).

Effect of Words "or Otherwise". — The legislature, after denouncing as criminal secret assaults with intent to kill, and after giving one explicit illustration, added the words "or otherwise," in order to prevent the application of the maxim expressio unius exclusio alterius, thus including every other manner of making secret attempts, regardless of the attendant circumstances. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894).

Assault with Intent to Commit Murder. —Attempts to commit any of the four capital offenses were formerly felonies, but during the prosecution for "Ku Klux" troubles the offense of assault with intent to commit murder was reduced to a simple misdemeanor. The act of 1887, ch. 32, restored the grade of the offense to a felony, except in those cases in which it is committed openly, giving the assailed an opportunity to know his assailant. State v. Telfair, 109 N.C. 878, 13 S.E. 726 (1891); State v. Harris, 120 N.C. 577, 26 S.E. 774 (1897).

What Constitutes Secret Assault. — While it is not required for the conviction of a secret assault, under the provisions of this section, that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant be not previously made known to him; and where the evidence does not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary is reversible error. State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924).

Same—Assault from Behind. — An assault made from behind and in such a manner as to prevent the person assaulted from knowing who his assailant is, or that the blow is about to be struck, is a secret assault. State v. Harris, 120 N.C. 577, 26 S.E. 774 (1897).

Same—Assault by Means of Poison. —

An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. State v. Alderman, 182 N.C. 917, 110 S.E. 59 (1921).

Same—Assault Facing Victim. — Where one, facing another or walking up in front of him, draws a pistol from a hip-pocket and shoots him without warning, it is not a secret assault, within the meaning of this section. State v. Patton, 115 N.C. 753, 20 S.E. 538 (1894).

Same—Sufficiency. — For sufficiency of evidence to prove a secret assault, see State v. Bridges, 178 N.C. 733, 101 S.E. 29 (1919).

Indictment — Necessary Allegations. — Indictment omitting the words "by waylaying or otherwise," is sufficient. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894).

Elements of Offense, Burden of Proof. —On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible and where assault and battery, prohibited by this section, are charged, the State must accordingly show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence is conflicting, it is an expression of opinion inhibited by § 1-180, for the judge to charge the jury that if they believe the evidence, a cold-blooded and cruel assault had been committed. State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925).

Evidence Permissible to Show Malice, etc.—As bearing on the question of malice and felonious intent, the State was allowed to show that, a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him. State v. Miller, 189 N.C. 695, 128 S.E. 1 (1925).

Instruction. — For charge not sufficiently explaining the offense, see State v. Vanderburg, 200 N.C. 713, 158 S.E. 248 (1931).

Verdict for Simple Assault.—Upon the trial of an indictment charging a secret felonious assault, verdict may be rendered for simple assault. State v. Jennings, 104 N.C. 774, 10 S.E. 249 (1889).

An indictment charging a felonious assault with intent to kill as defined in this section, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser offense. State v. High, 215 N.C. 244, 1 S.E.2d 563 (1939).

Applied in State v. Brock, 234 N.C. 390, 67 S.E.2d 282 (1951), aff'd, Brock v. North Carolina, 344 U.S. 424, 73 S. Ct. 349, 97 L. Ed. 456 (1953); State v. Stevens, 264 N.C. 737, 142 S.E.2d 588 (1965); State v. Lewis, 1 N.C. App. 296, 161 S.E.2d 497 (1968).

Cited in State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951); State v. Strickland, 192 N.C. 253, 134 S.E. 850 (1926); State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948).

§ 14-32. Assault with a firearm or other deadly weapon with intent to kill or inflicting serious injury; punishments.—(a) Any person who assaults another person with a firearm or other deadly weapon of any kind with intent to kill and inflict serious injury is guilty of a felony punishable under G.S. 14-2.

(b) Any person who assaults another person with a firearm or other deadly weapon per se and inflicts serious injury is guilty of a felony punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment.

(c) Any person who assaults another person with a firearm with intent to kill is guilty of a felony punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment. (1919, c. 101; C. S., s. 4214; 1931, c. 145, s. 30; 1969, c. 602, s. 2.)

Cross Reference. — As to assault in this State resulting in injury in another state, see § 15-132.

Editor's Note. — The 1969 amendment rewrote this section.

The cases cited in the note below were decided prior to the 1969 amendment.

Section Creates New Offense.—By the passing of this section the legislature intended to create a new offense of higher

degree than the common-law crime of assault with intent to kill. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

The felony described in this section is often referred to as felonious assault. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968).

Elements of Offense. — In order for a conviction of crime under the provisions of this section there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

To warrant the conviction of an accused of a felonious assault and battery under this section on the theory that he participated in the offense as a principal in the first degree, the State must produce evidence sufficient to establish beyond a reasonable doubt that he did these four things: (1) committed an assault and battery upon another; (2) committed the assault and battery with a deadly weapon; (3) committed the assault and battery with intent to kill the victim of his violence; and (4) thus inflict on the person of his victim serious injury not resulting in death. State v. Birchfield, 235 N.C. 410, 70 S.E.2d 5 (1952).

The statutory offense under this section embodies (1) assault, (2) with a deadly weapon, (3) the use of the weapon must be with intent to kill, (4) the result of the use must be the inflicting of serious injury, (5) which falls short of causing death. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

The crime of felonious assault, created and defined by this section, consists of these essential elements: (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968).

A specific intent to kill is an essential element of felonious assault. State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968).

Effect of Omitting Averment of Serious Injury. — An indictment charging assault with intent to kill, without averment of the infliction of serious injury, charges a misdemeanor. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Facts of Particular Case Are Determinative.—Whether serious injury has been inflicted must be determined according to the particular facts of each case. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Injury Must Fall Short of Causing Death.—The injury must be serious but it must fall short of causing death. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968).

"Serious Damage" and "Serious Injury" Not Synonymous.—The term "serious damage done" necessary to take an assault case from a justice of the peace is not synonymous with the term "inflicts serious injury not resulting in death," as used in this section. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

The law will not ordinarily presume a murderous intent where no homicide is committed. This is a matter for the State to prove. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

The admission or proof of an assault with a deadly weapon, resulting in serious injury, but not in death, cannot be said, as a matter of law, to establish a presumption of felonious intent, or intent to kill. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

A person might intentionally and without justification or excuse assault another with a deadly weapon and inflict upon him serious injury not resulting in death, but such an assault would not establish a presumption of felonious intent, or the intent to kill. Such intent must be found by the jury as a fact from the evidence. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Intent to Kill May Be Inferred from Circumstances.—An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence; that is, by proving facts from which the fact sought to be proven may be reasonably inferred. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Included Offense. — Assault with a deadly weapon under § 14-33 is an essen-

tial element of the felony created and defined by this section, being an included "less degree of the same crime." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

An indictment sufficiently charging defendant with assault with a deadly weapon, to wit, a pistol, with intent to kill and inflicting serious injury not resulting in death, includes the offense of assault with a deadly weapon. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

The offense of an assault with a deadly weapon with intent to kill under § 14-33, a general misdemeanor, is a lesser included offense of the felony charged in a bill of indictment drawn under this section. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

An indictment charging an assault with a deadly weapon, with intent to kill, inflicting serious injury, not resulting in death, includes the lesser offense of assault with a deadly weapon. State v. Lane, 1 N.C. App. 539, 162 S.E.2d 149 (1968).

Law of Self-Defense Applicable. — The law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949).

Indictment Necessary.—A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, under this section, and defendant may not be put to answer thereon but by indictment. State v. Clegg, 214 N.C. 675, 200 S.E. 371 (1939).

An indictment which follows substantially the language of this section as to its essential elements meets the requirements of law. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967); State v. Lane, 1 N.C. App. 539, 162 S.E.2d 149 (1968).

An indictment which does not incorporate the word "feloniously" or charge that the offense is a felony cannot support a conviction of an offense greater than a misdemeanor. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

Where the solicitor sets out to charge defendant with the crime of felonious assault as defined in this section, yet he fails to incorporate in it the word "feloniously," the indictment does not charge a felony. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

In an indictment charging an assault with intent to kill "and murder" the words "and murder" are surplusage and place no additional burden on the State. State v. Plemmons, 230 N.C. 56, 52 S.E.2d 10 (1949).

"A certain knife" is a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967).

Indictment Held Sufficient.—An indictment charging that defendant assaulted a named person with intent to kill and did inflict serious and permanent bodily injuries not resulting in death by setting his victim afire, is sufficient to charge an assault where serious injury was inflicted. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

Injury Need Not Be Described in Indictment. — In an indictment, under this section, it is not necessary to describe the injury further than in the words of the statute. State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943).

Evidence of Infliction of Serious Injury. —Evidence that several defendants indicted under the provisions of this section were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, is sufficient for the conviction of them all of an asault with a deadly weapon with intent to kill, resulting in serious injury, in violation of the statute. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Evidence of Use of Deadly Weapon.— Where the evidence against the defendants, tried under an indictment for violating this section tends to show an assault with a blackjack and other like instruments whereby they beat the one assaulted into unconsciousness and carried him into a field where alone he eventually recovered consciousness, it is sufficient as to the use of a deadly weapon in making the assault. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Evidence of communicated threats was received with apparent approval in State v. Scott, 26 N.C. 409 (1844), **and with** explicit approval in State v. Turpin, 77 N.C. 473, 24 Am. R. 455 (1877). It was denied in State v. Byrd, 121 N.C. 684, 28 S.E. 353 (1897), in an obscure opinion and in State v. Skidmore, 87 N.C. 509 (1882), in an opinion which overlooked the two cases first cited. 11 N.C. L. Rev. 20.

Instruction as to Serious Injury.—Where the evidence is sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that "serious injury" included "anything that would cause a breach of the peace," is held not to be reversible error to the defendant's prejudice where all the evidence tends to show that serious injury was inflicted in violation of the statute. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Omission of "Assault with a Deadly Weapon" from Charge to Jury. — When accused is indicted, under this section, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, does not deprive the jury of the statutory authority to consider it. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943).

The term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge. State v. Plemmons, 230 N.C. 56, 52 S.E.2d 10 (1949).

Erroneous Instruction Not Cured by Verdict.—An instruction that defendant's admission of assault with a deadly weapon, which resulted in serious injury, raised the presumption of defendant's guilt of assault with a deadly weapon with intent to kill, resulting in serious injury, as charged, and placed the burden on defendant to satisfy the jury of matters in mitigation or excuse, is not cured by a verdict of guilty of the misdemeanor of an assault with a deadly weapon, since the instruction required defendant to show to the satisfaction of the jury matters in mitigation or excuse before he could successfully ask for a verdict of not guilty. State v. Carver, 213 N.C. 150, 195 S.E. 349 (1938).

Burden of Proof. — This section under which the appealing defendant was indicted and convicted provides that any person who assaults another (1) with a deadly weapon, (2) with intent to kill, and (3) inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punishable by imprisonment in the State's prison or be worked on the county roads for a period of not less than four months nor more than ten years. These three essential elements must be proved in order to warrant a conviction under the statute (State v. Crisp, 188 N.C. 799, 125 S.E. 543 (1924)); and the burden is on the State to establish them all beyond a reasonable doubt, where the defendant enters a plea of "not guilty" to the charge contained in the bill of indictment. State v. Redditt, 189 N.C. 176, 126 S.E. 506 (1925).

In prosecutions for felonious assault and for assault with a deadly weapon, it is not incumbent on a defendant to satisfy the jury he acted in self-defense. On the contrary, the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

State Must Prove Murderous Intent. — Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, under this section, an instruction that the use of such weapon raises a presumption of felonious intent is reversible error, the fact of murderous intent being for the State to prove. State v. Gibson, 196 N.C. 393, 145 S.E. 772 (1928).

The deadly character of a weapon may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, is sufficient for the jury to infer that the knife was a deadly weapon. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947).

Admissibility of Evidence.—See State v. Oxendine, 224 N.C. 825, 32 S.E.2d 648 (1945).

The introduction in evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use and the injuries inflicted in establishing the character of the weapon as deadly. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947).

Evidence that defendant said nothing to prosecutrix at the time he shot her, but that two weeks before he shot her he told her he was going to kill her, was competent and properly admitted in evidence in a prosecution under this section. State v. Heard, 262 N.C. 599, 138 S.E.2d 243 (1964).

Sufficiency of Evidence.—In a prosecu-

tion under this section it was held that the evidence was amply sufficient to sustain a verdict of "guilty of an assault with a deadly weapon." State v. Cody, 225 N.C. 38, 33 S.E.2d 71 (1945).

Guilt of Lesser Degree of Offense. — Where the defendants are tried for violating this section in making an assault with a deadly weapon with intent to kill, etc., the action will not be dismissed when the undisputed evidence tends to show the assault was made with a deadly weapon. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Conviction of Simple Assault. — An instruction directing verdict of guilty of at least simple assault is not erroneous when the prosecuting witness had been injured by being struck by some hard metallic substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries. State v. Strickland, 192 N.C. 253, 134 S.E. 850 (1926).

A "whiplash" injury may or may not be a serious injury, depending upon its severity and the painful effect it may have on the injured victim. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Whether the assault is calculated to create a breach of the peace that would outrage the sensibilities of the community does not adequately or correctly describe the infliction of serious injury contemplated by this section. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Failure to instruct the jury with reference to defendant's right of self-defense in respect of repelling a nonfelonious assault is prejudicial error. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Evidence Sufficient to Require Instruction as to Defense of Third Person.—Evidence was sufficient to require an instruction as to the right of the defendant, indicted for a felonious assault with a deadly weapon with intent to kill, as a private citizen to interfere with and prevent the prosecuting witness from committing a felonious assault on a third person. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Erroneous Instructions. — Instructions implying that defendant could not lawfully use force in self-defense unless he was threatened with death or great bodily harm were erroneous. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Instructions implying that the burden of proof was on defendant to satisfy the jury that he acted in self-defense have no application in criminal prosecutions for felonious assault or assault with a deadly weapon. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

The following instruction did not properly define the serious injury contemplated by this section under which the indictment was drawn: "I instruct you in this case if you find beyond a reasonable doubt the assault was made with a gun under such circumstances as calculated to create a breach of the peace that would outrage the sensibilities of the community it would be an assault with a deadly weapon inflicting serious injury." State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Verdict. — In a prosecution under this section a verdict of guilty of "assault with intent to harm but not to kill" is a complete and sensible verdict, and supports judgment for a simple assault, the words "without intent to kill but with intent to harm" being mere surplusage. State v. Sumner, 269 N.C. 555, 153 S.E.2d 111 (1967).

Evidence Sufficient to Support Conviction.—See State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Strater, 272 N.C. 276, 158 S.E.2d 60 (1967).

Evidence Insufficient to Sustain Verdict against Defendant.—See State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951).

Applied in State v. Cooper, 238 N.C. 241, 77 S.E.2d 695 (1953); State v. Bridgers, 238 N.C. 677, 78 S.E.2d 756 (1953); State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956); State v. Williams, 246 N.C. 688, 99 S.E.2d 919 (1957); State v. Bullard, 253 N.C. 809, 117 S.E.2d 722 (1961); State v. Spencer, 256 N.C. 487, 124 S.E.2d 175 (1962); State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962); State v. Godwin, 260 N.C. 580, 133 S.E.2d 166 (1963); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Cooper, 266 N.C. 644, 146 S.E.2d 663 (1966); Housing Authority of City of Durham v. Thorpe, 267 N.C. 431, 148 S.E.2d 290 (1966), rev'd, 386 U.S. 670, 87 Sup. Ct. 515, 18 L. Ed. 2d 29 (1967); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Howard, 272 N.C. 144, 157 S.E.2d 665 (1967); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Jones, 229 N.C. 276, 49 S.E.2d 463 (1948); State v. Muse, 229 N.C. 536, 50 S.E.2d 311 (1948); State v. Way, 231 N.C. 716, 58 S.E.2d 716 (1950).

Stated in State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

Cited in State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Wagstaff, 235 N.C. 69, 68 S.E.2d 858 (1952); State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927);

State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); State v. Werst, 232 N.C. 330, 59 S.E.2d 835 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950).

§ 14-33. Misdemeanor assaults, batteries, and affrays; simple and aggravated; punishments.—(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than thirty (30) days.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault, assault and battery, or affray is guilty of a misdemeanor punishable as provided in subsection (c) below. A person commits an aggravated assault or assault and battery if in the course of such assault or assault and battery he:

(1) Uses a deadly weapon or other means or force likely to inflict serious injury or serious damage to another person; or
(2) Inflicts serious injury or serious damage to another person; or
(3) Intends to kill another person; or
(4) Assaults a female person, he being a male person; or
(5) Assaults a child under the age of twelve years; or
(6) Assaults a public officer while such officer is discharging or attempting to discharge a duty of his office.

A person commits an aggravated affray if in the course of it he commits an aggravated assault or assault and battery.

(c) Any aggravated assault, assault and battery, or affray is punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six (6) months, or both such fine and imprisonment if the offense is aggravated because of one of the following factors:

(1) Inflicting serious damage to another person;
(2) Assaulting a female, by a male person; or
(3) Assaulting a child under the age of twelve (12) years.

Any other aggravated assault, assault and battery, or affray is punishable by a fine in the discretion of the court, imprisonment not to exceed two (2) years, or both such fine and imprisonment. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620; 1911, c. 193; C. S., s. 4215; 1933, c. 189; 1949, c. 298; 1969, c. 618, s. 1.)

Cross Reference.—As to punishment for assault with intent to commit rape, see § 14-22.

Editor's Note.—The 1969 amendment rewrote this section.

The cases cited in the note below were decided prior to the 1969 amendment.

As to credit for time served under a vacated judgment upon retrial and second conviction, see 44 N.C.L. Rev. 458 (1966).

Opinions of Attorney General. — Mr. Charles B. Winberry, Seventh Judicial District Prosecutor, 8/8/69.

Constitutionality.—When the punishment does not exceed the limits fixed by this section, it cannot be considered cruel and unusual punishment in a constitutional sense. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common-law rules. State v. Roberts, 270 N.C. 655, 155 S.E.2d 303 (1967).

This section creates no new offense and relates only to punishment. Under its provisions all assaults and assaults and batteries not made felonious by other statutes are general misdemeanors punishable in the discretion of the court, except where no deadly weapon has been used and no serious damage done, the punishment may not exceed a fine of $50 or imprisonment for 30 days, unless the assault comes within one of the exceptions appearing in this section. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the exceptions and they remain general

misdemeanors. State v. Jackson, 226 N.C. 66, 36 S.E.2d 706 (1946).

This section creates no new offense. It relates only to punishment. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

This section deals with punishment for various types of assault — all common-law offenses. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

The 1911 amendment to this section was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or boy over eighteen years of age, upon a woman, for it was always a crime for a man, or a boy over eighteen years of age, to assault a woman. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

That defendant is over eighteen years of age does not create a separate and distinct offense in a prosecution of such defendant for assault upon a female. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

This section does not create a new offense as to assaults on a female, but only provides for different punishments for various types of assault. State v. Roberts, 270 N.C. 655, 155 S.E.2d 303 (1967).

Punishment — Extent. — While the language of this section authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of and imprisonment, or both, in the discretion of the trial judge, and his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

Where in a trial of an indictment, under § 14-32, defendant is convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's prison, there is error, as the offense described in the verdict is at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the court as provided by this section. State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943).

When no time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual, and violative of N.C. Const., Art. I, § 14. State v. Crandall, 225 N.C. 148, 33 S.E.2d 861 (1945).

Where the offense charged, an assault wherein serious damage was inflicted, was a misdemeanor, conviction thereof did not support judgment of imprisonment in the State's prison from two to five years. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

An assault with a deadly weapon with intent to kill is a misdemeanor and sentence of six years in the State's prison is not warranted. State v. Braxton, 265 N.C. 342, 144 S.E.2d 5 (1965).

Same—Limitation. — In conviction for simple assaults, where there is no intent to commit rape, and no deadly weapon used, and no serious bodily harm done, the punishment is limited to a fine of $50, or imprisonment for thirty days. State v. Johnson, 94 N.C. 863 (1886); State v. Battle, 130 N.C. 655, 41 S.E. 66 (1902), decided under former wording of section.

In prosecution for assault with a deadly weapon, appealing defendant relied upon and introduced evidence of self-defense and of matters in justification. The trial court instructed the jury that under the indictment and evidence the appealing defendant might be convicted of assault with a deadly weapon or of a simple assault. The jury convicted defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. It was held that the verdict of simple assault was permissible under the indictment and evidence, and the court was without power to sentence the appealing defendant to more than thirty days' imprisonment. State v. Palmer, 212 N.C. 10, 192 S.E. 896 (1937).

Effect of Acquittal on Part of Verdict. —The fact that the jury convicted defendant of assault with a deadly weapon, after it had acquitted him in a previous part of the verdict of assault with a deadly weapon doing serious injury, does not entitle him to his discharge on his motion in arrest of judgment. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943).

Jurisdiction Where No Deadly Weapon Used and No Serious Injury Done.—Long prior to the enactment of § 14-32, the legislature had dealt with the general subject of assault—including assault as known at the common law — and had attempted to lay down a schedule of punishments according to the aggravation of the offense, and at the same time, by the provisions of this section, carved out of the general jurisdiction of assaults given the courts an original and exclusive jurisdiction in the courts of the justice of the peace, where no deadly

weapon had been used and no serious injury inflicted. State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943).

Serious Damage or Use of Deadly Weapon Withdraws Jurisdiction from Justice of Peace.—If a deadly weapon is used, or "serious damage done," jurisdiction is withdrawn from the justice of the peace. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Serious damage includes serious physical injury. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

But May Include Damage Other Than Bodily Injury.—Serious damage may include damage other than bodily injury. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

An assailant may roll the victim in the mud, ruin his best Sunday suit, break his glasses, and destroy his watch. This "serious damage done" removes jurisdiction of the case from a justice of the peace. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

And Does Not Necessarily Involve Use of Deadly Weapon.—The term "serious damage done" embraces results other than those arising from the use of a deadly weapon. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Indictment Need Not Allege That Accused Was Male Person over Eighteen.—Since it is not an essential element of the criminal offense under this section, it is not required that the indictment allege that the defendant was a male person over 18 years of age at the time of the alleged assault. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921); State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

It is not necessary for the defendant's age to be stated in the bill of indictment to convict him for an assault on a female, when the proof clearly shows that he was over eighteen at the time of the alleged assault, and on the trial no question was made as to that fact. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Assault with a deadly weapon is a general misdemeanor, punishable by fine or imprisonment or both, "at the discretion of the court." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

An assault with a deadly weapon is a general misdemeanor. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

An assault with a deadly weapon with intent to kill is a general misdemeanor. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

And the maximum legal sentence therefor is two years. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

The maximum punishment for a general misdemeanor is two years. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

It Is an Included Offense under § 14-32.—Assault with a deadly weapon is an essential element of the felony created and defined by § 14-32, being an included "less degree of the same crime." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

The offense of an assault with a deadly weapon with intent to kill under this section, a general misdemeanor, is a lesser included offense of the felony charged in a bill of indictment drawn under § 14-32. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

Lesser Offense Included in Indictment for Assault with Intent to Rape.—An indictment charging assault with intent to commit rape includes the lesser offense of assault on a female. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

In a prosecution of a defendant for assault with intent to commit rape, nonsuit of the felony does not entitle the defendant to his discharge, but the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963); State v. Walker, 4 N.C. App. 478, 167 S.E.2d 18 (1969).

The marital relationship does not afford a license to commit assault. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Fact That Accused Is under Eighteen Is Matter of Defense. — The presumption is that the male person charged is over 18 years of age; and the fact, if it be a fact, that he is not over 18 years of age, relevant solely to punishment, is a matter of defense. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921); State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

If the defendant charged with an assault with intent to commit rape is under eighteen years of age, such fact is relevant only on the question of punishment and is a matter of defense. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Plea of Not Guilty as Putting Accused's Age in Issue.—Although not an essential

averment, if in fact the indictment charges that the defendant is a male person over the age of 18 years, it may be considered, nothing else appearing, that the defendant's plea of not guilty is a denial of this nonessential averment: but where as in the instant case the indictment does not so charge it cannot be said that the defendant, simply by his plea of not guilty, puts in issue whether he was over 18 years of age at the time of the alleged assault. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Age a Collateral Matter; How Determined. — Whether defendant was over 18 years of age is a collateral matter, wholly independent of defendant's guilt or innocence in respect of the assault charged; and it would seem appropriate that this be determined under a special issue. Unless the necessity therefor is eliminated by defendant's admission, this issue must be resolved by a jury, not by a court. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

The age of defendant relates only to the punishment. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Proof of Assault with Intent to Commit Rape. — To convict a defendant on the charge of an assault with intent to commit rape, the State must prove not only an assault, but that defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. It is not necessary to complete the offense that the defendant retain the intent throughout the assault, but if he, at any time during the assault, have an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence. It must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred. State v. Walker, 4 N.C. App. 478, 167 S.E.2d 18 (1969).

Presumption That Accused Is over Eighteen. — Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the jury is not required to determine defendant's age. State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944), citing State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921); State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932).

The presumption that defendant was over eighteen years of age at the time of the alleged assault is evidence for consideration by the jury. State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

There is a presumption that a male person charged with an assault with intent to commit rape, is over eighteen years of age. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Jury to Determine Defendant's Age.— In order to support the sentence as for a general misdemeanor it is required that the jury determine in its verdict specifically or by reference to the charge, that defendant is a male and was over eighteen years of age at the time of the assault. State v. Grimes, 226 N.C. 523, 39 S.E.2d 394 (1946).

Where there is no finding by jury that defendant was a man or boy over eighteen years of age at the time of the assault, judgment is not supported by the verdict, and a venire de novo will be ordered. State v. Grimes, 226 N.C. 523, 39 S.E.2d 394 (1946).

Evidence Sufficient under Section.—Evidence that the prisoner wakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her forehead, is sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon may not be granted, though such evidence is insufficient for a conviction of the intent to ravish her. State v. Hill, 181 N.C. 558, 107 S.E. 140 (1921).

Evidence that a negro man twenty-three years of age several times accosted a white girl fifteen years of age, on the streets of a town, with improper solicitation, resulting in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, is held to be such evidence of violence, begun to be executed with ability to effectuate it, as will come within the intent and meaning of this section making it a crime for a man or boy over eighteen years of age to assault any female person. State v. Williams, 186 N.C. 627, 120 S.E. 224 (1923).

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short

distance to her home, the evidence is insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

In a criminal prosecution upon an indictment charging defendant with assault with intent to commit rape wherein defendant tendered to the court a plea of guilty of an assault upon a female, it was held that while the court found that the assault was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, the court did not find the offense to be infamous and that the plea tendered by defendant, and accepted by the court, did not constitute a plea of guilty to an infamous offense, but, on the contrary, constituted a plea of guilty of a misdemeanor punishable as provided in this section. State v. Tyson, 223 N.C. 492, 27 S.E.2d 113 (1943).

In State v. Moore, 227 N.C. 326, 42 S.E.2d 84 (1947), the court held the evidence sufficient to sustain a verdict of guilty of assault upon a female.

Evidence Insufficient.—In State v. Silver, 227 N.C. 352, 42 S.E.2d 208 (1947), the court held the evidence insufficient to sustain a verdict of guilty of an assault upon a female.

Burden to Prove Age below Eighteen. — The burden is upon the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case, and it is not necessary to the validity of the bill that it state that he was over the age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911).

The burden of establishing the defense that he is under the age of eighteen rests on the defendant. State v. Morgan, 225 N.C. 549, 35 S.E.2d 621 (1945); State v. Herring, 226 N.C. 213, 37 S.E.2d 319 (1946); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958); State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Effect of Admission by Accused That He Is over Eighteen.—When a male defendant, during the progress of his trial on an indictment charging an assault on a female or a more serious crime embracing the charge of assault on a female, testifies that he is over eighteen years of age at the time of the alleged assault and there is no evidence or contention to the contrary, the collateral issue as to defendant's age need not be submitted to or answered by the jury. His testimony, under such circumstances, relating to such collateral issue, relevant solely to punishment, must be considered an admission on which the court may rely in the trial of the cause and in pronouncing judgment. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958), modifying in this connection. State v. Grimes, 226 N.C. 523, 39 S.E.2d 394 (1946).

Amendment of Warrant. — Where defendant enters a plea of guilty to a warrant charging an assault upon a female and nothing more, the trial court is without authority, upon a later amendment of the warrant to charge that defendant was a male person over eighteen years of age, to enter judgment on the amended warrant in the absence of a verdict of a jury or a plea of guilty by defendant to the warrant as amended, and sentence in excess of that permitted by law for the offense originally charged in the warrant will be set aside and cause remanded for trial upon the warrant as amended. State v. Terry, 236 N.C. 222, 72 S.E.2d 423 (1952).

Evidence of Assault on Female.—Evidence held sufficient to be submitted to the jury in a prosecution for assault on a female. State v. Allen, 245 N.C. 185, 95 S.E.2d 526 (1956).

For note as to the "show of violence" rule in North Carolina relative to an assault on a female, see 36 N.C.L. Rev. 198 (1958).

Sentence under Verdict of "Guilty of Simple Assault on a Female".—In a prosecution for assault to commit rape a verdict of "guilty of simple assault on a female" will support sentence for an assault on a female by a man or boy over eighteen years of age. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Verdicts of "guilty of an assault wherein serious injury is inflicted," is a sufficient finding of serious damage to remove these cases from the limitations under subsection (b) of this section and to permit punishment under subsection (a) of this section; that is, by fine, or imprisonment, or both, in the discretion of the court. State v. Troutman, 249 N.C. 395, 106 S.E.2d 569 (1959).

Applied in State v. Barham, 251 N.C. 207, 110 S.E.2d 894 (1959); State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966); State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Cited in State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953); State v. Barbour,

243 N.C. 265, 90 S.E.2d 388 (1955); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959); State v. Parrish, 251 N.C. 274, 111 S.E.2d 314 (1959); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); In re Wilson, 3 N.C. App. 136, 164 S.E.2d 56 (1968); State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968); State v. Stansberry, 197 N.C. 350, 148 S.E. 546 (1929); State v. Griggs, 197 N.C. 352, 148 S.E. 547 (1929); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950).

§ 14-33.1. Evidence of former threats upon plea of self-defense. —In any case of assault, assault and battery, or affray in which the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (1969, c. 618, s. 2.)

§ 14-34. Assaulting by pointing gun.—If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six (6) months, or both such fine and imprisonment. (1889, c. 527; Rev., s. 3622; C. S., s. 4216; 1969, c. 618, s. 2½.)

Editor's Note.—The 1969 amendment substituted "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six (6) months, or both such fine and imprisonment" for "fined, imprisoned, or both, at the discretion of the court."

Intentional Pointing Pistol without Legal Justification.—The literal provisions of this section are subject to the qualification that the intentional pointing of a pistol is in violation thereof only if done wilfully, that is, without legal justification. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956); State v. Adams, 2 N.C. App. 282, 163 S.E.2d 1 (1968).

An officer, in making a lawful arrest, is not justified in pointing a loaded weapon at the person to be arrested except in good faith upon necessity, real or apparent. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

Legal justification must be made to appear, whether it be an individual who intentionally points a pistol at his assailant in the exercise of a perfect right of self-defense or an officer who does so in good faith in the discharge of his official duty and when necessary or apparently necessary either to defend himself or to make a lawful arrest or otherwise to perform his official duty. But the mere fact that he is an officer engaged in the performance of an official duty does not perforce exempt him from the provisions of this section. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

Is Negligence Per Se.—If any person intentionally points a pistol at any person, this action is in violation of this section and constitutes an assault. Moreover, such action, being in violation of the statute is negligence per se; and if the pistol accidentally discharges, the injured person may recover damages for actionable negligence. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

Where there is no evidence that defendant intentionally pointed his pistol at anyone this section does not apply, and an instruction that the violation of the statute, proximately resulting in injury and death, would constitute manslaughter, must be held for error. The State's evidence of a statement by defendant to the effect that he was "dry firing" the pistol does not amount to evidence that defendant intentionally pointed the weapon at deceased, though it is competent upon the question of culpable negligence. State v. Kluckhohn, 243 N.C. 306, 90 S.E.2d 768 (1956).

Accidental Discharge of Gun — Manslaughter. — Where one points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter. State v. Coble, 177 N.C. 588, 99 S.E. 339 (1919); State v. Boldin, 227 N.C. 594, 42 S.E.2d 897 (1947).

When one causes the death of another by an unlawful act which amounts to an

assault on the person, as pointing a gun under circumstances which would not excuse its discharge, he is guilty at least of manslaughter. State v. Stitt, 146 N.C. 643, 61 S.E. 566 (1908).

Where one engages in an unlawful and dangerous act, such as "fooling with an old gun", i.e., using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter. State v. Hovis, 233 N.C. 359, 64 S.E.2d 564 (1951).

With few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Same — Question of Guilt for Jury. — Where one pointed a gun at another and death ensued by its discharge evidence was sufficient to submit to the jury the question of the prisoner's guilt or innocence of the crime of manslaughter. State v. Turnage, 138 N.C. 566, 49 S.E. 913 (1905); State v. Limerick, 146 N.C. 649, 61 S.E. 568 (1908).

Gun Need Not Be Loaded.—In an indictment for assault with a deadly weapon an instruction that if the State "had satisfied the jury beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty, was correct under the provisions of this section. State v. Atkinson, 141 N.C. 734, 53 S.E. 228 (1906).

Pointing Pistol in Pocket.—An instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket and "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault," is not error. State v. Atkinson, 141 N.C. 734, 53 S.E. 228 (1906).

Evidence of Guilt. — Defendant, pointing gun at the prosecutor, was, under the circumstances, guilty of an assault at common law, if not under this section. State v. Scott, 142 N.C. 582, 55 S.E. 69 (1906).

Variance. — Where warrant charged defendant with assaulting prosecutrix with a deadly weapon, to wit, a pistol, by pointing the pistol at her, her testimony that the defendant pointed a "gun" at her was sufficient to carry the case to the jury as tending to show a violation of this section. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

Applied in State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953); State v. Hammonds, 1 N.C. App. 448, 161 S.E.2d 749 (1968); State v. Head, 214 N.C. 700, 200 S.E. 415 (1939).

Cited in State v. Newton, 251 N.C. 151, 110 S.E.2d 810 (1959); Whitlow v. Southern Ry., 217 N.C. 558, 8 S.E.2d 809 (1940); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950).

§ 14-34.1. Discharging firearm into occupied property.—Any person who wilfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a felony punishable as provided in § 14-2. (1969, c. 341; c. 869, s. 7.)

Editor's Note. — The 1969 amendment rewrote this section.

§ 14-34.2. Assault with a firearm upon law-enforcement officer or fireman.—Any person who shall commit an assault with a firearm upon any law-enforcement officer or fireman while such officer or fireman is in the performance of his duties shall be guilty of a felony and shall be fined or imprisoned for a term not to exceed five years in the discretion of the court. (1969, c. 1134.)

ARTICLE 9.

Hazing.

§ 14-35. Hazing; definition and punishment.—It shall be unlawful for any student in any college or school in this State to engage in what is known as hazing, or to aid or abet any other student in the commission of this offense. For the purposes of this section hazing is defined as follows: "to annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat or harass

him, or to subject him to personal indignity." Any violation of this section shall constitute a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1913, c. 169, ss. 1, 2, 3, 4; C. S., s. 4217; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ 14-36. Expulsion from school; duty of faculty to expel.—Upon conviction of any student of the offense of hazing, or of aiding or abetting in the commission of this offense, he shall, in addition to any punishment imposed by the court, be expelled from the college or school he is attending. The faculty or governing board of any college or school charged with the duty of expulsion of students for proper cause shall, upon such conviction at once expel the offender, and a failure to do so shall be a misdemeanor. (1913, c. 169, ss. 5, 6; C. S., s. 4218.)

§ 14-37. Certain persons and schools excepted; copy of article to be posted.—This article shall not apply to females, nor to schools or colleges not keeping boarders, nor to schools keeping less than ten student boarders. A copy of this article shall be framed and hung on display in every college or school to which it applies. (1913, c. 169, s. 3; C. S., s. 4219.)

§ 14-38. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony.—In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the State shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony. (1913, c. 169, s. 8; C. S., s. 4220.)

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.—It shall be unlawful for any person, firm or corporation, or any individual, male or female, or its or their agents, to kidnap or cause to be kidnapped any human being, or to demand a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or to hold any human being for ransom: Provided, however, that this section shall not apply to a father or mother for taking into their custody their own child.

Any person, or their agent, violating or causing to be violated any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life.

Any firm or corporation violating, or causing to be violated through their agent or agents, any of the provisions of this section, and upon being found guilty, shall be liable to the injured party suing therefor, the sum of twenty-five thousand dollars ($25,000), and shall forfeit its or their charter and right to do business in the State of North Carolina. (1933, c. 542.)

Editor's Note.—For case law survey on kidnapping, see 41 N.C.L. Rev. 445 1963).

History.—A former statute, C.S., s. 4221, provided that any person who forcibly or fraudulently kidnapped any person should be guilty of a felony, and upon conviction might be punished in the discretion of the court, not exceeding twenty years in the State's prison. As a result of the kidnapping and death in the Lindbergh tragedy, the General Assembly of North Carolina repealed C.S., s. 4221 by the enactment of Public Laws 1933, c. 542, now codified as this section. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 1966).

The effect of this section, repealing C.S., s. 4221, is to increase within the discretion of the court the maximum punishment for kidnapping from twenty years to life, and not to make a life term mandatory upon conviction, the intent of this section to this effect being shown by the use of the word

"punishable" in prescribing the sentence. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

Kidnapping was a misdemeanor at common law. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

But Is Made a Felony by Statute.—The statutes of this jurisdiction relating to kidnapping did not originate the offense; they make kidnapping a felony and provide the limit of punishment. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

Definition.—Under this section kidnapping is the taking and carrying away of a human being by physical force or by fraud, done unlawfully or without lawful authority, and a charge to jury defining the offense as forcibly taking and carrying away of a human being is erroneous as being incomplete definition of the crime. State v. Witherington, 226 N.C. 211, 37 S.E.2d 497 (1946).

This section does not define "kidnap." State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

The word "kidnap" as used in this section means the unlawful taking and carrying away of a person by force and against his will (the common-law definition). State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965); State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

The word "kidnap" as used in this section means the unlawful taking and carrying away of a person by force or fraud and against his will, or the unlawful seizure and detention of a person by force or fraud and against his will. State v. Gough, 257 N.C. 348, 126 S.E.2d 118 (1962).

Construction.—This section is construed according to the common-law definition of "kidnap." State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

Elements of Crime Are Dependent on Wording of Statute.—The elements of the crime of kidnapping are necessarily dependent on the wording of the statute in the particular state, and authority cited from the states must be read in connection with the statute of the particular state. State v. Gough, 257 N.C. 348, 126 S.E.2d 118 (1962).

When Person Is Guilty of Kidnapping.—Under this section a person is guilty of kidnapping (1) if he kidnaps or causes to be kidnapped any human being, or (2) if he demands a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or (3) if he holds any human being for ransom. State v. Gough, 257 N.C. 348, 126 S.E.2d 118 (1962).

Taking and Carrying Away.—Under this section, regardless of the means used, by which the taking and carrying away of a human being is effected, there must be further finding that such taking and carrying away was unlawful or done without lawful authority, or effected by fraud. State v. Witherington, 226 N.C. 211, 37 S.E.2d 497 (1946).

Physical Force or Violence Is Not Always Necessary.—The better view as to the common-law definition of kidnapping is that the use of physical force or violence is not always necessary to the commission of kidnapping, or certainly of child stealing, but that fraud may likewise be sufficient. State v. Gough, 257 N.C. 348, 126 S.E.2d 118 (1962).

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping, as the word "kidnap" is used in this section and as it is defined at common law. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

The crime of kidnapping is frequently committed by threats and intimidation and appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and are equivalent to the use of actual force or violence. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

Distance Immaterial.—It is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

Crime May Be Committed by Means of Fraud.—The crime of kidnapping by its very nature cannot ordinarily be committed by an act to which a person, being capable in law of consenting, consents in a legally valid manner. But where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim. In brief, under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person. State v. Gough, 257 N.C. 347, 126 S.E.2d 118 (1962).

Section Increases Maximum Punishment.—The effect of this section, repealing § 4221 of the Consolidated Statutes of North Carolina, relating to the crime of kidnapping, is to increase, within the discretion

of the court, the maximum punishment for the crime from twenty years to life, and not to make a life term mandatory upon conviction, the intent of the statute to this effect being shown by the use of the word "punishable" in prescribing the sentence. State v. Kelly, 206 N.C. 660, 175 S.E. 294 (1934).

Punishment Discretionary.—This section leaves the term of imprisonment in the discretion of the court. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

Evidence held sufficient to be submitted to the jury on the charge of kidnapping. State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956).

There was ample evidence to support convictions of kidnapping in State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969).

Former Jeopardy.—The argument that assault and assault on a female are essential elements of rape and since the defendants were convicted of assault and assault on a female, respectively, when tried under the indictment for kidnapping, they have been formerly in jeopardy with reference to the offenses now charged in the indictments for rape, is ingenious but without merit. In the first place, a simple assault is probably not, and an assault on a female is certainly not, an essential element of the crime of kidnapping, since the victim of a kidnapping need not be a female and may be enticed away by fraud rather than forced by violence or threat to accompany the abductor. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Applied in State v. Mallory, 266 N.C. 31, 145 S.E.2d 335 (1965).

Cited in State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

§ 14-40. Enticing minors out of the State for the purpose of employment.—If any person shall employ and carry beyond the limits of this State any minor, or shall induce any minor to go beyond the limits of this State, for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. The fact of the employment and going out of the State of the minor, or of the going out of the State by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the State is a minor. (1891, c. 45; Rev., s. 3630; C. S., s. 4222; 1969, c. 1224, s. 4.)

Editor's Note. — The 1969 amendment rewrote the provisions of the first sentence relating to punishment.

Count Joined with One under § 14-41.—An indictment for abduction, containing two counts, one under this section and the second under § 14-41, cannot be quashed for misjoinder of two different offenses, as the two counts are merely statements of the same transaction to meet the different phases of proof. State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

§ 14-41. Abduction of children. — If anyone shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on conviction shall be fined or imprisoned in the State's prison for a period not exceeding fifteen years. (1879, c. 81; Code, s. 973; Rev., s. 3358; C. S., s. 4223.)

Definition. — Abduction under this section, is the taking and carrying away of a child, ward, etc., either by fraud, persuasion, or open violence. The consent of the child is no defense. If there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890); State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

This section is broad and comprehensive in its terms, and embraces all means by which the child may be abducted. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890).

Intent.—There is nothing in this section which requires that the abduction should be with a particular intent. It is only necessary to allege and prove that the child was abducted, or by any means induced to leave its custodian. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890).

Force Not Necessary.—In a prosecution under this section it is not necessary for

the State to show that the child was carried away by force. State v. Ashburn, 230 N.C. 722, 55 S.E.2d 333 (1949).

Father's Consent a Good Defense. — If the carrying away was with the father's consent, that fact is a defense the burden of which is upon the defendant. State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

The indictment need not state the means by which the abduction was accomplished, nor that it was done without the consent and against the will of her father, State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906), nor that the defendant was not a nearer relation to the child than the person from whose custody it was abducted. State v. George, 93 N.C. 567 (1885).

Evidence that defendant induced a minor to accompany him on a trip for immoral purposes by promising marriage is sufficient to sustain conviction. State v. Ashburn, 230 N.C. 722, 55 S.E.2d 333 (1949).

Use of Wrong Expression in Charge to Jury. — The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away." State v. Truelove, 224 N.C. 147, 29 S.E.2d 460 (1944).

§ 14-42. Conspiring to abduct children.—If anyone shall conspire to abduct, or by any means to induce any child under the age of fourteen years, who shall reside with any of the persons designated in § 14-41, or shall reside at school, to leave such persons or the school, he shall be guilty of a felony, and on conviction shall be punished as prescribed in that section: Provided, that no one who may be a nearer blood relation to the child than the persons named in § 14-41 shall be indicted for either of said offenses. (1879, c. 81, s. 2; Code, s. 974; Rev., s. 3359; C. S., s. 4224.)

Cross References.—As to application of this section, see note to § 14-41. As to persuading children to leave any State institution to which they have been legally committed, see § 14-266.

Editor's Note.—For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

§ 14-43. Abduction of married women.—If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided further, that no conviction shall be had upon the unsupported testimony of any such married woman. (1903, c. 362; Rev., s. 3360; C. S., s. 4225.)

Elopement Defined.—Elopement of wife is her voluntary act in deserting her husband to go away with and cohabit with another man. State v. O'Higgins, 178 N.C. 708, 100 S.E. 438 (1919).

Effect of Prior Adultery.—In order to constitute the offense of abducting or eloping with a married woman, under this section, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it was shown that the wife had not thus yielded herself to any other man than the defendant. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923); State v. Temple, 240 N.C. 738, 83 S.E.2d 792 (1954).

Adultery after the elopement is an essential element of the offense under this section. State v. Ashe, 196 N.C. 387, 145 S.E. 784 (1928).

Voluntary Leaving of Husband. — The fact that the wife had voluntarily left her husband falls within the definition of this section when this results from the unlawful scheming of the man to achieve that end. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Evidence. — Evidence tending to show that the defendant knew of the whereabouts of the wife of another after she had left her husband, and that they had dined together at a house of ill fame, and that they had shut themselves in a room thereof is competent upon the question of the abduction and of their immoral relations and a circumstance to be submitted to the jury. State v. Ashe, 196 N.C. 387, 145 S.E. 784 (1928).

In a prosecution under this section the necessary element of adultery may be shown by circumstantial evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt. State v. Ashe, 196 N.C. 387, 145 S.E. 784 (1928).

Evidence that a married woman had retained her innocence and virtue through some 20 years of married life and through more than 15 months of professions of love for her by defendant, and that she did not have intercourse with defendant until some six days prior to the actual elopement, and after he had asked her to marry him, is sufficient upon the question of her innocence and virtue, since the requirement of the statute is fulfilled if her innocence and virtue existed at the beginning of the acts of the defendant which in sequence led to the elopement. State v. Temple, 240 N.C. 738, 83 S.E.2d 792 (1954)

Testimony of Wife Supported by Others. —The provision of this section that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Evidence of Influence of Defendant. — Upon the question of influence of the defendant over the wife of another whom he is being tried for abducting and eloping with, it is competent to show the strength of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that the abducted woman had used her own money for expenses, is not subject to just exception. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Testimony of Husband as to Chastity. —On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home; such testimony may be sufficient to sustain a conviction. State v. O'Higgins, 178 N.C. 708, 100 S.E. 438 (1919); State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Woman's General Character for Virtue Admissible. — In an indictment under this section, where the character of the woman is by express terms of the statute directly in question, evidence as to her general character for virtue is admissible. State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906).

Burden of Proof of First Proviso. — The State has the burden of proving the facts required under the first proviso of the section. State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906).

The law requires proof of the fact that at the time of the commission of the offense the wife was an innocent and virtuous woman, before a conviction can be had under this section. State v. Temple, 240 N.C. 738, 83 S.E.2d 792 (1954).

Instructions.—In a prosecution under this section, an instruction that the married woman must have been innocent and virtuous at the time of the elopement "or at sometime prior to the elopement," must be held for prejudicial error. State v. Temple, 240 N.C. 738, 83 S.E.2d 792 (1954).

Where the evidence is that the defendant and the married woman met in a bad house, it is not prejudicial or reversible error for the judge in the statement of facts in his instructions to call it a "bad" house or "house of ill fame," where this was not brought to his attention at the time. State v. Ashe, 196 N.C. 387, 145 S.E. 784 (1928).

ARTICLE 11.

Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.—If any person shall wilfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (1881, c. 351, s. 1; Code, s. 975; Rev., s. 3618; C. S., s. 4226; 1967, c. 367, s. 1.)

Editor's Note.—The 1967 amendment deleted "unless the same shall be necessary to preserve the life of the mother" following the words "such child" near the middle of the section.

For article on "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes," see 46 N.C.L. Rev. 730 (1968).

Section relates to destruction of child.

State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

This section and § 14-45 create separate and distinct offenses, the first statute being designed to protect the life of a child in ventre sa mere, and the second being primarily for the protection of the woman. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947); State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

The words "either pregnant or quick with child" contained in this section mean "pregnant with child that is quick," since otherwise the words "or quick with child" would be merely confusing surplusage, and since the sine qua non of the offense is the intent to destroy the child in ventre sa mere, which must be quick before it has independent life. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947); State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949). But see, State v. Slagle, 83 N.C. 630 (1880).

Thus, evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within thirty days after she had conceived, is insufficient to be submitted to the jury in a prosecution under this section since in such instance the child could not be quick. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947).

Elements of Offense—Intent. — The essential ingredients of the offense is the intent and not the noxious nature of the drug used. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901); State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

Same—Abortion or Procuring Abortion. —It is just as much a crime to produce an abortion under the advice of and with means furnished by another, as it is to have an abortion performed by another. The gravamen of the offense is the abortion, or the procuring of the abortion, and not the manner by which it is accomplished. Parker v. Edwards, 222 N.C. 75, 21 S.E.2d 876 (1942).

Same—Prescribing or Advising.—For a conviction under this section it is not essential to show that defendant procured the drug or that the woman used it. If defendant prescribed or advised its use with the illegal intent, that alone is sufficient. State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921).

Same—Procuring Drug. — Under this section it is not necessary to charge or prove that the accused procured the drug. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901).

Same — Nature of Drug. — It is no defense even if defendant could show that the drug would not in fact cause a miscarriage. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901). For the offense is committed by administering any substance with intent to procure an abortion. State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

Woman Not an Accomplice.—The woman is not, in a legal sense, an accomplice, whether or not she consents to the abortion. State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

Statement of Woman as to Payment of Doctor's Fee.—The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of this section and § 14-45, that the defendant had paid the physician one half of the $200 fee he had charged for such services, uttered in the defendant's presence, is held competent with the other evidence in this case; and whether the defendant, under the circumstances was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence, whether they were understood by him, whether he denied them or remained silent. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Admissibility of Statement Made Four Months Prior to Abortion. — Upon the trial of a physician for procuring an abortion, testimony of a conversation between the physician and the woman as to an abortion about four months prior to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error. State v. Brown, 202 N.C. 221, 162 S.E. 216 (1932).

Evidence of Disease Facilitating Abortion Properly Excluded.—Evidence offered by the defendant tending to show that the deceased was suffering from a disease which facilitated the abortion was not relevant to the issue involving the defendant's guilt as charged in the indictment. There was no error in the exclusion of such evidence. State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937).

Admission of evidence that woman took an anaesthetic was not prejudicial. State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937).

Sufficiency of Evidence. — Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine or substance with intent to destroy the child is sufficient for a conviction under this section. State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921).

Testimony of the relation between the

defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Variance.—On the trial of an indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, where the proof tends to show the performance of an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and defendant's motion for nonsuit should be allowed. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

Where warrant charged that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, and the evidence tended to show that this was prior to the time the child was quick, nonsuit for fatal variance should have been allowed. State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949).

Joinder of Offenses.—Where the defendant is tried under this section and § 14-45, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Upon the trial on an indictment charging the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, there was a verdict of guilty, and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered, and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby. State v. Dilliard, 223 N.C. 446, 27 S.E.2d 85 (1943).

Belief of Woman as to Her Pregnancy.—In a prosecution for abortion, belief of victim on the day of alleged operation that she was pregnant is a relevant circumstance, properly proved by her own testimony. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Prejudicial Evidence. — In a prosecution for abortion, testimony of the woman that she went to defendant by reason of newspaper articles stating that defendant had performed abortions was held incompetent as hearsay and extremely prejudicial to defendant, entitling her to a new trial. State v. Gavin, 232 N.C. 323, 59 S.E.2d 823 (1950).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Cited in State v. Geurukus, 195 N.C. 642, 143 S.E. 208 (1928).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or State's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court. (1881, c. 351, s. 2; Code, s. 976; Rev., s. 3619; C. S., s. 4227.)

Cross Reference.—See note under § 14-44.

Generally.—This section relates to miscarriage of, or to injury to, or destruction of the woman. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

Section Is Designed for Protection of Woman. — This section is designed primarily for the protection of the woman. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

This section does not require that the woman be quick with child and for that reason provides for a lesser punishment than § 14-44. Its purpose is the protection of "any pregnant woman." State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

A woman may be pregnant within the meaning of this section though the foetus has not quickened. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

An actual miscarriage is not a necessary element to prove violation of this section. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960); State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

But proof of pregnancy is essential. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960); State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

When Death Results from Abortion, It Is Culpable Homicide.—When death results from an abortion or attempted abortion of a pregnant woman, when not necessary to save the life of the woman or that of the

unborn child or to protect the health of the woman, it is a culpable homicide, even though done at the woman's request. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

Evidence.—In a prosecution for aiding and abetting in an abortion, it was held that the evidence was sufficient to take the case to the jury. State v. Manning, 225 N.C. 41, 33 S.E.2d 239 (1945); State v. Choate, 228 N.C. 491, 46 S.E.2d 476 (1948).

Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show animus; but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent. State v. Choate, 228 N.C. 491, 46 S.E.2d 476 (1948).

In a prosecution for abortion, testimony of a medical expert that a certain described treatment of a pregnant woman might cause an abortion is competent. State v. Brooks, 267 N.C. 427, 148 S.E.2d 263 (1966).

Applied in State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964).

Cited in State v. Furley, 245 N.C. 219, 95 S.E.2d 448 (1956); State v. Gavin, 232 N.C. 323, 59 S.E.2d 823 (1950).

§ 14-45.1. When abortion not unlawful.—Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in North Carolina, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest and the said alleged rape was reported to a law-enforcement agency or court official within seven days after the alleged rape, and

Only after the said woman has given her written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent, and

Only when the said woman shall have resided in the State of North Carolina for a period of at least four months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger, and

Only if the abortion is performed in a hospital licensed by the North Carolina Medical Care Commission, and

Only after three doctors of medicine not engaged jointly in private practice, one of whom shall be the person performing the abortion, shall have examined said woman and certified in writing the circumstances which they believe to justify the abortion, and

Only when such certificate shall have been submitted before the abortion to the hospital where it is to be performed; provided, however, that where an emergency exists, and the certificate so states, such certificate may be submitted within twenty-four hours after the abortion. (1967, c. 367, s. 2.)

Editor's Note. — Session Laws 1967, c. 367, s. 2, designated the above section as § 14-46. Since there was already a § 14-46 in the General Statutes, the section added by the 1967 act has been designated § 14-45.1 herein.

For comment on this section, see 46 N.C.L. Rev. 585 (1968).

Opinions of Attorney General.—Representative James H. Carson, Jr., Charlotte, 7/31/69.

§ 14-46. Concealing birth of child.—If any person shall, by secretly burying or otherwise disposing of the dead body of a newborn child, endeavor to

conceal the birth of such child, such person shall be guilty of a felony, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or State's prison, at the discretion of the court: Provided, that the imprisonment in the State's prison shall in no case exceed a term of ten years: Provided further, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. Any person aiding, counseling or abetting any woman in concealing the birth of her child shall be guilty of a misdemeanor. (21 Jac. I, c. 27; 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14; 1818, c. 985, P. R.; R. C., c. 34, s. 28; 1883, c. 390; Code, s. 1004; Rev., s. 3623; C. S., s. 4228.)

Editor's Note.—Under the section as it stood after the amendment of 1818, the offense was the concealing of the death of a being on whom murder could have been committed. If, therefore, the child was stillborn, concealment would be no offense. The burden of showing that fact would, however, be on the defendant. State v. Joiner, 11 N.C. 350 (1826).

And a former conviction for concealing the birth of a child is no defense to an indictment for the murder of such child. State v. Morgan, 95 N.C. 641 (1886).

Evidence Insufficient for Directed Verdict.—Under the provisions of this section making it a felony for any person to conceal the birth of a newborn child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. State v. Arrowood, 187 N.C. 715, 122 S.E. 759 (1924).

ARTICLE 12.

Libel and Slander.

§ 14-47. Communicating libelous matter to newspapers. — If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1901, c. 557, ss. 2, 3; Rev., s. 3635; C. S., s. 4229; 1969, c. 1224, s. 1.)

Cross References.—As to the truth of allegations in indictment for libel as a defense, see § 15-168. As to libel by a newspaper, see §§ 99-1 and 99-2. As to derogatory reports about banks, see §§ 53-128 and 53-129. As to derogatory statements about building and loan associations, see § 54-44.

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Responsibility of Newspapermen. — This statute punishes criminally the person who communicates libelous matter to newspapers, but that does not excuse the newspaper for publishing such libels, and the newspaper is responsible in damages for the injury done by the publication. Newspapermen, however, are not so apt to be prosecuted criminally for libel unless the publication attempts to destroy the reputation of an innocent woman by words which amount to charge of incontinency, under § 14-48, or unless there is a willful derogatory statement about the financial condition of a bank, under § 54-44. 4 N.C.L. Rev. 27.

Cited in Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961); State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

§ 14-48. Slandering innocent women.—If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor punishable by a fine not to

exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1879, c. 156; Code, s. 1113; Rev., s. 3640; C. S., s. 4230; 1969, c. 1224, s. 1.)

Cross Reference. — As to civil liability for charging innocent women with incontinency, see § 99-4 and note thereto.

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Object of Statute. — The object of the legislature in enacting this section was to protect the character of innocent women, that is, chaste and virtuous women, against wanton and malicious attempts to destroy their reputation by charges of incontinency. State v. Aldridge, 86 N.C. 680 (1882).

Essential Elements of Offense.—The innocence and virtue, then, of the woman who is subject of the attempt, lie at the very foundation of the offense, and constitute its most essential element. State v. McDaniel, 84 N.C. 803 (1881); State v. Aldridge, 86 N.C. 680 (1882); State v. Smith, 155 N.C. 473, 71 S.E. 305 (1911).

What Constitutes Offense.—The offense of slandering an innocent woman consists in the attempt to destroy the reputation of an innocent woman by a charge of incontinency. State v. Davis, 92 N.C. 764 (1885).

It consists not in the slander of a woman falsely by charging her with incontinency, but in the attempt to destroy her reputation by such means. State v. McDaniel, 84 N.C. 803 (1881).

Same—Sufficiency. — And to constitute this offense, it is necessary to prove that the words alleged to have been spoken amounted to a charge of actual, definitive, illicit sexual intercourse. State v. Moody, 98 N.C. 671, 4 S.E. 119 (1887).

"Innocent Woman". — An "innocent woman," within the meaning of this section, is one who has never had sexual intercourse with any man, State v. Malloy, 115 N.C. 737, 20 S.E. 461 (1894); one who had never had actual illicit intercourse with any man, State v. Davis, 92 N.C. 764 (1885); State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888); a pure woman—one whose character is "unsullied," State v. McDaniel, 84 N.C. 803 (1881); a woman who, at the time the alleged slanderous charge was made, and at the time of the trial therefor, was chaste and virtuous, State v. Grigg, 104 N.C. 882, 10 S.E. 684 (1889).

Improper Conduct Short of Incontinency. —Mere lasciviousness, and the permission of liberties by men with her, although we might consider them improper, were not contemplated by the statute. State v. Davis, 92 N.C. 764 (1885).

And a woman who has never had actual sexual intercourse with anyone is an innocent woman, within the meaning of this section, even though she and a man were surprised in each other's embrace, about to commit the act of copulation, but before it took place. State v. Hinson, 103 N.C. 374, 9 S.E. 552 (1889).

Status of Reformed Women.—The question whether to slander a woman who had once lapsed from virtue, but who had reformed and led an exemplary life, would be a crime under this statute, was discussed but undecided in State v. Davis, 92 N.C. 764 (1885), the court expressing the opinion that in view of the strict construction put on the statute it would seem to exclude from the protection of its provisions every woman who had, at some time of her life, made a slip in her virtue, even though she had afterwards reformed.

Fortunately, however, the question was finally decided in favor of the reformed woman and the present law is that the fact that a woman at some former period in her life had departed from the path of virtue, will not per se entitle a defendant, indicted under the statute, to an acquittal; on the contrary, if the prosecutrix has satisfied the jury that she has reformed and lead an exemplary life, she is entitled to the protection of the law. State v. Grigg, 104 N.C. 882, 10 S.E. 684 (1889).

Status of Seduced Women. — "A man cannot seduce a virtuous woman and then slander her with impunity, and, when indicted for such slander, claim protection against the penalties of law by pleading her disgrace, which he had caused to be brought upon her. The statute would fail to give that protection to innocent women, that was intended, if this was allowed." State v. Misenheimer, 123 N.C. 758, 31 S.E. 852 (1898).

And a woman, seduced before marriage, but whose character was good before and since marriage, with this exception, is an "innocent woman" under this section. State v. Grigg, 104 N.C. 882, 10 S.E. 684 (1889); State v. Misenheimer, 123 N.C. 758, 31 S.E. 852 (1898).

Slander by Husband.—State v. Edens, 85 N.C. 522 (1881), holding that a husband is not indictable for slandering his wife, is overruled, and now, he is indictable under this section, if he wantonly and maliciously

slanders his wife. State v. Fulton, 149 N.C. 485, 63 S.E. 145 (1908).

Malice Implied. — Where a slanderous charge is made, malice is implied, except in case of a privileged communication. State v. Malloy, 115 N.C. 737, 20 S.E. 461 (1894).

Burden of Proof.—The burden is upon the State to show that an innocent and virtuous woman has been slandered in order to convict under the provisions of this section. State v. Smith, 155 N.C. 473, 71 S.E. 305 (1911).

On trial of an indictment for slander under this section, the admission of the defendant that he spoke the words charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her innocence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant. State v. McDaniel, 84 N.C. 803 (1881).

ARTICLE 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-49. Malicious use of explosive or incendiary; attempt; punishment.—(a) Any person who wilfully and maliciously injures or attempts to injure another by the use of any explosive or incendiary device or material is guilty of a felony.

(b) Any person who wilfully and maliciously damages or attempts to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony.

(c) Any person who violates any provision of this section is punishable by imprisonment in the State's prison for not less than five nor more than thirty years. (1923, c. 80, s. 1; C. S., s. 4231(a); 1951, c. 1126, s. 1; 1969, c. 869, s. 6.)

Editor's Note. — The 1969 amendment rewrote this section.

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.—Any person who wilfully and maliciously damages or attempts to damage any real or personal property of any kind or nature, being at the time occupied by another, by the use of any explosive or incendiary device or material is guilty of a felony punishable by imprisonment in the State's prison for not less than ten years nor more than imprisonment for life. (1967, c. 342; 1969, c. 869, s. 6.)

Editor's Note. — The 1969 amendment rewrote this section.

Applied in State v. Conrad, 4 N.C. App. 50, 165 S.E.2d 771 (1969).

§ 14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.—(a) Any person who conspires with another wilfully and maliciously to injure another by the use of any explosive or incendiary device or material is guilty of a felony.

(b) Any person who conspires with another wilfully and maliciously to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony.

(c) Any person who violates any provision of this section is punishable by imprisonment in the State's prison for not more than fifteen years. (1923, c. 80, s. 2; C. S., s. 4231(b); 1951, c. 1126, s. 1; 1969, c. 869, s. 6.)

Editor's Note. — The 1969 amendment rewrote this section.

For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

A criminal conspiracy is continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. State v. Hicks, 233 N.C. 511, 64 S.E.2d 871 (1951), cert. denied, Hicks v. North Carolina, 342 U.S. 831, 72 S. Ct. 56, 96 L. Ed. 629 (1951).

Nonsuit Where Conspiracy Formed Out of State.—See note to § 15-173.

§ 14-50.1. Explosive or incendiary device or material defined.—As used in this article, "explosive or incendiary device or material" means nitroglycerine, dynamite, gunpowder, other high explosive, incendiary bomb or grenade, other destructive incendiary device, or any other destructive incendiary or explosive device, compound, or formulation; any instrument or substance capable of being used for destructive explosive or incendiary purposes against persons or property, when the circumstances indicate some probability that such instrument or substance will be so used; or any explosive or incendiary part or ingredient in any instrument or substance included above, when the circumstances indicate some probability that such part or ingredient will be so used. (1969, c. 869, s. 6.)

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.—There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question. (1889, c. 434, s. 1; Rev., s. 3331; C. S., s. 4232; 1969, c. 543, s. 1.)

Cross References. — As to power of an individual to arrest a burglar, see § 15-40. As to accessories, see § 14-5 et seq. As to breaking into or entering jails with intent to kill or injure prisoners therein, see § 14-221.

Editor's Note. — The 1969 amendment added the last sentence.

For note on burglary in North Carolina, see 35 N.C.L. Rev. 98 (1956).

In General. — Burglary, as defined at common law, was a capital offense, i.e., the breaking into and entering of the "mansion or dwelling house of another in the nighttime, with an intent to commit a felony therein," whether the intent was executed after the burglarious act or not. This has been changed by this section dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923); State v. Morris, 215 N.C. 552, 2 S.E.2d 554 (1939).

The crime of burglary at common law was composed of five distinct elements, which were: (1), the breaking; (2), the entering; (3), that the breaking and entry be into a mansion house; (4), that the breaking and entering were in the nighttime, and (5), that the breaking and entering were with the intent to commit a felony. State v. Whit, 49 N.C. 349 (1857).

Burglary is a common-law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein and whether the building is occupied at the time affects only the degree. State v. Mumford, 227 N.C. 132, 41 S.E.2d 201 (1947).

Burglary is a common-law offense. To warrant a conviction thereof it must be made to appear that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. That the building was or was not occupied at the time affects the degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

The purpose of the statute is to protect the habitations of men, where they repose and sleep, from meditated harm. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

First and Second Degree Burglary Distinguished.—If the burglary occurred—i.e., the breaking and entry occurred—while the dwelling house was actually occupied, that is, while some person other than the intruder was in the house, the crime is burglary in the first degree. If the house was then unoccupied, however momentarily, and whether known to the intruder or not, the offense is burglary in the second degree. Otherwise, the elements of the two offenses are identical. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Elements of Burglary in First Degree.—Burglary in the first degree consists of the intent, which must be executed, of breaking and entering the presently occupied dwelling house or sleeping apartment of another, in the nighttime, with the further concurrent intent, which may be executed or not, then and there to commit therein some crime which is in law a felony. This particular, or ulterior, intent to commit therein some designated felony must be proved, in addition to the more general one, in order to make out the offense. State v. Thorpe, 274 N.C. 457, 164 S.E.2d 171 (1968).

Lesser Offense Set Forth in § 14-54.—The statutory offense set forth in § 14-54 is a less degree of the offense of burglary in the first degree as defined in this section. State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968).

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of § 14-54, is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

A violation of § 14-54 is a less degree of the felony of burglary in the first degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

The sleeping apartment referred to in this section is one in which a person regularly sleeps. State v. Foster, 129 N.C. 704, 40 S.E. 209 (1901).

Curtilage. — The meaning of the term curtilage is a piece of ground, either inclosed or not, that is commonly used with the dwelling house. State v. Twitty, 2 N.C. 102 (1794).

Indictment Must Charge Intended Felony.—In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though it is not necessary that the actual commission of the intended felony be charged or proven. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923).

Same—Proof of a Different Intent.—An averment in an indictment for burglary, that the breaking was with the intent to commit larceny, is supported by proof that the entry was made with a purpose to commit a robbery. State v. Halford, 104 N.C. 874, 10 S.E. 524 (1889). The intent may be shown by circumstances. State v. McBryde, 97 N.C. 393, 1 S.E. 925 (1887).

Indictment Must Charge Occupancy. — The indictment charging the offense alleging that the dwelling house was in the actual occupation of someone at the time of the commission of the crime, was not required at common law, nor under § 14-53, but now, under the provisions of this section omission of that averment makes the indictment good only as an indictment for burglary in the second degree. State v. Fleming, 107 N.C. 905, 12 S.E. 131 (1890).

Burglary cannot be committed in a tent or booth erected in a market or fair, although the owner lodges in it. State v. Jake, 60 N.C. 471 (1864).

Burglary in a Store with Sleeping Quarters.—The offense of burglary may be committed by breaking into a store if there are sleeping quarters in the store, for the sleeping there makes it a dwelling. State v. Foster, 129 N.C. 704, 40 S.E. 209 (1901).

Value of Goods Stolen Immaterial. — A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than $20.00 is no defense to the capital charge, the provision of § 14-72, dividing larceny into two degrees, by its terms having no application to burglary. State v. Richardson, 216 N.C. 304, 4 S.E.2d 852 (1939).

Charging Elements of First and Second Degree. — Where a burglarious breaking into a dwelling house has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree is erroneous. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923).

Where there is evidence of a burglarious entry into a dwelling house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of

the greater offense. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923).

Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible is without error. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

Discretionary Power of the Jury as to Degree.—The jury does not have the discretionary power to return a verdict of burglary in the second degree if all the evidence shows burglary in the first degree. But under an indictment for burglary in the first degree a verdict of second degree burglary may be returned if the evidence shows such an offense. State v. Fleming, 107 N.C. 905, 12 S.E. 131 (1890).

Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized. State v. Alston, 113 N.C. 666, 18 S.E. 692 (1893); State v. Johnston, 119 N.C. 883, 26 S.E. 163 (1896).

One charged with burglary in the first degree and having admitted the entering and taking, the only question is whether it was done at nighttime, and the jury should not be charged that they could convict of a lesser offense as provided by this section, for the offense was either burglary in the first degree or larceny. State v. McKnight, 111 N.C. 690, 16 S.E. 319 (1892).

Sufficient Evidence to Submit Question of First Degree Burglary to Jury. — Evidence that the house was broken into by forcing the door open, that the time was late at night, and that the prosecuting witness and his wife were asleep in the room entered, together with evidence that tracks in the freshly fallen snow were followed and led to the defendant's room in another house in a distant part of the city, where defendant was apprehended, is held sufficient to be submitted to the jury on the question of defendant's guilt of burglary in the first degree. State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936).

Evidence held sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Sufficient Evidence to Submit Question of Second Degree Burglary. — Evidence that the defendants encountered the owner of a dwelling house immediately outside of the house at nighttime, and marched him into the house at the point of firearms and stole money which was hidden in the house, is sufficient to be submitted to the jury on the charge of second degree burglary, the method of entry being a constructive "breaking." State v. Rodgers, 216 N.C. 572, 5 S.E.2d 831 (1939).

The jury may convict of an attempt to commit burglary in the second degree where the prosecution is for burglary in the first degree. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Effect of Requesting Verdict of Second Degree Burglary on Indictment Charging Burglary in First Degree.—The defendant was charged with burglary in the first degree in the bill of indictment, and when the solicitor stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a nolle prosequi with leave on the capital charge. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside. — Where defendant was tried for burglary in the second degree on indictment charging burglary in the first degree, and the verdict, as rendered, showed defendant was convicted of burglary in the first degree, or was guilty "as charged in the bill of indictment," the fact that clerk certified "that defendant was guilty of second degree burglary as charged in the bill of indictment" which was merely the clerk's interpretation of verdict, rather than a precise certification of it, was not sufficient to deny motion to set aside verdict. State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

Submission of Question of Guilt of Nonburglarious Breaking.—The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that a window of the room in which felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglari-

ously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. State v. Chambers, 219 N.C. 442, 11 S.E.2d 280 (1941).

Instructions.—Where all the evidence is to the effect that the building was actually occupied at the time of the breaking and entry, the court is not authorized to instruct the jury that it may return a verdict of burglary in the second degree. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Where the evidence showed that the house was unoccupied for approximately half an hour, there was no error in instructing the jury that if it did not find from the evidence, beyond a reasonable doubt, that the house was occupied at the time of the breaking and entering, it should find the defendant not guilty of burglary in the first degree, but it should return a verdict of burglary in the second degree if it did so find each of the elements thereof. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Applied in State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Elam, 263 N.C. 273, 139 S.E.2d 601 (1965); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Walls, 211 N.C. 487, 191 S.E. 232 (1937).

Cited in State v. Lawrence, 199 N.C. 481, 154 S.E. 741 (1930); State v. Hamlet, 206 N.C. 568, 174 S.E. 451 (1934); State v. Brown, 206 N.C. 747, 175 S.E. 116 (1934); State v. Stevenson, 212 N.C. 648, 194 S.E. 81 (1937); State v. Mathis, 230 N.C. 508, 53 S.E.2d 666 (1949).

§ **14-52. Punishment for burglary.**—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the court. (1870-1, c. 222; Code, s. 994; 1889, c. 434, s. 2; Rev., s. 3330; C. S., s. 4233; 1941, c. 215, s. 1; 1949, c. 299, s. 2.)

The discretionary element of the second degree burglary penalty is that the judge can impose a lesser penalty than that of the specific maximum allowed of life imprisonment. Jones v. Ross, 257 F. Supp. 798 (E.D.N.C. 1966).

Provisions for Imposition of Death Penalty Are Unconstitutional. — In the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional, and hence capital punishment may not, under United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), be imposed under any circumstances. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968). But see Parker v. State, 2 N.C. App. 27, 162 S.E.2d 526 (1968).

The death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

A prisoner is entitled to relief if he can demonstrate that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1966).

It is error for the court to fail to charge the jury in a prosecution for burglary in the first degree that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. State v. Mathis, 230 N.C. 508, 53 S.E.2d 666 (1949).

Applied in State v. McAfee, 247 N.C. 98, 100 S.E.2d 249 (1957); State v. Conyers, 267 N.C. 618, 148 S.E.2d 569 (1966); Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967); In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948).

Quoted in State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

Stated in State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965).

Cited in State v. Lawrence, 199 N.C. 481, 154 S.E. 741 (1930); State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

§ **14-53. Breaking out of dwelling house burglary.**—If any person shall enter the dwelling house of another with intent to commit any felony or

larceny therein, or being in such dwelling house, shall commit any felony or larceny therein, and shall, in either case, break out of such dwelling house in the nighttime, such person shall be guilty of burglary. (12 Anne, c. 7, s. 3; R. C., c. 34, s. 8; Code, s. 995; Rev., s. 3332; C. S., s. 4234; 1969, c. 543, s. 2.)

Editor's Note. — The 1969 amendment substituted "larceny" for "other infamous crime" in two places.

Indictment Must Charge Breaking Out. —One charged by indictment of breaking into a house cannot be convicted of breaking out, and a charge of the court to that effect is error. State v. McPherson, 70 N.C. 239 (1874).

§ 14-54. Breaking or entering buildings generally.—(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2.

(b) Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3 (a).

(c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property. (1874-5, c. 166; 1879, c. 323; Code, s. 996; Rev., s. 3333; C. S., s. 4235; 1955, c. 1015; 1969, c. 543, s. 3.)

Editor's Note. — The 1969 amendment rewrote this section.

The cases cited in the note below were decided prior to the 1969 amendment.

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 538 (1955).

For comment on alleging and proving elements of offense under this section and § 14-72, see 3 Wake Forest Intra. L. Rev. 1 (1967).

For note on burglary in North Carolina, see 35 N.C.L. Rev. 98 (1956).

Prior to the 1955 amendment, a nude defendant who entered the sleeping quarters of hospital nurses was not guilty of an offense under this section, where he did not flee when discovered but merely asked for a girl who worked at the hospital, and left upon demand without any attempt at larceny. State v. Cook, 242 N.C. 700, 89 S.E.2d 383 (1955).

Statutory Offense.—The offense defined in this section, commonly referred to as housebreaking or nonburglarious breaking, is a statutory, not a common-law, offense. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Offense Stated.—Under the provisions of this section, if any person breaks and enters or enters any storehouse, shop or other building where any merchandise, chattel, money, valuable security or other personal property shall be, with the intent to commit the felony of larceny, he shall be guilty of a felony. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

In respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by this section. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

This section makes it a crime for any person, with intent to commit a felony therein, to break or enter the dwelling of another, otherwise than by a burglarious breaking. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

What Constitutes Offense. — In respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by this section. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

Under this section it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. State v. Gaston, 4 N.C. App. 575, 167 S.E. 2d 510 (1969).

Indictment Held Sufficient.—See Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

This section condemns three separate felonies as follows: (1) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter the dwelling house of another otherwise than by a burglarious breaking, he shall be guilty of a felony; (2) if any person, with intent to commit a felony or other infamous crime therein, shall break or enter any storehouse, shop, warehouse, bankinghouse, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be, he shall be guilty of a felony; (3) if any person, with intent to commit a felony or other infamous crime therein, shall

break or enter any uninhabited house, he shall be guilty of a felony. State v. McDowell, 1 N.C. App. 361, 161 S.E.2d 769 (1968).

"Dwelling House".—A dwelling house is the place wherein a man reposes. State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

Every permanent building in which the owner or renter and his family, or any member thereof, usually and habitually dwell and sleep is deemed a dwelling. State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

A room in a rooming house is included in the meaning of the term "dwelling house." State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

Criminal Conduct Not Determined by Success of Venture.—Under this section, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent or whether, if successful, the goods he succeeds in stealing have a value in excess of $200.00. In short, his criminal conduct is not determinable on the basis of the success of his felonious venture. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965); State v. Smith, 266 N.C. 747, 147 S.E.2d 165 (1966); State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966); State v. Cloud, 271 N.C. 591, 157 S.E.2d 12 (1967); State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

If a person breaks or enters with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent. His criminal conduct is not determinable on the basis of the success of his felonious venture. State v. Wooten, 1 N.C. App. 240, 161 S.E.2d 59 (1968).

Intent Must Be Shown. — In order to convict under this section it is necessary to show intent and a failure to show intent leaves no other course except acquittal. State v. Spear, 164 N.C. 452, 79 S.E. 869 (1913), disapproving dictum in State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907). And see State v. Crisp, 188 N.C. 799, 125 S.E. 543 (1924).

Felonious intent is an essential element of the crime defined in this section. It must be alleged and proved, and the felonious intent proven must be the felonious intent alleged, which is the "intent to steal." State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968); State v. Jackson, 4 N.C. App. 459, 167 S.E.2d 20 (1969).

The crime defined in this section is complete, all other elements being present, if there was an entry with felonious intent. State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964).

In order to satisfy the felony requirement of this section it must be made to appear that there was a breaking or entering into a designated building or room "with intent to commit a felony or other infamous crime therein." State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957).

To convict of the felony defined in this section, the State must satisfy the jury from the evidence beyond a reasonable doubt that a building described in this section was broken into or entered "with intent to commit a felony or other infamous crime therein." State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965).

"Unlawfully Breaking" Charges Intent.—An indictment under this section for housebreaking is sufficient when charging "that defendant did break and enter (otherwise than by burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., feloniously to steal, etc.," and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony." State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

Intent to Commit Felony of Larceny.—To justify a conviction of breaking and entering with intent to commit the felony of larceny, it was held necessary for the State to prove and for the jury to find beyond a reasonable doubt that the defendant intended to steal property of sufficient value to make the taking thereof a felony. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957). See now § 14-72.

In order for the larceny of personal property of the value of $200.00, or less, to be a felony, it must be stolen from the person or from a building feloniously broken into or entered, and the indictment should so charge. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

"Unlawful Breaking or Entering" Essential to Both Offenses.—The unlawful breaking or entering of a building described in this section is an essential element of both the felony and misdemeanor offenses. The distinction rests solely on

whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965).

This section defines a felony and defines a misdemeanor. The unlawful breaking or entering of a building described in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." State v. Green, 2 N.C. App. 221, 162 S.E.2d 513 (1968).

Intent to Commit More than One Offense.—An indictment for entering a house with an intent to commit a felony or other infamous crime is not defective because it charges an intent to commit more than one offense. State v. Christmas, 101 N.C. 749, 8 S.E. 361 (1888).

Owner Procuring Act to Be Done.—In order to convict of housebreaking under this section there must have been an unlawful entry by the prisoner, and when the owner has procured the act to be done by the prisoner company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

Entry without Breaking. — It is evident it was the intention of the legislature to make it a penal offense to wilfully break into a storehouse where merchandise, etc., is kept, or into an uninhabited house, or to wilfully enter into a dwelling house in the night otherwise than by breaking, with the intent to commit a felony. State v. Hughes, 86 N.C. 662 (1882).

Housebreaking or nonburglarious breaking is a statutory and not a common-law offense, and under this section it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking, and therefore while evidence of a breaking, when available, is always relevant proof of a breaking is not essential to sustain conviction. State v. Mumford, 227 N.C. 132, 41 S.E.2d 201 (1947); State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950).

Where defendant was charged under this section with nonburglariously breaking and entering and the evidence showed that he sat in his car while a friend unlawfully entered the house of another, the defendant was a principal in the crime being committed and the fact that his friend did not enter by burglarious breaking is immaterial. State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950).

A breaking is not now and has never been a prerequisite of guilt and proof thereof is not required. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

Under this section it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. Hence, evidence of a breaking, when available, is always relevant, but absence of such evidence does not constitute a fatal defect of proof. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

Evidence of a breaking when available is relevant, but the absence of such evidence is not a fatal defect of proof to support a conviction of breaking and entering under this section where there is proof of entry. Nor is proof of entry where there is proof of breaking necessary to support a conviction on a charge of breaking and entering under this section. Blakeney v. State, 2 N.C. App. 312, 163 S.E.2d 69 (1968).

Crime Therein Distinct from Breaking and Entering. — Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny, the larceny being necessarily distinct from the breaking and entering. State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907).

Ownership of Property Is Immaterial.—It is incumbent upon the State to establish that, at the time the defendant broke and entered, he intended to steal something. However, it is not incumbent upon the State to establish the ownership of the property which he intended to steal, the particular ownership being immaterial. State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

In a prosecution for breaking and entering a building with intent to steal, the fact that the indictment alleges an intent to steal the property of a named corporation while the evidence discloses the property actually stolen belonged to another is not fatal. State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

Value of Stolen Property Immaterial.—Larceny by breaking and entering a building is a felony without regard to the value of the stolen property. State v. Stubbs, 266 N.C. 274, 145 S.E.2d 896 (1966).

Breaking of store window with requisite intent to commit a felony therein, completes offense, even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building. State v. Burgess, 1 N.C. App. 104, 160 S.E.2d 110

(1968); State v. Wooten, 1 N.C. App. 240, 161 S.E.2d 59 (1968); State v. Jones, 272 N.C. 108, 157 S.E.2d 610 (1967).

Description of Building.—In an indictment under this section punishing the breaking and entering of buildings, a building must be described as to show that it is within the language of the statute and so as to identify it with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1968).

Possession of Recently Stolen Property.—Evidence that defendant was in possession of stolen property shortly after the property was stolen raises a presumption of defendant's guilt of larceny of such property. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

Lesser Offense than Burglary in the First Degree.—The statutory offense set forth in this section is a less degree of the offense of burglary in the first degree set forth in § 14-51. State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968).

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of this section, is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

A violation of this section is a less degree of the felony of burglary in the first degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Included Offense.—The misdemeanor defined in this section must be considered "a less degree of the same crime," an included offense, within the meaning of § 15-170. State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965).

Wrongful breaking or entering without intent to commit a felony or other infamous crime is a lesser degree of felonious breaking or entering within this section. State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967).

The misdemeanor of nonfelonious breaking and entering, if there is evidence to support it, is a lesser included offense of the felony of breaking and entering with intent to commit a felony as described in this section. State v. Johnson, 1 N.C. App. 15, 159 S.E.2d 249 (1968); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968).

Wrongful breaking and entering without intent to commit a felony or other infamous crime is a lesser included offense of the felony of breaking or entering with intent to commit a felony under this section. State v. Fowler, 1 N.C. App. 549, 162 S.E.2d 39 (1968).

This section defines a felony and defines a misdemeanor. The unlawful breaking or entering of a building described in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." Hence, the misdemeanor must be considered "a less degree of the same crime," an included offense, within the meaning of § 15-170. State v. Dickens, 272 N.C. 515, 158 S.E.2d 614 (1968); State v. Williams, 2 N.C. App. 194, 162 S.E.2d 688 (1968).

Unlocking Door with Key.—There is a sufficient breaking where a person enters a building with a felonious intent by unlocking a door with a key. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

The fact that the shaking of a door and its opening was not followed by a physical entrance into the building does not prevent a finding by the jury that defendants broke and entered the building. They had actually opened the door although they had not entered and the crime was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence. State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966).

Bill of Particulars.—If a defendant is in doubt as to the identity of the building he is charged with having feloniously broken into and entered, he can call for a bill of particulars. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1968).

Proper Instruction.—See State v. Jones, 272 N.C. 108, 157 S.E.2d 610 (1967).

Indictment under This Section or § 14-51.—Where on appeal defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered, defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment under this section. State v. Locklear, 226 N.C. 410, 38 S.E.2d 162 (1946).

Erroneous Instruction.—The State's evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran away when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at

the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. Held: The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant was entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. State v. Feyd, 213 N.C. 617, 197 S.E. 171 (1938).

Where the evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony, it was prejudicial error for the court to fail to charge that the jury could find a verdict of nonfelonious breaking and entering, a misdemeanor, and for the court to fail to explain the full contents of this section to the jury. State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967).

Evidence held sufficient to overrule nonsuit in the prosecution for unlawfully breaking and entering a building with intent to steal merchandise therefrom. State v. Cloud, 271 N.C. 591, 157 S.E.2d 12 (1967).

Question for the Jury.—Under § 15-40 a person in whose presence a felony is committed has power to arrest the offender. Where someone breaks into the garage of another and the owner of the garage is killed in trying to make the arrest, the question of the offense being committed in his presence should be submitted to the jury. State v. Blackwelder, 182 N.C. 899, 109 S.E. 644 (1921).

Evidence held sufficient to sustain conviction under this section. State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929).

Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. State v. Williams, 187 N.C. 492, 122 S.E. 13 (1924).

The evidence was held amply sufficient to support verdict of guilty of feloniously breaking and entering and larceny by means of such felonious breaking and entering. State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966).

Duty of Court to Submit to Jury Question of Guilt Hereunder Where Indictment Charges First Degree Burglary. — Where the evidence is sufficient to justify it upon a bill of indictment charging a defendant with burglary in the first degree, it is the duty and mandatory upon the court to submit to the jury the question of whether or not the defendant is guilty of breaking and entering the dwelling house in question at the time and place mentioned in the bill of indictment otherwise than burglariously, and it is error for the court to fail or refuse to do so. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that the window of the room in which the felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1940).

Verdict Disapproved.—In a prosecution for felonious breaking and entering, a verdict that defendant is guilty of felonious "B. & E." is disapproved. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Punishment.—The punishment for a violation of this section may be a maximum of ten years. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

A sentence of twenty-five years' imprisonment, imposed after a plea of guilty to

four indictments charging felonious breaking and entering and larceny in violation of this section and § 14-72, did not exceed the statutory maximum and was not cruel and unusual punishment in the constitutional sense. State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967).

Where the maximum term of a sentence is set beyond statutory authorization under this section, the sentence imposed is not void in toto. Petitioner is not entitled to be released from custody since he has not served that part of the sentence which is within lawful limits. State v. Clendon, 249 N.C. 44, 105 S.E.2d 93 (1958).

The maximum punishment for the felony of breaking and entering is ten years' imprisonment. State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969); State v. Perryman, 4 N.C. App. 684, 167 S.E.2d 517 (1969).

The imposition of a sentence of imprisonment of seven to nine years upon plea of nolo contendere to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense. State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967).

Larceny of any property of another of any value after breaking and entering, and larceny of property of more than $200 in value, are felonious, each of which may be punishable by imprisonment for as much as ten years. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

Scope of Review.—Each defendant having entered a plea of guilty to a valid information charging the felony of nonburglarious breaking, their appeal brings up for review only the question whether the facts charged constitute an offense punishable under the laws and Constitution. Defendants' plea established a violation of this section. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

Applied in State v. Templeton, 237 N.C. 440, 75 S.E.2d 243 (1953); In re Bentley, 240 N.C. 112, 81 S.E.2d 206 (1954); State v. Jones, 247 N.C. 260, 100 S.E.2d 845 (1957); State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Ward, 263 N.C. 93, 138 S.E.2d 779 (1964); State v. Yates, 263 N.C. 100, 138 S.E.2d 787 (1964); Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964); State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965); State v. Mullinax, 263 N.C. 512, 139 S.E.2d 639 (1965); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Morgan, 265 N.C. 597, 144 S.E.2d 633 (1965); State v. Ford, 266 N.C. 743, 147 S.E.2d 198 (1966); State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966); State v. Jones, 267 N.C. 434, 148 S.E.2d 236 (1966); State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Dawson, 268 N.C. 603, 151 S.E.2d 203 (1966); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Barnes, 270 N.C. 146, 153 S.E.2d 868 (1967); State v. Wilson, 270 N.C. 299, 54 S.E.2d 102 (1967); State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967); State v. Lovelace, 271 N.C. 613, 157 S.E.2d 209 (1967); State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967); State v. Foster, 271 N.C. 727, 157 S.E.2d 542 (1967); State v. Bethea, 272 N.C. 521, 158 S.E.2d 591 (1968); State v. Parrish, 273 N.C. 477, 160 S.E.2d 153 (1968); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968); State v. Thorpe, 274 N.C. 457, 164 S.E.2d 171 (1968); State v. Evers, 1 N.C. App. 81, 159 S.E.2d 372 (1968); State v. Burgess, 1 N.C. App. 142, 160 S.E.2d 105 (1968); State v. Martin, 2 N.C. App. 148, 162 S.E.2d 667 (1968); State v. Morris, 2 N.C. App. 611, 163 S.E.2d 539 (1968); State v. Kelly, 3 N.C. App. 72, 164 S.E.2d 22 (1968); State v. Biggs, 3 N.C. App. 589, 165 S.E.2d 560 (1969); State v. Minton, 228 N.C. 518, 46 S.E.2d 296 (1948).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Cited in State v. Alston, 233 N.C. 341, 64 S.E.2d 3 (1951); State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968); State v. Stafford, 274 N.C. 519, 164 S.E.2d 371 (1968); State v. Ellsworth, 130 N.C. 690, 41 S.E. 548 (1902); State v. Setzer, 198 N.C. 663, 153 S.E. 118 (1930); State v. Ratcliff, 199 N.C. 9, 153 S.E. 605 (1930); In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948).

§ 14-55. Preparation to commit burglary or other housebreakings. —If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be guilty of a felony and punished by

fine or imprisonment in the State's prison, or both, in the discretion of the court. (Code, s. 997; Rev., s. 3334; 1907, c. 822; C. S., s. 4236; 1969, c. 543, s. 4.)

Editor's Note. — The 1969 amendment substituted "any felony or larceny" for "a felony or other infamous crime" in two places.

The gravamen of the offense is the possession of burglar's tools without lawful excuse, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943).

But the phrase "without lawful excuse" must be construed in the spirit of this section, and, even though the possession of the pistols and blackjack be unlawful and even though defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of intoxicating liquor, such possession is not within the meaning of this section. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943).

Separate Offenses.—The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein, and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, under this section, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

This section defines three separate offenses. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

This section defines three separate offenses, and the part of this section relating to possession of implements of housebreaking is a separate offense. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

This section defines a separate felony for mere possession without lawful excuse of tools or implements of housebreaking, and it is the inherent nature and purpose of the tool, or the clear effect of a combination of otherwise innocent tools, which is condemned. State v. Godwin, 3 N.C. App. 55, 164 S.E.2d 86 (1968).

Sufficiency of Indictment. — If tools enumerated in an indictment are embraced within the general term "other implement of housebreaking," their possession without lawful excuse is prohibited by this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

An indictment under this section is not fatally defective because of its failure to enumerate any of the articles specified in the statute as implements of housebreaking when it does specify implements coming within the generic term of "implements of housebreaking." State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

A crowbar is clearly a breaking tool. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

As Is a Picklock.—This section contemplates a picklock as being a burglary tool when it is in the possession of someone without lawful excuse. State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967).

Likewise, a Combination of Crowbar and Big Screwdriver.—Under the circumstances the possession of a crowbar and a big screwdriver were without lawful excuse, and said crowbar and big screwdriver were other implements of housebreaking within the intent and meaning of this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

And a Combination of Gloves, Tapes, Chisels, Crowbars, Hammers, and Punches. — While gloves, tapes, chisels, crowbars, hammers, and punches all have their honest and legitimate uses, when no explanation is offered for this combination of articles by a man several hundred miles from his home, in the middle of the night, it is ample to sustain a possession of wrongful and unlawful possession of tools used in store breaking. State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966).

But a Pistol Is Not.—A pistol is not an "implement of housebreaking" within the intent and meaning of this section. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

Neither Are Small Screwdrivers, Tire Tool, Gloves, Flashlights, and Socks. — Two small screwdrivers, a tire tool, gloves, flashlights, and socks in defendant's possession at time store was broken into and entered by defendant were not other implements of housebreaking within the intent and meaning of this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

A "lockpick" and a "picklock" are the

same thing. State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967).

A tire tool is a part of the repair kit which the manufacturer delivers with each motor vehicle designed to run on pneumatic tires; not only is there lawful excuse for its possession, but there is little or no excuse for a motorist to be on the road without one. State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965).

There is some doubt whether a tire tool, under the ejusdem generis rule, is of the same classification as a picklock, key, or bit, and hence, condemned by this section. State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965); State v. Godwin, 3 N.C. App. 55, 164 S.E.2d 86 (1968).

State's Burden of Proof.—In a prosecution under this section for having possession without lawful excuse of a crowbar, hack saw and automatic pistol, the burden is on the State to prove beyond a reasonable doubt that the possession of the implements was "without lawful excuse" within the spirit of the statute, and the possession of a pistol for personal protection, even though unauthorized, cannot be unlawful possession within the meaning of the statute. State v. Davis, 245 N.C. 146, 95 S.E.2d 564 (1956).

In a prosecution under the provisions of this section, the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute, and (2) that such possession was without lawful excuse. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966); State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967); State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967); State v. Davis, 272 N.C. 469, 158 S.E.2d 630 (1968); State v. Styles, 3 N.C. App. 204, 164 S.E.2d 412 (1968).

Proof of "Intent" or "Unlawful Use" Not Required.—The offense of possessing implements of housebreaking without lawful excuse, does not require the proof of any "intent" or "unlawful use." State v. Vick, 213 N.C. 235, 195 S.E. 779 (1938).

It does not appear that the use to which a tool or instrument is put is necessarily controlling in determining whether it is within the intent of the phrase "or other implement of housebreaking" as contained in this section. State v. Godwin, 3 N.C. App. 55, 164 S.E.2d 86 (1968).

Where defendant is charged with possession of certain specific items condemned by this section, it is not necessary for the court to determine whether tools or implements that have legitimate purposes were being possessed for an illegitimate purpose. State v. Styles, 3 N.C. App. 204, 164 S.E.2d 412 (1968).

Judicial Knowledge of Housebreaking Implements.—Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

Sufficiency of Evidence. — In State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943), it was held that the evidence failed to show that any of the articles found in the automobile was an implement made and designed for the express purpose of housebreaking, within the terms of this section.

Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

Evidence Insufficient for Jury. — Upon an indictment charging possession, without lawful excuse, of a crowbar, hack saw and automatic pistol, in a prosecution under this section, the evidence was held insufficient to be submitted to the jury. State v. Davis, 245 N.C. 146, 95 S.E.2d 564 (1956).

Evidence tending to show that defendant was a passenger in a car in which implements of housebreaking were found, without any evidence that defendant had any control whatsoever over either the automobile or the implements of housebreaking found therein, and without evidence showing when, where, or under what circumstances defendant entered the automobile, or disclosing his relationship or association with the driver thereof, is insufficient to be submitted to the jury in prosecution for possession of implements of housebreaking without lawful excuse. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

A sentence of not less than twenty-five nor more than thirty years upon a plea of guilty of possession of weapons and implements for housebreaking, in violation of this section is within the discretion of the court conferred by the statute, and is not objectionable as a cruel and unusual punishment within the meaning of N.C. Const., Art. I, § 14. State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936).

A sentence of not less than twenty years nor more than thirty years on a plea of guilty to the charge of unlawful possession of implements of housebreaking, constitutes cruel and unusual punishment within the meaning of N.C. Const., Art. I, § 14. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963), overruling State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936).

Maximum Punishment.—The punishment for possession of the implements of housebreaking is limited to a maximum of ten years' imprisonment, since punishment by fine or imprisonment, or both, in the discretion of the court, as prescribed by this section, is not a specific punishment and therefore comes within the purview of § 14-2. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963), overruling State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936).

This section, prescribing punishment "by fine or imprisonment in the State's prison, or both, in the discretion of the court," does not prescribe "specific punishment" within the meaning of that term as used in § 14-2. State v. Thompson, 268 N.C. 447, 150 S.E.2d 781 (1966).

Applied in State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968).

Cited in State v. McPeak, 243 N.C. 243, 90 S.E.2d 501 (1955); State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966); State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

§ 14-56. Breaking or entering into railroad cars, motor vehicles, or trailers; breaking out.—If any person shall, with intent to commit any felony or larceny therein, break or enter any railroad car, motor vehicle, or trailer containing any goods, wares, freight, or other thing of value, or shall, after having committed any felony or larceny therein, break out of any railroad car, motor vehicle, or trailer containing any goods, wares, freight, or other thing of value, such person shall upon conviction be punished by confinement in the penitentiary in the discretion of the court for a term of years not exceeding five years. If any person is found unlawfully in such car, motor vehicle, or trailer, being so found shall be prima facie evidence that he entered in violation of this section. (1907, c. 468; C. S., s. 4237; 1969, c. 543, s. 5.)

Editor's Note.—The 1969 amendment rewrote this section.

Cited in State v. Brown, 198 N.C. 41, 150 S.E. 635 (1929); State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935).

§ 14-56.1. Breaking into or forcibly opening coin-operated machines.—Any person who forcibly breaks into, or by the unauthorized use of key, keys, or other instrument, opens any coin-operated vending machine, coin-activated machine or device, or coin-operated telephone or telephone coin receptacle, with intent to steal any property or moneys therein, shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1963, c. 814, s. 1.)

§ 14-56.2. Damaging or destroying coin-operated machines. — Any person who shall willfully and maliciously damage or destroy any coin-operated vending machine, coin-activated machine or device, or coin-operated telephone or telephone coin receptacle shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1963, c. 814, s. 2.)

§ 14-57. Burglary with explosives.—Any person who, with intent to commit any felony or larceny therein, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gunpowder, or any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives. Any person convicted under this section shall be punished as for burglary in the second degree, as provided in G.S. 14-52. (1921, c. 5; C. S., s. 4237(a); 1969, c. 543, s. 6.)

Editor's Note.—The 1969 amendment substituted "any felony or larceny therein" for "crime" near the beginning of the section.

"Burglary with explosives" was unknown to the common law. Obviously, it is separate and distinct from the crime of burglary named in § 14-51. United States v. Brandenburg, 144 F.2d 656 (3rd Cir. 1944).

This section is not void for vagueness. Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967).

Punishment. — Punishment prescribed for the violation of this statute is as for burglary in the second degree. Under § 14-52, burglary in the second degree is punishable by "imprisonment in the State's prison for life, or for a term of years, in the discretion of the court." Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967).

There is clearly no merit to the contentions that a sentence of not less than 35 nor more than 45 years imposed was impermissible. Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967).

Applied in State v. Roux, 263 N.C. 149, 139 S.E.2d 189 (1964); State v. Roux, 266 N.C. 555, 146 S.E.2d 654 (1966); In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948).

Cited in State v. Vick, 213 N.C. 235, 195 S.E. 779 (1938).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.—Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. (R. C., c. 34, s. 2; 1870-1, c. 222; Code, s. 985; Rev., s. 3335; C. S., s. 4238; 1941, c. 215, s. 2; 1949, c. 299, s. 3.)

Cross References.—As to accomplices, see § 14-5 et seq. As to arrest of offender by Commissioner of Insurance and prosecution, see § 69-2.

Editor's Note.—The common-law definition of arson is still in force in this State. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

Provisions for Imposition of Death Penalty Unconstitutional. — In the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional, and hence capital punishment may not, under United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), be imposed under any circumstances. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

The death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

A prisoner is entitled to relief if he can demonstrate that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

Wood Must Be Charred.—Where the statute requires that the building be "burned" an indictment charging "setting fire to" is not sufficient for there can be a setting fire to without charring the wood, as required to constitute burning. But if the statute provides "setting fire to," the indictment charging "setting fire to and burning" is sufficient as the charge of burning is surplusage and not detrimental to the indictment. State v. Hall, 93 N.C. 571 (1885).

Evidence held admissible in prosecution for arson as tending to show ill will towards occupants of house burned and as being part of res gestae. State v. Smith, 225 N.C. 78, 33 S.E.2d 472 (1945).

Cited in State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); State v. Wilfong, 222 N.C. 746, 24 S.E.2d 629 (1943).

§ 14-59. Burning of certain public and other corporate buildings.—If any person shall willfully and maliciously burn the Statehouse, or any of the public offices of the State, or any building owned by the State or any of its agencies, institutions, or subdivisions, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the State or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town or corporation, he shall, on conviction, be imprisoned in the State's prison for not less than five nor

more than ten years. (1830, c. 41, s. 1; R. C., c. 34, s. 7; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 3; Rev., s. 3344; C. S., s. 4239; 1965, c. 14.)

Intent Necessary.—If the prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act. But if he put fire to the jail and burnt it with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although his main intention was to escape. State v. Mitchell, 27 N.C. 350 (1845).

§ 14-60. Burning of schoolhouses or buildings of educational institutions.—If any person shall willfully set fire or attempt to set fire to any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, or procure the same to be done, he shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the State's prison or the county jail, and may also be fined, in the discretion of the court. (1901, c. 4, s. 28; Rev., s. 3345; 1919, c. 70; C. S., s. 4240; 1965, c. 870.)

Cited in State v. Kelly, 5 N.C. App. 209, 167 S.E.2d 881 (1969).

§ 14-61. Burning or attempting to burn certain bridges and buildings.—If any person, with intent to destroy the same, shall willfully and maliciously set fire to and burn any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall willfully and maliciously attempt to burn any of such houses or bridges, or any of the houses or buildings mentioned in this article, the person offending shall be guilty of a felony and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years. (1825, c. 1278, P. R.; R. C., c. 34, s. 30; Code, s. 985, subsec. 4; Rev., s. 3337; C. S., s. 4241.)

City Market House.—A person charged with damaging a market house by fire must be tried under this section and not under a municipal ordinance as the general law must prevail over the ordinance, when they conflict. The municipal court would have jurisdiction only by express legislation conveying it. Town of Washington v. Hammond, 76 N.C. 33 (1877).

§ 14-62. Setting fire to churches and certain other buildings.—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than two nor more than forty years. (1874-5, c. 228; Code, s. 985, subsec. 6; 1885, c. 66; 1903, c. 665, s. 2; Rev., s. 3338; C. S., s. 4242; 1927, c. 11, s. 1; 1953, c. 815; 1959, c. 1298, s. 1.)

I. In General.
II. Indictment.
III. Evidence.
IV. Questions for Jury.

Cross References.

As to buildings destroyed by a tenant, see § 42-11 and note thereto. As to burning crops in fields, see § 14-141. As to burning of ginhouses, tobacco houses, and stables, see § 14-64. As to setting fire to grass and brush lands and woodlands, see § 14-136.

I. IN GENERAL.

Editor's Note.—For comment on the 1953 amendment, see 31 N.C.L. Rev. 403 (1953).

Constitutionality.—This section is not unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

The imposition of a sentence of 12 years in prison for violation of this section is not cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

The provision of this section giving the trial judge the absolute discretion to impose a sentence of imprisonment ranging from 2 to 40 years for the crime of feloniously setting fire to certain buildings in violation of the statute is not violative of the due process and equal protection clauses of the federal Constitution, the statute permitting the trial judge to impose a sentence appropriate to the individual and the specific factual situation. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

Crime Fixed Herein Is Separate from That in § 14-66.—A verdict of not guilty on a count brought under this section does not necessarily carry a verdict of not guilty on a second count brought under § 14-66, the counts being separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 208 N.C. 47, 179 S.E. 8 (1935).

This section clearly and specifically defines the prohibited conduct and sets out the possible punishment. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

This section cannot be extended to cover structures not intended by the legislature. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

The word "building" embraces any edifice, structure, or other erection set up by the hand of man, designed to stand more or less permanently, and which is capable of affording shelter for human beings, or usable for some useful purpose. Ordinarily, in the absence of a statute to the contrary, an uncompleted structure, not ready for occupation or use, is not a "building" as that term is generally used in the law of arson. However, by the weight of authority, the word "building" as used in criminal burning statutes does not necessarily imply a structure so far advanced as to be in every respect finished and perfect for the purpose for which it is designed eventually to be used; and if the structure is so far advanced in construction, although not completed, as to be ready for habitation or use, the burning of it may be violative of this section. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

"Used in Carrying on Any Trade."—In this phrase, the crucial words of the statute are "used" and "trade." The verb "used," when referring to a place or thing, has two meanings recognized by all lexicographers and usually differentiated in common speech: (1) In one sense the word means to be the subject of customary occupation, practice or employment. In this sense the word denotes the idea of habitual use, and implies a certain degree of continuity and permanence and is sometimes used synonymously with the word "occupied." (2) In another sense the word means to employ for a purpose to put to its intended purpose, application to an end, the act of using. In this sense to single isolated instance may be sufficient to fulfill the meaning of the word. It is in this latter sense that the word "used" was intended to be employed in this section. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

The word "trade" as used in this section means more than traffic in goods, and the like. It is used in its broader sense, and as such is synonymous with "occupation" or "calling." Thus the word "trade" as here used embraces any ordinary occupation or business, whether manual or mercantile. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Barn Defined.—A building of hewn logs (twenty-six feet by fifteen), divided by a partition of the same, upon one side of which were horses and upon the other corn, oats and wheat (threshed and unthreshed), also hay, fodder, etc., having sheds adjoining, under which were wagons and other farming utensils, is a "barn" within the meaning of this section. State v. Cherry, 63 N.C. 493 (1869).

But a house seventeen feet long and twelve wide, setting on blocks in a stable yard, having two rooms in it—one quite small, used for storing nubbins and refuse corn to be first fed to the stock, and the other used for storing peas, oats, and other products of the farm—is not a barn within the meaning of the statute. State v. Laughlin, 53 N.C. 455 (1862).

Duty of Trial Court to Define and Explain Words.—The duty rests upon the trial court to define and explain to the jury the meaning of (1) "building," and (2) "used in carrying on any trade," as used in the section State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Necessity for Proving Nature and Use of Structure.—Under an indictment charging that the defendant wilfully and felo-

niously procured the burning of a certain building used in carrying on a trade, the burden rests on the State to prove that the defendant unlawfully procured the burning of (1) a structure that answered to the description of a "building" within the meaning of this section, and also (2) that the structure was "used in carrying on a trade," within the purview of the section. Findings by the jury concerning these two elements of the statutory offense charged are quite as essential to a conviction as proof of the fact of procuring the burning of the structure. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Inquiry Desirable.—Inquiry into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced is a procedure particularly desirable in respect to this section, which covers the wanton and willful burning of a wide variety of structures. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

Burden of Proof on Plea of Not Guilty.—Where a plea of not guilty is entered in a prosecution for common-law arson or for the statutory felony of burning a building contrary to this section it is incumbent on the State to prove both the fire and the cause of the fire and the connection of the accused with the crime. State v. Cuthrell, 233 N.C. 274, 63 S.E.2d 549 (1951).

II. INDICTMENT.

Indictment in Language of Section Insufficient. — Where a bill of indictment merely charges the offense in the language of this section, it fails to meet the minimum requirements as to identity of the offense attempted to be charged and is fatally defective. State v. Banks, 247 N.C. 745, 102 S.E.2d 245 (1958).

"Wantonly and Wilfully" Must Be Charged.—An indictment charged that the defendant "did unlawfully, wilfully and feloniously set fire to and burn a certain ginhouse, belonging to B. and in the possession of one G." Verdict of guilty and defendant moved in arrest of judgment for that this section had been amended (Laws 1885, c. 66) by striking out the words "unlawfully and maliciously" and inserting in lieu thereof "wantonly and wilfully," and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under this section. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887); State v. Morgan, 98 N.C. 641, 3 S.E. 27 (1887). But it is a valid indictment under § 14-64, as was held in State v. Thorne, 81 N.C. 555 (1879), cited and followed by State v. Green, 92 N.C. 779 (1885). It seems to be the rule that "unlawfully and wilfully" do not answer the requirements under this section but under § 14-64 it is sufficient in the indictment. State v. Pierce, 123 N.C. 745, 31 S.E. 847 (1898).

Charge of Particular Intent Not Necessary.—An indictment for burning a mill, under this section, as amended by the Laws of 1885, ch. 66, need not allege that the prisoner set fire to the mill with the intent to injure some particular person. State v. Rogers, 94 N.C. 860 (1886).

It was formerly the rule that an indictment under this section for burning a barn must aver that the act was done "with intent thereby to injure or defraud" some person. And an indictment for such offense at common law must charge that the barn contained hay or grain, or is a parcel of the dwelling house. State v. Porter, 90 N.C. 719 (1884).

Title to Property Immaterial.—In the indictment it is not necessary to set out that the burned property "was the property of" or "was in the possession of" anyone. The constituent element is "wilful and wanton." State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897).

Kind of Building Must Be Specified.—An indictment for burning a ginhouse will not lie under this section as a ginhouse is not specified. An indictment describing the subject of offense as "house" is sufficient to describe a dwelling, and "house" is only used to describe dwellings. This section applies only to specified buildings. State v. Thorne, 81 N.C. 555 (1879).

Identity of Building Must Be Fixed with Reasonable Particularity.—In a statutory arson case, it is necessary to aver what building was burned by descriptive allegation showing not only that the structure comes within the class designated in the statute, but also fixing its identity with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Banks, 247 N.C. 745, 102 S.E.2d 245 (1958).

An allegation of ownership or of possession suffices to meet the requirements of idenity under this section. State v. Banks, 247 N.C. 745, 102 S.E.2d 245 (1958).

III. EVIDENCE.

In General.—Under an indictment for

burning a barn evidence of bad blood for the owner of the barn, footprints, failure of defendant to go to fire when the remainder of the neighborhood was there, the hour defendant arose, and his acts when notified of the fire is admissible and is sufficient to sustain a verdict of guilty. State v. Allen, 149 N.C. 458, 62 S.E. 597 (1908).

Admissibility. — On trial under indictment under this section for burning a barn to collect fire insurance thereon, evidence that the defendant at another place, at some indefinite time in the past, had another barn to burn is incompetent and does not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, nor were they a part of the same transaction. State v. Deadmon, 195 N.C. 705, 143 S.E. 514 (1928).

Motive or Intent.—"It is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. State v. King, 86 N.C. 603 (1882); State v. Voight, 90 N.C. 741 (1884); State v. Smith, 93 N.C. 516 (1885); State v. McBrayer, 98 N.C. 619, 2 S.E. 755 (1887); State v. McLean, 121 N.C. 589, 28 S.E. 140, 42 L.R.A. 721 (1897). But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent." State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

Bad Feeling. — It is entirely competent for the State to show motive upon the part of the defendant to burn a barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reason for it, but that part of a reply of a witness in which he stated that defendant had been convicted of stealing and sent to the chain gang should be excluded and the jury carefully cautioned not to regard it as it puts the character of the defendant in issue. State v. Barrett, 151 N.C. 665, 65 S.E. 894 (1909).

Where the only evidence against a person accused of burning a barn is threats made by him, without any evidence connecting him with the execution of said threats, or with the offense charged, the trial judge should withdraw the case from the jury. State v. Freeman, 131 N.C. 725, 42 S.E. 575 (1902).

The proof of threats directed against the son and grandson, from their near relationship to the owner of a burned house, is relevant, though perhaps feeble, in showing general ill will to the family and a motive for the act. State v. Rash, 34 N.C. 382 (1851); State v. Gailor, 71 N.C. 88 (1874); State v. Green, 92 N.C. 779 (1885); State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887).

Same—Toward Agent. — Ill will toward an agent of the owner of a building is not sufficient to show motive for setting fire to the building, as such evidence is too remote. State v. Battle, 126 N.C. 1036, 35 S.E. 624 (1900).

Clark, J., dissents on the ground that malice toward the owner is not necessary to constitute the offense, and though the ill will was remote it was a circumstance to show motive.

Proof of Title Not Necessary.—"Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy. State v. Gailor, 71 N.C. 88 (1874); State v. Jaynes, 78 N.C. 504 (1878); State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887); State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897)." State v. Sprouse, 150 N.C. 860, 64 S.E. 900 (1909).

"This section is copied from the English Statute of 7 and 8 Geo. IV., c. 30; and under that it was sufficient to allege the building simply 'of' A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and lxiv.); and this is the better practice, proof of either possession or property being sufficient identification." State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897).

Opinion Evidence as to Origin of Fire. —In a prosecution under this section it is reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion are so simply and readily understood that it is for the jury to draw the conclusion from testimony as to the facts, and therefore the conclusion is not the subject of opinion testimony. State v. Cuthrell, 233 N.C. 274, 63 S.E.2d 549 (1951).

Subsequent Attempt to Fire Another Building.—Where the defendant was indicted for setting fire to an outhouse, evidence is competent to show that at the same time an attempt was made to fire a dwelling house near it, the evidence directly connecting the defendant with the latter attempt. State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887).

Bloodhounds. — On the trial of defendant for burning a barn, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the

identification of the track as that of defendant by one of his shoes, with evidence of motive, is sufficient evidence of guilt to take the case to the jury. State v. Thompson, 192 N.C. 704, 135 S.E. 775 (1926).

IV. QUESTIONS FOR JURY.

Must Be Sufficient Evidence. — The general rule is, if there be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the judge should say so, and, in a criminal case, direct an acquittal. In State v. Vinson, 63 N.C. 335 (1869), it is said: "But is is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that fact no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. State v. Rhodes, 111 N.C. 647, 15 S.E. 1038 (1892).

Where, in a prosecution under this section, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury. State v. Church, 202 N.C. 692, 163 S.E. 874 (1932).

On trial for wilfully and wantonly burning a barn in violation of this section, evidence of the felonious origin of the fire and of the identity of the defendant as the culprit is sufficient to be submitted to the jury that defendant had committed the crime, the corpus delicti being reasonably inferable from the circumstances, there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in the presence of officers, under circumstances calling for a reply. State v. Wilson, 205 N.C. 376, 171 S.E. 338 (1933).

For circumstantial evidence sufficient for jury, see State v. Moore, 262 N.C. 431, 137 S.E.2d 812 (1964).

Intent.—It is prima facie presumed that a person intended the natural consequence of his act when he set fire to a building. But this is subject to rebuttal by evidence to the contrary and then "intent" becomes a question for the jury. State v. Phifer, 90 N.C. 721 (1884).

Nature and Use of Structure.—It is for the jury to find and declare by their verdict, among other things, (1) whether the structure alleged to have been burned had arrived at such a stage of completion as to be usable for some useful purpose so as to make it a building within the meaning of the statute, and, if so, (2) whether it had been put to use in the occupation or business of the lessee prior to the fire. The action of the trial court in assuming the existence of these disputed facts was prejudicial error. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Alibi.—The burden of proving an alibi does not rest on the prisoner, but the burden of proving the guilt of the prisoner rests on the State. It is for the jury to decide, and it is only necessary for the prisoner to offer enough evidence to produce in the mind of the jury a reasonable doubt. State v. Jaynes, 78 N.C. 504 (1878).

§ 14-62.1. Burning of building or structure in process of construction.—The wilful and intentional burning of any building or structure in the process of construction for use or intended to be used as a dwelling house or in carrying on any trade or manufacture, or otherwise, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, shall be a felony and punished by imprisonment in the county jail or State prison, or by fine or by both such fine and imprisonment, in the discretion of the court. (1957, c. 792.)

§ 14-63. Burning boats and barges.—If any person, with the intent to destroy the same, shall willfully and maliciously, or for a fraudulent purpose, set fire to and burn any boat, barge or float, whether he be the owner thereof or not, he shall be guilty of a felony and shall be punished by imprisonment in the State's prison for not less than four months nor more than ten years, or fined in the discretion of the court. (1909, c. 854; C. S., s. 4243.)

§ 14-64. Burning of ginhouses, tobacco houses and stables.—Every person convicted of the willful burning of any ginhouse or tobacco house, or any part thereof, or, in the nighttime, of any stable containing a horse or a mule, or cattle, shall be imprisoned in the State's prison not less than two nor more

than ten years. (1863, c. 17; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 2; 1903, c. 665, s. 1; Rev., s. 3341; C. S., s. 4244.)

Cross References.—As to burning crops in the field, see § 14-141. As to setting fire to churches and certain other buildings, see § 14-62. As to setting fire to grass and brushlands and woodlands, see §§ 14-136 and 14-137.

Indictment in General.—That any informality will not be grounds for quashing proceeding if the charge is set out in a clear manner and enough matter appears to enable the court to proceed to judgment, see § 15-153. That judgments will not be vitiated for failure to aver certain unnecessary matter, see § 15-155. State v. Rogers, 168 N.C. 112, 83 S.E. 161 (1914).

Necessity of Alleging "Wilful Burning".—In the case of State v. Thorne, 81 N.C. 555 (1879), there was an indictment for unlawfully, maliciously and feloniously burning a ginhouse. The court was asked to charge the jury that the defendant could not be convicted under the act of 1869, because the burning was not charged to have been wilfully done. The court held that the word maliciously was more comprehensive and included wilfully. State v. Green, 92 N.C. 779 (1885).

"Nighttime" Must Be Alleged.—An indictment which omits to allege that the burning was in the "nighttime," is defective. State v. England, 78 N.C. 552 (1878).

Necessity of Showing Motive. — It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State has to rely upon circumstantial evidence to establish the guilt of the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime. State v. Green, 92 N.C. 779 (1885).

§ 14-65. Fraudulently setting fire to dwelling houses.—If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall willfully and wantonly or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail, and may also be fined, in the discretion of the court. (Code, s. 985; 1903, c. 665, s. 3; Rev., s. 3340; 1909, c. 862; C. S., 4245; 1927, c. 11, s. 2.)

Essential Element of Crime. — Burning or procuring to be burned the dwelling house occupied by defendant to constitute a criminal offense must have been done willfully and wantonly, or for a fraudulent purpose. To convict the defendant something more must be found than the fact that the house was burned, and that it was done at the instance and request of the defendant. By the terms of this section an essential element of the crime charged was that it be done willfully and wantonly or for a fraudulent purpose. State v. Cash, 234 N.C. 292, 67 S.E.2d 50 (1951).

Specifying Particular Fraudulent Purpose.—Where in a prosecution under this section the indictment charges that the defendant burned his dwelling house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged for a fraudulent purpose, it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal. State v. Morrison, 202 N.C. 60, 161 S.E. 725 (1932).

Sufficiency of Evidence.—Evidence that fire in defendant's house started in a closet in which was hanging a quilt soaked in kerosene, that kindling wood was on the floor of the closet, that the closet had no ceiling, but opened at the top into the attic, that defendant was being pressed to pay installments on the mortgage on the house, and was threatened with foreclosure, with other incriminating circumstantial evidence, establishes a motive and an opportunity for the defendant to commit the crime, and that the fire was of incendiary origin, and is sufficient to be submitted to the jury in a prosecution under this section. State v. Moses, 207 N.C. 139, 176 S.E. 267 (1934).

Cited in State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934).

§ 14-66. Willful and malicious burning of personal property.—Any person who shall willfully or maliciously burn, or cause to be burned, or aid, coun-

sel, or procure the burning of any goods, wares, merchandise, or other chattels or personal property of any kind, whether the same shall be at the time insured, by any person or corporation against loss or damage by fire, or not, with intent to injure or prejudice the insurer, creditor or the person owning the property, or any other person, whether the same be the property of such person or another, shall be guilty of a felony. (1921, c. 119; C. S., s. 4245 (a).)

Cross Reference.—See note to § 14-62.

Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire, and that the car had been driven to the house several times during the days preceding the fire, and that the occupants of the car were heard in the house, is held insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of nonsuit in a prosecution under this section, although there was ample evidence that the fire was of incendiary origin and destroyed personal property of defendant which had been insured by him. State v. Simms, 208 N.C. 459, 181 S.E. 269 (1935).

§ 14-67. Attempting to burn dwelling houses and certain other buildings.—If any person shall wilfully and feloniously attempt to burn any dwelling house, uninhabited house, the Statehouse, or any of the public offices of the State, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the State or to any incorporated company whatever, in which are kept, the archives, documents, or public papers of such county, town or corporation, any schoolhouse, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, or any building or structure in the process of construction for use or intended to be used as a dwelling house or in carrying on any trade or manufacture, or otherwise, any boat, barge or float, any ginhouse or tobacco house, or any part thereof, whether such buildings or structures or any of them shall then be in the possession of the offender or in the possession of any other person, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail, or by a fine, or by both such fine and imprisonment, in the discretion of the court. (1876-7, c. 13; Code, s. 985, subsec. 7; Rev., s. 3336; C. S., s. 4246; 1957, c. 250, s. 1; 1959, c. 1298, s. 2.)

Cross References.—See note to § 14-64. As to offense of burning an uninhabited house as distinguished from an attempt to do so, see § 14-144.

In General.—A conviction for burning a ginhouse can be had either under this section or § 14-64. All that is required is a clear statement of the charge and because of §§ 15-153, 15-155 if sufficient matter is set out in the charge, the proceedings will not be quashed, because of use of terms that have the same meaning as those used in the statute. If the punishment does not exceed that prescribed by either section it is immaterial under which section the conviction was had. State v. Rogers, 168 N.C. 112, 83 S.E. 161 (1914).

Applied in State v. Lawhorn, 250 N.C. 598, 108 S.E.2d 863 (1959).

Cited in State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936).

§ 14-68. Failure of owner of property to comply with orders of public authorities.—If the owner or occupant of any building or premises shall fail to comply with the duly authorized orders of the chief of the fire department, or of the Commissioner of Insurance, or of any municipal or county inspector of buildings or of particular features, facilities, or installations of buildings, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars for each day's neglect, failure, or refusal to obey such orders. (1899, c. 58, s. 4; Rev., s. 3343; C. S., s. 4247; 1969, c. 1063, s. 1.)

Editor's Note. — The 1969 amendment rewrote this section.

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" near the middle of the section.

§ 14-69. Failure of officers to investigate incendiary fires.—If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five nor more than two hundred dollars. (1899, c. 58, s. 5; Rev., s. 3342; C. S., s. 4248.)

§ 14-69.1. Making a false report concerning destructive device.—If any person shall, by any means of communication to any person or group of persons, make a report, knowing or having reason to know the same to be false, that there is located in any building, house or other structure whatsoever or any vehicle, aircraft, vessel or boat any device designed to destroy or damage the building, house or structure or vehicle, aircraft, vessel or boat by explosion, blasting or burning, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned or both in the discretion of the court. (1959, c. 555, s. 1.)

Cited in State v. Smith, 267 N.C. 755, 148 S.E.2d 844 (1966).

§ 14-69.2. Perpetrating hoax by use of false bomb or other device.—If any person, with intent to perpetrate a hoax, shall secrete, place or display any device, machine, instrument or artifact, so as to cause any person reasonably to believe the same to be a bomb or other device capable of causing injury to persons or property, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned or both in the discretion of the court. (1959, c. 555, s. 1.)

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.—All distinctions between petit and grand larceny are abolished. Unless otherwise provided by statute, larceny is a felony punishable under G.S. 14-2 and is subject to the same rules of criminal procedure and principles of law as to accessories before and after the fact as other felonies. (R. C., c. 34, s. 26; Code, s. 1075; Rev., s. 3500; C. S., s. 4249; 1969, c. 522, s. 1.)

Cross References.—As to larceny from dwelling by breaking and entering, see § 14-51 et seq. As to stealing of aircraft, see § 63-25. As to obtaining property by false pretense, see § 14-100 et seq. As to taking away or injuring exhibits at fairs, see § 14-164. As to theft of property from public libraries, museums, etc., see § 14-398. As to restitution of stolen property to its owner, see § 15-8. As to robbery, see § 14-87.

Editor's Note. — The 1969 amendment rewrote this section.

The cases cited in the note below were decided prior to the 1969 amendment.

At common law both grand and petit larceny were felonies. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

At common law the stealing of property of any value was a felony, and both grand larceny and petit larceny were felonies. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

"Larceny". — Larceny, according to the common-law meaning of the term, may be defined as the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

The phrase "felonious intent" originated when both grand and petit larceny were felonies. Now "felonious intent," in the law of larceny, does not necessarily signify an intent to commit a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

Intent Necessary. — "To constitute the crime of larceny, there must be an original, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the

original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be felony by any subsequent misconduct or bad faith on the part of the taker. State v. Arkle, 116 N.C. 1017, 21 S.E. 408 (1895)." State v. Holder, 188 N.C. 561, 563, 125 S.E. 113 (1924).

Felonious intent is an essential element of the crime of larceny. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

Proof of Intent.—The intent to convert to one's own use is met by showing an intent to deprive the owner of his property permanently for the use of the taker, although he might have in mind to benefit another. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

Possession of Fruits of Crime.—The defendant's possession of the fruits of the crime recently after its commission justifies the inference of guilt on his trial for larceny. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

Section Applicable to Larceny from the Person.—Section 14-72 clearly points out that if larceny is from the person the limitation in the statute does not apply. Therefore, larceny from the person in any amount is punishable under this section. State v. Stevens, 252 N.C. 331, 113 S.E.2d 577 (1960).

Stolen Property Must Be Designated in Indictment. — There is required a reasonable certainty in the designation of stolen property to enable the defendant to know and meet the specific charge if he can, and to protect himself if he cannot, from a second prosecution for the same offense. State v. Clark, 30 N.C. 226 (1848); State v. Horan, 61 N.C. 571 (1868); State v. Bragg, 86 N.C. 688 (1882).

Evidence Must Sustain Charge. — A charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. State v. Moore, 33 N.C. 70 (1850); State v. Bragg, 86 N.C. 688 (1882).

One Act Two Offenses. — A person committing larceny from the person, upon two persons at the same time may be tried and convicted for both offenses. State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895); State v. Bynum, 117 N.C. 52, 23 S.E. 219 (1895).

Accessories Abolished. — There are no accessories to larceny. All that counsel and aid are guilty of the offenses as principals. State v. Gaston, 73 N.C. 93 (1875); State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953).

Larceny and Malicious Mischief Distinguished. — An indictment for larceny at common law for stealing a cow is not supported by proof that the defendant shot the cow down and then cut off her ears. Such an act is not larceny, but malicious mischief. State v. Butler, 65 N.C. 309 (1871). See § 14-85.

Exclusive Jurisdiction in Superior Court.—Under the general law all misdemeanors are punishable by fine and imprisonment at the discretion of the superior court, so by the Constitution the jurisdiction over such offenses appertains exclusively to the superior courts, unless some statute has limited the punishment to a fine not exceeding fifty dollars or imprisonment not exceeding one month. Washington v. Hammond, 76 N.C. 33 (1877).

Jury Question.—What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

Maximum Sentence.—The punishment for larceny from a person can be imprisonment for ten years. State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964).

Sentence Not Excessive.—A sentence to the common jail of the county for a period of 12 months, and an assignment to work the public roads, upon defendant's plea of nolo contendere to a charge of stealing an automobile of the value of $325.00, is not excessive. State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941).

Sentence in Excess of Statutory Maximum.—A sentence of not less than twelve and not more than fifteen years is in excess of that allowed by this section. State v. Fain, 250 N.C. 117, 108 S.E.2d 68 (1959).

Where the maximum term of a sentence is set beyond statutory authorization under this section, the sentence imposed is not void in toto. Petitioner is not entitled to be released from custody, where he has not served that part of the sentence which is within lawful limits. State v. Clendon, 249 N.C. 44, 105 S.E.2d 93 (1958).

Applied in State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Bines, 263 N.C. 48, 138 S.E.2d 797 (1964); State v. Yates, 263 N.C. 100, 138 S.E.2d 787 (1964); Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964); State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Dye, 268 N.C. 362, 150 S.E.2d 507 (1966); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967).

Stated in State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965).

Cited in State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969).

§ 14-71. Receiving stolen goods. — If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (1797, c. 485, s. 2; R. C., c. 34, s. 56; Code, s. 1074; Rev., s. 3507; C. S., s. 4250; 1949, c. 145, s. 1.)

Editor's Note.—As to elements of crime of receiving stolen goods, see 26 N.C.L. Rev. 192.

Included in Indictment for Larceny Charge. — An indictment for larceny if concluded at common law may include two counts, one for larceny, the other for receiving stolen goods. The count for receiving stolen goods must conclude against this section. If the offense of larceny charged is punishable by statute with a sentence greater than is provided by this section and if the count charging larceny concludes against the statute the two counts cannot be joined, as the punishment is different, but if the count charging larceny concludes at common law, which provided whipping, the two counts may be joined, for by abolishing whipping the punishment for the two offenses was made the same. State v. Lawrence, 81 N.C. 522 (1879).

A judgment upon a general verdict of guilty upon an indictment containing two counts — one for horse stealing, under § 14-81, and the other for receiving, under this section, is erroneous—the offenses not being of the same grade and the punishment being different. State v. Goings, 98 N.C. 766, 4 S.E. 121 (1887).

A charge of larceny of goods of the value of $3,000 and a charge of receiving the stolen property with knowledge that it had been stolen, may be joined as separate counts in a single bill, each being a felony. State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957).

The indictment was held sufficient in Doss v. North Carolina, 252 F. Supp 298 (M.D.N.C. 1966); State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Larceny Distinguished. — The crimes of larceny and of receiving stolen goods, knowing them to have been stolen, are separate and distinct offenses. However, receiving stolen property is a sort of secondary crime based upon a prior commission of the primary crime of larceny. It presupposes, but does not include, larceny. Therefore the elements of larceny are not elements of the crime of receiving. State v. Brady, 237 N.C. 675, 75 S.E.2d 155 (1953); State v. Neill, 244 N.C. 252, 93 S.E.2d 155 (1956).

Elements of the Offense.—The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. Sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. State v. Yow, 227 N.C. 585, 42 S.E.2d 661 (1947).

The essential elements of the crime of receiving stolen goods which must be proven, are stated as follows: (a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods, and (c) continued such possession or concealment with a dishonest purpose. State v. Brady, 237 N.C. 675, 75 S.E.2d 791 (1953).

If property was not stolen or taken from the owner in violation of this section, as where the original taking was without felonious intent, or was not against the owner's will or consent, the receiver is not

guilty of receiving stolen property State v. Collins, 240 N.C. 128, 81 S.E.2d 270 (1954)

If there was no theft, the buying of the property is not criminal, even if the buyer believes the property to have been stolen. State v. Collins, 240 N.C. 128, 81 S.E.2d 270 (1954).

The essential elements of the offense of receiving stolen goods are the receiving of goods which had been feloniously stolen by some person other than the accused, with knowledge by the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention of the possession of such goods with a felonious intent or with a dishonest motive. State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968).

The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968).

This section makes guilty knowledge one of the essential elements of the offense of receiving stolen goods. This knowledge may be actual, or it may be implied when the circumstances under which the goods were received are sufficient to lead the party charged to believe they were stolen. State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935).

It is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen. The question involved is whether the person charged had knowledge of the fact that the goods had been stolen at the time he received them, and not whether a reasonably prudent man in the transaction of his business would have gained such knowledge under the circumstances. State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935).

In a prosecution under this section, the test of felonious intent is whether the prisoners knew, or must have known, that the goods were stolen, not whether a reasonably prudent person would have suspected strangers calling at a very early morning hour. State v. Oxendine, 223 N.C. 659, 27 S.E.2d 814 (1943).

The test is as to the knowledge, actual or implied, of the defendant, and not what some other person would have believed from the facts attending the receipt of the goods. State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935).

Guilty knowledge is an essential element of the offense defined by this section, and while such knowledge may be implied or inferred by the jury from the facts and circumstances, it is error for the court to instruct the jury to the effect that defendant would have knowledge within the meaning of the statute if he received the goods under circumstances "such as to cause defendant to reasonably believe or know" that the property had been stolen, "reasonable belief" and "implied knowledge" not being synonymous. State v. Miller, 212 N.C. 361, 193 S.E. 388 (1937).

Felonious intent in receiving stolen goods with knowledge at the time that they had been stolen is necessary to a conviction under this section, and a charge which fails to submit the question of such intent to the jury entitled defendant to a new trial. State v. Morrison, 207 N.C. 804, 178 S.E. 562 (1935).

Value of Goods Received Must Exceed $200.00.—That the value of stolen goods received with knowledge by defendant exceeded $100.00 is an essential element of the offense prescribed by this section. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961), decided prior to the 1961 amendment to § 14-72, which increased the amount to $200.00. State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

Time Not of the Essence.—The crime of receiving stolen goods is not one of the offenses in which time is of the essence. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

Interest Not Necessary for Conviction. —It is not necessary that one receiving stolen goods do it for the purpose of making them his own or to derive profit from them, if he receives them to help the thief, as a friendly act, he is nevertheless guilty. State v. Rushing, 69 N.C. 29 (1873).

Goods Received through Agent. — If stolen goods are received by an agent of the accused, at his instance, that is sufficient to sustain a conviction if he knew that they were stolen goods. State v. Stroud, 95 N.C. 626 (1886).

Failure to Prove Ownership of Property.—In a prosecution under this section where there was no evidence on the record tending to show that the property alleged to have been stolen was that of the owner named in the indictment, the defendant's motion for dismissal or nonsuit. should be allowed. State v. Pugh, 196 N.C. 725, 147 S.E. 7 (1929).

The inference or presumption arising from the recent possession of stolen property, without more, does not extend to the charge of this section of receiving said

property knowing it to have been feloniously stolen or taken. State v. Best, 202 N.C. 9, 161 S.E. 535 (1931); State v. Lowe, 204 N.C. 572, 169 S.E. 180 (1933); State v. Yow, 227 N.C. 585, 42 S.E.2d 661 (1947); State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952); State v. Neill, 244 N.C. 252, 93 S.E.2d 155 (1956).

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error. State v. Larkin, 229 N.C. 126, 47 S.E.2d 697 (1948).

Accessories Abolished. — By abolishing the distinction between petit and grand larceny the offense of accessory after the fact was also abolished, and one receiving stolen goods is treated and punished as principal. State v. Tyler, 85 N.C. 569 (1881).

Conviction of Larceny Is Tantamount to Acquittal on Charge of Receiving.— Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving. State v. Holbrook, 223 N.C. 622, 27 S.E.2d 725 (1943).

A plea of guilty of receiving stolen property knowing it to have been stolen is insufficient to support a felony sentence, even though the indictment charges defendant with receiving stolen goods having a value of more than $200. State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

Burden of Proof.—In order for the defendant to be found guilty of a felony under this section, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than $200. This is an essential element of the crime because § 14-72 specifically provides that "the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars, is hereby declared a misdemeanor." State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

Verdict Need Not Specify Value of Goods.—In a prosecution under this section, it is not required that the jury should determine the value of the goods in its verdict. State v. Morrison, 207 N.C. 804, 178 S.E. 562 (1935); State v. Hill, 237 N.C. 764, 75 S.E.2d 915 (1953).

Defective Verdict. — Where the verdict in an indictment under this section is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed. State v. Shaw, 194 N.C. 690, 140 S.E. 621 (1927); State v. Cannon, 218 N.C. 466, 11 S.E.2d 301 (1940).

In a prosecution upon an indictment charging in one count larceny and in another count receiving the stolen goods, a verdict of guilty as charged is equivalent to a verdict of guilty as to each count, and is not merely inconsistent, but contradictory, since a defendant may be guilty of larceny or of receiving, but not both. State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957)

The jury returned a verdict of guilty as charged to an indictment charging both larceny and receiving the stolen goods with knowledge that they had been stolen. A single judgment was entered on the verdict There was error in the court's instruction to the jury on the count of receiving. Since defendant could not be guilty of both larceny and receiving the same goods, and it was impossible to determine to which count the verdict related, it was impossible to determine whether the error was prejudicial or harmless and therefore a new trial must be awarded State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957).

Same — Failure to Charge as to Guilty Knowledge.—Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a venire de novo will be ordered on appeal. State v. Barbee, 197 N.C. 248, 148 S.E. 249 (1929).

Evidence Held Sufficient for Jury.— State v. Chambers, 239 N.C. 114, 79 S.E.2d 262 (1953).

Evidence held sufficient to go to jury upon charge of receiving stolen property with knowledge that it had been feloniously stolen. State v. Larkin, 229 N.C. 126, 47 S.E.2d 697 (1948).

Evidence of receiving stolen goods held amply sufficient to overrule motion for nonsuit. State v. Myers, 240 N.C. 462, 82 S.E.2d 213 (1954).

Upon appeal from a conviction under an indictment for feloniously receiving property of a value of $602, knowing it to have

been feloniously stolen, it was held that, considering the evidence in the light most favorable to the State, it was amply sufficient to carry the State's case to the jury, and to support the verdict, and defendant's motions for judgment of compulsory nonsuit were properly overruled by the trial judge. State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Evidence Held Insufficient for Jury.— See State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952).

Instructions. — Where the indictment charges the defendant with "feloniously" receiving stolen goods, knowing them to have been stolen, but the charge fails to instruct the jury that it must find that the receiving was with the felonious intent, this is error and entitles the defendant to a new trial. State v. Brady, 237 N.C. 675, 75 S.E.2d 791 (1953).

Where the judge charged the jury: "Now, the offense charged here has at least four distinct elements that the State must satisfy you beyond a reasonable doubt about," and the court then instructed the jury as to the essential elements of the crime of receiving stolen goods, quoting from 1 Wharton's Criminal Evidence, 10th Ed., § 325b, p. 643, with the exception that Wharton states there are three elements, and the second element is " . . . (b) that the accused, knowing them to be stolen, received or aided in concealing the goods," and the trial judge charged: " . . . second, that the defendant received the goods that were stolen; third, that at the time of receiving the goods the defendant knew that they had been stolen," an assignment of error to the charge was overruled. State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Where the trial judge clearly charged the jury in substance that if it found beyond a reasonable doubt from the evidence that defendant was guilty of receiving stolen property (certain guns), knowing it to have been stolen, as he had defined the offense for it, and found beyond a reasonable doubt that the guns were of a value of $600, then it would return a verdict of guilty as charged, but if under those circumstances it found the guns were of a value of $200 or less, then it would return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200 or less, a misdemeanor, this conforms to the decision in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962). State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Punishment.—Prior to the 1949 amendment receiving stolen goods was only a misdemeanor under this section, but it could be punished as larceny at the discretion of the court. State v. Brite, 73 N.C. 26 (1875).

An execption to a judgment of imprisonment in the State's prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, was untenable, in that the judgment was within this section. State v. Reddick, 222 N.C. 520, 23 S.E.2d 909 (1943).

Upon a plea of nolo contendere to a charge of receiving cigarettes of the value of $75.00 knowing them to have been stolen, a sentence of imprisonment at hard labor for not less than three years nor more than five years is within the limits prescribed by this section and §§ 14-1 through 14-3, and therefore defendant's contention that the punishment imposed is excessive for the offense charged is not meritorious. State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946).

Applied in State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962); State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Brown, 1 N.C. App. 145, 160 S.E.2d 508 (1968); State v. Whitley, 208 N.C. 661, 182 S.E 338 (1935); State v. Camby, 209 N.C. 50, 182 S.E. 715 (1935); State v. Law, 228 N.C. 443, 45 S.E.2d 374 (1947); State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950).

Cited in State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Wilson, 251 N.C. 174, 110 S.E.2d 813 (1959); State v. Brown, 198 N.C. 41, 150 S.E. 635 (1929); State v. Ray, 209 N.C. 772, 184 S.E. 836 (1936); State v. Conner, 212 N.C. 668, 194 S.E. 291 (1937); State v. Law, 227 N.C. 103, 40 S.E.2d 699 (1946); Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 151 (1933).

§ 14-72. Larceny of property; receiving stolen goods not exceeding two hundred dollars in value.—(a) Except as provided in subsections (b) and (c) below, the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars ($200.00) is a misdemeanor punishable under G.S. 14-3 (a). In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

(3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerine, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; any weapon, gunpowder, ammunition, or other device or substance primarily useful in hunting or sport; any antique or souvenir weapon or ammunition; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.

(c) The crime of receiving stolen goods knowing them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1; C. S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2; 1959, c. 1285; 1961, c. 39, s. 1; 1965, c. 621, s. 5; 1969, c. 522, s. 2.)

Editor's Note.—

The 1969 amendment rewrote this section.

The cases cited in the note below were decided prior to the 1969 amndment.

For case law survey as to punishment for larceny, see 45 N.C.L. Rev. 910 (1967).

For comment on alleging and proving elements of offense under this section and § 14-54, see 3 Wake Forest Intra. L. Rev. 1 (1967).

This section relates solely to punishment for the separate crime of larceny. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

Purpose of Amendments. — It seems probable the General Assembly, in enacting the amendments to this section, was not motivated by a disposition to protect thieves from the adverse effects of inflation, but to reduce the number of cases (involving felony charges) in the exclusive jurisdiction of the superior court. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

This section divides larceny into two degrees, one a misdemeanor, the other a felony. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957); State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

Degree of Offense Depends Solely on Value of Property Taken.—Whether a person who commits the crime of larceny is guilty of a felony or guilty of a misdemeanor depends solely upon the value of the property taken. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

The dividing line between felonious and nonfelonious larceny, not perpetrated by breaking and entering, is $200. Anders v. Turner, 379 F.2d 46 (4th Cir. 1967.)

And money is the standard of value. If the amount is known there can be no disagreement as to value. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

It Is Inapplicable to Larceny from the Person.—This section clearly points out that if larceny is from the person, the limitation in the statute does not apply. Therefore, larceny from the person in any amount is punishable under § 14-70. State v. Stevens, 252 N.C. 331, 113 S.E.2d 577 (1960).

Larceny from a person is a felony. State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964).

In larceny from the person there must be a taking, though the value of the property is immaterial. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

Larceny from the person as at common law is a felony without regard to the value of the property stolen. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

And to Unlawful Taking of Vehicle.—A defendant may not be convicted under § 20-105 for the unlawful taking of a vehicle upon trial on a bill of indictment for

larceny. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

Where this section does not apply, the larceny is a felony, as at common law, without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Fowler, 266 N.C. 667, 147 S.E.2d 36 (1966).

Larceny of any property of another of any value after breaking and entering, and larceny of property of more than $200 in value, are felonious, each of which may be punishable by imprisonment for as much as ten years. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

Thus, larceny of property of a value in excess of $200 is a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

As Is Receiving Stolen Property of Such Value.—The criminal offense of receiving stolen property, defined in § 14-71, where the value of the property is in excess of $200, is a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

In order for the defendant to be found guilty of a felony under § 14-71, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than $200. This is an essential element of the crime because this section specifically provides that "the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars is hereby declared a misdemeanor." State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

And Larceny by Breaking and Entering.—Under the amendment of this section, larceny by breaking and entering any building referred to therein is a felony without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Wilson, 264 N.C. 595, 142 S.E.2d 180 (1965); State v. McKoy, 265 N.C. 380, 144 S.E.2d 46 (1965); State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

But Larceny of Property of a Value of Not More than $200 Is Only a Misdemeanor.—If the value of the stolen property is found to be of the value of not more than $200 or less, such larceny is only a misdemeanor and punishable as such. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

Nothing else appearing, larceny of goods of the value of not more than $200 is a misdemeanor. State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

And this section applies where there is no charge of breaking and entering or breaking or entering involved. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

The misdemeanor of larceny is a lesser degree of the felony of larceny within the meaning of § 15-170. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

What Constitutes Larceny.—To constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

To constitute larceny the taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although guilty knowledge may be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous. State v. Saulding, 211 N.C. 63, 188 S.E. 647 (1936).

"Felonious intent" is an essential element of the crime of larceny without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

The phrase "felonious intent" originated when both grand and petit larceny were felonies. Now "felonious intent," in the law of larceny, does not necessarily signify an intent to commit a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

For definitions of "felonious intent," as an element of the crime of larceny, see State v. Powell, 103 N.C. 424, 9 S.E. 627 (1889); State v. Kirkland, 178 N.C. 810, 101 S.E. 560 (1919); State v. Booker, 250 N.C. 272, 108 S.E.2d 426 (1959); State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

Larceny involves a trespass either actual or constructive. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

But actual trespass is not a necessary element of larceny when possession of property is fraudulently obtained by some

trick or artifice. State v. Bowers, 73 N.C. 652, 161 S.E.2d 11 (1968).

Indictment.—An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified a sum of money, charges the crime of larceny and not that of robbery. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

Where the indictment charges the larceny of $200 or less and does not charge that the larceny was from a building by breaking or entering, or by any other means of such nature as to make the larceny a felony, the indictment charges only a misdemeanor, and a sentence on the count in excess of two years must be vacated and the cause remanded for proper judgment. State v. Fowler, 266 N.C. 667, 147 S.E.2d 36 (1966).

The indictment was held sufficient in Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

Indictment for Larceny from the Person.—It is not necessary for the indictment to allege that the larceny was from the person for it to be shown. State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895).

Solicitors would do well to include in bills of indictment the words "from the person" if and when they intend to prosecute for the felony of larceny from the person. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Exclusive Jurisdiction in Superior Court.—The crime of larceny is a felony punishable in the State's prison, and a recorder's court, not having jurisdiction thereof, may not make orders disposing of a juvenile "delinquent" under the statute providing for reclamation of such, whether the offense be termed therein a misdemeanor or otherwise, N.C. Const., Art. I, §§ 12 and 13; and when such has been attempted, it will be disregarded upon conviction of this offense in the superior court having jurisdiction. State v. Newell, 172 N.C. 933, 90 S.E. 594 (1916).

Larceny from the person regardless of the value of the property is within the exclusive jurisdiction of the superior court, as punishment under § 14-70 may be as much as ten years. State v. Brown, 150 N.C. 867, 64 S.E. 775 (1909).

When State Must Prove That Value of Property Exceeded $200.—Except in those instances where this section does not apply, to convict of the felony of larceny, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than $200; and, this being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Holloway, 265 N.C. 581, 144 S.E.2d 634 (1965).

In cases under this section, it is incumbent upon the State to prove beyond a reasonable doubt that the property stolen had a value in excess of $200 in order for the punishment to be that provided for a felony. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965).

It is not always necessary that the stolen property should have been actually in the hands or on the person of the accused. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

It is sufficient if such property was under his exclusive personal control. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

The principle of law known as recent possession of stolen property itself indicates the conditions under which it operates, and to bring it into play there must be proof of three things: (1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

The principle of law known as recent possession of stolen property is usually applied to possession which involves custody about the person, but it is not necessarily so limited. It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

The identity of the fruits of the crime must be established before the presumption of recent possession can apply. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

The presumption of recent possession is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

If the circumstances are such as to exclude the intervening agency of others between the theft and the recent possession

of stolen goods, then such recent possession may afford presumptive evidence that the person in possession is the thief. The presumption, however, is one of fact only and is to be considered by the jury merely as an evidential fact along with other evidence in determining the defendant's guilt. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

The applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession. It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

Evidence that defendant was in possession of stolen property shortly after the property was stolen raises a presumption of defendant's guilt of larceny of such property. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker as the possession is nearer to or more distant from the time of the commission of the offense. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

"Value" as used in this section means fair market value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

Opinion as to Value.—It is not necessary that a witness be an expert in order to give his opinion as to value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

An estimate has been held to be some evidence of value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

Burglary.—A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than $20 is no defense to the capital charge, this section dividing larceny into two degrees having no application to burglary. State v. Richardson, 216 N.C. 304, 4 S.E.2d 852 (1939).

Evidence.—In a prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than $50 (now $100) to establish a felony under this section. State v. Weinstein, 224 N.C. 645, 31 S.E.2d 920 (1944).

Where the State's evidence was that $400 was stolen, and defendant testified that she received $420 by gift, and that she stole nothing, there was no evidence from which the jury could have found the defendant guilty of larceny of a value of $200 or less. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

Evidence was held amply sufficient to support verdict of guilty of feloniously breaking and entering and larceny by means of such felonious breaking and entering in State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966).

Instructions. — Where the trial judge clearly charged the jury in substance that if it found beyond a reasonable doubt from the evidence that defendant was guilty of receiving stolen property (certain guns), knowing it to have been stolen, as he had defined the offense for it, and found beyond a reasonable doubt that the guns were of a value of $600, then it would return a verdict of guilty as charged, but if under those circumstances it found the guns were of a value of $200 or less, then it would return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200 or less, a misdemeanor, this conforms to the decision in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962). State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Where a defendant is indicted for the larceny of property of the value of more than $200, except in those instances where this section does not apply, it is incumbent upon the trial judge to instruct the jury, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen property exceeds $200, the jury should return a verdict of guilty of larceny of property of a value not exceeding $200. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

And Need Fix Value Only in Case of Doubt.—The portion of this section which expressly states, "In all cases of doubt the jury shall in its verdict fix the value of the

property stolen," means exactly what it says, and where all the evidence is to the effect that the stolen property had a value many times in excess of $200, and there is no evidence or contention to the contrary, the trial court is under no legal obligation to require the jury to fix the value of the stolen property. State v. Brown, 267 N.C. 189, 147 S.E.2d 916 (1966).

Where the bill upon which the defendant was tried charged the defendant with the larceny of a 1961 Chevrolet automobile of the value of $1200 and the evidence amply supported the charge, and there was no evidence to the contrary, it was unnecessary upon such a factual situation to require the jury to find that a 1961 Chevrolet automobile of the value of $1200 was worth more than $200. State v. Brown, 267 N.C. 189, 147 S.E.2d 916 (1966).

Jury Need Not Fix Precise Value of Stolen Property.—The final sentence of this section does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200. When the jury is properly instructed, the verdict necessarily determines whether the value of the stolen property exceeds $200. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

A finding that defendant stole property of the value of more than $50 is not a finding that the property had a value of more than $100. State v. Williams, 235 N.C. 429, 70 S.E.2d 1 (1952), decided prior to the 1961 amendment increasing the amount to $200.

Sentence. — A sentence of twenty-five years imprisonment, imposed after a plea of guilty to four indictments charging felonious breaking and entering and larceny in violation of § 14-54 and this section, did not exceed the statutory maximum and was not cruel and unusual punishment in the constitutional sense. State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967).

A plea of guilty to the larceny of a sum less than $200 does not support a sentence of ten years' imprisonment, and the imposition of such sentence must be vacated. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

The punishment for larceny from the person may be for as much as ten years in State's prison. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

The punishment for larceny from the person may include imprisonment for a term of ten years. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

The maximum punishment is ten years' imprisonment for the felony of larceny of property from a building referred to in this section by breaking or entering therein with intent to steal. State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969).

The maximum imprisonment for the misdemeanor of larceny is two years. State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

Where an indictment charges larceny of property of the value of $200 or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

The imposition of a sentence of imprisonment of seven to nine years upon plea of nolo contendere to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense. State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967).

Where an indictment charges larceny of $200 or less, but does not contain allegations that the larceny was from a building by breaking and entering, the punishment cannot exceed two years in prison, even though all the evidence tends to show the larceny was accomplished by a felonious breaking and entering. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Applied in State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953); State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Barnes, 270 N.C. 146, 153 S.E.2d 868 (1967); State v. Martin, 270 N.C. 286, 153 S.E.2d 96 (1967); State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967); State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967); State v. Burgess, 1 N.C. App. 142, 160 S.E.2d 105 (1968); State v. Davidson, 124 N.C. 839, 32 S.E. 957 (1899).

Quoted in State v. Hill, 237 N.C. 764, 75 S.E.2d 915 (1953); State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

Stated in State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965).

Cited in State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957); Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Ford, 266 N.C. 743, 147 S.E.2d 198 (1966); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968); State v. Hemphill, 273 N.C. 388, 160 S.E.2d 53 (1968); State v. Stafford, 274 N.C. 519,

164 S.E.2d 371 (1968); State v. Johnson, 1 N.C. App. 15, 159 S.E.2d 249 (1968); State v. Corpening, 207 N.C. 805, 178 S.E. 564 (1935); State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Jones, 227 N.C. 47, 40 S.E.2d 458 (1946).

§ 14-72.1. Concealment of merchandise in mercantile establishments.—Whoever, without authority, wilfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than six months, or by both such fine and imprisonment. Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

Any person found guilty of a second or subsequent offense of willful concealment of goods as defined in the first paragraph of this section shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1957, c. 301.)

Editor's Note.—For case law survey on shoplifting, see 41 N.C.L. Rev. 446 (1963).

Purpose of Section.—The sly, stealthy, crafty nature of the crime of shoplifting and the small individual thefts make detection, prosecution and conviction of the shoplifter for larceny a most difficult and perilous matter. When a merchant accosts a shoplifter, and takes out a warrant against him for larceny, and the shoplifter is acquitted when tried, the merchant risks a lawsuit for large damages for malicious prosecution, false imprisonment, false arrest, or similar tort. Faced with such a formidable array of deterrents, many a merchant stands by and watches his property disappear without a fair, legally protected, opportunity to protect it, if his sole remedy is a successful prosecution for larceny, in which offense super-added to the wrongful taking there must be a felonious intent. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

This section violates neither N.C. Const., Art. I, § 17, nor the due process clauses of the federal Constitution, by reason of vagueness and uncertainty, and of not informing a person of ordinary intelligence with reasonable precision of the acts it prohibits. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

It Is Sufficiently Definite.—This section is sufficiently definite to guide the judge in its application and the lawyer in defending one charged with its violation. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

This section defines with sufficient clarity and definiteness the acts which are penalized, and informs a person of ordinary intelligence with reasonable precision what acts it intends to prohibit so that he may know what acts he should avoid, in order that he may not "cross the line" and bring himself within its penalties. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

And Omits No Essential Provisions.—This section omits no essential provisions which go to impress the inhibited acts committed as being wrongful and criminal. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

And Has a Substantial Relation to the End Sought to Be Accomplished.—It is manifest that this section has a rational, real and substantial relation to the end sought to be accomplished, which is the protection of our merchants from shoplifting, and that such was the manifest purpose and design of the legislation. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Act May Be Made Criminal Irrespective of Intent.—It is within the power of the legislature to declare an act criminal irrespective of the intent of the doer of the act. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Elements of Offense. — The statutory offense created by this section is composed of four essential elements: Whoever (1) without authority, (2) willfully conceals the goods or merchandise of any store, (3) not theretofore purchased by such person, (4) while still upon the premises of the store, shall be guilty of a misdemeanor. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Felonious or Criminal Intent Is Not a Necessary Element.—It is manifest from the language of this section, in view of its manifest purpose and design, that the legislature intended that a felonious intent or a criminal intent should not be a necessary element of the statutory crime of shoplifting. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Willful Concealment. — "Willfully con-

ceals" as used in this section means that the concealing is done under the circumstances set forth in the statute voluntarily, intentionally, purposely and deliberately, indicating a purpose to do it without authority, and in violation of law, and this is an essential element of the statutory offense of shoplifting. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Applied in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968).

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.—The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than two hundred dollars. (1913, c. 118, s. 2; C. S., s. 4252; 1941, c. 178, s. 2; 1949, c. 145, s. 3; 1961, c. 39, s. 2.)

Cross References.—See note to § 14-72. For subsequent law effecting this section, see § 14-73.1.

Applied in State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960).

Cited in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

§ 14-73.1. Jurisdiction generally in cases of larceny and receiving stolen goods; petty misdemeanors.—The offenses of larceny and the receiving of stolen goods knowing the same to have been stolen, which are made misdemeanors by article 16, subchapter V, chapter 14 of the General Statutes, as amended, are hereby declared to be petty misdemeanors, and jurisdiction to hear, try and finally dispose of such offenses committed within their respective territorial jurisdictions, is hereby vested in all courts established by a special act of the legislature or pursuant to the provisions of chapter 7 of the General Statutes which now possess jurisdiction of misdemeanors which are punishable in the discretion of the court. (1949, c. 145, s. 4.)

Editor's Note.—For brief comment on section, see 27 N.C.L. Rev. 448.

§ 14-74. Larceny by servants and other employees.—If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in the following section [§ 14-75], by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be fined or imprisoned in the State prison or county jail not less than four months nor more than ten years, at the discretion of the court: Provided, that nothing contained in this section shall extend to apprentices or servants within the age of sixteen years. (21 Hen. VIII, c. 7, ss. 1, 2; R. C., c. 34, s. 18; Code, s. 1065; Rev., s. 3499; C. S., s. 4253.)

Cross Reference.—As to embezzlement, see § 14-90 et seq.

Servant Defined.—In a strict sense all employees are servants but the term servant is usually applied, and meant to apply to one of menial rank. State v. Higgins, 1 N.C., 36 (1792).

Trust Relation Necessary. — A person employed as a clerk, who takes goods from his employer's store and sends them to another at a distance to be sold cannot be convicted under this statute as there was no parting with possession by the owner which brought about a trust relation. State v. Higgins, 1 N.C. 36 (1792).

Trust Relation Must Be Alleged.—In an indictment under this section, it is necessary to allege that the property was received and held by the defendant in trust, or for the use of the owner, and beng so

held it was feloniously converted or made way with by the servant or agent. State v. Wilson, 101 N.C. 720, 7 S.E. 872 (1888).

Averment of Age.—The averment that the defendant, when committing the act, was not within—that is, was of the age of eighteen years or more, and thus negatives that she was under sixteen years of age—does not invalidate the indictment, although the negative goes beyond the statutory requirement, for the greater includes the less. State v. Wilson, 101 N.C. 730, 7 S.E. 872 (1888).

Applied in State v. Hauser, 257 N.C. 158, 125 S.E.2d 389 (1962).

Cited in State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

§ 14-75. Larceny of chose in action.—If any person shall feloniously steal, take and carry away, or take by robbery, any bank note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this State or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a crime of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of the same value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of such value. (1811, c. 814, s. 1; R. C., c. 34, s. 20; Code, s. 1064; Rev., s. 3498; C. S., s. 4254; 1945, c. 635.)

Cross Reference.—As to description of stolen money in indictment, see § 15-149.

Treasury Notes.—Treasury notes issued by the United States Treasury Department are covered by this statute as they are "public securities." Although a class of securities issued after the enactment of the statute they are subject to larceny the same as any other note issued after the enactment. State v. **Thompson, 71 N.C.** 146 (1874).

Due Bills. — While a "due bill" is not a promissory note, and negotiable by endorsement, it is within the meaning of the words, "or other obligation," in this section. The larceny of such a paper is indictable. State v. Campbell, 103, N.C. 344, 9 S.E. 410 (1889).

A pension check on the United States Treasury comes under this section. State v. Bishop, 98 N.C. 773, 4 S.E. 357 (1887).

Larceny of the Instrument and Paper Distinguished.—When a person is indicted for stealing a promissory note or any other chose in action, it is upon the State to prove the larceny of the instrument, and proof of larceny of a piece of paper is not sufficient. If the instrument has been paid before the alleged felonious taking, the indictment charging only larceny of a chose in action is not sufficient to convict. State v. Campbell, 103 N.C. 344, 9 S.E. 410 (1889).

Charter of Bank Issuing Immaterial. — If a stolen note was issued by a bank within one of the United States, it is within the letter of the act, and there cannot be the slightest doubt but that it is also within its spirit and meaning. The act is silent as to the authority by which the bank must be chartered, and the mischief of stealing one of its notes from a bona fide holder is the same, whether it derives its existence from an act of Congress or from the legislature of New York. State v. Banks, 61 N.C. 577 (1868).

Sufficient Description.—An indictment for larceny which describes the thing stolen, as "one promissory note issued by the Treasury Department of the government of the United States for the payment of one dollar," is in that respect sufficient. State v. Fulford, 61 N.C. 563 (1868).

Amount Must Be Set Out.—An indictment for stealing a bank note is sufficient if it states the amount of the note and what bank it was drawn on. Some cases hold that the mere statement of the amount of the note is sufficient description. State v. Rout, 10 N.C. 618 (1825).

Cited in State v. Freeman, 88 N.C. 469 (1883).

§ 14-75.1. Larceny of secret technical processes.—Any person who steals property consisting of a sample, culture, microorganism, specimen, record, recording, document, drawing, or any other article, material, device, or substance which constitutes, represents, evidences, reflects, or records a secret scientific or technical process, invention, formula, or any phase or part thereof shall be guilty of a felony punishable by imprisonment not exceeding four years or by a fine not exceeding five thousand dollars ($5,000.00), or by both. A process, invention, or formula is "secret" when it is not, and is not intended to be, available to anyone other than the owner thereof or selected persons having access thereto for limited purposes with his consent, and when it accords or may accord the owner an advantage over competitors or other persons who do not have knowledge or the benefit thereof. (1967, c. 1175.)

§ 14-76. Larceny, mutilation, or destruction of public records and papers.—If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offense it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and willfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration or record required to be kept by the register of deeds or shall unlawfully destroy, obliterate, deface or remove any records of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor. (8 Hen. VI, c. 12, s. 3; R. C., c. 34, s. 31; 1881, c. 17; Code, s. 1071; Rev., s. 3508; C. S., s. 4255.)

In General.—An indictment will lie under this section for changing, injuring or obliterating tax books, and the oral testimony of the register of deeds is competent to show the amount of the abstract made by him and sent to the auditor, the changed amount, and the acts of the deputy sheriff, as circumstances to show his guilt. State v. Gouge, 157 N.C. 602, 72 S.E. 994 (1911).

Nomenclature does not always determine the grade or class of a crime; a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony and construed with § 14-3 the offense prescribed by this section is punishable by imprisonment in the penitentiary, and therefore a felony. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Must Show Offense Committed on Day of Opportunity.—On a trial under this section for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. State v. Swinson, 196 N.C. 100, 144 S.E. 555 (1928).

§ 14-77. Larceny, concealment or destruction of wills.—If any person, either during the life of the testator or after his death, shall steal or, for any

fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor. (R. C., c. 34, s. 32; Code, s. 1072; Rev., s. 3510; C. S., s. 4256.)

Cross Reference.—As to clerk's power to compel production of will when one in whose custody it is refuses to produce it, see § 31-15.

Basis.—Obviously the basis for making the fraudulent suppression of a will a crime as provided by this section is the fact that it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. Wells v. Odum, 207 N.C. 226, 176 S.E. 563 (1934).

Cited in In re Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960); In re Will of Covington, 252 N.C. 546, 114 S.E.2d 257 (1960).

§ 14-78. Larceny of ungathered crops.—If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly. (1811, c. 816, P. R.; R. C., c. 34, s. 21; 1868-9, c. 251; Code, s. 1069; Rev., s. 3503; C. S., s. 4257.)

At Common Law.—By the common law, larceny cannot be committed of things which savor of the realty, and are at the time they are taken a part of the freehold, such as corn and the produce of land. State v. Foy, 82 N.C. 679 (1880); State v. Thompson, 93 N.C. 537 (1885).

What Indictment Must Allege.—On trial of an indictment for larceny charging the defendant with stealing "seed cotton and lint cotton," evidence that defendant took the gleanings of the cotton from the field, is not admissible. To render such evidence competent, the indictment should be framed under the statute, and described the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. State v. Bragg, 86 N.C. 688 (1882).

In the case of State v. Liles, 78 N.C. 496 (1878), the defendant was indicted for the larceny of figs, "remaining ungathered in a certain field," etc., and the words "cultivated for food or market," were omitted, and it was held by this court that the indictment, for that reason, was fatally defective. State v. Thompson, 93 N.C. 537 (1885).

Indictment Must Conclude against the Statute. — An indictment for larceny of growing cabbage must conclude against the statute, and a failure to so conclude makes the indictment one at common law. As the offense at common law was not larceny but only a civil trespass there can be no judgment. State v. Foy, 82 N.C. 679 (1880).

Applies to All Crops. — This section applies to any growing crops cultivated for food or market, and is not restricted to several articles specifically named. State v. Ballard, 97 N.C. 443, 1 S.E. 685 (1887).

Exclusive Jurisdiction of Superior Court. — The punishment for an offense under this section is greater than a justice of the peace can adjudge under the Constitution. State v. Cherry, 72 N.C. 123 (1875). Therefore exclusive jurisdiction is vested in the superior court. State v. Graham, 76 N.C. 195 (1877).

§ 14-78.1. Trading for corn without permission of owner of premises.—Any person engaged in traveling from house to house or from place to place, buying or trading for corn, without the permission of the landowner upon whose premises such buying or trading is conducted, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. This section shall apply only to the counties of Bertie, Columbus, Craven, Edgecombe, Greene, Halifax, Harnett, Hertford, Martin, Nash, Northampton, Perquimans, Robeson, Sampson, Wake, Warren, Wayne and Wilson. (1951, c. 30; 1955, c. 684; 1957, c. 356; 1969, c. 1224, s. 4.)

Editor's Note. — The 1969 amendment rewrote the provisions of the first sentence relating to punishment.

§ **14-79. Larceny of ginseng.**—If any person shall take and carry away, or shall aid in taking or carrying away, any ginseng growing upon the lands of another person, with intent to steal the same, he shall be guilty of a felony, and shall be imprisoned not less than two years nor more than five years, in the discretion of the court: Provided, that such ginseng, at the time the same is taken, shall be in beds and the land upon which such beds are located shall be surrounded by a lawful fence. (1905, c. 211; Rev., s. 3502; C. S., s. 4258.)

Cross Reference.—As to digging ginseng out of season on the lands of another, see § 14-392.

§ **14-80. Larceny of wood and other property from land.**—If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (1866, c. 60; Code, s. 1070; Rev., s. 3511; C. S., s. 4259.)

Cross References.—As to cutting, injuring, or removing another's timber, see § 14-135. As to larceny of branded timber, see §§ 80-21 and 80-22.

In General. — This section and § 14-134 were enacted immediately after the Civil War to protect landowners from aimless wanderers who entered land without force, but often did great damage. It was not intended to prevent entry by person who had an honest claim to the land, nor was it intended to apply when force was employed. State v. Crawley, 103 N.C. 353, 9 S.E. 409 (1889). It was intended to prevent the willful and unlawful taking from the land of another property that was not by common law or prior statute subject to larceny. State v. Vosburg, 111 N.C. 718, 16 S.E. 392 (1892).

The word "whatsoever" shows a clear intent of the legislature to make it general in its application. State v. Beck, 141 N.C. 829, 53 S.E. 843 (1906).

The taking of a brass rail from around an engine that is stationary is larceny under this section. The rule in State v. Burt, 64 N.C. 619 (1870) in holding that taking a loose nugget of gold from a loose pile of stone is not larceny is not approved. It, although decided after this section was enacted, was probably decided under the common law as this section is not mentioned by the court and in all probability was not called to its attention. State v. Beck, 141 N.C. 829, 53 S.E. 843 (1906). In the case of State v. Graves, 74 N.C. 396 (1876), it is held that an indictment for trespass to personal property cannot be supported for the taking of rails from a fence as the taking is "one continuous act" and is trespass to the realty. State v. Burt is cited and approved, and no reference is made to this section. The technical distinction of one continuous act is exactly what was repealed.

One having title to the land or a bona fide claim thereto is not liable under this section by its express terms. One who enters as a servant of a bona fide claimant or one having title is not subject to the application of this section as the protection afforded the master extends to his servant. State v. Boyce, 109 N.C. 739, 14 S.E. 98 (1891).

A tenant of seven acres being a part of a tract of thirty-five acres claimed by the landlord, when expressly prohibited from cutting timber on any of the tract except the seven acres on which he is a tenant, may as the servant of a third person claiming adversely go on the other part of the tract and cut timber, and he will not be estopped to deny his landlord's title except as to the seven acres leased to him, nor will he be liable under this section if the person whose servant he has been can prove his title or bona fide claim. State v. Boyce, 109 N.C. 739, 14 S.E. 98 (1891).

Purpose of Section. — This section was enacted to eliminate a defect in the common-law rule and to extend it so as to make chattels real, such as growing trees, plants, minerals, metals and fences, connected in some way with the land, the subject of larceny. The obvious intent of the act was to prevent the willful and unlawful entry upon the land of another and the taking and carrying away of such articles as were not, at common law or by previous statute, the subject of larceny. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

Money Not Included.—The penalty for entering the lands of another and carrying off wood or any other kind of property whatsoever growing or being thereon, does not contemplate or embrace such taking and carrying away of money; it means such property as was not, at common law, subject to larceny. State v. Vosburg, 111 N.C. 718, 16 S.E. 392 (1892).

Turpentine which has flowed down trees into boxes made to catch it, and is in a state to be dipped out, is a subject of larceny. State v. Moore, 33 N.C. 70 (1850); State v. King, 98 N.C. 648, 4 S.E. 44 (1887).

Trespass upon land is an essential element of the offense hereby created. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

Claim of Interest Must Be Founded. — An entry, without a survey and grant from the State is not sufficient to support a claim to the land, and is no defense to an indictment under this section. State v. Calloway, 119 N.C. 864, 26 S.E. 46 (1896).

Tombstones. — Defendant was charged with feloniously stealing and carrying away one tombstone erected at the grave of a deceased person, being the goods and chattels of a named person. The court instructed the jury that the offense charged was larceny, which is the wrongful and felonious taking and carrying away of personal property of some value belonging to another, with felonious intent. Held: Neither the indictment nor the theory of trial refers to trespass constituting an element of the statutory crime of larceny of chattels real, nor to the distinction of taking with, and taking without felonious intent set forth in this section, and there is a fatal variance between the indictment for common-law larceny and the proof of the statutory larceny of a chattel real, and defendant's motion to nonsuit should have been granted. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

Warrant Not Charging Offense. — A warrant charging that defendant unlawfully and willfully authorized and directed his employee to enter upon the lands of another and carry off sand and gravel therefrom, without alleging what, if anything, the employee did pursuant to such authorization, does not charge a criminal offense. State v. Everett, 244 N.C. 596, 94 S.E.2d 576 (1956).

Evidence Insufficent to Go to Jury. — Testimony that defendant was paid for dogwood delivered to a woodyard, without evidence that defendant actually delivered the wood, with further evidence that dogwood taken from the yard fitted stumps on prosecuting witness' land from which the wood had been wrongfully taken, was held insufficient to be submitted to the jury in a prosecution under this section, even though the doctrine of recent possession be invoked, since the evidence does not disclose that defendant had been in possession of the wood. State v. Turner, 238 N.C. 411, 77 S.E.2d 782 (1953).

§ 14-81. Larceny of horses and mules. — If any person shall steal any horse, mare, gelding, or mule he shall be guilty of larceny and punished as provided by this article for the crime of larceny. (1866-7, c. 62; 1868, c. 37, s. 1; 1879, c. 234, s. 2; Code, s. 1066; Rev., s. 3505; 1917, c. 162, s. 2; C. S., s. 4260; 1965, c. 621, s. 6.)

Taking with Belief of Interest. — One taking a mule from the stable of another at night and without the consent of the owner is not guilty of larceny if he believed at the time when he took the mule that he had an interest in it. State v. Thompson, 95 N.C. 596 (1886).

Same — Question for a Jury.—One who takes a mule from the stable of another in a manner indicating felonious purpose but under a claim of interest should have the question of his act being under a bona fide claim submitted to the jury, and a charge that if the taking was not under a bona fide belief that he had a property or interest in the mule he would be guilty of larceny was not error. State v. Thompson, 95 N.C. 596 (1886).

Joinder with Charge of Receiving Stolen Goods.—An indictment for horse stealing concluded at common law is punishable as petit larceny. If there are two counts and the second is for receiving stolen goods and concludes against the statute, the punishment for the two is the same and they may be joined, but on conviction a sentence of ten years is all that can be given. State v. Lawrence, 81 N.C. 522 (1879).

An indictment having two counts, one for horse stealing, the other for receiving stolen property, both concluding upon a statute, is defective as the offenses are not of the same grade and a conviction is error. State v. Johnson, 75 N.C. 123 (1876).

§ 14-82. Taking horses or mules for temporary purposes.—If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1879, c. 234, s. 1; Code, s. 1067; Rev., s. 3509; 1913, c. 11; C. S., s. 4261; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

Indictment.—An indictment for stealing the temporary use of a horse in violation of this section is not defective because it charges the stealing of the temporary use of a buggy also. State v. Darden, 117 N.C. 697, 23 S.E. 106 (1895).

Employee Liable. — An occasional employee, who took the employer's mule at night and drove it off without the knowledge or consent of the employer, was guilty of a tortious conversion, and an act indictable under this section; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. Clark v. Whitehurst, 171 N.C. 1, 86 S.E. 78 (1915).

§ 14-83: Repealed by Session Laws 1943, c. 543.

§ 14-84. Larceny of dogs misdemeanor. — The larceny of any dog upon which a license tax has or has not been paid shall be a misdemeanor. Any person convicted of the larceny of any dog shall be fined or imprisoned in the discretion of the court. (1919, c. 116, s. 9; C. S., s. 4263; 1955, c. 804.)

Cross Reference.—See §§ 67-15 and 67-27.

§ 14-85. Pursuing or injuring livestock with intent to steal.—If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. (1866, c. 57; Code, s. 1068; Rev., s. 3504; C. S., s. 4264.)

Sufficiency of Indictment. — An indictment under this section for injury to livestock, in which the animal alleged to have been injured is described as a "certain cattle beast," is sufficiently definite. State v. Credle, 91 N.C. 640 (1884).

§ 14-86. Destruction or taking of soft drink bottles. — It shall be unlawful for any person, firm or corporation, or any employee thereof, to maliciously take up, carry away, destroy or in any way dispose of bottles or other property belonging to any bottler, bottling company, person, firm or corporation engaged in the business of bottling and/or distributing in bottles or other closed containers soda water, Coca-Cola, Pepsi-Cola, cheri-wine, Chero-Cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations commonly known as soft drinks. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1937, c. 322, ss. 1, 2; 1969, c. 1224, s. 5.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

Cross Reference.—As to pollution of soft drink bottles, see § 14-288.

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.—Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the

life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years. (1929, c. 187, s. 1.)

The primary purpose and intent of the legislature in enacting this section, was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947); State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955). See State v. Chase, 231 N.C. 589, 58 S.E.2d 364 (1950).

Common-Law Offense Not Changed.—This section does not change the offense of common-law robbery or divide it into degrees. State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955).

This section creates no new offense. It does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense, more severe punishment may be imposed. In re Sellers, 234 N.C. 648, 68 S.E.2d 308 (1951); State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967).

The use, or threatened use, of firearms or other dangerous weapons in perpetrating a robbery does not add to or subtract from the common-law offense of robbery, but this section provides a more severe punishment for a robbery attempted or accomplished with the use of a dangerous weapon. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

This section creates no new offense, but provides that when firearms or other dangerous weapons are used, more severe punishment may be imposed. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

This section does not attempt to change the offense of common-law robbery or divide it into degrees. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

This section does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

This section superadds to the minimum essentials of common-law robbery the additional requirement that the robbery must be committed "with the use or threatened use of . . . firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened." State v. Rogers, 246 N.C. 611, 99 S.E.2d 803 (1957); State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

Common-Law Robbery Defined.—Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

An essential element of the offense of common-law robbery is a felonious taking, i.e., a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. Thus, if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery. If he takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

Robbery, a common-law offense not defined by statute in North Carolina, is

merely an aggravated form of larceny. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

The taking must be done animo furandi, with a felonious intent to appropriate the goods taken to some use or purpose of the taker. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

Highway robbery is a common-law offense and is frequently denominated "common-law robbery." State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

Punishment for Common-Law Robbery.—Common-law robbery is punishable by imprisonment in the State's prison for a term not to exceed ten years under § 14-2. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use of or threatened use of firearms or other dangerous weapon. State v. Williams, 265 N.C. 446, 144 S.E.2d 267 (1965).

In an indictment for robbery the kind and value of the property taken is not material—the gist of the offense is not the taking, but a taking by force or putting in fear. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

The main element of the offense is force or intimidation occasioned by the use or threatened use of firearms. **State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944).**

A taking with "felonious intent" is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common-law robbery, and it is prejudicial error for the court to charge that defendant may be convicted of such offense even though the taking was without felonious intent. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

A taking of personal property with felonious intent is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common-law robbery. The court must so instruct the jury in every robbery case, and must in some sufficient form explain and define the term "felonious intent." The extent of the definition required depends upon the evidence in the particular case. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

"Intent to Rob" Is a Sufficient Definition of "Felonious Intent".—The word "rob" was known to the common law and the expression "intent to rob" is a sufficient definition of "felonious intent" as applied to this section, in the absence of evidence raising an inference of a different intent or purpose. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

In some cases, as where the defense is an alibi or the evidence develops no direct issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, "felonious intent" may be simply defined as an "intent to rob" or "intent to steal." On the other hand, where the evidence raises a direct issue as to the intent and purpose of the taking, a more comprehensive definition is required. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Since "Rob" Imports an Intent to Steal.—"Rob" or "robbery" has a well-defined meaning and imports an intent to steal. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

The distinction between robbery and forcible trespass is that in the former there is, and in the latter there is not, a felonious intention to take the goods, and appropriate them to the offender's own use. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, or for the personal protection and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

The offense requires the taking, or the attempt to take, in robbery with firearms. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

There must be an actual taking of property for there to be the crime of common-law robbery, whereas under this section the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapon. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

Actual Possession of Firearms Necessary.—The purpose and intent of this section is to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common-law robbery, and construing the title and context of the statute together to ascertain the legislative in-

tent, it is held that possession of firearms or other of the specified weapons is necessary to constitute the offense of "robbery with firearms" under this section, and it is reversible error for the court to refuse to so instruct the jury in accordance with defendants' prayers for special instructions upon evidence tending to show that defendants sought to make their victim believe they had firearms, and threatened to use same, but that they actually carried no weapon. State v. Keller, 214 N.C. 447, 199 S.E. 620 (1938).

In a prosecution for robbery by use of a knife, an instruction to return a verdict of guilty "as charged," without any reference to a knife or other weapon whereby the life of the victim was endangered or threatened, is erroneous. State v. Ross, 268 N.C. 282, 150 S.E.2d 421 (1966).

The actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon. Whether it was a firearm or a toy pistol, and if a toy pistol, whether it was a dangerous weapon were questions for the jury under proper instructions. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

Profit Immaterial.—So great is the offense when life is endangered and threatened by the use of firearms or other dangerous weapons, that it is not of controlling consequence whether the assailants profit much or little, or nothing, from their felonious undertaking. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

Force May Be Actual or Constructive.—The element of force in the offense of robbery may be actual or constructive. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

"Actual Force". — Actual force implies physical violence. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

"Constructive Force".—Under constructive force are included all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

Pocketknife as Dangerous Weapon.—A pocketknife, considering its use or threatened use by defendant, was a dangerous weapon. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

State must show active participation or accessory before the fact in a prosecution for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

Armed robbery differs in fact and in law from accessory after the fact under § 14-7. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

Hence, Prosecution Not Barred by Acquittal as Accessory.—An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963).

It is not necessary to describe accurately or prove the particular identity or value of the property, further than to show it was the property of the person assaulted or in his care, and had a value. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944).

An indictment for robbery with firearms will support a conviction of the lesser offenses of common-law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses. State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948); State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955); State v. Wenrich, 251 N.C. 460, 111 S.E.2d 582 (1959).

The court should not submit to the jury an included lesser crime where there is no testimony tending to show that such lesser offense was committed. But where there is evidence tending to show the commission of a lesser offense the court, of its own motion, should submit such offense to the jury for its determination. State v. Wenrich, 251 N.C. 460, 111 S.E.2d 582 (1959), citing State v. Holt, 192 N.C. 490, 135 S.E. 324 (1926).

Highway robbery is a lesser offense embraced in the charge of robbery with firearms or other dangerous weapon. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

An indictment under this section includes common-law robbery. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

In a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

In a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included

or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

An indictment for robbery with firearms will support a conviction of a lesser offense such as common-law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

Indictment Must Allege Facts Bringing Case within Section.—To support a judgment imposing a prison term for highway robbery in excess of ten years, the bill of indictment must allege facts sufficient to bring the case within the additional requirement and in accord with the tenor and substance of this section. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

But allegation that the intent to convert the personal property stolen to the defendant's own use is not required to be alleged in the bill of indictment. State v. Williams, 265 N.C. 446, 144 S.E.2d 267 (1965).

An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

Where an indictment charged defendants with robbery with firearms from the companion of the person they were formerly charged with killing, the two offenses having been committed at the same time, and evidence of guilt of one of the offenses being substantially the same as the evidence of guilt of the other, the acquittal or conviction for one offense will not bar a subsequent prosecution for the other. State v. Dills, 210 N.C. 178, 185 S.E. 677 (1936), distinguishing State v. Clemmons, 207 N.C. 276, 176 S.E. 760 (1934).

Indictment Insufficient to Permit Punishment under Section.—A bill of indictment was sufficient to support a plea or conviction of highway robbery, for the facts alleged were sufficient to charge robbery by intimidation or violence, which is the gist of common-law robbery, but it did not allege that the life of a person was endangered or threatened by the use or threatened use of a dangerous weapon, instrument or means; hence, the indictment did not contain the additional allegations required in order to permit the more severe punishment provided for in this section. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified a sum of money, charges the crime of larceny and not that of robbery. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

Plea of Guilty of Robbery without Firearms.—Where defendant was charged with attempted robbery with firearms, his plea of guilty of robbery without firearms was insufficient to support judgment, and the court erred in accepting such plea. State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955).

Upon a plea of guilty of highway robbery the court may not change the effect of the plea by finding facts and thereby expose defendant to greater punishment than the plea will support. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

Indictments Consolidated. — An indictment charging defendants with rape and an indictment charging defendants with armed robbery may be consolidated for trial when it appears that defendants stopped the car in which husband and wife were riding, forced them into the woods where each raped the wife while the other held a pistol on the husband, and that one of them committed robbery from the person of the husband while he was being held at the point of the pistol, since the crimes are so connected in time and place that the evidence on the trial of the one is competent and admissible on the trial of the other. State v. Morrow, 262 N.C. 592, 138 S.E.2d 245 (1964).

Proof of Intent. — When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (animus furandi). State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

Where the evidence does not permit the inference that defendant ever intended to return the property forcibly taken but requires the conclusion that defendant was totally indifferent as to whether the owner ever recovered the property, there is no justification for indulging the fiction that

the taking was for a temporary purpose, without any animus furandi or lucri causa. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

The intent to convert to one's own use is met by showing an intent to deprive the owner of his property permanently for the use of the taker, although he might have in mind to benefit another. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

The property taken must be such as is the subject of larceny to constitute the offense of robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

It is not necessary that ownership of the property be laid in any particular person in order to allege and prove the crime of armed robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

Exhibition of a pistol while demanding money conveys the message loud and clear that the victim's life is being threatened. State v. Green, 2 N.C. App. 170, 162 S.E.2d 641 (1968).

Prerequisite to conviction for armed robbery, the jury must find from the evidence, beyond a reasonable doubt, that the life of the victim was endangered or threatened by the use, or threatened use, of firearms or other dangerous weapon, implement, or means. A conviction of "guilty as charged" may not be based on a finding that the accused "used force or intimidation sufficient to create an apprehension of danger." This is a critical distinction between armed robbery as defined in this section, which is punishable by imprisonment for not less than five nor more than thirty years, and common-law robbery, which is punishable by imprisonment not exceeding ten years. State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968).

Evidence.—Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there is no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944).

Evidence held sufficient to be submitted to the jury on the charge of robbery with firearms. State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956).

Evidence held sufficient to sustain conviction in State v. Vance, 268 N.C. 287, 150 S.E.2d 418 (1966).

Evidence tending to show that the victim of a robbery was left unconscious from a blow, inflicting a wound in the back of her head requiring eight stitches to close and causing her to be hospitalized for two weeks, is sufficient to show that the robbery was committed by the use of a dangerous weapon, since the dangerous character of the weapon may be inferred from the wound. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

The evidence tended to show that defendant was apprehended by the owner of a filling station after defendant had broken into the station, and that defendant by the use of a pistol disarmed such owner and took his rifle. Even conceding that defendant took the rifle "for a temporary use" and that he intended thereafter to abandon the rifle at the first opportunity, the evidence conclusively shows that defendant intended to deprive the owner permanently of the rifle or to leave the recovery of the rifle by the owner to mere chance, and therefore the evidence discloses the animus furandi, and does not require the court to submit the question of defendant's guilt of assault as a less degree of the offense of robbery with firearms. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

Attempt.—An attempt to take money or other personal property from another under the circumstances delineated by this section constitutes an accomplished offense, and is punishable to the same extent as if there was an actual taking. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Failure to Instruct on Common-Law Robbery.—Where the State's evidence is to the effect that defendant's companion held a knife to the victim's throat in perpetrating a robbery, and that the victim received a cut on his neck, and that defendant and his companion attacked and beat their victim and took money from his person, but no knife is introduced in evidence or described by any witness, it is error for the court to fail to submit the question of defendant's guilt of the lesser crime of common-law robbery. State v. Ross, 268 N.C. 282, 150 S.E.2d 421 (1966).

Maximum Punishment.—Defendant may be sentenced to imprisonment not to exceed thirty years upon conviction of armed robbery. State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964).

When, on a charge of robbery with firearms or other dangerous weapon, the jury returns a verdict of guilty of robbery, the maximum sentence that may be imposed is ten years. State v. Williams, 265 N.C. 446, 144 S.E.2d 267 (1965).

A sentence of 24 to 30 years for the offense of robbery with firearms does not exceed the maximum prescribed by this section and does not constitute cruel and

unusual punishment. State v. LePard, 270 N.C. 157, 153 S.E.2d 875 (1967).

If defendant believes that the sentence imposed under this section upon his plea of guilty, understandingly and voluntarily made, is excessive, his sole recourse is to executive clemency, the sentence being within the statutory maximum. State v. Baugh, 268 N.C. 294, 150 S.E.2d 437 (1966).

A sentence for robbery which was within the statutory maximum did not constitute the cruel and unusual punishment forbidden by N.C. Const., Art. I, § 14. State v. Witherspoon, 271 N.C. 714, 157 S.E.2d 362 (1967).

Applied in State v. Marsh, 243 N.C. 101, 66 S.E.2d 684 (1951); State v. Kerley, 246 N.C. 157, 97 S.E.2d 876 (1957); State v. Sheffield, 251 N.C. 309, 1 S.E.2d 195 (1959); State v. Graves, 251 N.C. 550, 112 S.E.2d 85 (1960); State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963); State v. Goins, 261 N.C. 707, 136 S.E.2d 97 (1964); State v. McNeil, 263 N.C. 260, 139 S.E.2d 667 (1965); State v. Chamberlain, 263 N.C. 406, 139 S.E.2d 620 (1965); State v. Haney 263 N.C. 816, 140 S.E.2d 544 (1965); State v. Reid, 263 N.C. 825, 140 S.E.2d 547 (1965); State v. Benfield 264 N.C. 75, 140 S.E.2d 706 (1965); State v. Fletcher, 264 N.C. 482, 141 S.E.2d 873 (1965); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Bridges, 266 N.C. 354, 146 S.E.2d 107 (1966); State v. McKissick, 268 N.C. 411, 150 S.E.2d 767 (1966); State v. Day, 268 N.C. 464, 150 S.E.2d 863 (1966); State v. Barber, 268 N.C. 509, 151 S.E.2d 51 (1966); State v. Goodman, 269 N.C. 305, 152 S.E.2d 116 (1967); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Aycoth, 270 N.C. 270, 154 S.E.2d 59 (1967); State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967); State v. McKissick, 271 N.C. 500, 157 S.E.2d 112 (1967); State v. Aycoth, 272 N.C. 48, 157 S.E.2d 655 (1967); State v. McNair, 272 N.C. 130, 157 S.E.2d 660 (1967); State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968); State v. Davis, 273 N.C. 349, 160 S.E.2d 75 (1968); State v. Williams, 1 N.C. App. 127, 160 S.E.2d 121 (1968); State v. Hamm, 1 N.C. App. 444, 161 S.E.2d 758 (1968); State v. Riddle, 205 N.C. 591, 172 S.E. 400 (1934).

Quoted in Broyhill v. Morris, 408 F.2d 820 (4th Cir. 1969).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); Gainey v. Turner, 266 F. Supp. 95 (E.D.N.C. 1967).

Cited in State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Guthrie, 269 N.C. 699, 153 S.E.2d 361 (1967); State v. Green, 2 N.C. App. 391, 163 S.E.2d 14 (1968); State v. Murph, 212 N.C. 494, 193 S.E. 709 (1937); State v. Proctor, 213 N.C. 221, 195 S.E. 816 (1938).

§ 14-88. Train robbery.—If any person shall enter upon any locomotive engine or car on any railroad in this State, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished by imprisonment in the State's prison for not less than ten years nor more than twenty years. (1895, c. 204, s. 2; Rev., s. 3765; C. S., s. 4266.)

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Cited in State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964).

§ 14-89. Attempted train robbery.—If any person shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire with others for that purpose, any locomotive engine or car on any railroad in this State, by intimidation of those in charge thereof or by force, threats or otherwise, for the purpose of taking therefrom or causing to be delivered up to such person so forcing, threatening or intimidating, anything of value, to be appropriated to his own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the State's prison for not less than two years nor more than twenty years. (1895, c. 204, s. 1; Rev., s. 3766; C. S., s. 4267.)

Editor's Note.—For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

Cited in State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964).

§ 14-89.1. Safecracking and safe robbery.—Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or "pick" the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary. (1961, c. 653.)

What Section Condemns.—This section condemns (1) the felonious opening or attempting to force open a safe or vault used for storing money or other valuables by explosives, drills, or other tools, or (2) to pick feloniously the combination of a safe or vault used for storing money or other valuables. State v. Pinyatello, 272 N.C. 312, 158 S.E.2d 596 (1968).

Violation of this section is a felony. State v. Whaley, 262 N.C. 536, 138 S.E.2d 138 (1964).

Indictment.—An indictment for violation of this section which does not contain the word "feloniously" is fatally defective. State v. Whaley, 262 N.C. 536, 138 S.E.2d 138 (1964).

An element of the offense is that the safe forced open be one "used for storing money or other valuables." State v. Hill, 272 N.C. 439, 158 S.E.2d 329 (1968).

The phrase "used for storing money or other valuables" was intended to qualify and restrict the words "safe or vault." State v. Hill, 272 N.C. 439, 158 S.E.2d 329 (1968).

The phrase "used for storing money or other valuables" means "kept and customarily used for the storing of money or other valuables as of the time of the forcible opening." State v. Hill, 272 N.C. 439, 158 S.E.2d 329 (1968).

Safe Need Not Have Combination Lock.—It is not a prerequisite to a prosecution under this section that the safe broken into have a combination lock. State v. Pinyatello, 272 N.C. 312, 158 S.E.2d 596 (1968).

Evidence held sufficient to sustain conviction of defendant as abettor of offense of attempted safecracking. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

Offense Not Committed.—One has not committed the offense forbidden by this section, when, with the requisite intent and by one of the specified methods, he forcibly opens a newly acquired safe not yet installed in its intended location in the owner's place of business and which has never been used by the owner as a container for anything. State v. Hill, 272 N.C. 439, 158 S.E.2d 329 (1968).

Applied in State v. Cox, 262 N.C. 609, 138 S.E.2d 224 (1964); State v. Bullock, 268 N.C. 560, 151 S.E.2d 9 (1966); State v. Watson, 272 N.C. 526, 158 S.E.2d 334 (1968); State v. Thacker, 5 N.C. App. 197, 167 S.E. 879 (1969).

Stated in State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

Cited in State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); State v. Logner, 266 N.C. 238, 145 S.E.2d 867 (1966).

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.—If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny. (21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; Code, s. 1014; 1889, c. 226; 1891, c. 188; 1897, c. 31;

Rev., s. 3406; 1919, c. 97, s. 25; C. S., s. 4268; 1931, c. 158; 1939, c. 1; 1941, c. 31; 1967, c. 819.)

Cross References. — As to larceny by servants or other employees, see § 14-74. As to the embezzlement of funds of a corporation by its officers, see § 14-254. As to embezzlement of funds of a bank by its officers, see § 53-129. As to embezzlement by a member of the State Sinking Fund Commission, see § 142-40. As to description in indictment for embezzlement, see § 15-150.

Editor's Note. — The 1967 amendment inserted "unincorporated association or organization" near the end of the section.

Origin and Purpose. — Embezzlement was not a common-law offense. State v. Hill, 91 N.C. 561 (1884). It was first made a criminal offense in England by statute, 21 Henry VIII, ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed in them. 1 McLain Cr. Law, § 621. It was enacted in consequence of a decision that a banker's clerk, who received money from a customer and appropriated it to his own use, could not be convicted of larceny on the ground that the money had never been in the employer's possession. Clark's Cr. Law, p. 308. State v. McDonald, 133 N.C. 680, 45 S.E. 582 (1903); State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

The manifest purpose of the 1939 amendment was to enlarge the scope of the embezzlement statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

Strict Construction. — Statutes creating criminal offenses must be strictly construed. This rule has been applied with vigor in the construction of the embezzlement statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

The words "or any other fiduciary" show clearly the General Assembly did not intend to restrict the application of the 1939 amendment to receivers. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

The offense of embezzlement is exclusively statutory, and this section does not embrace a vendor in an executory contract of purchase and sale. State v. Blair, 227 N.C. 70, 40 S.E.2d 460 (1946); State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

The crime of embezzlement, unknown to the common law, was created and is defined by statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

Elements of Offense. — This section makes criminal the fraudulent conversion of personal property by one occupying some position of trust or some fiduciary relationship. The person accused must have been entrusted with and received into his possession lawfully the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

In order to convict a defendant of embezzlement, four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use. State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957).

The establishment by the State of the following elements was sufficient to constitute embezzlement under this section: (1) Defendant was the agent of his principal and charged with the duty of receiving from his principal in his fiduciary capacity, and paying over to a third party certain payments; (2) that he did in fact receive such money; (3) that he received this money in the course of his employment and by virtue of his fiduciary relationship; and (4) defendant knowing this money was not his own fraudulently embezzled and converted some of these payments entrusted to him in his fiduciary relationship to his own use. State v. Helsabeck, 258 N.C. 107, 128 S.E.2d 205 (1962).

Trespass is not a necessary element. In embezzlement the possession of the property is acquired lawfully by virtue of the fiduciary relationship and thereafter the felonious intent and fraudulent conversion enter in to make the act of appropriation a crime. State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

Compared with § 14-254. — The use of the word "abstract" in § 14-254 differentiates it from this section. The latter applies to embezzlement and excepts offenders under sixteen years of age. It is not necessary under § 14-254 to allege that the defendant is more than sixteen years old. State v. Switzer, 187 N.C. 88, 121 S.E. 143 (1924).

Cannot Be Extended by Construction. —This section is a penal statute, creating a new offense, and cannot be extended by construction to persons not within the

classes designated. State v. Eurell, 220 N.C. 519, 17 S.E.2d 669 (1941).

The fact that ch. 31, Public Laws 1941, amended this section, by adding "bailee" to the classes of persons specified constitutes a legislative declaration that theretofore a bailee was not included in the definition of classes of persons made by the statute. State v. Eurell, 220 N.C. 519, 17 S.E.2d 669 (1941).

The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. State v. Cahoon, 206 N.C. 388, 174 S.E. 91 (1934).

Fraudulent intent is a necessary element of the statutory offense of embezzlement and the State must prove such intent beyond a reasonable doubt, but direct proof is not necessary, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935).

Meaning of Fraudulent Intent.—Fraudulent intent within the meaning of this section is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his own use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent. State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935); State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Fraudulent intent which constitutes a necessary element of embezzlement, within the meaning of this section, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. State v. Gentry, 228 N.C. 643, 46 S.E.2d 863 (1948).

Conversion Not Necessary. — To embezzle is for an agent fraudulently to misapply the property of his principal; it is not necessary that the agent should convert it to his own use, that is, expend the money for his own benefit. State v. Foust, 114 N.C. 842, 19 S.E. 276 (1894).

Necessity of Demand for Payment. — A demand is not necessary to support a prosecution under this section as it is not made a prerequisite to prosecution. State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905).

Property of Prosecutor. — The property alleged to have been embezzled must be the property of the prosecutor. State v. Barton, 125 N.C. 702, 34 S.E. 553 (1899).

Goods Received under Special Directions.—Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzles the same, he is indictable under this section. State v. Costin, 89 N.C. 511 (1883).

Intent to Repay No Defense. — An intent to restore the property embezzled or a readiness and willingness at a latter date is not a defense to a prosecution under this section. State v. Summers, 141 N.C. 841, 53 S.E. 856 (1906).

To Whom Section Applies.—A contractor is not an officer, clerk or servant within the meaning of this section. State v. Barton, 125 N.C. 702, 34 S.E. 553 (1899). Nor is the relation of lessor and lessee embraced by the statute. State v. Keith, 126 N.C. 1114, 36 S.E. 169 (1900). And it does not apply to clerks of the superior courts and like officers who would seem to fall within the terms of § 14-92. State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

Where the relationship between the parties is that of debtor and creditor and not that of employee and employer the debtor cannot be guilty of embezzlement of any funds due on the account. Gray v. Bennett, 250 N.C. 707, 110 S.E.2d 324 (1959).

One who, under authority of and subject to the orders of the clerk of the superior court, is commissioned to collect, receive and handle money, and to disburse it to those entitled thereto under the law, has substantially the same status as a court-appointed receiver. Such commissioner is a fiduciary in the same sense a receiver is a fiduciary. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

Commissioner in Equity Cannot Be Convicted as Agent or Attorney.—A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz: to sell the land and distribute the proceeds to the parties entitled thereto; immediately upon his appointment he ceases to be an attorney or agent for either party, and where the indictment charges the defendant with embezzlement of funds under this section as commissioner the defendant could not be convicted as agent or attorney. State v. Ray, 207 N.C. 642, 178 S.E. 224 (1935).

Allegations and Proof. — The name of the person from whom the money was received need not be stated. State v. Lanier, 88 N.C. 658 (1883); State v. Lanier, 89 N.C. 517 (1883).

And it need not be alleged or proved that the property charged to have been embezzled had been committed to the care of defendant, nor that any breach of confidence or trust, save that which grows out of the relation of owner and servant or agent, had occurred. State v. Wilson, 101 N.C. 730, 7 S.E. 872 (1888).

The averment that the defendant is neither an apprentice nor under the age of sixteen years, is a substantial compliance with the statute. State v. Lanier, 88 N.C. 658 (1883); State v. Lanier, 89 N.C. 517 (1883).

The crime of embezzlement rests upon statute alone and conviction thereof under an indictment drawn under this section, when the evidence tends only to show a violation of § 14-92, is erroneous upon the ground that the proof is at variance with the offense charged in the bill. State v. Grace, 196 N.C. 280, 145 S.E. 399 (1928).

Where the owner of embezzled property is an association, partnership, corporation, or other firm or organization, there must be allegations showing such organization to be a legal entity capable of owning property as such, or the individuals comprising the same and owning the property should be set out as owners. State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

How Fraudulent Intent Shown.—The fraudulent intent within the meaning of this section may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred. State v. Helsabeck, 258 N.C. 107, 128 S.E.2d 205 (1962).

Evidence—Intent Must Be Shown. — The conversion being admitted or shown, the burden is on the State to show beyond a reasonable doubt the intent to defraud. State v. McDonald, 133 N.C. 680, 45 S.E. 582 (1903). But the burden of showing that he is under age is on the defendant and the State is not called on to prove that he is past sixteen years old, for this is a matter of defense and within the defendant's knowledge. State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905).

It is not necessary that a warrant for embezzlement issued by a justice of the peace should describe the criminal offense with the legal accuracy required in an indictment. Durham v. Jones, 119 N.C. 262, 25 S.E. 873 (1896).

Where there is evidence that an agent is charged with the duty of selling a load of tobacco upon a local market on behalf of the principal only, and accordingly receiving the price, he intentionally and wrongfully converted it to his use, it is sufficient to constitute the crime of embezzlement under this section and to sustain a verdict of guilty. State v. Eubanks, 194 N.C. 319, 139 S.E. 451 (1927).

Evidence Sufficient to Go to Jury.—The evidence tended to show that prosecuting witness requested defendant to refinance a chattel mortgage on the witness' automobile, that defendant agreed to do so for a fee, that defendant obtained cash from a finance company on a second chattel mortgage and notes executed by the witness or purported to have been executed by him, and advised the witness that he had sent the money to pay off the prior mortgage, that the prior mortgage was not paid, and that defendant refused to reimburse the witness. It was held that the evidence was sufficient to be submitted to the jury on the charge of embezzlement by defendant of funds received by him as agent of the prosecuting witness. State v. Gentry, 228 N.C. 643, 46 S.E.2d 863 (1948).

Evidence that defendant was employed on a commission basis to procure construction contracts for his principal, that he procured such contract, collected from the contractee the entire contract price and converted it to his own use, notwithstanding he was entitled to only a small part thereof as commission, was held sufficient to overrule defendant's motion for nonsuit in a prosecution under this section. State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957).

Accusation of Embezzlement Actionable Per Se in Slander.—The offense defined in this section is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. Elmore v. Atlantic Coast Line R.R., 189 N.C. 658, 127 S.E. 710 (1925).

It is unnecessary to determine whether an indictment could be sustained under other of the cognate statutes, §§ 14-91 through 14-99, where an indictment of a bank receiver for embezzlement is drawn under this section. State v. Whitehurst, 212 N.C. 300, 193 S.E. 657, 113 A.L.R. 740 (1937).

Illustrations of Wrongful Misapplications.—By a treasurer of a society depositing money in his private bank. See State v. Dunn, 138 N.C. 672, 50 S.E. 772 (1905). By a sales agent for automobiles. See State v. Klingman, 172 N.C.

947, 90 S.E. 690 (1916). By an agent selling a load of tobacco. See State v. Eubanks, 194 N.C. 319, 139 S.E. 451 (1927). By an agent to buy a lot and build house. See State v. McClure, 205 N.C. 11, 169 S.E. 809 (1933). By a consignee and agent of a piano company. See State v. Dula, 206 N.C. 745, 175 S.E. 80 (1934).

Stated in In re Hege, 205 N.C. 625, 172 S.E. 345 (1934).

Cited in State v. Hill, 91 N.C. 561 (1884); State v. Harper, 94 N.C. 936 (1886); State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904); State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906); Beck v. Bank of Thomasville, 161 N.C. 201, 76 S.E. 722 (1912); State v. Wadford, 194 N.C. 336, 139 S.E. 608 (1927); State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934); State v. Shore, 206 N.C. 743, 175 S.E. 116 (1934).

§ 14-91. Embezzlement of State property by public officers and employees.—If any officer, agent or employee of the State, or other person having or holding in trust for the same any bonds issued by the State, or any security, or other property and effects of the same, shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of a felony, and shall be fined not less than ten thousand dollars, or imprisoned in the State's prison not less than twenty years, or both, at the discretion of the court. (1874-5, c. 52; Code, s. 1015; Rev., s. 3407; C. S., s. 4269.)

The word "property" is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action. State v. Ward, 222 N.C. 316, 22 S.E.2d 922 (1942).

The fraudulent intent which constitutes a necessary element of the crime of embezzlement, within this section, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Instructions. — Where, in a prosecution for embezzlement, under this section and § 14-90, counsel for defendant, in argument to the jury, commented on the severity of the minimum punishment in this section, and the court in its charge read the section to the jury and the indictment thereunder and also a portion of the general probation statute, carefully cautioning them that they were to decide the issue upon the evidence without regard to the punishment which might or might not be imposed, the charge was proper and not prejudicial. State v. Ward, 222 N.C. 316, 22 S.E.2d 922 (1942). See State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Cited in State v. Hill, 91 N.C. 561 (1874); State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

§ 14-92. Embezzlement of funds by public officers and trustees. — If any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony, and shall be fined and imprisoned in the State's prison in the discretion of the court. If any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county or town of the State shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successors in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment

in the State's prison or county jail, or fine in the discretion of the court. (1876-7, c. 47; Code, s. 1016; 1891, c. 241; Rev., s. 3408; C. S., s. 4270.)

Compared with § 14-231.—Under § 14-231 failure by an officer to pay over money coming into his hands is a misdemeanor. That section is very broad and seems to cover every case of failure by an officer to pay to the proper person funds coming into his hands. By this section the offense is declared a felony. An officer indicted for failure to pay to proper persons funds coming into his hands should be allowed the privilege of having the facts submitted to the jury. State v. Windley, 178 N.C. 670, 100 S.E. 116 (1919).

Meaning of "Wilfully and Corruptly". — In a charge upon the trial of county officials for the misapplication of county funds under the provisions of this section, the definition that "wilfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" is not erroneous under the circumstances of this case. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

Applies Only to Public Funds.—This section does not embrace the unlawful appropriation of the property of private individuals. State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

Clerks of Courts.—In the case of State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889), it was held that this section was not applicable to clerks of the superior courts but by an amendment at the next session of the legislature it was expressly made applicable to clerks of superior courts. State v. Windley, 178 N.C. 670, 100 S.E. 116 (1919).

Cited in State v. Hill, 91 N.C. 561 (1884); New York Indem. Co. v. Corporation Comm'n, 197 N.C. 562, 150 S.E. 16 (1929).

§ 14-93. Embezzlement by treasurers of charitable and religious organizations.—If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (1879, c. 105; Code, s. 1017; Rev., s. 3409; C. S., s. 4271.)

Two Offenses Created.—Under this section two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending their moneys without consent; the other is the failure to account for such moneys. State v. Dunn, 138 N.C. 672, 50 S.E. 772 (1905).

Association for Members Solely. — An association organized for the benefit of its members solely is not a benevolent or religious association and an indictment under this section cannot be sustained against an officer who misappropriates funds of the association. State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

Cited in State v. Hill, 91 N.C. 561 (1884).

§ 14-94. Embezzlement by officers of railroad companies. — If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the State's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (1870-1, c. 103, s. 1; Code, s. 1018; Rev., s. 3403; C. S., s. 4272.)

§ 14-95. Conspiring with officers of railroad companies to embezzle. —If any person shall agree, combine, collude or conspire with the president,

secretary, treasurer, director, engineer or agent of any railroad company to commit any offense specified in § 14-94, such person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offense may be perpetrated passes, shall be imprisoned in the State's prison for not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (1870-1, c. 103, s. 2; Code, s. 1019; Rev., s. 3404; C. S., s. 4273.)

Cited in State v. Hill, 91 N.C. 561 (1884); State v. Lewis, 142 N.C. 626, 633, 55 S.E. 600 (1906).

§ 14-96. Embezzlement by insurance agents and brokers.—If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company, association or fraternal order or society, lawfully doing business in this State, embezzles or fraudulently converts to his own use, or, with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny. (1889, c. 54, s. 103; Rev., s. 3489; 1911, c. 196, s. 8; C. S., s. 4274.)

§ 14-96.1. Report to Commissioner.—Whenever any insurance company, its manager, general agent or other representative knows or has reasonable cause to believe that any agent, broker or other representative of such company is guilty under the preceding section [§ 14-96], it shall be the duty of such company, its manager, general agent or other representative, within thirty days after acquiring such knowledge to file with the Commissioner a complete statement of all the relevant facts and circumstances. All such reports shall be privileged communications, and when filed in good faith shall in nowise subject the company or individuals making the same to any liability whatsoever. The Commissioner may suspend the license to do business in this State of any insurance company, its general manager, agent or other representative who wilfully fails to comply with this section. (1945, c. 382.)

§ 14-97. Appropriation of partnership funds by partner to personal use.—Any person engaged in a partnership business in the State of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to his own personal use with the fraudulent intent of depriving his copartners of the use thereof, shall be guilty of a misdemeanor. Any person or persons violating the provisions of this section, upon conviction, shall be punished as is now done in cases of misdemeanor. (1921, c. 127; C. S., s. 4274(a).)

Fraudulent intent is an essential element of this crime and must be proved by the State, and in a prosecution under this section an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence. State v. Rawls, 202 N.C. 397, 162 S.E. 899 (1932).

§ 14-98. Embezzlement by surviving partner. — If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the State's prison in the discretion of the court. (1901, c. 640, s. 9; Rev., s. 3405; C. S., s. 4275.)

§ 14-99. Embezzlement of taxes by officers.—If any officer appropriates to his own use the State, county, school, city or town taxes, he shall be

guilty of embezzlement, and may be punished by confinement in the State's prison not exceeding five years, at the discretion of the court. (1883, c. 136, s. 49; Code, s. 3705; Rev., s. 3410; C. S., s. 4276.)

Whether Felony or Misdemeanor. — As this section is silent as to whether or not the offense set out is a felony or a misdemeanor it will be construed as a misdemeanor as an offense will never be made a felony by construction of any doubtful or ambiguous words in the statute. State v. Hill, 91 N.C. 561 (1884). But see § 14-1.

Inference of Fraudulent Intent. — While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable. State v. Lancaster, 202 N.C. 204, 162 S.E. 367 (1932).

Cited in State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

Article 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false tokens and other false pretenses.—If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation within the State any money, goods, property or other thing of value, or any bank note, check or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this State or any of the United States, or any treasury warrant, debenture, certificate of stock or public security, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a felony, and shall be imprisoned in the State's prison not less than four months nor more than ten years, or fined, in the discretion of the court: Provided, that if, on the trial of anyone indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the felony; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud. (33 Hen. VIII, c. 1, ss, 1, 2; 30 Geo. II, c. 24, s. 1; 1811, c. 814, s. 2, P. R.; R. C., c. 34, s. 67; Code, s. 1025; Rev., s. 3432; C. S., s. 4277.)

Cross References.—As to alleging intent in the indictment, see § 15-151. As to obtaining property or services by false or fraudulent use of credit cards or other means, see §§ 14-113.1 through 14-113.7a.

Origin of Section. — This section was derived from the English statutes, 33 Hen. VIII, and 30 George II. State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927).

Elements of the Crime.—To constitute the crime of false pretense, a mistake, a pretense, a false pretense, a mere promise or opinion is not sufficient. It must be a (1) false representation of a subsisting fact, whether in writing or in words or in acts; (2) which is calculated to deceive and intended to deceive, and (3) which does in fact deceive (4) by which one man obtains value from another without compensation. State v. Simpson, 10 N.C. 620 (1825); State v. Roberts, 189 N.C. 93, 126 S.E. 161 (1925), cited in State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927); State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941); State v. Davenport, 227 N.C. 475, 492, 42 S.E.2d 686 (1947).

The constituent elements of the offense of false pretense are: (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. State v. Carlson, 171 N.C. 818, 89 S.E. 30 (1916); State v. Johnson, 195 N.C. 506, 142 S.E. 775 (1928).

A false pretense or representation, to be indictable, must be an untrue statement of a past or an existing fact. False representations amounting to mere promises or statements of intention have reference to future events and are not criminal within false pretense statutes, even though they induce the party defrauded to part with his property. State v. Hargett, 259 N.C. 496, 130 S.E.2d 865 (1963).

The elements of the offense of obtaining property by false pretense are that there must be (1) a false representation by the defendant, by conduct, word or writing, of a subsisting fact, (2) which is calculated to deceive and intended to deceive, (3) which does in fact deceive, and (4) by which defendant obtains something of value from another without compensation. State v. Houston, 4 N.C. App. 484, 166 S.E.2d 881 (1969).

Same—Subsisting Fact.—It is settled that a promise is not a pretense. No matter what the form, or however false the promise to do something in the future, it will not come within the statute. There must be a false allegation of some subsisting fact. State v. Phifer, 65 N.C. 321 (1871); State v. Knott, 124 N.C. 814, 32 S.E. 798 (1899).

No matter what the form, or however false the promise, to do something in the future, it will not come within the statute. There must be a false allegation of some subsisting fact; but there need not be any token. State v. Hargett, 259 N.C. 496, 130 S.E.2d 865 (1963).

Same—Whether in Writing or Words. — It was held formerly that some false writing or token was necessary to constitute the offense. See State v. Simpson, 10 N.C. 620 (1825). This case was overruled in State v. Phifer, 65 N.C. 321 (1871), where it is held that a naked lie as to a subsisting fact is a crime within the meaning of the section. This latter case is followed in State v. Dixon, 101 N.C. 741, 7 S.E. 870 (1888). In fact the false pretense may be by act or conduct without spoken words. See State v. Matthews, 121 N.C. 604, 28 S.E. 469 (1897).

Same—Intent to Deceive.—The intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. State v. Blue, 84 N.C. 807 (1881); State v. Oakley, 103 N.C. 408, 9 S.E. 575 (1889). In the absence of such definite finding, the uniform practice is to grant a new trial. State v. McCloud, 151 N.C. 730, 66 S.E. 568 (1909).

Same—Actual Deceit.—Another of the elements is that the party to whom the false representation was made was deceived by it. State v. Whedbee, 152 N.C. 770, 67 S.E. 60 (1910). If he is so deceived it matters not whether he parted with goods for the sake of gain or for a charitable purpose. State v. Matthews, 91 N.C. 635 (1884).

Caveat Emptor.—The doctrine of caveat emptor "let the buyer beware" does not apply to actual fraud or obtaining property by false representation. By this doctrine the purchaser is forewarned of tricks of the trade, bluster, puffs and empty boasts on the part of the person putting his property on the market; but the seller cannot escape the penalty by reason of the doctrine where the facts constituting the crime are made to appear. See State v. Jones, 70 N.C. 75 (1874); State v. Young, 76 N.C. 258 (1877); State v. Burke, 108 N.C. 750, 12 S.E. 1000 (1891).

False Representations as to Deed of Trust.—A representation that a deed of trust covered certain land, which was not in fact included, on the faith of which defendant obtained money is a false pretense within this section. State v. Roberts, 189 N.C. 93, 126 S.E. 161 (1925).

False Representation as to Title to Land.—One who obtains money as the purchase price of land sold by him to another upon the representation that the land is unencumbered when it is encumbered by a mortgage, is liable in a prosecution for obtaining goods under false pretenses. State v. Munday, 78 N.C. 460 (1878).

False Representations as to Standing Timber.—A conviction under this section for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees when the prosecutor had ample

opportunity to inspect them and had been urged to do so by the defendant. State v. Corey, 199 N.C. 209, 153 S.E. 923 (1930).

Passing Counterfeit Money. — Where a person buys goods from another and the change given back by the seller is counterfeit an indictment under this section cannot be had, for there has been no fraudulent representations, nor intent to defraud before the defendant received the money. State v. Allred, 84 N.C. 749 (1881).

Representation to Agent of Owner of Goods.—It is not necessary that the false representations be made to the owner of the goods directly, but it is sufficient if they were made to his agent. State v. Taylor, 131 N.C. 711, 42 S.E. 539 (1902).

Corporations Liable.—In State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910), it is said: "The first ground, that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as fully liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. State v. Shaw, 92 N.C. 768 (1885)." This is fully sustained by all the late authorities. State v. Salisbury Ice & Fuel Co., 166 N.C. 366, 81 S.E. 737 (1914).

The Indictment.—The indictment must allege all of the essential elements of the offense. State v. Claudius, 164 N.C. 521, 80 S.E. 261 (1913).

The indictment must show a causal connection between the false representation and the parting with the property (State v. Whedbee, 152 N.C. 770, 67 S.E. 60 (1910)) but no particular form of words is necessary; an allegation that "by means of the false pretense" or "relying on the false pretense," or the like, is sufficient, where it is apparent that the delivery of the property was the natural result of the pretense alleged. State v. Claudius 164 N.C. 521, 80 S.E. 261 (1913).

The charge as to the persons intended to be cheated is surplusage and immaterial, all that is necessary is a charge of intent. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899); State v. Salisbury Ice & Fuel Co., 166 N.C. 366, 81 S.E. 737 (1914).

An indictment for false pretense charging that defendant wilfully, knowingly, falsely and feloniously pretended to the prosecutor that he had cut for him, for the use of another, twenty cords of wood, whereas in truth and in fact he had not cut the same, and by means of said false pretense did obtain from the prosecutor three dollars in money, with intent, etc., is sufficient. State v. Eason, 86 N.C. 674 (1882).

Indictment held sufficient. State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941); State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

Indictment failing to include the word "feloniously" was held insufficient in State v. Fowler, 266 N.C. 528, 146 S.E.2d 418 (1966).

An indictment charging that defendant, who owned a casket, a box in which it was to be placed, and a cemetery used for burial purposes, promised to bury the son of the prosecuting witness in the casket shown and give the body a decent burial, and that defendant did not bury the child in the casket shown and in a separate grave, held fatally defective, since the averments other than those in regard to existing facts related to promises for future fulfillment, which were insufficient basis for a prosecution for false pretense. State v. Hargett, 259 N.C. 496, 130 S.E.2d 865 (1963).

Necessity of Averring Property Obtained.—The indictment must describe the thing alleged to have been thereby obtained with reasonable certainty, and by the name or term usually employed to describe it; and where the indictment charges obtaining money by a false pretense, and the State's evidence tends only to show that the defendant had obtained the signature of the prosecutor as an indorser or surety to a negotiable instrument, there is a fatal variance between the charge and the proof, and defendant's motion to nonsuit should be sustained. State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915). No averment of the value of the property obtained is necessary. State v. Gillespie, 80 N.C. 396 (1879). And where the allegation is that money was obtained and the proof is that property was obtained but the defendant made no exception, there is no ground for reversal. State v. Ashford, 120 N.C. 588, 26 S.E. 915 (1897). Nonsuit is the proper method of raising the question of variance. State v. Gibson, supra.

The offense is a felony and a bill of indictment charging such offense and which omits the word "feloniously" is defective, and judgment will be arrested on a verdict of guilty. State v. Caldwell, 112 N.C. 854, 16 S.E. 1010 (1893).

Evidence held insufficient to sustain conviction in prosecution under this section. State v. Yancey, 228 N.C. 313, 45 S.E.2d 348 (1947).

Applied in State v. Hinson, 261 N.C. 614, 135 S.E.2d 583 (1964); Bottoms v.

State, 262 N.C. 483, 137 S.E.2d 817 (1964); State v. Hollingsworth, 206 N.C. 739, 175 S.E. 99 (1934); State v. Stansbury, 230 N.C. 589, 55 S.E.2d 185 (1949).

Cited in State v. Jones, 65 N.C. 395 (1871); State v. Howard, 129 N.C. 584, 40 S.E. 71 (1901); Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 151 (1933).

§ 14-101. Obtaining signatures by false pretenses. — If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the State's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court. (1871-2, c. 92; Code, s. 1026; Rev., s. 3433; C. S., s. 4278; 1945, c. 635.)

Cross References.—See note under § 14-100. As to forgery, see § 14-119 et seq. As to uttering a false bill of lading, see § 21-42.

Offense Is a Felony.—This section provides for imprisonment in the penitentiary, and therefore since the enactment of § 14-1 all offenses under this section are felonies, and an indictment must charge "feloniously." State v. Caldwell, 112 N.C. 854, 16 S.E. 1010 (1893), overruling State v. Crumples, 90 N.C. 701 (1884) in which it was held that as this section did not specify that the offense was a felony it would be treated as a misdemeanor in spite of the punishment being as for felonies.

Signing or Endorsing Note. — It has been held in State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915), that it is an indictable offense under this section, to procure a person to sign or endorse a note by means of false representation and with intent to cheat and defraud. State v. Johnson, 195 N.C. 506, 142 S.E. 775 (1928).

Same—Element of Intent.—In order to constitute false pretense in procuring endorsement of a note upon misrepresentation by the maker to one of the endorsers that he had secured certain endorsers with him, when, in fact he had used the note without other endorsers, evidence that the maker had turned over to the endorsers on the note his entire stock of merchandise and that he had thereupon had a civil judgment in their favor canceled of record, is material and competent upon the element of intent necessary to constitute the offense charged. State v. Johnson, 195 N.C. 506, 142 S.E. 775 (1928).

Indictment Must Allege Certain Offense. —An indictment should state with reasonable certainty the offense charged, and an indictment charging the defendant with obtaining money when he obtained a note, is defective. State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915).

§ 14-102. Obtaining property by false representation of pedigree of animals.—If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtain from any other person money or other thing of value, he shall be guilty of a misdemeanor, and upon conviction thereof shall for each offense be punished by a fine of not less than sixty dollars nor more than three hundred dollars, or by imprisonment for a term not exceeding six months. (1891, c. 94, s. 2; Rev., s. 3307; C. S., s. 4279.)

§ 14-103. Obtaining certificate of registration of animals by false representation.—If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months or a fine not exceeding one hundred dollars, or by both such fine and imprisonment. (1891, c. 94, s. 1; Rev., s. 3308; C. S., s. 4280.)

§ 14-104. Obtaining advances under promise to work and pay for same.—If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1889, c. 444; 1891, c. 106; 1905, c. 411; Rev., s. 3431; C. S., s. 4281.)

Cross Reference.—As to tenant or cropper willfully abandoning landlord after advances have been made, see § 14-358.

Constitutional.—The gist of the offense of procuring advances "with intent to cheat and defraud" is not the obtaining the advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances, and making the promise. This section is constitutional. State v. Norman, 110 N.C. 484, 14 S.E. 968 (1892), decided before the 1905 amendment discussed above.

Intent Must Be Shown.—To convict under this section it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. State v. Griffin, 154 N.C. 611, 70 S.E. 292 (1911); State v. Islay, 164 N.C. 491, 79 S.E. 1105 (1913).

And Must Be Alleged in Warrant. — A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advance was obtained with intent to cheat or defraud, is fatally defective. State v. Phillips, 228 N.C. 446, 45 S.E.2d 535 (1947).

No Day of Grace.—Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday, defendant's failure was held to be a failure to begin work within the meaning of the statute. State v. Norman, 110 N.C. 484, 14 S.E. 968 (1892).

§ 14-105. Obtaining advances under written promise to pay therefor out of designated property.—If any property shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1879, cc. 185, 186; Code, s. 1027; 1905, c. 104; Rev., s. 3434; C. S., s. 4282; 1969, c. 1224, s. 9.)

Editor's Note. — The 1969 amendment added the last sentence.

Constitutional.—It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its payment, and advances made on the faith of such pledge; on this ground it is declared constitutional. State v. Torrence, 127 N.C. 550, 37 S.E. 268 (1900); State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

Representations Must Be of Existing Facts.—An indictment for obtaining goods under a false pretense, must be founded on a false representation by the defendant of an existing fact, and the pledging of a check to be received at a subsequent date does not come within the meaning of the

section. State v. Whidbee, 124 N.C. 796, 32 S.E. 318 (1899).

Indictment Should Charge Exact Terms.—The indictment should charge in the exact terms of the statute, and on failure to follow the statute it is subject to being quashed. State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

Compared with § 14-114.—This section is on the same footing as § 14-114 for disposing of mortgaged property. It is not the failure to pay the debt which is made indictable, but the fraud in disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such quasi mortgage, to one who has thus pro tanto become the owner thereof, and the subsequent conversion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

§ 14-106. Obtaining property in return for worthless check, draft or order.—Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud. (1907, c. 975; 1909, c. 647; C. S., s. 4283.)

Local Modification.—New Hanover: Pub. Loc. 1927, c. 636.

Cross Reference.—As to false warehouse receipts, see § 27-54 et seq.

It is a misdemeanor for any person knowingly to utter a worthless check in this State and such act involves moral turpitude under this section if done with intent to defraud. Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933).

Intent to Cheat or Defraud.—In order to convict a defendant under the provisions of this section for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value. State v. Horton, 199 N.C. 771, 155 S.E. 866 (1930).

Signing in Name of Company. — Upon the trial under indictment for violating this section, the evidence tended to show that the check in question was signed in the name of a certain company by the defendant, and was conflicting as to whether the defendant was a member of the concern. It was held, that the question as to whether the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence he was not a partner, was reversible error. State v. Anderson, 194 N.C. 377, 139 S.E. 701 (1927).

Same—Burden of Proof.—The burden of proving the guilt of defendant in violating this section, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. State v. Anderson, 194 N.C. 377, 139 S.E. 701 (1927).

Applied in Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Cited in Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966); Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276, 162 A.L.R. 793 (1945).

§ 14-107. Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and de-

liver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

Any person, firm, or corporation violating any provision of this section, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Provided, however, if the amount of such check is not over fifty dollars ($50.00), the punishment shall not exceed a fine of fifty dollars ($50.00) or imprisonment for thirty days. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356; 1961, c. 89; 1963, cc. 73, 547, 870; 1967, c. 49, s. 1; c. 661, s. 1; 1969, c. 157; c. 876, s. 1; cc. 909, 1014; c. 1224, s. 10.)

Local Modification. — Craven: 1963, c. 199, repealed by Session Laws 1969, c. 909.

Cross Reference.—See note to § 14-106.

Editor's Note.—Session Laws 1969, c. 876, s. 1, rewrote the former third and fourth paragraphs to appear as the present third paragraph. Prior to the amendment, the provisions now contained in the proviso to the first sentence of the third paragraph were applicable only in certain named counties.

Session Laws 1969, c. 909, inserted Craven County in the former last sentence of the section, which was eliminated by Session Laws 1969, c. 876. Session Laws 1969, c. 1014, and Session Laws 1969, c. 1224, effective Oct. 1, 1969, added substantially similar provisions as to punishment at the end of the present first sentence of the third paragraph. The language of c. 1224 has been used in the first sentence of the third paragraph of the section as set out above.

The other 1969 amendments and the 1961, 1963 and 1967 amendments added or deleted counties appearing in the former last paragraph.

This Section Is Constitutional. — See Mathis v. North Carolina, 266 F. Supp. 841 (M.D.N.C. 1967).

The offense condemned by this section is the giving of a worthless check and its consequent disturbance of business integrity. State v. Ivey, 248 N.C. 316, 103 S.E.2d 398 (1958).

The act made criminal by this section is knowingly putting worthless commercial paper in circulation. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

The gravamen of the offense proscribed by this section is the putting into circulation worthless commercial paper to the public detriment, and not that of the individual payee. State v. Levy, 220 N.C. 812, 18 S.E.2d 355 (1942).

Representation Constituting False Pretense. — The drawing and delivery of a check to a third person, without more, is a representation that drawer has funds sufficient to insure payment upon presentation, and if known to be untrue, is a false pretense. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Postdated Check. — A postdated check given for a past-due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. State v. Crawford, 198 N.C. 522, 152 S.E. 504 (1930).

Indictment—Necessity of Charging All Elements.—In order to charge a statutory offense (the giving of a bad check), the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good. State v. Edwards, 190 N.C. 322, 130 S.E. 10 (1925).

Issuance as Fraud.—The issuance of a check on a bank in violation of this law is a false representation of subsisting facts that the maker has on deposit sufficient funds for its payment at the bank, upon its presentation, or that he has made the necessary arrangements with the bank therefor and is in effect a fraud upon the payee, the payee accepting it in good faith. State

v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927) (dis. op.).

It is not the attempted payment of a debt that is condemned by the statute, but the giving of a worthless check and its consequent disturbance of business integrity. State v. White, 230 N.C. 513, 53 S.E.2d 436 (1949); State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Regardless of the consent of anyone, the giving of a worthless check in contravention of this section is a crime. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1957).

Section Not Applicable to Person Signing Check under Direction as a Clerical Task. — A person authorized to sign his name under the printed name of his employer on the employer's checks, who does so under direction merely as a clerical task to authenticate the checks, cannot be found guilty of violating this section upon the nonpayment of the checks for insufficient funds. State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960).

Directing Employee to Issue Worthless Checks.—Persons directing their employee to issue checks on the firm's account, knowing at the time that the firm did not have sufficient funds or credits with the drawee bank to pay the checks on presentation, are guilty of knowingly putting worthless commercial paper in circulation. State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960).

Agreement of Payee Not to Present Check for Collection. — If at the time of delivering a check to the payee the maker knows that he has neither funds nor credit to pay the check upon presentation, the fact that the payee agrees that the check would not be presented for collection, would not constitute a defense. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Use of Wrong Check Form. — Where the evidence disclosed that the check issued by defendant was returned by the bank, not on account of insufficient funds, but because it was written on the wrong kind of check form, the court should enter a judgment of not guilty in a prosecution for issuing a worthless check. State v. Coppley, 260 N.C. 542, 133 S.E.2d 147 (1963).

Instrument Signed by Defendant Held Not a Check.—If the instrument defendant signed did not contain a promise or order to pay any sum in any amount nor state to whom it was payable and he did not authorize anyone to fill it out in any amount and he did not know by whom or when it was filled out, what he signed was not a check, and he was not guilty of the offense charged against him in the warrant under this section. State v. Ivey, 248 N.C. 316, 103 S.E.2d 398 (1958).

Warrant.—A warrant charging that defendant, trading under a trade name, did, on a specified date, unlawfully and willfully issue a check knowing at the time that the named defendant, or the named defendant trading under the designated trade name, or the designated firm, did not have sufficient funds or credit to pay the check upon presentation, is sufficient and is not objectionable on the ground that the offense was charged disjunctively or alternately. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

What State Must Prove.—In a prosecution under this statute the State must prove that the maker of the check had neither sufficient funds on deposit in, nor credit with, the bank on which the check was drawn to pay it on presentation. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Defense of entrapment on a charge of giving a worthless check cannot be maintained where the inducement to give the worthless check came from a person unconnected with the State. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Fatal Variance in Allegata and Probata.—An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in violation of the statute, and evidence that it was given for the hire of an automoble, ten days later, are at fatal variance, and will not support a conviction. State v. Corpening, 191 N.C. 751, 133 S.E. 14 (1926).

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an executive officer, and that the corporation did not have sufficient funds or credit for its payment. There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed. State v. Dowless, 217 N.C. 589, 9 S.E.2d 18 (1940).

Waiver of Right to Trial by Jury. — Where the defendant in a criminal action enters the plea of "not guilty," the requirement of N.C. Const., Art. I, § 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried accord-

ing to law. State v. Crawford, 197 N.C. 513, 149 S.E. 729 (1929).

Instruction held proper. State v. Levy, 220 N.C. 812, 18 S.E.2d 355 (1942).

Sentence.—Upon defendant's conviction upon two warrants charging the issuance of worthless checks, a sentence of two years' imprisonment on the first warrant and one year's imprisonment on the second, the sentences to run consecutively, cannot be held excessive, cruel or unusual, since the sentences were within the limits prescribed by this section. State v. Levy, 220 N.C. 812, 18 S.E.2d 355 (1942).

A sentence to 18 months' labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. State v. White, 230 N.C. 513, 53 S.E.2d 436 (1949).

A two-year sentence for each violation of this section is not excessive, cruel, or unusual. Mathis v. North Carolina, 266 F. Supp. 841 (M.D.N.C. 1967).

Applied in State v. Oates, 262 N.C. 532, 138 S.E.2d 139 (1964); State v. Beaver, 266 N.C. 115, 145 S.E.2d 330 (1965); State v. Hart, 266 N.C. 671, 146 S.E.2d 816 (1966); State v. Cleaves, 4 N.C. App. 506, 166 S.E.2d 861 (1969).

Cited in Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966); State v. Byrd, 204 N.C. 162, 167 S.E. 626 (1933); Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933).

§ 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.—Any person who shall operate, or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee, of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 68, s. 1; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

§ 14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.—Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin-box telephone or other such receptacle, depository or contrivance, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 68, s. 2; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

§ 14-110. Defrauding innkeeper.—No person shall, with intent to defraud, obtain food, lodging, or other accommodations at a hotel, inn, boardinghouse or eating house. Whoever violates this section shall be guilty of a misdemeanor, punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Obtaining such lodging, food, or other accommodation by false pretense, or by false or fictitious show of pretense of baggage or other property, or absconding without paying or offering to pay therefor, or surreptitiously removing or attempting to remove such baggage, shall be prima facie evidence of such fraudulent intent, but this section shall not apply where there has been an agreement in writing for delay in such payment. (1907, c. 816; C. S., s. 4284; 1969, c. 947; c. 1224, s. 3.)

Local Modification.—Buncombe, Franklin, Jackson: 1933, c. 531; Lee: 1937, c. 168; Martin: 1931, c. 9; Pitt: 1929, c. 103; Rockingham: 1939, c. 53; Wake, Watauga: 1931, c. 9.

Editor's Note. — The first 1969 amendment rewrote this section.

The second 1969 amendment rewrote the provisions relating to punishment.

Constitutionality. — The misdemeanor prescribed by this section expressly applies, when the contract has been made with a fraudulent intent, and this intent also exists in surreptitiously absconding and removing baggage without having paid the bill, and this statute is not inhibited by N.C. Const., Art. I, § 16, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. State v. Barbee, 187 N.C. 703, 122 S.E. 753 (1924).

Boardinghouse Defined. — One who has not been licensed to keep a boardinghouse, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boardinghouse. State v. McRae, 170 N.C. 712, 86 S.E. 1039 (1915).

Prosecution of Guest for Refusing to Pay without Deduction for Unwarranted Charges.—Evidence tending to show that the general manager of a motel in complete charge of its operations had a car towed from its premises under the mistaken belief that the owner of the car was not a guest, and that when the guest refused to pay his bill without deducting the unwarranted towing charges, instituted a prosecution of the guest under this section, is held sufficient to be submitted to the jury on the issue of respondeat superior in an action against the motel for malicious prosecution, the acts of the manager having been performed in furtherance of the motel's business. Ross v. Dellinger, 262 N.C. 589, 138 S.E.2d 226 (1964).

Evidence Sufficient to Convict.—Where there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor, and without having paid his bill, it is sufficient to convict under this section, the question of intent being for the jury. State v. Hill, 166 N.C. 298, 81 S.E. 408 (1914).

Evidence Insufficient for Conviction.—In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boardinghouse, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boardinghouse to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. State v. Barbee, 187 N.C. 703, 122 S.E. 753 (1924).

§ 14-111. Fraudulently obtaining credit at hospitals and sanatoriums.—Any person who obtains accommodation at any public or private hospital or sanatorium without paying therefor, with intent to defraud the said hospital or sanatorium, or who obtains credit at such hospital or sanatorium by the use of any false pretense, or who, after obtaining credit or accommodation at a hospital or sanatorium, absconds and surreptitiously removes his baggage therefrom without paying for the accommodation or credit, shall be guilty of a misde-

meanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1931, c. 214; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

§ 14-111.1. Obtaining ambulance services without intending to pay therefor—Buncombe, Haywood and Madison counties.—Any person who with the intent to defraud shall obtain ambulance services for himself or other persons without intending at the time of obtaining such services to pay a reasonable charge therefor, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. If a person or persons obtaining such services willfully fails to pay for the services within a period of ninety days after request for payment, such failure shall raise a presumption that the services were obtained with the intention to defraud, and with the intention not to pay therefor.

This section shall apply only to the counties of Buncombe, Haywood and Madison. (1965, c. 976, s. 1; 1969, c. 1224, s. 4.)

Editor's Note. — The 1969 amendment rewrote the provisions of the first sentence relating to punishment.

§ 14-111.2. Obtaining ambulance services without intending to pay therefor—Alamance and other named counties. — Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. A determination by the court that the recipient of such services has willfully failed to pay for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

This section shall apply to Alamance, Anson, Caswell, Catawba, Chatham, Cumberland, Davie, Forsyth, Gaston, Guilford, Orange, Randolph, Rockingham, Stanly, Surry and Wilkes counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4.)

Editor's Note.—The first 1969 amendment made this section applicable to Catawba, Chatham, Cumberland, Forsyth, Rockingham and Wilkes counties.

The second 1969 amendment made this section applicable to Stanly County.

The third 1969 amendment rewrote the provisions of the first sentence relating to punishment.

§ 14-111.3. Making false ambulance request in Buncombe, Haywood and Madison counties.—It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall upon conviction be punished by a fine of fifty dollars ($50.00) or imprisonment not to exceed thirty days or both such fine and imprisonment.

This section shall apply only to the counties of Buncombe, Haywood and Madison. (1965, c. 976, s. 2.)

§ 14-112. Obtaining merchandise on approval.—If any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any article of merchandise on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a misdemeanor pun-

ishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Evidence that a person has solicited a merchant to deliver to him any article of merchandise for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section: Provided, this section shall not apply to merchandise sold upon a written contract which is signed by the purchaser. (1911, c. 185; C. S., s. 4285; 1941, c. 242; 1969, c. 1224, s. 2.)

Editor's Note. — The 1969 amendment added, at the end of the first sentence, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ 14-112.1: Repealed by Session Laws 1967, c. 1088, s. 2.

Editor's Note. — Section 4 of c. 1088, Session Laws 1967, makes the act effective from and after ratification, but provides that it shall not apply to actions or indictments pending in courts in the State. The act was ratified July 3, 1967.

The repealed section, which derived from Session Laws 1965, c. 950, related to false statements in claims for insurance benefits.

§ 14-113. Obtaining money by false representation of physical defect.—It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1919, c. 104; C. S., s. 4286; 1969, c. 1224, s. 1.)

Cross Reference.—As to defrauding the North Carolina governmental employees' retirement system for counties, cities, and towns, see § 128-32.

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

ARTICLE 19A.

Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

§ 14-113.1. Use of false or counterfeit credit device; unauthorized use of another's credit device; use after notice of revocation.—It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or service, by the use of any false, fictitious, or counterfeit telephone number, credit number or other credit device, or by the use of any telephone number, credit number or other credit device of another without the authority of the person to whom such number or device was issued, or by the use of any telephone number, credit number or other credit device in any case where such number or device has been revoked and notice of revocation has been given to the person to whom issued. (1961, c. 223, s. 1; 1965, c. 1147; 1967, c. 1244, s. 1.)

Editor's Note. — The 1967 amendment deleted references to credit cards throughout this section.

§ 14-113.2. Notice defined; prima facie evidence of receipt of notice.—The word "notice" as used in § 14-113.1 shall be construed to include either notice given in person or notice given in writing to the person to whom the number or device was issued. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last address known to the issuer, shall be prima facie evidence that such notice was duly received after five days from the date of the deposit in the mail. (1961, c. 223, s. 3; 1965, c. 1147; 1967, c. 1244, s. 1.)

Editor's Note. — The 1967 amendment deleted "card" following "number" near the end of the first sentence.

§ 14-113.3. Use of credit device as prima facie evidence of knowledge.—The presentation or use of a revoked, false, fictitious or counterfeit telephone number, credit number, or other credit device for the purpose of obtaining credit or the privilege of making a deferred payment for the article or service purchased shall be prima facie evidence of knowledge that the said credit device is revoked, false, fictitious or counterfeit; and the unauthorized use of any telephone number, credit number or other credit device of another shall be prima facie evidence of knowledge that such use was without the authority of the person to whom such number or device was issued. (1961, c. 223, s. 4; 1965, c. 1147; 1967, c. 1244, s. 1.)

Editor's Note. — The 1967 amendment deleted references to credit cards throughout this section.

§ 14-113.4. Avoiding or attempting to avoid payment for telecommunication services.—It shall be unlawful for any person to avoid or attempt to avoid, or to cause another to avoid, the lawful charges, in whole or in part, for any telephone or telegraph service or for the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities by the use of any fraudulent scheme, device, means or method. (1961, c. 223, s. 2; 1965, c. 1147.)

§ 14-113.5. Making, possessing or transferring device for theft of telecommunication service; concealment of existence, origin or destination of any telecommunication. — It shall be unlawful for any person knowingly to:

(1) Make or possess any apparatus, equipment, or device designed, adapted, or which is used
   a. For commission of a theft of telecommunication service in violation of this article, or
   b. To conceal, or to assist another to conceal, from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination of any telecommunication, or

(2) Sell, give, transport, or otherwise transfer to another or offer or advertise for sale, any apparatus, equipment, or device described in (1) above, or plans or instructions for making or assembling the same; under circumstances evincing an intent to use or employ such apparatus, equipment, or device, or to allow the same to be used or employed, for a purpose described in (1) a or (1) b, above, or knowing or having reason to believe that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for making or assembling such apparatus, equipment or device. (1965, c. 1147.)

§ 14-113.6. Violation made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor punishable by a

fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1961, c. 223, s. 5; 1965, c. 1147; 1969, c. 1224, s. 6.)

Editor's Note. — The 1969 amendment substituted the present provisions as to punishment for a provision that the violator be fined or imprisoned, or both, at the discretion of the court.

§ 14-113.7. Article not construed as repealing § 14-100. This article shall not be construed as repealing § 14-100. (1961, c. 223, s. 6; 1965, c. 1147.)

§ 14-113.7a. Application of article to credit cards.—This article shall not be construed as being applicable to any credit card as the term is defined in G.S. 14-113.8. (1967, c. 1244, s. 1.)

ARTICLE 19B.

Credit Card Crime Act.

§ 14-113.8. Definitions.—The following words and phrases as used in this chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) Cardholder.—"Cardholder" means the person or organization named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer.

(2) Credit Card.—"Credit card" means any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value on credit.

(3) Expired Credit Card.—"Expired credit card" means a credit card which is no longer valid because the term shown on it has elapsed.

(4) Issuer.—"Issuer" means the business organization or financial institution which issues a credit card or its duly authorized agent.

(5) Receives.—"Receives" or "receiving" means acquiring possession or control or accepting as security for a loan.

(6) Revoked Credit Card.—"Revoked credit card" means a credit card which is no longer valid because permission to use it has been suspended or terminated by the issuer. (1967, c. 1244, s. 2.)

§ 14-113.9. Credit card theft.—(a) A person is guilty of credit card theft when:

(1) He takes, obtains or withholds a credit card from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder; or

(2) He receives a credit card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder; or

(3) He, not being the issuer, sells a credit card or buys a credit card from a person other than the issuer; or

(4) He, not being the issuer, during any 12-month period, receives credit cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of G.S. 14-113.13 (a) (3) and subdivision (3) of subsection (a) of this section.

(b) Taking, obtaining or withholding a credit card without consent is included in conduct defined in G.S. 14-75 as larceny.

Conviction of credit card theft is punishable as provided in G.S. 14-113.17 (b). (1967, c. 1244, s. 2.)

§ 14-113.10. Prima facie evidence of theft.—When a person has in his possession or under his control credit cards issued in the names of two or more other persons other than members of his immediate family, such possession shall be prima facie evidence that such credit cards have been obtained in violation of subsection (a) of G.S. 14-113.9. (1967, c. 1244, s. 2.)

§ 14-113.11. Forgery of credit card.—(a) A person is guilty of credit card forgery when:

(1) With intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported credit card or utters such a credit card; or

(2) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a credit card.

(b) A person falsely makes a credit card when he makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing, or alters a credit card which was validly issued.

(c) A person falsely embosses a credit card when, without the authorization of the named issuer, he completes a credit card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder. Conviction of credit card forgery shall be punishable as provided in G.S. 14-113.17 (b). (1967, c. 1244, s. 2.)

§ 14-113.12. Prima facie evidence of forgery.—(a) When a person, other than the purported issuer, possesses two or more credit cards which are falsely made or falsely embossed, such possession shall be prima facie evidence that said cards were obtained in violation of G.S. 14-113.11 (a) (1).

(b) When a person, other than the cardholder or a person authorized by him, possesses two or more credit cards which are signed, such possession shall be prima facie evidence that said cards were obtained in violation of G.S. 14-113.11 (a) (2). (1967, c. 1244, s. 2.)

§ 14-113.13. Credit card fraud.—(a) A person is guilty of credit card fraud when, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he

(1) Uses for the purpose of obtaining money, goods, services or anything else of value a credit card obtained or retained in violation of G.S. 14-113.9 or a credit card which he knows is forged, expired or revoked; or

(2) Obtains money, goods, services or anything else of value by representing without the consent of the cardholder that he is the holder of a specified card or by representing that he is the holder of a card and such card has not in fact been issued; or

(3) Obtains control over a credit card as security for debt.

(b) A person who is authorized by an issuer to furnish money, goods, services or anything else of value upon presentation of a credit card by the cardholder, or any agent or employee of such person, is guilty of a credit card fraud when, with intent to defraud the issuer or the cardholder, he

(1) Furnishes money, goods, services or anything else of value upon presentation of a credit card obtained or retained in violation of G.S.

14-113.9, or a credit card which he knows is forged, expired or revoked; or

(2) Fails to furnish money, goods, services or anything else of value which he represents in writing to the issuer that he has furnished.

Conviction of credit card fraud is punishable as provided in G.S. 14-113.17 (a) if the value of all money, goods, services and other things of value furnished in violation of this section, or if the difference between the value of all money, goods, services and anything else of value actually furnished and the value represented to the issuer to have been furnished in violation of this section, does not exceed five hundred dollars ($500.00) in any six-month period; conviction of credit card fraud is punishable as provided in G.S. 14-113.17 (b) if such value exceeds five hundred dollars ($500.00) in any six-month period. (1967, c. 1244, s. 2.)

§ 14-113.14. Criminal possession of credit card forgery devices.—(a) A person is guilty of criminal possession of credit card forgery devices when:

(1) He is a person other than the cardholder and possesses two or more incomplete credit cards, with intent to complete them without the consent of the issuer; or

(2) He possesses, with knowledge of its character, machinery, plates or any other contrivance designed to reproduce instruments purporting to be credit cards of an issuer who has not consented to the preparation of such credit cards.

(b) A credit card is incomplete if part of the matter other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder, has not yet been stamped, embossed, imprinted or written upon.

Conviction of criminal possession of credit card forgery devices is punishable as provided in G.S. 14-113.17 (b). (1967, c. 1244, s. 2.)

§ 14-113.15. Criminal receipt of goods and services fraudulently obtained.—A person is guilty of criminally receiving goods and services fraudulently obtained when he receives money, goods, services or anything else of value obtained in violation of G.S. 14-113.13 (a) with the knowledge or belief that the same were obtained in violation of G.S. 14-113.13 (a). Conviction of criminal receipt of goods and services fraudulently obtained is punishable as provided in G.S. 14-113.17 (a) if the value of all money, goods, services and anything else of value, obtained in violation of this section, does not exceed five hundred dollars ($500.00) in any six-month period; conviction of criminal receipt of goods and services fraudulently obtained is punishable as provided in G.S. 14-113.17 (b) if such value exceeds five hundred dollars ($500.00) in any six-month period. (1967, c. 1244, s. 2.)

§ 14-113.16. Presumption of criminal receipt of goods and services fraudulently obtained.—A person who obtains at a discount price a ticket issued by an airline, railroad, steamship or other transportation company from other than an authorized agent of such company which was acquired in violation of G.S. 14-113.13 (a) without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it shall be presumed to know that such ticket was acquired under circumstances constituting a violation of G.S. 14-113.13 (a). (1967, c. 1244, s. 2.)

§ 14-113.17. Punishment and penalties.—(a) A person who is subject to the punishment and penalties of this subsection shall be fined not more than one thousand dollars ($1,000.00) or imprisoned not more than one year, or both.

(b) A crime punishable under this subsection is a felony and shall be punish-

able by a fine of not more than three thousand dollars ($3,000.00) or imprisonment for not more than three years, or both. (1967, c. 1244, s. 2.)

ARTICLE 20.

Frauds.

§ 14-114. Fraudulent disposal of personal property on which there is a security interest.—If any person, after executing a security agreement on personal property for a lawful purpose, shall make any disposition of any property embraced in such security agreement, with intent to hinder, delay or defeat the rights of the secured party, every person so offending and every person with a knowledge of the security interest buying any property embraced in which security agreement, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any secured party in such security agreement, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. In all indictments for violations of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made, but proof of the possession of the property embraced in such security agreement by the grantor thereof, after the execution of said security agreement, and while it is in force, the further proof of the fact that the sheriff or other officer charged with the execution of process cannot after due diligence find such property under process directed to him for its seizure, for the satisfaction of such security agreement, or that the secured party demanded the possession thereof of the grantor for the purpose of sale to foreclose said security agreement, after the right to such foreclosure had accrued, and that the grantor failed to produce, deliver or surrender the same to the secured party for that purpose, shall be prima facie proof of the fact of the disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the secured party. (1873-4, c. 31; 1874-5, c. 215; 1883, c. 61; Code, s. 1089; 1887, c. 14; Rev., s. 3435; C. S., s. 4287; 1969, c. 984, s. 2; c. 1224, s. 4.)

Cross Reference.—As to fraudulent conveyances, see § 39-15 et seq.

Editor's Note. — The first 1969 amendment rewrote this section.

The second 1969 amendment rewrote the provisions of the first sentence relating to punishment.

The cases cited in the following note were decided prior to the 1969 amendments when this section referred to chattel mortgages, deeds of trust or other liens rather than to security agreements.

Three Classes of Offenders.—The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) those who buy with a knowledge of the lien, and (3) those who aid or abet either the maker or purchaser in the unlawful acts. State v. Woods, 104 N.C. 898, 10 S.E. 555 (1889).

Intent Necessary. — Under this section the forbidden act must, in order to be indictable, be accomplished with a specific intent, and the courts cannot disregard this clearly expressed purpose of the legislature. State v. Manning, 107 N.C. 910, 12 S.E. 248 (1890). The actual sale of mortgaged crops raises a presumption of fraudulent intent. State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897). In a trial under this section the burden is upon the defendant to disprove the criminal intent. State v. Surles, 117 N.C. 720, 23 S.E. 324 (1895); State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897).

Result of Sale Must Injure. — If the property included in the mortgage (other than that disposed of), was abundantly sufficient and available to pay the indebtedness, there could be no such prejudicial result as is contemplated by the statute. State v. Manning, 107 N.C. 910, 12 S.E. 248 1890).

Justice Jurisdiction.—Under the original acts justices of the peace have exclusive jurisdiction of the offense of fraudulently disposing of personal property embraced in a chattel mortgage. State v. Jones, 83 N.C. 657 (1880).

Infant's Liability. — An indictment under this section for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant.

The alleged disposition was a disaffirmance of the contract and renders it void. State v. Howard, 88 N.C. 651 (1883).

Indictment Must Charge Maker, Buyer or Assistant.—If the indictment does not charge the defendant as the maker of the lien nor the buyer of the property with knowledge of it, nor as assisting, aiding or abetting in the unlawful disposition of the property no offense is charged. State v. Woods, 104 N.C. 898, 10 S.E. 555 (1889).

Indictment Must Charge Lien and Manner of Sale.—An indictment for disposing of mortgaged property is fatally defective, if it fails to set forth that the lien was in force at the time of sale, the party to whom sold, and the manner of disposition. State v. Pickens, 79 N.C. 652 (1878); State v. Burns, 80 N.C. 376 (1879).

Indictment Must Identify Transaction and Point to Offense Charged. – In a prosecution under this section, the bill of indictment must allege the facts and circumstances so as to identify the transaction and point with reasonable certainty to the offense charged. State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958).

Indictment in Two Counts.—Where an indictment for disposing of mortgaged property contained two counts, one alleging a disposal with intent to defraud G., "business manager" of an association, and the other a disposal with intent to defraud G., "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction, varied only to meet the probable proof, and the court will neither quash the bill nor force the State to elect on which count it will proceed. State v. Surles, 117 N.C. 720, 23 S.E. 324 (1895).

Prior Lien as Defense.—It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property—a crop of tobacco—to show that he, in good faith, applied the entire crop to the discharge of his landlord's lien. State v. Ellington, 98 N.C. 749, 4 S.E. 534 (1887).

Evidence of Other Sales Inadmissable.—On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offense was committed. State v. Jeffries, 117 N.C. 727, 23 S.E. 163 (1895).

Applied in State v. Dunn, 264 N.C. 391, 141 S.E.2d 630 (1965).

Cited in State v. Torrence, 127 N.C. 550, 37 S.E. 268 (1900); State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905).

§ 14-115. Secreting property to hinder enforcement of lien or security interest.—Any person removing, exchanging or secreting any personal property on which a lien or security interest exists, with intent to prevent or hinder the enforcement of the lien or security interest, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1887, c. 14; Rev., s. 3436; C. S., s. 4288; 1969, c. 984, s. 3; c. 1224, s. 1.)

Local Modification.—Pitt: 1941, c. 284.

Editor's Note. — The first 1969 amendment inserted "or security interest" in two places in the section.

The second 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ 14-116. Fraudulent entry of horses at fairs. — If any person shall knowingly enter or cause to be entered in competition for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person in this State, any horse, mare, gelding, colt or filly under an assumed name or out of its proper class, he shall be punished by a fine not less than one hundred nor more than one thousand dollars, or by imprisonment in the State's prison for not less than one nor more than five years, or by both fine and imprisonment, at the discretion of the court. (1893, c. 387; Rev., s. 3429; C. S., s. 4289.)

§ 14-117. Fraudulent and deceptive advertising.—It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for

sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make public, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminated, circulated or placed before the public in this State, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1915, c. 218; C. S., s. 4290.)

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

§ 14-117.1. **Use of words "army" or "navy" in name of mercantile establishment.**—It shall be unlawful for any person, firm, or corporation, to use the words "army" or "navy" or either, or both, in the name or as a part of the name of any mercantile establishment in this State which is not in fact operated by the United States government or a duly authorized agency thereof.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00) for the first offense, and not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00) for each subsequent such offense. (1945, c. 879.)

Local Modification.—Beaufort: 1949, c. 857.

§ 14-118. **Blackmailing.**—If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the State's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a misdemeanor. (R. C., c. 34, s. 110; Code, s. 989; Rev., s. 3428; C. S., s. 4291.)

Indictment.—Where the offense charged was the sending of a letter, under this section, and the letter was set out in the indictment, from which it is deducible by necessary implication that the defendant threatened to indict the prosecutor for an offense punishable by imprisonment in the penitentiary, with a view and intent to extort money a criminal offense is sufficiently charged. State v. Harper, 94 N.C. 936 (1886).

Circumstantial Evidence. — Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. State v. Frady, 172 N.C. 978, 90 S.E. 802 (1916).

Circumstantial evidence held to sustain conviction of blackmail. State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

§ 14-118.1. **Simulation of court process in connection with collection of claim, demand or account.**—It shall be unlawful for any person, firm, corporation, association, agent or employee to in any manner coerce, intimidate

or attempt to coerce or intimidate any person by the issuance, utterance or delivery of any matter, printed, typed or written, which simulates or is intended to simulate a summons, warrant, writ or other court process in connection with any claim, demand or account or any forms of demand or notice or other document drawn to resemble court process, writs, summonses, warrants or pleadings or any simulation of seals or words using the name of the State or county or any likeness thereof, or the words "State of North Carolina" or any of the several counties of the State as a part of such simulation. Any violation of the provisions of this section shall be a misdemeanor and shall be punishable by a fine of not more than two hundred dollars ($200.00) or by imprisonment of not more than six months, or both such fine and imprisonment, in the discretion of the court. (1961, c. 1188.)

§ 14-118.2. Assisting, etc., in obtaining academic credit by fraudulent means.—(a) It shall be unlawful for any person, firm, corporation or association to assist any student, or advertise, offer or attempt to assist any student, in obtaining or in attempting to obtain, by fraudulent means, any academic credit, or any diploma, certificate or other instrument purporting to confer any literary, scientific, professional, technical or other degree in any course of study in any university, college, academy or other educational institution. The activity prohibited by this subsection includes, but is not limited to, preparing or advertising, offering, or attempting to prepare a term paper, thesis, or dissertation for another and impersonating or advertising, offering or attempting to impersonate another in taking or attempting to take an examination.

(b) Any person, firm, corporation or association violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Provided, however, the provisions of this section shall not apply to the acts of one student in assisting another student as herein defined if the former is duly registered in an educational institution and is subject to the disciplinary authority thereof. (1963, c. 781; 1969, c. 1224, s. 7.)

Editor's Note. — The 1969 amendment substituted in the first sentence of subsection (b), the present provisions as to punishment for a provision for punishment by fine or imprisonment, or both, in the discretion of the court.

For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra L. Rev. 359 (1969).

§ 14-118.3. Acquisition and use of information obtained from patients in hospitals for fraudulent purposes.—It shall be unlawful for any person, firm or corporation, or any officer, agent or other representative of any person, firm or corporation to obtain or seek to obtain from any person while a patient in any hospital information concerning any illness, injury or disease of such patient, other than information concerning the illness, injury or disease for which such patient is then hospitalized and being treated, for a fraudulent purpose, or to use any information so obtained in regard to such other illness, injury or disease for a fraudulent purpose.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1967, c. 974; 1969, c. 1224, s. 5.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.—If any person shall falsely make, forge or counterfeit, or cause or procure the same

to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this State, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the State, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the State, the person so offending shall be guilty of a felony and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years, or by a fine in the discretion of the court. (1819, c. 994, s. 1, P. R.; R. C., c. 34, s. 60; Code, s. 1030; Rev., s. 3419; C. S., s. 4293.)

Cross Reference.—As to alleging intent in the indictment, see § 15-151.

Definitions.—The common-law definition of forgery obtains in this State, the statute not attempting to define it. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Forgery, at common law, denotes a false making, a making malo animo, of any written instrument for the purpose of fraud and deceit. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Forgery may generally be defined as the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Elements of Offense.—To constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false; it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud. Barnes v. Crawford, 115 N.C. 76, 20 S.E. 386 (1894). While an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded, or that any act be done other than the fraudulent making or altering of the instrument. State v. Cross, 101 N.C. 770, 7 S.E. 715 (1888); State v. Hall, 108 N.C. 777 13 S.E. 189 (1891).

The essentials to the completion of the offense of forgery are: (a) The falsification of a paper, or the making of a false paper, of legal efficacy "apparently capable of effecting a fraud;" (b) the fraudulent intent. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Three elements are necessary to constitute the offense of forgery: (1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962).

The three essential elements necessary to constitute the crime of forgery are: (1) a false making of a check, (2) a fraudulent intent on the part of the person who knowingly participated in the false making of the check, and (3) the check was apparently capable of effecting a fraud. State v. Keller, 268 N.C. 522, 151 S.E.2d 56 (1966).

The three essential elements necessary to constitute the crime of forgery are (1) a false writing of the check; (2) an intent to defraud on the part of defendant who falsely made the said check; and (3) the check as made was apparently capable of defrauding. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

An instrument may be a forgery even though in itself it is not false in any particular, if there is a fraudulent intent that the signature should pass or be received as the genuine act of another person whose signing, only, could make the paper valid and effectual. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Real and Forged Signatures Need Not Be Identical. — An instrument is nonetheless a forgery because the signature is not identical with that of the person whose signature it is intended to simulate if they are sufficiently similar for the doctrine of idem sonans to apply, and the insertion of a middle initial not in the signature simulated is not a fatal variance. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

A person without a bank account who signs his name to checks and presents them to the bank with intent that the signature should be taken as that of another of the same or similar name who has funds on deposit, and cashes the checks fraudulently and with knowledge that he was withdraw-

ing from the bank the funds of such other person, is guilty of forgery. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Indictment. — Even though the offense of forgery is charged in statutory language in the bill of indictment, in order to be a valid bill of indictment, it is necessary that the statutory words be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. State v. Cross, 5 N.C. App. 217, 167 S.E.2d 868 (1969).

Where the alteration of a genuine instrument is charged, an indictment for forgery must clearly set forth the alteration alleged, with the proper allegations showing alteration of a material part of the instrument. Thus, in an indictment for forgery effected by interpolating words in a genuine instrument, as by raising the amount of a note, the added words should be quoted and their position in the instrument shown, so that it may appear how they affect its meaning. State v. Cross, 5 N.C. App. 217, 167 S.E.2d 868 (1969).

Indictment Must Allege Existence of Bank.—In an indictment under this section to punish the making, passing, etc., of counterfeit bank notes, if the note alleged to have been passed be of a bank not within the State, the indictment should aver that such a bank exists as that by which the counterfeit note purports to have been issued. State v. Twitty, 9 N.C. 248 (1822).

Uttering Distinct from Forgery. — By virtue of § 14-120, uttering is an offense distinct from that of forgery which is defined in this section. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

Signing Fictitious Name.—If the name signed to a negotiable instrument, or other instrument requiring a signature is fictitious, of necessity, the name must have been affixed by one without authority, and if a person signs a fictitious name to such instrument with the purpose and intent to defraud—the instrument being sufficient in form to import legal liability —an indictable forgery is committed. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962).

State Must Show Want of Authority.—If the purported maker is a real person and actually exists, the State is required to show not only that the signature in question is not genuine, but was made by defendant without authority. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962).

Presumption of Authority.—Where defendant signs the name of another person to an instrument, there is no presumption of want of authority; on the contrary, where it appears that accused signed the name of another to an instrument, it is presumed that he did so with authority. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962).

Evidence of Former Acts.—Upon an indictment for uttering forged money, knowing it to be forged, evidence may be received of former acts and transactions which tend to bring home the scienter to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he is tried. State v. Twitty, 9 N.C. 248 (1822).

In a prosecution for forgery and issuing a forged instrument under this section and § 14-120, evidence that defendant had theretofore forged checks other than those specified in the indictment may be competent on the question of intent. State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965).

Evidence Held Sufficient.—Evidence that defendant signed the name of another in endorsing a check payable to such other person, and negotiated it, that such other person had not authorized anyone to sign his name on the check, and that such person was not owed the amount of the check, is held sufficient to overrule nonsuit in a prosecution for violation of this section and § 14-120. State v. Coleman, 253 N.C. 799, 117 S.E.2d 742 (1961).

Punishment.—Where the sentences imposed on defendant's plea of guilty, understandingly and voluntarily made, are within the limits prescribed by this section and § 14-120, such sentences cannot be considered cruel or unusual in the constitutional sense. State v. Newell, 268 N.C. 300, 150 S.E.2d 405 (1966).

A contention that the punishment for forging and uttering a check in violation of this section and § 14-120, by analogy to § 14-72, should be limited to the punishment imposed for a misdemeanor is untenable since a violation of each section is a felony and the court has no power to amend an act of the General Assembly. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

Prison sentences of not less than seven nor more than ten years for forgery, and not less than five nor more than seven years for uttering, to run consecutively, did not constitute cruel and unusual punishment. State v. Hopper, 271 N.C. 464, 156 S.E.2d 857 (1967).

Applied in State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953); State v. Ayscue, 240 N.C. 196, 81 S.E.2d 403 (1954); State v. Shepard, 261 N.C. 402, 134 S.E.2d 696 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Gibbs, 266 N.C. 647, 146 S.E.2d 676 (1966); State v. Miller, 271 N.C. 611, 157 S.E.2d 211 (1967).

Cited in State v. Peter, 53 N.C. 19 (1860); Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.—If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check or security as is mentioned in the preceding section [§ 14-119], or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited) the person so offending shall be punished by imprisonment in the county jail or State's prison not less than four months nor more than ten years. If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall falsely make, forge or counterfeit any endorsement on any instrument described in the preceding section, whether such instrument be genuine or false, or shall knowingly utter or publish any such instrument containing a false, forged or counterfeited endorsement or, knowing the same to be falsely endorsed, shall pass or deliver or attempt to pass or deliver any such instrument containing a forged endorsement to another person, the person so offending shall be guilty of a felony and punishable by the same punishment provided in the preceding sentence. (1819, c. 994, s. 2, P. R.; R. C., c. 34, s. 61; Code, s. 1031; Rev., s. 3427; 1909, c. 666; C. S., s. 4294; 1961, c. 94.)

Cross Reference.—As to payment of a forged check, see § 53-52.

What Constitutes Uttering.—The mere offer of the false instrument with fraudulent intent constitutes an uttering or publishing, the essence of the offense being, as in the case of forgery, the fraudulent intent regardless of its successful consummation. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

Uttering Distinct from Forgery. — By virtue of this section, uttering is an offense distinct from that of forgery which is defined in § 14-119. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

A check filled out by the payee at the direction of the drawer falls within the meaning of the words "directly or indirectly" as used in this section. State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953).

Delivering to Agent.—It is putting spurious paper into circulation, and not defrauding the individual who takes it, that the statute has in view. Hence, upon a similar statute, it was held that delivering a forged note to an agent, that he might dispose of it in buying goods, was a passing within the act. State v. Harris, 27 N.C. 287 (1844).

Evidence of Former Acts.—In a prosecution for forgery and issuing a forged instrument under this section and § 14-119, evidence that defendant had theretofore forged checks other than those specified in the indictment may be competent on the question of intent. State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965).

Evidence Held Sufficient. — See note under § 14-119.

Punishment.—Where the sentences imposed on defendant's plea of guilty, understandingly and voluntarily made, are within the limits prescribed by this section and § 14-119, such sentences cannot be considered cruel or unusual in the constitutional sense. State v. Newell, 268 N.C. 300, 150 S.E.2d 405 (1966).

A contention that the punishment for forging and uttering a check in violation of this section and § 14-119, by analogy to § 14-72, should be limited to the punishment imposed for a misdemeanor is untenable since a violation of each section is a felony and the court has no power to amend an act of the General Assembly. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

A charge of uttering a forged check, even if enough to break a bank, cannot support a judgment of imprisonment exceeding ten years. State v. Wright, 261 N.C. 356, 134 S.E.2d 624 (1964).

Prison sentences of not less than seven nor more than ten years for forgery, and not less than five nor more than seven years for uttering, to run consecutively, did not constitute cruel and unusual punishment. State v. Hopper, 271 N.C. 464, 156 S.E.2d 857 (1967).

Applied in State v. Ayscue, 240 N.C. 196, 81 S.E.2d 403 (1954); State v. Shepard, 261 N.C. 402, 134 S.E.2d 696 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Gibbs, 266 N.C. 647, 146 S.E.2d 676 (1966); State v. Keller, 268 N.C. 422, 151 S.E.2d 56 (1966); State v. Miller, 271 N.C. 611, 157 S.E.2d 211 (1967); State v. Mosteller, 3 N.C. App. 67, 164 S.E.2d 27 (1968).

§ 14-121. Selling of certain forged securities.—If any person shall sell, by delivery, indorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years. (R. C., c. 34, s. 63; Code, s. 1033; Rev., s. 3425; C. S., s. 4295.)

§ 14-122. Forgery of deeds, wills and certain other instruments.—If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance or receipt for money or goods; or any receipt or release for any bond, note, bill or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the State's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court. (5 Eliz., c. 14, ss. 2, 3; 21 James I, c. 26; 1801, c. 572, P. R.; R. C., c. 34, s. 59; Code, s. 1029; Rev., s. 3424; C. S., s. 4296.)

Cross References.—As to forgery of certificate of discharge from the armed forces of the United States, see § 47-112. As to uttering a false bill of lading, see § 21-42.

General Consideration. — Differing from false pretenses, it is not an element of this offense that the forgery was "calculated to deceive and did deceive"; intent alone suffices to constitute the crime. State v. Hall, 108 N.C. 777, 13 S.E. 189 (1891); State v. Collins, 115 N.C. 716, 20 S.E. 452 (1894). It is immaterial to whom the advantages of the forgery would accrue. State v. Cross, 101 N.C. 70, 7 S.E. 715 (1888).

An instrument in writing on which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. Barnes v. Crawford, 115 N.C. 76, 20 S.E. 386 (1894).

To constitute an "order for the delivery of goods," a forgery within the meaning of this section, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered, and if the paper writing set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under this section, State v. Lamb, 65 N.C. 419 (1871); but in such case a conviction will be sustained for the offense at common law. State v. Leak, 80 N.C. 403 (1879).

Possession Raises Presumption of Guilt. —One possessing a forged intrument is presumed to have either forged it or consented to the forgery, and nothing else appearing such holder will be presumed guilty. State v. Peterson, 129 N.C. 556, 40 S.E. 9 (1901).

In State v. Britt, 14 N.C. 122 (1831), Ruffin, J., says: "That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument; that he either did the act or

caused it to be done until he showed the actual perpetrator and that he himself was not privy." To the same effect is State v. Morgan, 19 N.C. 348 (1837). It is wholly immaterial whether the defendant himself forged the order or procured and caused it to be done. In either case his guilt is the same. State v. Lane, 80 N.C. 407 (1879).

Lost Instruments.—If the forged instrument is lost it is not necessary to set it out in the indictment, and the substance of the forged instrument is all that need be charged, though in such case it would be better practice to aver the loss. State v. Peterson, 129 N.C. 556, 40 S.E. 9 (1901).

Misspelled Signature. — An indictment lies for forgery of an order for the payment of money, although the signature is misspelled, State v. Covington, 94 N.C. 913 (1886); or the names of a firm are in reverse order if it is clear who the parties intended to be designated are. State v. Lane, 80 N.C. 407 (1879).

Falsely putting a witness' name to a bond not required to be attested by a subscribing witness does not affect the validity of the bond, and is not forgery. State v. Gherkin, 29 N.C. 206 (1847).

Erasure or Obliteration Not a Forgery. —Obliterating by erasure, or otherwise, a release or acquittance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not according to the law of North Carolina, a forgery. State v. Thornburg, 28 N.C. 79 (1845).

Forgery of One of Two Names.—Where the alleged forged instrument has the names of two or more persons affixed, it is sufficient if one of them is proved to have been forged. State v. Cross, 101 N.C. 770, 7 S.E. 715 (1888).

Instrument Partly Printed and Partly in Writing. — An indictment for forging "a certain instrument in writing" is supported by proof of the forgery of an instrument partly printed and partly in writing. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899).

"Railroad Pass" Insufficiency of Description.—A description of the forged instrument as a "railroad pass" merely, is insufficient. The circumstances showing authority of the officer whose name is forged, and the obligation of the company to honor it, must be set out in the indictment. State v. Weaver, 94 N.C. 836 (1886).

§ 14-123. Forging names to petitions and uttering forged petitions. —If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be guilty of a felony, and shall be fined not exceeding one thousand dollars, or imprisoned in the county jail or State's prison not exceeding five years, or both, at the discretion of the court; and if any person shall willfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and shall be punished in like manner. (1883, c. 275; Code, s. 1034; Rev., s. 3426; C. S., s. 4297.)

§ 14-124. Forging certificate of corporate stock and uttering forged certificates.—If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, holder or bearer is entitled to or has an interest in the stock of such corporation, when in fact such person, holder or bearer is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign or deliver the same to another person, for the

sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be imprisoned in the county jail or State's prison not less than four months nor more than ten years. (R. C., c. 34, s. 62; Code, s. 1032; Rev., s. 3421; C. S., s. 4298.)

§ 14-125. Forgery of bank notes and other instruments by connecting genuine parts.—If any person shall fraudulently connect together different parts of two or more bank notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged. (R. C., c. 34, s. 66; Code, s. 1037; Rev., s. 3420; C. S., s. 4299.)

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.—No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor. (5 Ric. II, c. 8; R. C., c. 49, s. 1; Code, s. 1028; Rev., s. 3670; C. S., s. 4300.)

Cross Reference.—As to trespass after being forbidden, see § 14-134.

Editor's Note.—For discussion of the distinctions between the common-law crime of forcible trespass to real property and forcible entry and detainer, see 39 N.C.L. Rev. 121 (1961).

Constitutionality.—See note to § 14-134.

This section and § 14-134 place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

The word "entry" as used in this section and § 14-134, is synonymous with the word "trespass." It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

A peaceful entry negatives liability under this section. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

But One Who Remains after Being Directed to Leave Is Guilty of Wrongful Entry.—In applying this section, one who remains after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961).

Where persons of the negro race entered that part of the premises of a private enterprise reserved for white clientele, and refused to leave upon order of the proprietor, they were guilty of a wrongful entry within the meaning of this section, even though their original entrance was peaceful. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961).

Force. — Actual force or appearances tending to inspire a just apprehension of violence is necessary to constitute the offense. A forcible entry is not proved by evidence of a mere trespass; there must be proof of such force, or at least such show of force, as is calculated to prevent resistance. State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904); State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911). So riding into the yard of a house occupied by a woman and remaining there cursing her constitutes force. State v. Davenport, supra. But where a person, in the absence of the prosecutor, merely unlocked and took off the lock put on by the prosecutor

and put his own lock on, without breaking anything or doing any violence, and committed no violence upon the return of the prosecutor, he is not guilty of forcible entry and detainer. State v. Leary, supra.

To convict one of the crime of forcible trespass, it is essential for the State to establish an entry with such force as to be "apt to strike terror" to the prosecutor whose possession was disturbed. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Same—Title No Excuse.—The right or title to land cannot be vindicated with the bludgeon, but the party who claims the better title must, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elects to use violence, the law holds him criminally responsible for his act. State v. Webster, 121 N.C. 586, 28 S.E. 254 (1897), where it is said: "As forcible trespass is essentially an offense against the possession of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense." State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911).

Original Entry Unlawful.—In order to convict of a misdemeanor under the provisions of this section it is not necessary that the act of going on the lands be unlawful, if the accused thereafter have in overpowering numbers cursed and abused the one in lawful possession, using threatening and abusive language. State v. Fleming, 194 N.C. 42, 138 S.E. 342 (1927).

Same—Title Not Invalid.—The offense of forcible trespass under this section, does not involve title to the premises, but is directed against the possession, and when the possession is in the prosecuting witness, and the entry is made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tends to a breach of the peace, it is sufficient for conviction. State v. Earp, 196 N.C. 264, 144 S.E. 23 (1928).

Extent of Liability of Title Holder.—The court quoting from Reeder v. Purdy, 41 Ill. 279, says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie . . . . Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has the title." Mosseller v. Deaver, 106 N.C. 494, 11 S.E. 529 (1890).

Actual Possession Necessary.—The essential element of the offense of forcible entry is that the lands, etc., must be in the actual possession of him whose possession is charged to have been interferred with. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to be in possession. He need not at all times be personally present on the premises. State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889).

The element of actual possession must be charged in the indictment. State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889). It is a sufficient compliance with this rule to allege that the owner was "then and there in peaceable possession." State v. Eason, 70 N.C. 88 (1874).

This section is designed to protect actual possession only, and it is no defense that the accused has title to the locus in quo if the prosecutor be in actual possession of it. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

It is necessary to allege and establish actual possession in the prosecutor. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Right of Tenant at Sufferance.—Where the possession of the prosecutor in forcible entry and detainer is only by sufferance, the prosecution cannot be sustained. State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904).

No Accessories.—In misdemeanors there are no accessories, and those who were present in numbers, some armed with axes and others with guns, while one of their number caused the prosecutor's agents to abandon the locus in quo, were his aiders and abettors and equally guilty of forcible trespass. State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911).

Jurisdiction of a Justice of the Peace.—The distribution of judicial powers by former Article IV of the Constitution was

a virtual repeal of all laws giving jurisdiction to justices of the peace in case of forcible entry and detainer, except for the binding of trespassers to the superior court to answer a criminal charge. State v. Yarborough, 70 N.C. 250 (1874); Atlantic T. & O.R.R. v. Sharpe, 70 N.C. 509 (1874).

Entry under Void Warrant. — Where four or more men enter upon premises in the actual possession of another by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass. State v. Yarborough, 70 N.C. 250 (1874); Atlantic T. & O.R.R. v. Johnston, 70 N.C. 348 (1874).

Applied in State v. Dove, 261 N.C. 366, 134 S.E.2d 683 (1964).

Cited in State v. Cooke, 248 N.C. 485, 103 S.E.2d 846 (1958).

§ 14-127. Wilful and wanton injury to real property.—If any person shall wilfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or both, in the discretion of the court. (R. C., c. 34, s. 111; 1873-4, c. 176, s. 5; Code, s. 1081; Rev., s. 3677; C. S., s. 4301; 1967, c. 1083.)

Editor's Note.—The 1967 amendment rewrote this section.

Former Law. — See State v. Childress, 267 N.C. 85, 147 S.E.2d 595 (1966); State v. Fisher, 270 N.C. 315, 154 S.E.2d 333 (1967).

§ 14-128. Injury to trees, crops, lands, etc., of another.—Any person, not being on his own lands, who shall without the consent of the owner thereof, wilfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower, shall be guilty of a misdemeanor and, upon conviction, shall be fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding six (6) months, or both in the discretion of the court: Provided, however, that this section shall not apply to the officers, agents, and employees of the State Highway Commission while in the discharge of their duties within the right-of-way or easement of the Commission. (Ex. Sess. 1924, c. 54; 1957, c. 65, s. 11; c. 754; 1965, c. 300, s. 1; 1969, c. 22, s. 1.)

Editor's Note. — By virtue of Session Laws 1957, c. 65, § 11, "State Highway Commission" was substituted for "State Highway and Public Works Commission."

The 1869 amendment substituted "not exceeding five hundred dollars ($500.00) or imprisoned not exceeding six (6) months, or both in the discretion of the court" for "not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty (30) days."

It was said in 3 N.C.L. Rev. 25 that it is hoped that this section may prevent the laying waste of gardens, flowers, etc., by tourists who are not in the habit of regarding another's property rights and who usually leave trash and garbage at every place they stop to eat.

§ 14-128.1. Unauthorized cutting, digging, removal or transportation of certain ornamental plants and trees.—(a) As used in this section, the words "ornamental plants or trees" shall mean any venus fly trap (Dionaea muscipula), trailing arbutus, American holly, white pine, red cedar, balsam, hemlock or other coniferous trees, flowering dogwood, mountain laurel, rhododendron, ground pine, Christmas greens, Judas tree, leucothea, azalea, or any other ornamental plant or ornamental tree, or any part thereof.

(b) No person shall cut, dig up, break off or otherwise sever from the lands of another within this State any ornamental plants or trees without first procuring and having in his possession a bill of sale or written permit executed by the owner or the duly authorized agent of the owner of the land from which such ornamental plants or trees are being cut, dug up, broken off or otherwise severed.

(c) No person shall transport on the streets, highways or public roads of the State more than two ornamental plants or trees taken from the lands of another in this State without having in his possession a bill of sale for the purchase there-

of, if purchased, or written permit, if acquired pursuant to such permit: Provided, however, this paragraph shall not apply to common carriers.

(d) Such bill of sale or written permit described above shall be carried by the person having possession of said ornamental plants or trees and be exhibited to any duly authorized law enforcement officer at his request; provided that it shall not be necessary for the owner or duly authorized agent of the owner of the land from which said ornamental plants or trees were taken to carry a bill of sale or written permit.

(e) This section shall not apply to the owner or duly authorized agent of the owner of the land from which said ornamental plants or trees were taken: Provided, further, no person charged with violating this section shall be convicted if he produces at the trial the bill of sale or permit described in this section with respect to the transaction in question regardless of whether such bill of sale or written permit was secured before or subsequent to the time of the alleged violation of this section.

(f) Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court; provided that the terms of this section shall apply only to the following counties: Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Cherokee, Clay, Craven, Dare, Davidson, Forsyth, Franklin, Gaston, Graham, Guilford, Haywood, Henderson, Hoke, Jackson, Lenoir, Macon, Madison, McDowell, Mecklenburg, Mitchell, Pitt, Polk, Randolph, Stokes, Swain, Transylvania, Wake, Watauga, Wayne, Wilkes and Yancey. (1963, c. 603.)

§ 14-129. Taking, etc., of certain wild plants from land of another. —No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any venus fly trap (Dionaea muscipula), trailing arbutus, American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense. The provisions of this section shall not apply to the counties of Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Pamlico, Pender, Person, Richmond, Rockingham, Rowan and Swain. (1941, c. 253; 1951, c. 367, s. 1; 1955, cc. 251, 962; 1961, c. 1021; 1967, c. 355.)

Local Modification. — Avery, Mitchell and Watauga: 1867, c. 355.

Editor's Note.—The 1967 amendment deleted "Mitchell" from the list of counties in the last sentence.

§ 14-129.1. Selling or bartering venus flytrap.—In order to prevent the extinction of the rapidly disappearing rare and unique plant known as the venus flytrap (Dionaea muscipula), it shall be unlawful for any person, firm or corporation to sell or barter or to export for sale or barter, any venus flytrap plant or any part thereof. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both: Provided, this section shall not apply to the sale or exportation of the venus flytrap plant for the purposes of scientific experimentation or study when such sale or export for such purposes has been authorized in writing by the Department of Conservation and Development. Provided further, that this section shall not prevent any person from selling or exporting for sale any venus flytrap plant which such person has cultivated domestically under controlled conditions if the person so cultivating such plants has obtained his original stock of plants either from his own land or from some lawful seller and has obtained written

authorization for selling such plants from the Department of Conservation and Development. (1951, c. 367, s. 2; 1957, c. 334; 1969, c. 1224, s. 11.)

Editor's Note. — The 1969 amendment substituted the present provisions as to punishment in the second sentence for a provision that the violator be fined or imprisoned in the discretion of the court.

§ 14-130. Trespass on public lands.—If any person shall erect a building on any public lands before the same shall have been sold or granted by the State, or on any lands belonging to the State Board of Education before the same shall have been sold and conveyed by them, or cultivate or remove timber from any of such lands, he shall be guilty of a misdemeanor. Moreover, the State Board of Education can recover from any person cutting timber on its land three times the value of the timber which is cut. When any person shall be in possession of any part of such land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary he shall summon the power of the county to assist him in so doing. (1823, c. 1190, P. R.; 1842, c. 36, s. 4; R. C., c. 34, s. 42; Code, s. 1121; Rev., s. 3746; 1909, c. 891; C. S., s. 4302.)

Cited in Eastern Carolina Land, Lumber & Mfg. Co. v. State Board of Educ. 101 N.C. 35, 7 S.E. 573 (1888); Worth v. Commissioners of Craven County, 118 N.C. 112, 24 S.E. 778 (1896).

§ 14-131. Trespass on land under option by the federal government.—On lands under option which have formally or informally been offered to and accepted by the North Carolina Department of Conservation and Development by the acquiring federal agency and tentatively accepted by said Department for administration as State forests, State parks, State game refuges or for other public purposes, it shall be unlawful to cut, dig, break, injure or remove any timber, lumber, firewood, trees, shrubs or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor and shall be subject to a fine of not more than fifty dollars or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment.

The Department of Conservation and Development through its legally appointed forestry, fish and game wardens is hereby authorized and empowered to assist the county law-enforcement officers in the enforcement of this section. (1935, c. 317.)

§ 14-132. Disorderly conduct in and injuries to public buildings and facilities.—(a) It is a misdemeanor if any person shall:

(1) Make any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building or facility; or

(2) Unlawfully write or scribble on, mark, deface, besmear, or injure the walls of any public building or facility, or any statue or monument situated in any public place; or

(3) Commit any nuisance in or near any public building or facility.

(b) Any person in charge of any public building or facility owned or controlled by the State, any subdivision of the State, or any other public agency shall have authority to arrest summarily and without warrant for a violation of this section.

(c) The term "public building or facility" as used in this section includes any building or facility which is:

(1) One to which the public or a portion of the public has access and is owned or controlled by the State, any subdivision of the State, any other public agency, or any private institution or agency of a charitable, educational, or eleemosynary nature; or

(2) Dedicated to the use of the general public for a purpose which is primarily concerned with public recreation, cultural activities, and other events of a public nature or character.

The term "building or facility" as used in this section also includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(d) Any person who violates any provision of this section is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1829, c. 29, ss. 1, 2; 1842, c. 47; R. C., c. 103, ss. 7, 8; Code, s. 2308; Rev., s. 3742; 1915, c. 269; C. S., s. 4303; 1969, c. 869, s. 7½; c. 1224, s. 2.)

Editor's Note. — The first 1969 amendment rewrote this section.

The second 1969 amendment provided the same punishment (the fine not to exceed $500, imprisonment for not more than six months, or both) as is provided in subsection (d) of the section as rewritten by the first 1969 amendment.

§ 14-132.1. Demonstrations or assemblies of persons kneeling or lying down in public buildings.—If any person, persons, group or assembly of persons, after being forbidden to do so by the supervisor, keeper, custodian or person in charge of any public building of the State or of any county or municipality shall go or enter into such public building so owned by the State, county or municipality or shall enter upon the lands in or near any such public building and shall engage in sitting, kneeling, lying down or inclining so as to obstruct the ingress or egress of members of the public in the use of said building for normal business affairs or who shall congregate, assemble or by groups or formations, whether organized or unorganized, or by any method or manner whatsoever, so as to block or interfere with the customary, normal use of said building or the land or grounds in, around and adjacent to said building, such person or persons shall be guilty of a misdemeanor, and upon conviction, plea of guilty or nolo contendere, shall be punished by a fine of not more than five hundred dollars ($500.00) or imprisonment of not more than six months, or both, in the discretion of the court. (1965, c. 1183; 1969, c. 740.)

Editor's Note. — The 1969 amendment substituted "of not more than five hundred dollars ($500.00) or imprisonment of not more than six months, or both, in the discretion of the court" for "not to exceed fifty dollars ($50.00) or by imprisonment not to exceed thirty days, or both such fine or imprisonment" at the end of the section.

§ 14-133. Erecting artificial islands and lumps in public waters.—If any person shall erect artificial islands or lumps in any of the waters of the State east of the Atlantic Coast Line Railroad running from Wilmington to Weldon by way of Burgaw, Warsaw, Goldsboro, Wilson, Rocky Mount, and Halifax (formerly the Wilmington and Weldon Railroad) and running from Weldon to the North Carolina-Virginia State boundary by way of Garysburg and Pleasant Hill (formerly the Petersburg and Weldon Railroad), he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1883, c. 109; Code, s. 986; Rev., s. 3543; C. S., s. 4304; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Quoted in Gaither v. Albemarle Hosp., 235 N.C. 431, 70 S.E.2d 680 (1952).

§ 14-134. Trespass on land after being forbidden; license to look for estrays.—If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both: Provided, that if any person shall make a written affidavit before a justice of the peace of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the justice may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without firearms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the justice shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (1866, c. 60; Code, s. 1120; Rev., s. 3688; C. S., s. 4305; 1963, c. 1106; 1969, c. 1224, s. 12.)

Cross References.—As to forcible trespass, see § 14-126.

Editor's Note. — The 1969 amendment substituted the present provisions for punishment in the first sentence for a provision authorizing punishment by fine or imprisonment, or both, in the discretion of the court.

For note as to trespass prosecution not being discrimination by State, see 37 N.C.L. Rev. 73 (1958). For discussion of the distinctions between the common-law crime of forcible trespass to real property and entry after being forbidden, see 39 N.C.L. Rev. 121 (1961).

For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

Constitutionality.—This section and § 14-126 may not be held unconstitutional on the ground that they constitute State action, enforcing discrimination on the basis of race, since the statutes merely provide procedure for protection against trespassers in behalf of those in the peaceful possession of private property without regard to race, and the application of the statute in a particular instance for the protection of the clear legal right of racial discrimination appertaining to the ownership and possession of private property is not State action enforcing segregation. State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961).

Abatement of Pending Convictions by Civil Rights Act.—See Blow v. North Carolina, 379 U.S. 684, 84 S. Ct. 635, 13 L. Ed. 2d 603 (1965).

Since the Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities, pending convictions for violation of this section are abated by passage of the act, even though the conduct involved occurred prior to its enactment. Blow v. North Carolina, 379 U.S. 684, 85 S. Ct. 635, 13 L. Ed. 2d 603 (1965).

This statute is not too vague and indefinite to be enforceable because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof. State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961).

Essential Ingredients of Offense.—To constitute trespass on the land of another after notice or warning under this section, three essential ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961).

To constitute the offense forbidden by this section and with which defendants are charged there must be an entry on land after being forbidden; and such entry must be wilful, and not from ignorance, accident, or under a bona fide claim of right or license. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

This section is designed to protect possession regardless whether it be actual or constructive. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Entry under Claim of Right.—One who enters upon the land of another under a bona fide claim of right is guilty of no criminal offense. State v. Crosset, 81 N.C. 579 (1879). Mere belief of the claim is not sufficient, there must be proof of title

or evidence of a reasonable belief of the existence of the right of entry. State v. Fisher, 109 N.C. 817, 13 S.E. 878 (1891); State v. Durham, 121 N.C. 546, 28 S.E. 22 (1897). This bona fide claim of right must be passed on by a jury before defendant can be convicted. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906). But the question will not be submitted as a mere abstraction; there must be evidence of a claim or of facts giving rise to a reasonable and bona fide claim. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915).

It must be noted that entry under a claim of right is a defense only in a criminal action, as ignorance of a trespasser will not exonerate him from civil liability. State v. Whitener, 93 N.C. 590 (1885).

In a prosecution under this section, even though the State establish that defendant intentionally entered upon land in the actual or constructive possession of prosecutor after being forbidden to do so by the prosecutor, and thus established as an ultimate fact that defendant entered the locus in quo without legal right, defendant may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right, i.e., that he believed he had a right to enter, and that he had reasonable grounds for such belief. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Good faith in making the entry is a defense. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

An entry under a bona fide claim of right avoids criminal responsibility under this section though civil liability may remain. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

As a defense to a charge under this section, it is sufficient for defendants to establish that they entered under a bona fide belief of a right to so enter, which belief had a reasonable foundation in fact, but the burden is on the defendant to establish facts sufficient to excuse his wrongful conduct. State v. Cooke, 248 N.C. 485, 103 S.E.2d 846 (1958).

A mere belief on the part of a trespasser that he had a claim of right or license will not protect him; he must satisfy the jury that he had reasonable grounds for such belief. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

Land Sought to Be Condemned.—An indictment for willful trespass under this section will lie against an employee of a railroad company for an entry after being forbidden on land which the company is seeking to condemn, the entry being for the purpose of constructing the road and before an appraisement has been made, although a restraining order against such a trespass would be refused. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

Entry by Husband on Wife's Property.—A husband is not subject to the rule of this section, in regard to property of his wife, and although she may forbid him to enter he may enter nevertheless. State v. Jones, 132 N.C. 1043, 43 S.E. 939 (1903).

Entry as Servant.—Upon the trial under an indictment for trespass on lands after being forbidden, it is no defense to show that defendant acted under the instructions of his superior officer of a railroad company in entering upon the lands to construct a railroad. Evidence that such superior officer therein acted by the advice of counsel learned in the law is incompetent. State v. Mallard, 143 N.C. 666, 57 S.E. 351 (1907).

One who enters upon the land of another, after being forbidden, as the servant, and at the command of a bona fide claimant, is not guilty of any criminal offense. State v. Winslow, 95 N.C. 649 (1886).

Entry by Former Tenant to Gather Crops.—For a conviction under the provisions of this section for unlawful trespass on lands after being forbidden, it is not alone sufficient to show that the trespass had been forbidden, when there is evidence tending to show that the trespasser peacefully entered upon a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence is held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915).

Entry as Guest of Tenant.—One forbidden by the landlord to enter his land is not guilty under this section if he enters a part of the land in the possession of a tenant and as a guest of the tenant. State v. Lawson, 101 N.C. 717, 7 S.E. 905 (1888).

License to Enter Must Be Negatived in Indictment.—In an indictment for entering on the land of another and taking therefrom turpentine, etc., it is necessary that a "license so to enter" should be dis-

tinctly negatived as an essential part of the description of the offense. State v. Bullard, 72 N.C. 445 (1875).

An indictment in which it is charged that the defendant did unlawfully enter upon the premises of the prosecutors, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, etc., is sufficient. State v. Whitehurst, 70 N.C. 85 (1874).

An indictment is fatally defective if it does not charge that the entry was "without a license therefor." State v. Smith, 263 N.C. 788, 140 S.E.2d 404 (1965).

Possession is an essential element of the crime. If the State fails to establish that prosecutor has possession (actual or constructive) no crime has been established. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

It Must Be Alleged and the Proof Must Correspond.—It is necessary to allege in the warrant or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge. If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Entry When Sober after Entry While Intoxicated Forbidden.—Where defendant's evidence in a prosecution for trespass was to the effect that the prosecutrix had forbidden him the premises only when he was intoxicated and that on the occasion in question he was sober, his testimony, if the jury found it to be true, would entitle him to an acquittal, and he is entitled to an instruction on the legal effect of his evidence. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Court Having Jurisdiction.—Justices of the peace have exclusive original jurisdiction of the offense under this section. State v. Dudley, 83 N.C. 660 (1880).

In State v. Presley, 72 N.C. 204 (1875), the rule at that time was held to be that justices of the peace and superior courts had concurrent jurisdiction and after six months the superior court had exclusive jurisdiction. In State v. Edney, 80 N.C. 360 (1879), the court held that because of the wording of the statute and former Article IV of the Constitution justices of the peace had no jurisdiction. These irregularities were removed by legislation, and State v. Dudley, supra, construed this section as it was no doubt originally intended by the legislature to be construed.

Warrant May Be Amended.—The superior court has power to amend, after verdict, a warrant brought by appeal of defendant from a justice's court, charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "willful and unlawful," and to make the charge conclude, "against the peace and dignity of the State." State v. Smith, 103 N.C. 410, 9 S.E. 200 (1889).

Warrant with Affidavit Attached.—A warrant for trespass will not be quashed because it does not contain the necessary descriptive words of the allegal offense, when it refers to an "annexed affidavit" in which all the essential averments are made, as the reference to the affidavit makes it a part of the warrant. State v. Winslow, 95 N.C. 649 (1886).

Evidence Not Establishing Prosecutor's Possession.—Where, in a prosecution under this section the only evidence offered by the State as to title of prosecutor is oral testimony that prosecutor had purchased the property, and the only evidence of possession was that prosecutor had warned defendant to stay off the land and had entered upon the land temporarily on a single occasion to erect a barbed wire fence thereon, held, defendant's motion to nonsuit should have been granted, since the evidence is insufficient to establish prosecutor's possession of the land within the meaning of this section. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Amendment as to Possession Constitutes Fatal Variance.—On appeal to the superior court from conviction on a warrant charging trespass on the property of one person after being forbidden, the allowance of an amendment to charge the property was in the possession of a different person results in the charge of an entirely different crime and constitutes a fatal variance. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

What Constitutes State Action.—An inspection report form, promulgated by the State Board of Health under §§ 72-46 through 72-49, making provisions for toilet facilities "for each sex and race" was held sufficient to constitute State action depriving the operator of a restaurant of a freedom of choice with respect to the patrons he could serve. State v. Fox, 263 N.C. 233, 139 S.E.2d 233 (1964), reversing trespass convictions of "sit-in" demonstrators.

The removal of a trespasser, whether he be white or negro, from an owner's premises by the police does not constitute State action to enforce segregation and is not prohibited by the Fourteenth Amendment

to the federal Constitution. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

The law does not look to the motive of a proprietor but to the wrongful invasion of his property and to the disturbance of his right to undisputed possession. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

"Sit-In" at Department Store Lunch Counter. — The operator of a privately owned department store has the right to discriminate on the basis of race as to those he will serve at the lunch counter in such store, and a negro who, with knowledge of the policy of the store not to serve negroes at the lunch counter, seats himself at the lunch counter and refuses to leave after request, is guilty of trespass. State v. Fox, 254 N.C. 97, 118 S.E.2d 58 (1961), remanded Fox v. North Carolina, 378 U.S. 587, 84 S. Ct. 1901, 12 L. Ed. 2d 1032 (1964).

In accordance with mandate of the Supreme Court of the United States, conviction of the defendant of trespass in wilfully refusing to leave a restaurant after being requested to do so by the management, was reversed on the ground that the inspection form of the State Board of Health providing for toilet facilities separate for each race constituted State action depriving the operator of the restaurant of freedom of choice as to patrons he could serve. State v. Fox, 263 N.C. 233, 139 S.E.2d 233 (1964).

Trespassing on City-Owned Golf Course. —Where negroes were convicted under this section for trespassing on a city-owned golf course, despite trial court's instructions that defendants could not be found guilty if they were excluded because of their race, and decision was affirmed by the State Supreme Court, an appeal to the United States Supreme Court was dismissed and certiorari denied for want of a federal question, since the judgment of the State Supreme Court was independently and adequately supported on State procedural grounds. Wolfe v. North Carolina, 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650 (1960).

Applied in State v. Dove, 261 N.C. 366, 134 S.E.2d 683 (1964); State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945).

Cited in State v. Francis, 261 N.C. 358, 134 S.E.2d 681 (1964); State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897); State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906).

§ 14-134.1. Depositing trash, garbage, etc., on lands of another or in river or stream.—It shall be unlawful for any person, firm, organization, corporation, or for the governing body, agents or employees of any municipal corporation or county to place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any trash, refuse, garbage, debris, litter, plastic materials, scrapped vehicle or equipment, or waste materials of any kind upon the lands of another without first obtaining written consent of the owner thereof, or to deposit any of such materials in any river or stream. Provided, it shall not be unlawful to deposit such materials upon a public dump maintained by a municipality or county.

A violation of this section shall constitute a misdemeanor and is punishable by a fine of not more than five hundred dollars ($500.00) or by imprisonment of not more than six (6) months, or both, in the discretion of the court. (1965, c. 300, ss. 2, 3; 1969, c. 22, s. 2.)

Editor's Note.—The 1969 amendment inserted "or county" near the beginning of the first sentence, added "or county" at the end of the second sentence and rewrote the second paragraph.

§ 14-135. Cutting, injuring, or removing another's timber.—If any person not being the bona fide owner thereof, shall knowingly and wilfully cut down, injure or remove any standing, growing or fallen tree or log, the property of another, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or both, in the discretion of the court. (1889, c. 168; Rev., s. 3687; C. S., s. 4306; 1957, c. 1437, s. 1.)

Local Modification. — Burke, Caldwell, Cherokee: C.S. 4307, 4308; Duplin: 1929, c. 174; Granville: 1965, c. 570; McDowell, Mitchell, Watauga, Wilkes, Yadkin: C.S. 4307, 4308.

Cross Reference.—As to larceny of wood from land, see § 14-80.

Prosecutor's Ownership of Land Essential.—The crime of unlawfully cutting, injuring or removing another's timber as

defined by this section is an offense against the freehold rather than the possession, and ownership of the property by the prosecutor is a sine qua non to conviction. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

§ 14-136. Setting fire to grass and brushlands and woodlands. — If any person shall intentionally set fire to any grassland, brushland or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for a period of not less than sixty days nor more than four months for the first offense, and for a second or any subsequent similar offense shall be imprisoned not less than four months nor more than one year. If willful or malicious intent to damage the property of another shall be shown, said person shall be guilty of a felony, and shall, upon conviction, be punished by imprisonment in the State prison for not less than one nor more than five years. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cutover land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the State evidence sufficient for the conviction of a violation of this statute shall receive the sum of fifty dollars, to be taxed as part of the court costs. (1777, c. 123, ss. 1, 2, P. R.; R. C., c. 16, ss. 1, 2; Code, ss. 52, 53; Rev., s. 3346; 1915, c. 243, ss. 8, 11; 1919, c. 318; C. S., s. 4309; 1925, c. 61, s. 1; 1943, c. 661.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301; Onslow: 1929, c. 185; 1939, c. 160.

The primary purpose of this section is to protect property from fire damage. But the enactment is broad enough to include setting fire to a grass-covered field. Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961).

The primary purpose of this section is to protect property. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

This section defines the standard of care imposed upon a person who undertakes to burn brush, grass, etc., and a violation of its provisions constitutes negligence. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

This section formerly provided only for setting fire to woodland, and one who let fire escape while burning other lands was not liable, under this section, Averitt v. Murrell, 49 N.C. 322 (1857); but was only liable for negligence. Cato v. Toler, 160 N.C. 104, 75 S.E. 929 (1912). In Hall v. Crawford, 50 N.C. 3 (1857) it was held that "an old field which had turned out without any fence around it and which had grown up in broom sedge and pine bushes" came within the meaning of woodland. This case was pointed out in Achenback v. Johnston, 84 N.C. 264 (1881), as stretching the doctrine of liability too far. There it was held that a field grown up in grass and used as a pasture was not woodland. By Public Laws 1915, c. 243, this section was made applicable to setting fire to grassland and brushland as well as woodland, so the prior constructions so strictly made in regard to firing woodland are no longer applicable as this section now seems to cover burning of any lands.

Care No Defense.—If one firing woods fails to give the statutory notice to adjoining owners and damages ensue, the cause of action is complete, no matter what degree of care may have been shown. Lamb v. Sloan, 94 N.C. 534 (1886); Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961).

Waiver of Notice Bars Damages.—A waiver of notice is a sufficient answer to an action for damages caused to woodland by fire. Roberson v. Kirby, 52 N.C. 477 (1860); Lamb v. Sloan, 94 N.C. 534 (1886). Waiver when made by a tenant in common while in possession is also a sufficient defense. See Stanland v. Rousk, 168 N.C. 568, 84 S.E. 845 (1915).

Waiver by Adjoining Owner No Bar to Penalty.—When an adjoining owner waives notice of the intended fire such waiver does not waive the penalty of this section, but is only a waiver of the landowner's right of action for damages to his land caused by the spreading of the fire. Lamb v. Sloan, 94 N.C. 534 (1886).

Liability to One Not an Adjoining Owner.—The notice required by this section applies only to adjoining owners and one is not subject to the penalty for failure to give notice to one who is not an adjoining owner, but by the express terms of the statute there is a liability in damages for damages to "any property." See Robinson v. Morgan, 118 N.C. 991, 24 S.E. 667 (1896).

Firing to Protect Property.—In the case of Lamb v. Sloan, 94 N.C. 534 (1886), it was held that if one set fire to his property to protect it he was not liable under the statute in force at that time which provided the act must be "wilfull."

No Evidence to Show Fire Started by Defendant.—Where the evidence tends only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there is neither direct nor circumstantial evidence tending to show the fire had been started either by the defendant or his employees under his authority, a judgment as of nonsuit is proper. Sutton v. Herrin, 202 N.C. 599, 163 S.E. 578 (1932).

Burning Off Railroad Rights-of-Way.—In case of Nizzell v. Bramming Mfg. Co., 158 N.C. 265, 73 S.E. 802 (1912), it was held under a prior statute, similar in some respects to this except that it did not provide against burning grassland and brushland, that the statute did not apply to railroads burning off their rights-of-way that were covered with grass and tree tops.

Action to Recover Penalty.—Action for a recovery of penalties provided for by this section may be brought before any justice of the peace where service can be had on the defendant. Fisher v. Bullard, 109 N.C. 574, 13 S.E. 799 (1891).

§ 14-137. Wilfully or negligently setting fire to woods and fields.—If any person, firm or corporation shall wilfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields, whatsoever, every such offender, upon conviction, shall be fined or imprisoned in the discretion of the court. This section shall apply only in those counties under the protection of the State forest service in its work of forest fire control. It shall not apply in the case of a landowner firing, or causing to be fired, his own open, nonwooded lands, or fields in connection with farming or building operations at the time and in the manner now provided by law: Provided, he shall have confined the fire at his own expense to said open lands or fields. (1907, c. 320, ss. 4, 5; C. S., s. 4310; 1925, c. 61, s. 2; 1941, c. 258.)

Evidence that the county in which defendant negligently or wilfully started forest fires was in charge of the State forest service and that this section was applicable to the county, defendant having offered no evidence to the contrary, was sufficient to show a violation of the section. State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942).

Cited in Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968); Caldwell Land & Lumber Co. v. Hayes, 157 N.C. 333, 72 S.E. 1078 (1911).

§ 14-138. Setting fire to woodlands and grasslands with campfires.—Any wagoner, hunter, camper or other person who shall kindle a campfire or shall authorize another to kindle such fire, unless all combustible material for the space of ten feet surrounding the place where such fire is kindled has been removed, or shall leave a campfire without fully extinguishing it, or who shall accidentally or negligently by the use of any torch, gun, match or other instrumentality, or in any manner whatever, start any fire upon any grassland, brushland or woodland without fully extinguishing the same, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment not exceeding thirty days. For the purposes of this section the term "woodland" is to be taken to include all forest areas, both timber and cutover land, and all second-growth stands on areas that have at one time been cultivated. (Code, s. 54; 1885, c. 126; Rev., s. 3347; 1913, c. 8; 1915, c. 243, ss. 9, 11; C. S., s. 4311.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301.

Applied in State v. Powell, 254 N.C. 231, 118 S.E.2d 617 (1961).

§ 14-139. Starting fires within five hundred feet of areas under protection of State forest service.—It shall be unlawful for any person, firm or corporation to start or cause to be started any fire or ignite any material in any of the areas of woodlands under the protection of the State forest service or within five hundred (500) feet of any such protected area, during the hours starting at midnight and ending at 4:00 P.M., without first obtaining from the State Forester or one of his duly authorized agents a permit to start or cause to be started any fire or ignite any material in such above-mentioned protected areas; the provisions of this section to be in force during the period between the first day of October and the first day of June inclusive. No charge shall be made for the granting of said permits.

During periods of hazardous forest fire conditions the State Forester is authorized to cancel all permits and prohibit the starting of any fires in any of the woodlands under the protection of the State forest service or within five hundred (500) feet of any such protected area.

This section shall not apply to any fires started or caused to be started within one hundred (100) feet of an occupied dwelling house.

Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned for a period of not more than thirty (30) days. (1937, c. 207; 1939, c. 120; 1953, c. 915.)

Local Modification.—Dare, Hyde, Tyrrell, Washington: 1963, c. 617.

Cited in Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

§ 14-140. Certain fires to be guarded by watchman.—All persons, firms or corporations who shall burn any tar kiln or pit of charcoal, or set fire to or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such kiln, pit, brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment for not exceeding thirty days. Fire escaping from such kiln, pit, brush or other material while burning shall be prima facie evidence of neglect of these provisions. (1915, c. 243, s. 10; C. S., s. 4312.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301.

The primary purpose of this section is to protect property. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

This section defines the standard of care imposed upon a person who undertakes to burn brush, grass, etc., and a violation of its provisions constitutes negligence. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

Cited in State v. Swanson, 233 N.C. 442, 27 S.E.2d 122 (1943).

§ 14-141. Burning or otherwise destroying crops in the field.—If any person shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be guilty of a felony, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than five years. (1874-5, c. 133; Code, s. 985, subsec. 2; 1885, c. 42; Rev., s. 3339; C. S., s. 4313.)

Cross Reference.—As to arson, see § 14-58 et seq.

Out of Doors Defined.—One who burns cotton in a railroad car cannot be convicted under this section as the cotton is not out of doors. State v. Avery, 109 N.C. 798, 13 S.E. 931 (1891).

Formerly Misdemeanor. — The burning provided in this section was at one time a misdemeanor. State v. Huskins, 126 N.C. 1070, 35 S.E. 608 (1900).

Indictment. — An indictment should charge a statutory crime in the words of the statute. Therefore an indictment charging setting fire to a lot of fodder without charging the burning, is defective. State v. Hall, 93 N.C. 571 (1885).

It is not necessary under this section to aver in the indictment that the stack burned was "out of doors." State v Huskins, 126 N.C. 1070, 35 S.E. 608 (1900).

§ 14-142. Injuries to dams and water channels of mills and factories.—If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1866, c. 48; Code, s. 1087; Rev., s. 3678; C. S., s. 4315; 1969, c. 1224, s. 13.)

Editor's Note.—The 1969 amendment substituted the present provisions for punishment for provisions authorizing punishment by fine or imprisonment, or both, at the discretion of the court.

Obstruction below Dam or Channel.—This section only applies to obstructions and damages to the dam or channel and an indictment cannot be had for obstructions below the dam or channel. State v. Tomlinson, 77 N.C. 528 (1877).

Cited in State v. Suttle, 115 N.C. 784, 20 S.E. 725 (1894).

§ 14-143. Taking unlawful possession of another's house.—If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate such premises within ten days after being notified personally in writing to do so, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1893, c. 347; Rev., s. 3685; C. S., s. 4316; 1969, c. 1224, s. 1.)

Local Modification.—Durham: 1929, c. 109.

Cross Reference.—See note to § 14-134. See also § 14-159.

Editor's Note — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ 14-144. Injuring houses, churches, fences and walls.—If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this chapter in the article entitled Arson and Other Burnings; or shall by any other means than burning or attempting to burn unlawfully and willfully demolish, pull down, destroy, deface, damage or injure any church, uninhabited house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (R. C., c. 34, s. 103; Code, s. 1062; Rev., s. 3673; C. S., s. 4317; 1957, c. 250, s. 2; 1969, c. 1224, s. 1.)

I. Houses.
II. Fences around Fields.

Cross References.

See § 14-159. As to willful destruction by a tenant, see § 42-11. As to willful destruction of a fence which does not enclose something, see § 68-4. As to injury to stock-law fences, see § 68-36.

I. HOUSES.

Editor's Note.—The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Trespass Necessary Part of Offense.—It is held, to constitute a criminal offense under this section, there must be a tres-

pass. State v. Williams, 44 N.C. 197 (1853); State v. Watson, 86 N.C. 626 (1882); State v. McCracken, 118 N.C. 1240, 24 S.E. 530 (1896). And a party in lawful possession cannot commit a trespass upon the property he is in possession of. Dobbs v. Gullidge, 20 N.C. 197 (1838); State v. Reynolds, 95 N.C. 616 (1886); State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890). Therefore, according to the logic of these decisions, if a defendant is shown to have been in the actual possession of the house at the time he tore it down, he committed no criminal offense under this section. We say the lawful possession, to distinguish his possession from that of a mere trespasser, which would not protect him from the penalty of the statute. State v. Jones, 129 N.C. 508, 39 S.E. 795 (1901).

Tenant's and Landlord's Liability to One Another.—A tenant is not subject under this section for damage done to property in his possession, but the owner of the reversion would be subject to prosecution for damage to property in the possession of a tenant, as the statute covers offenses against possession. State v. Mason, 35 N.C. 341 (1852); State v. Whitener, 92 N.C. 798 (1885).

A tenant cannot divest the possession of his landlord by an attempted attornment to another, and if the person to whom the attempted attornment is made enters the land and damages buildings he is liable under this section, in spite of proof of good faith and claim of title. State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890).

Same—Tenant at Sufferance.—If a building is torn down by a landlord while it is in the possession of a tenant at sufferance an indictment under this section cannot be supported, for this section was intended to protect property which the tenant at sufferance has no interest in. State v. Mace, 65 N.C. 344 (1871).

Houses Erected through Mistake.—One who peaceably enters upon lands believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under this section. State v. Reynold, 95 N.C. 616 (1886).

Schoolhouses Held by Adverse Possession.—If defendants are in the adverse possession of the schoolhouse and bona fide claiming it as their own, it is not a crime in them to pull it down. State v. Roseman, 66 N.C. 634 (1872).

"Other Houses".—It is manifest that the words "other house or building." embrace a jail, a jailhouse or building. State v. Bryan, 89 N.C. 531 (1883).

Dynamiting a Crib.—An indictment will lie under this section for injury to a crib by an explosion of dynamite. See State v. Martin, 173 N.C. 808, 92 S.E. 597 (1917).

An "uninhabited house" within the purview of this section is a house fit for human habitation, but which is uninhabited at the time. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

An indictment which charged that the defendant unlawfully, wilfully and feloniously set fire to and burned the dwelling house of named person, the same being unoccupied at the time of the burning, charged the burning of an "uninhabited house" in violation of this section, and not a violation of § 14-67. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

Proof of defacement by either bullets or paint would be sufficient to sustain a conviction under this section. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

Where the evidence discloses that the structure was not fit for human habitation at the time of the alleged offense, the evidence is insufficient to be submitted to the jury in a prosecution for burning an uninhabited house in violation of this section. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

II. FENCES AROUND FIELDS.

Cultivated Field Defined. — Where a piece or tract of land has been cleared and fenced, and cultivated, or proposed to be cultivated and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is a "cultivated field" within the description of the statute. State v. Allen, 35 N.C. 36 (1851); State v. McMinn, 81 N.C. 585 (1879).

The ruling in State v. Allen, 35 N.C. 36 (1851), was cited and approved in State v. McMinn, 81 N.C. 585 (1879), in which case it was also held that the smallness of the tract made no difference; that a town lot, if inclosed and cultivated, could be described as a "field" under this statute, unless it was used as a "garden," in which case it should be so described. State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903).

Fence Must Enclose Something.—It is necessary under this section that the fence destroyed or injured surround or enclose something and a fence along a road to prevent passersby from turning into the field to avoid mud in the road, when not connected with any other fence is not within

the meaning of this section. See State v. Roberts, 101 N.C. 744, 7 S.E. 714 (1888).

Instruction That Pasture Is a Field. — Where in a criminal prosecution for the violation of this section providing that a person removing a fence surrounding "any yard, garden, cultivated field, or pasture" should be guilty of a misdemeanor, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture, the word "pasture" and "cultivated field" are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous. State v. Cornett, 199 N.C. 634, 155 S.E. 451 (1930).

Title to Land No Defense.—It is well settled that where the State, in an indictment under this section, for unlawfully and wilfully removing a fence, shows actual possession in the prosecutor, the defendant cannot excuse himself by showing title to the land upon which the fence was situated. State v. Graham, 53 N.C. 397 (1861); State v. Hovis, 76 N.C. 117 (1877); State v. Marsh, 91 N.C. 632 (1884); State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890); State v. Fender, 125 N.C. 649, 34 S.E. 448 (1899); State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903); State v. Taylor, 172 N.C. 892, 90 S.E. 294 (1916).

Question of Title Cannot Be Raised.— Where a party has neither possession, nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence therefrom, raise a question as to a right of entry, nor is it any defense to him that he did the act to bring on a civil suit in order to try the title. State v. Graham, 53 N.C. 397 (1861).

Agency No Defense.—Under an indictment for tearing down a fence the defendant cannot avoid liability by showing that he acted as agent for another. State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903).

Destroying Fence When Line Is in Dispute.—Although a defendant cannot plead his title as a defense to an indictment for destroying fences, etc., on the land in possession of another, he can plead his title if the land is not in the possession of the prosecutor. In case of a disputed line if the prosecutor erects a fence on land in possession of the defendant, the defendant is not liable under this section for pulling it down. State v. Watson, 86 N.C. 626 (1882); State v. Fender, 125 N.C. 649, 34 S.E. 448 (1899). Nor is a quasi tenant occupying by the consent of the owner subject to prosecution under this section for the removal of a fence. State v. Williams, 44 N.C. 197 (1853).

Right to Reclaim Fence.—Although rails of which a fence around an enclosure is made were taken from the land of another, no right to go on the land and remove the fence exists in favor of the person from whom the rails were taken as the fence is a part of the realty, and such a trespass comes within the meaning of this section. State v. McMinn, 81 N.C. 585 (1879).

Applicable to Wire Fences.—An indictment for cutting and destroying a wire fence may be maintained under this section if it charges that the wire fence was an enclosure. State v. Biggers, 108 N.C. 760, 12 S.E. 1024 (1891).

Defective Bill of Indictment.—A motion in arrest of judgment after conviction for a removal of fences on the ground that the bill of indictment is defective, will not be granted, unless it appears that the bill is so defective that judgment cannot be pronounced upon it. State v. Taylor, 172 N.C. 892, 90 S.E. 294 (1916).

Fences across a Street Removed by Officer.—A fence erected across a public street is a public nuisance, and a city marshal will not be liable for abating the nuisance by pulling it down. State v. Godwin, 145 N.C. 461, 59 S.E. 132 (1907).

§ **14-145. Unlawful posting of advertisements.**—Any person who in any manner paints, prints, places, or affixes, or causes to be painted, printed, placed, or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, automobile, building, or other object, which is the property of another without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts, or affixes, or causes to be painted, printed, placed, or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, milestone, danger-sign, danger-signal, guide-sign, guide-post, automobile, building or other object within the limits of a public highway, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars ($50) or imprisoned not exceeding thirty (30) days. (Ex. Sess. 1924, c. 109.)

Cross Reference.—As to injuring, defacing, or destroying notices and advertisements, see §§ 14-384 and 14-385.

Editor's Note.—It was suggested in 3 N.C.L. Rev. 25 that the first part of this section seems to apply to posting advertise-

ments anywhere on private property, while the last part applies to those posted within the limits of the public highway.

§ 14-146. Injuring bridges.—If any person shall unlawfully and willfully demolish, destroy, break, tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the State, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court. (1883, c. 271; Code, s. 993; Rev., s. 3771; C. S., s. 4318.)

§ 14-147. Removing, altering or defacing landmarks.—If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a misdemeanor. This section shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested. (1858-9, c. 17; Code, s. 1063; Rev., s. 3674; 1915, c. 248; C. S., s. 4319.)

Removal of Stakes. — As between the parties stakes are evidence of a definite location of land, as also is the planting of a stone, and a removal of such stakes comes within the meaning of this section. State v. Jenkins, 164 N.C. 527, 80 S.E. 231 (1913).

Indictment. — An indictment charging that one A. B., with force and arms, etc., wilfully and unlawfully did alter, and deface and remove a corner tree, the property of C., against the form of the statute, is good without a negative averment of the matter contained in the proviso to the act creating the offense. State v. Bryant, 111 N.C. 693, 16 S.E. 326 (1892).

§ 14-148. Removing or defacing monuments and tombstones.—If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully and on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor. Provided, that nothing contained in this section shall preclude operators of public or private cemeteries from exercising all the powers reserved to them in their respective rules and regulations relating to the use and care of such cemeteries. (1840, c. 6; R. C., c. 34, s. 102; Code, s. 1088; Rev., s. 3680; C. S., s. 4320; 1969, c. 987.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality and removal of monuments and graves, see § 160-200, subdivision (36). See note to § 14-150.

Editor's Note. — The 1969 amendment added the second sentence.

This section creates a misdemeanor not defined as larceny. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

Indictment. — It is not necessary, to charge in the indictment that the monument removed was intended to designate the spot where the dead body of a particular person named, or a person unknown, was interred. State v. Wilson, 94 N.C. 1015 (1886).

It is not necessary to charge in terms that the dead body was that of a dead person. State v. Wilson, 94 N.C. 1015 (1886).

Right of Landowner to Remove. — Where the owner of land consents, either expressly or by implication to the interment of dead bodies on his land, he has no right to afterwards remove the bodies or to deface or pull down the gravestones and monuments erected to perpetuate their memory. State v. Wilson, 94 N.C. 1015 (1886).

Cited in Mills v. Carolina Cem. Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

§ 14-149. Interfering with graveyards.—If any person shall unlawfully take away any stone, brick, iron or other material that encloses private graveyards, or shall cut or keep open any ditch or drainway, or put any permanent log or other obstruction not intended as a monument to a grave in such graveyards, or knowingly plow over and tear up any grave, or shall remove or change the location of any fence around such graveyard without the consent of such person or persons as may have parents, children or brothers or sisters buried therein, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than ten dollars or imprisoned not more than thirty days. (1889, c. 130; Rev., s. 3681; 1919, c. 218; C. S., s. 4321.)

§ 14-150. Disturbing graves.—If any person shall, without due process of law, or the consent of the surviving husband or wife or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any dead body, or any part thereof buried therein, or anything interred therewith, he shall be guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1885, c. 90; Rev., s. 3672; C. S., s. 4322.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality and removal of monuments and graves, see § 160-200, subdivision (36).

Intent.—The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

Persons Liable. — The mayor or other town officers counseling their subordinates to remove bodies are liable under this section although they were honestly mistaken as to the scope of their official power. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

When Lot Is Not Paid For.—The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

Cited in Mills v. Carolina Cem. Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

§ 14-150.1. Desecration of public and private cemeteries.—If any person shall willfully commit any of the acts set forth in the following subdivisions, he shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars ($100.00) or imprisoned for not more than 30 days, or both, in the discretion of the court.

(1) Throwing, placing, or putting any refuse, garbage, trash, or articles of similar nature in or on a public or private cemetery where human bodies are interred.

(2) Destroying, removing, breaking, damaging, overturning, or polluting any flower, plant, shrub or ornament located in any public or private cemetery where human bodies are interred without the express consent of the person in charge of said cemetery.

Provided, nothing contained in this section shall preclude operators of such cemeteries from exercising all the powers reserved to them in their respective rules and regulations relating to the care of such cemeteries. (1967, c. 582.)

§ 14-151. Interfering with gas, electric and steam appliances.—If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subdivisions, he shall be guilty of a misdemeanor:

(1) Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

(2) Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or

burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

(3) In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

(4) Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turn on or off or in any manner interfere with any valve or stopcock or other appliance belonging to such person, and connected with his service or other pipes or wires, or enlarge the orifices of mixers, or use natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stopcock or valve, or to make such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stopcocks, wires or other appliances of such, as the case may be; or,

(5) Retain possession of or refuse to deliver any mixer, meter, lamp or other appliance which may be leased or rented by any person, for the purpose of furnishing gas, electricity or power through the same, or sell, lend or in any other manner dispose of the same to any person other than such person entitled to the possession of the same; or,

(6) Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gateboxes, valves, stopcocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

(7) Open or cause to be opened, or reconnect or cause to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or,

(8) Turn on steam or cause it to be turned on or to reenter any premises when the same has been lawfully stopped from entering such premises. (1901, c. 735; Rev., s. 3666; C. S., s. 4323.)

§ 14-152. Injuring fixtures and other property of gas companies; civil liability.—If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days for such offense. Such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury. (1889 (Pr.), c. 35, s. 3; Rev., s. 3671; C. S., s. 4324.)

§ 14-153. Tampering with engines and boilers.—If any person shall willfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor. (1901, c. 733; Rev., s. 3667; C. S., s. 4325.)

Cited in State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929).

§ 14-154. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.—If any person shall willfully injure, destroy or pull down any telegraph, telephone or electric-power-transmission pole, wire, insulator or any other fixture or apparatus attached to a telegraph, telephone or electric-power-transmission line, he shall be guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court. (1881, c. 4; 1883, c. 103; Code, s. 1118; Rev., s. 3847; 1907, c. 827, s. 1; C. S., s. 4326.)

§ 14-155. Making unauthorized connections with telephone and telegraph wires.—It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this State, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days for each offense. Each day's continuance of such unlawful connection shall be a separate offense. (1911, c. 113; C. S., s. 4327.)

Tape recordings allegedly containing telephone conversations by the defendant with the prosecuting witness made by a recorder attached to the witness' telephone are not incompetent in prosecuting for annoying a female by repeated telephoning in violation of § 14-196.1, because they violate the North Carolina Wiretapping Statute (this section) and also §§ 14-372 and 15-27; these statutes were not enacted to prevent introduction of evidence obtained in such a case and are not relevant in such prosecution. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966).

§ 14-156. Injuring fixtures and other property of electric-power companies.—It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any of the property mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not longer than one year, or both fined and imprisoned, in the discretion of the court. (1907, c. 919; C. S., s. 4328.)

§ 14-157. Felling trees on telephone and electric-power wires.—If any person shall negligently and carelessly cut or fell any tree, or any limb or branch therefrom, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to penalty of fifty dollars for each and every offense. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1903, c. 616; Rev., s. 3849; 1907, c. 827, s. 2; C. S., s. 4329; 1969, c. 1224, s. 9.)

Editor's Note. — The 1969 amendment added the last sentence.

§ 14-158. Interfering with telephone lines.—If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of mes-

sages any part of the wire of a telephone line, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1901, c. 318; Rev., s. 3845; C. S., s. 4330; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

Civil Action for Damages.—The willful cutting of a telephone wire in public use for hire is made a misdemeanor punishable by fine or imprisonment by this section, and where such act has caused damages to another the action sounds in tort, making the tort-feasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. Hodges v. Virginia-Carolina Ry., 179 N.C. 566, 103 S.E. 145 (1920).

§ 14-159. Injuring buildings or fences; taking possession of house without consent.—If any person shall deface, injure or damage any house, uninhabited house or other building belonging to another; or deface, damage, pull down, injure, remove or destroy any fence or wall enclosing, in whole or in part, the premises belonging to another; or shall move into, take possession of and/or occupy any house, uninhabited house or other building situated on the premises belonging to another, without having first obtained authority so to do and consent of the owner or agent thereof, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1929, c. 192, s. 1.)

Cross References.—See § 14-144. As to willful destruction by a tenant, see § 42.-11. As to taking unlawful possession of another's house, see § 14-143.

ARTICLE 23.

Trespasses to Personal Property.

§ 14-160. Wilful and wanton injury to personal property; punishments.—(a) If any person shall wantonly and wilfully injure the personal property of another he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months or both.

(b) Notwithstanding the provisions of subsection (a), if any person shall wantonly and wilfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars ($200.00), he shall be guilty of a misdemeanor punishable as provided in § 14-3 (a).

(c) This section applies to injuries to personal property without regard to whether the property is destroyed or not. (1876-7, c. 18; Code, s. 1082; 1885, c. 53; Rev., s. 3676; C. S., s. 4331; 1969, c. 1224, s. 14.)

Cross References.—As to definition of personal property, see § 12-3, subdivision (6). As to prosecution for perjury based upon acquittal in former prosecution under this section, see note to § 14-209.

Editor's Note. — The 1969 amendment rewrote this section.

Things That Are Personalty.—A promissory note or due bill being an "evidence of debt" is personal property within the meaning of this section and § 12-3, subdivision (6). State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

An electric streetcar is personalty and not a fixture. State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Proof of the destruction of a fence erected upon land was held to be insufficient to sustain a conviction upon an indictment charging wanton and willful injury to personal property, since a fence is a part of the realty and there was a fatal variance between allegation of ownership of the realty and proof. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Malice Not Necessary.—It is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and willfully injures it nor is it material whether the property was destroyed or not. State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Injury Must Be Wanton and Wilful.—Destruction of personal property is not a

crime. It becomes so only when the injury is wanton and wilful under this section. State v. Sims, 247 N.C. 751, 102 S.E.2d 143 (1958).

"Wantonly and Wilfully" Necessary. — An indictment for injury to personal property, under this section, which charged that the act was "wantonly and wilfully" done, was not defective because it did not aver the act to have been unlawfully perpetrated. Lawful acts are not done wantonly and wilfully. State v. Martin, 107 N.C. 904, 12 S.E. 194 (1890).

But an indictment cannot be sustained under this section if there is neither an allegation nor finding that the injury was "wilfully and wantonly" done. The words "unlawfully and on purpose" will not supply their place. State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

Malicious Mischief at Common Law. — This section was not intended to supersede the common law as to malicious mischief, and though malice must be charged at common law it is not necessary under this section. State v. Martin, 141 N.C. 832, 53 S.E. 874 (1906).

No Accessories.—As there are no accessories in misdemeanors, the offense under this section may be committed jointly by several persons, one doing the act, the others aiding and abetting or participating. State v. Martin, 141 N.C. 832, 53 S.E. 874 (1906); State v. Parrish, 251 N.C. 274, 111 S.E.2d 314 (1959).

Destroying Whisky.—The mere possession of whisky gives no title; and a revenue officer who seizes a barrel concealed on private premises, and in good faith destoys it, is not guilty of a misdemeanor under this section. North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

Conviction under This Section in Place of § 14-165.—Where there is an erroneous conviction under this section, when the indictment should have been drawn under § 14-165, et seq., the prisoner should be discharged with permission to the solicitor to send another bill, if so advised. State v. Reed, 196 N.C. 357, 145 S.E. 691 (1928).

Applied in State v. Fisher, 270 N.C. 315, 154 S.E.2d 333 (1967).

Stated in State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965).

Cited in State v. Hicks, 233 N.C. 511, 64 S.E.2d 871 (1951); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959).

§ 14-161. Malicious removal of packing from railway coaches and other rolling stock.—If any person shall willfully and maliciously take or remove the waste or packing from the journal box of any locomotive, engine, tender, carriage, coach, car, caboose or truck used or operated upon any railroad whether the same be operated by steam or electricity, he shall upon conviction thereof be fined or imprisoned in the jail or State's prison, in the discretion of the court. (1905, c. 335; Rev., s. 3759; C. S., s. 4332.)

§ 14-162. Removing boats or their fixtures and appliances.—If any person shall take away from any landing or other place where the same shall be, or shall loose, unmoor, or turn adrift from the same, any boat, canoe, pettiaugua, oars, paddles, sails or tackle belonging to or in the lawful custody of any person; or if any person shall direct the same to be done without the consent of the owner, or the person having the custody or possession of such property, he shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars, and shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (R. C., c. 14, ss. 1, 3; Code, s. 2288; 1889, c. 378; Rev., s. 3544; C. S., s. 4333.)

§ 14-163. Injuring livestock not inclosed by lawful fence.—If any person shall willfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any inclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six

months, or both. (1868-9, c. 253; Code, s. 1003; Rev., s. 3313; C. S., s. 4334; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

At Common Law.—Wounding of cattle maliciously is not an indictable offense at common law. State v. Manual, 72 N.C. 201 (1875).

Purpose of Section. — The obvious purpose of the statute is to prohibit and prevent every person from unlawfully and wilfully killing and abusing livestock of another, that may get into and trespass upon inclosures not surrounded and protected by a lawful fence. This is the mischief to be suppressed. State v. Godfrey, 97 N.C. 507, 1 S.E. 779 (1887).

Offense May Be Completed Elsewhere. —In order to complete the offense of injury to livestock, it is not necessary that the offense should be consummated within the inclosure not surrounded by a lawful fence, for if it is begun therein and completed outside of such inclosure, the offense is complete. State v. Godfrey, 97 N.C. 507, 1 S.E. 779 (1887).

Cattle Defined. — The word "cattle" has a restricted sense which applies only to the bovine species, and also a broader meaning which includes all domestic animals. That it is used in this section in the latter and broader sense is apparent from the context, "horse, mule, hog, sheep or other cattle." State v. Groves, 119 N.C. 822, 25 S.E. 819 (1896).

Injuries in Enclosed Fields.—A person is not liable under this section for injuring stock within his own field which is enclosed and under cultivation. State v. Waters, 51 N.C. 276 (1859).

Indictment Must Charge. — An indictment for injuring stock under this section must charge that the cattle abused or killed were property of someone, the abusing or killing must be charged to have been willfully and unlawfully done while the animal was in an inclosure not surrounded by a lawful fence. State v. Simpson, 73 N.C. 269 (1875); State v. Deal, 92 N.C. 802 (1885).

An indictment charging an offense under this section but not setting out who owned the inclosure, although not encouraged because of its looseness, is sufficient. State v. Allen, 69 N.C. 23 (1873); State v. Painter, 70 N.C. 70 (1874).

"The Field" Is Too General.—An indictment which simply charges the injury, etc., to have been committed on stock in "the field" is not certain to that extent required in such pleading. State v. Staton, 66 N.C. 640 (1872).

§ 14-164. Taking away or injuring exhibits at fairs.—If any person, without the license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mar, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen is the property of the society to which the said thing shall be forwarded for exhibition. (1870-1, c. 184, s. 4; Code, s. 2796; Rev., s. 3668; C. S., s. 4335; 1969, c. 1224, s. 2.)

Cross Reference.—As to fraudulent entries at fairs, see § 14-116.

Editor's Note. — The 1969 amendment added, at the end of the first sentence, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

ARTICLE 24.

Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee.

§ 14-165. Malicious or wilful injury to hired personal property.—Any person who shall rent or hire from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile, or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, who shall maliciously or wilfully injure or damage the same by in any way using

or driving the same in violation of any statute of the State of North Carolina, or who shall permit any other person so to do, shall be guilty of a misdemeanor and subject to punishment as hereinafter provided. (1927, c. 61, s. 1; 1965, c. 1073, s. 1.)

Cross Reference.—See note under § 14-160.

§ **14-166. Subletting of hired property.**—Any person who shall rent or hire, any horse, mule, or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, who shall, without the permission of the person, firm or corporation from whom such property is rented or hired, sublet or rent the same to any other person, firm or corporation, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 61, s. 2; 1965, c. 1073, s. 2; 1969, c. 1224, s. 15.)

Editor's Note. — The 1969 amendment substituted "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both" for "and punished as hereinafter provided" at the end of the section.

§ **14-167. Failure to return hired property.**—Any person who shall rent or hire, any horse, mule or other like animal, or any buggy, wagon, truck, automobile, or other vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, and who shall wilfully fail to return the same to the possession of the person, firm or corporation from whom such property has been rented or hired at the expiration of the time for which such property has been rented or hired, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 61, s. 3; 1965, c. 1073, s. 3; 1969, c. 1224, s. 15.)

Editor's Note. — The 1969 amendment substituted "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both" for "and punished as hereinafter provided" at the end of the section.

§ **14-168. Hiring with intent to defraud.**—Any person who shall, with intent to cheat and defraud the owner thereof of the rental price therefor, hire or rent any horse or mule or any other like animal, or any buggy, wagon, truck, automobile or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, or who shall obtain the possession of the same by false and fraudulent statements made with intent to deceive, which are calculated to deceive, and which do deceive, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 61, s. 4; 1965, c. 1073, s. 4; 1969, c. 1224, s. 15.)

Editor's Note. — The 1969 amendment substituted "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both" for "and punished as hereinafter provided" at the end of the section.

§ **14-168.1. Conversion by bailee, lessee, tenant or attorney in fact.**—Every person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a misdemeanor. (1965, c. 1073, s. 5.)

§ **14-168.2. Definitions.**—For the purposes of this article, the terms "rent," "hire" and "lease" are used to designate the letting for hire of any horse, mule or other like animal, or any buggy, wagon, truck, automobile, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value by lease, bailment, or rental agreement. (1965, c. 1073, s. 5.)

§ 14-168.3. Prima facie evidence of intent to convert property.—It shall be prima facie evidence of intent to commit a crime as set forth in G.S. 14-167, 14-168, and 14-168.1 when one who has, by written instrument, leased or rented the personal property of another:

(1) Failed or refused to return such property to its owner after the lease, bailment, or rental agreement has expired,
   a. Within ten (10) days, and
   b. Within forty-eight (48) hours after written demand for return thereof is personally served or given by registered mail delivered to the last known address provided in such lease or rental agreement, or

(2) When the leasing or rental of such personal property is obtained by presentation of identification to the lessor or rentor thereof which is false, fictitious, or knowingly not current as to name, address, place of employment, or other identification. (1965, c. 1118.)

§ 14-169. Violation made misdemeanor.—Except as otherwise provided, any person violating the provisions of this article shall be guilty of a misdemeanor and punished at the discretion of the court. (1927, c. 61, s. 5; 1929, c. 38, s. 1; 1969, c. 1224, s. 15.)

Editor's Note. — The 1969 amendment added "Except as otherwise provided" at the beginning of this section.

ARTICLE 25.

Regulating the Leasing of Storage Batteries.

§ 14-170. "Rental battery" defined; identification of rental storage batteries.—As used in this article the words "rental battery" are defined as an electric storage battery loaned, rented or furnished for temporary use by any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries. All such persons, firms or corporations may mark any such rental batteries belonging to them with the word "rental," or any other word of similar meaning, printed or stamped upon or attached to such battery together with such words as shall identify such batteries as the property of the person, firm or corporation so marking the same. It shall be unlawful for any person, firm or corporation to so mark any such batteries which are not the property of such person, firm or corporation. (1933, c. 185, s. 1.)

§ 14-171. Defacing word "rental" prohibited.—It is unlawful for any person, firm or corporation to remove, deface, alter or destroy the word "rental" on any rental battery or any other word, mark or character printed, painted or stamped upon or attached to any rental battery to identify the same as belonging to or being the property of any person, firm or corporation. (1933, c. 185, s. 2.)

§ 14-172. Sale, etc., of rental battery prohibited.—It is unlawful for any person, firm or corporation other than the owner thereof to sell, dispose of, deliver, rent or give to any other person, firm or corporation any rental battery marked by the owner as provided by § 14-170. (1933, c. 185, s. 3.)

§ 14-173. Repairing another's rental battery prohibited.—It is unlawful for any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries to recharge or repair any rental battery not owned by such person, firm or corporation marked by the owner thereof as provided by § 14-170. (1933, c. 185, s. 4.)

§ 14-174. Time limit on possession of rental battery without written consent.—It is unlawful for any person, firm or corporation to retain in his, their or its possession for a longer period than ten (10) days, without the writ-

ten consent of the owner, any rental battery marked as such by the owner as provided by § 14-170. Demand must be made on any person who so retains a rental battery in his possession at least five days before a prosecution can be instituted: Provided, however, that proof of a registered letter having been sent to the person so offending at his last known address shall be accepted as conclusive evidence of such demand. (1933, c. 185, s. 5.)

§ 14-175. Violation made misdemeanor.—Any person, firm or corporation, and the officers, agents, employees, and members of any firm or corporation violating any of the provisions of §§ 14-170 to 14-174 shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding fifty dollars or be imprisoned for a term of not exceeding thirty days in the discretion of the court. (1933, c. 185, s. 6.)

§ 14-176. Rebuilding storage batteries out of old parts and sale of, regulated.—Any person, firm or corporation who assembles or rebuilds an electric storage battery for use on automobiles, in whole or in part, out of secondhand or used material such as containers, separators, plates, groups or other battery parts, and sells same or offers same for sale in the State of North Carolina without the word "rebuilt" placed in the side of the container, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine not exceeding two hundred and fifty dollars or imprisoned for a term not exceeding six months or both. (1933, c. 535.)

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.—If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court. (5 Eliz., c. 17; 25 Hen. VIII, c. 6; R. C., c. 34, s. 6; 1868-9, c. 167, s. 6; Code, s. 1010; Rev., s. 3349; C. S., s. 4336; 1965, c. 621, s. 4.)

Editor's Note. — For article on the law of crime against nature with particular regard to this section, see 32 N.C.L. Rev. 312 (1954).

Definition.—The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans per anum and per os. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

Scope of Section.—This section includes all kindred acts of bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Griffin, 175 N.C. 767, 94 S.E. 678 (1917); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965). It includes unatural intercourse between male and male. State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914).

This section includes acts with animals and acts between humans per anum and per os. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

In this jurisdiction crime against nature embraces sodomy, buggery and bestiality as those offenses were known and defined at common law. State v. O'Keefe, 263 N.C. 53, 138 S.E.2d 767 (1964).

Crime against nature embraces sodomy, buggery, and bestiality as those offenses were known and defined at common law. State v. Stokes, 1 N.C. App. 245, 161 S.E.2d 53 (1968).

Purpose.—The legislative intent and purpose of this section, prior to the 1965 amendment and since, is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality. State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966).

Conviction for Attempt.—Upon the trial

of an indictment for the crime against nature the prisoner may be convicted of the crime charged therein, or of an attempt to commit a less degree of the same crime. State v. Savage, 161 N.C. 245, 76 S.E. 238 (1912); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Section 14-202.1 is not repugnant to this section so as to work a repeal in part of this section, intentionally or otherwise. The two sections are complementary rather than repugnant or inconsistent. This section condemns crimes against nature whether committed against adults or children, while § 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of this section. State v. Lance, 244 N.C. 455, 94 S.E.2d 335 (1956).

Section 14-202.1 supplements this section. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

This section and § 14-202.1 are complementary rather than repugnant or inconsistent. This section condemns crimes against nature whether committed against adults or children. Section 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of this section. Section 14-202.1, of course, condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

Conduct declared criminal by this section is sexual intercourse contrary to the order of nature. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Is a Felony.—The crime against nature in this jurisdiction is a felony. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

An assault upon a woman is not a lesser degree of the crime of sodomy. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Proof of penetration of or by the sexual organ is essential to conviction under this section. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

A valid warrant or indictment is an essential of jurisdiction in a prosecution under this section. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Sufficiency of Indictment.—An indictment under this section which charges that defendant did unlawfully, wilfully, and feloniously commit the infamous crime against nature with a particular man, woman, or beast is sufficient. State v. O'Keefe, 263 N.C. 53, 138 S.E.2d 767 (1964); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966).

It is essential to a valid indictment in this jurisdiction that the indictment must allege that the defendant did unlawfully, wilfully, and feloniously commit the infamous crime against nature with a particular man, woman, or beast. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

It is necessary to the legal sufficiency of an indictment charging the commission of a crime against nature to state with exactitude, inter alia, the name of the person with or against whom the offense was committed, in order that there can be certitude in the statement of the accusation as will identify the offense with which the accused is sought to be charged and to protect the accused from being twice put in jeopardy for the same offense. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

The practice in North Carolina has been to charge the offense in language which closely follows the wording of this section. State v. Stokes, 1 N.C. App. 245, 161 S.E.2d 53 (1968).

Details Unnecessary.—In charging the offense of crime against nature, because of its vile and degrading nature, there has been some laxity of the strict rules of pleading. It has never been the usual practice to describe the particular manner or the details of the commission of the act. State v. Stokes, 1 N.C. App. 245, 161 S.E.2d 53 (1968).

Bill of Particulars.—The practice in this State has been to charge the offense of crime against nature in language closely following the wording of this section and where defendant feels that he may be taken by surprise or that the indictment fails to impart information sufficiently specific as to the nature of the charge, he may move for a bill of particulars. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

Punishment.—The punishment of a fine or imprisonment in the discretion of the court prescribed by this section, is not a

"specific punishment" within the meaning of § 14-2, and the maximum lawful imprisonment is ten years. State v. Thompson, 268 N.C. 447, 150 S.E.2d 781 (1966).

Applied in State v. Mintz, 242 N.C. 761, 89 S.E.2d 463 (1955); State v. Williams, 247 N.C. 272, 100 S.E.2d 500 (1957); State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); State v. Walston, 259 N.C. 385, 130 S.E.2d 636 (1963); State v. Hayes, 261 N.C. 648, 135 S.E.2d 653 (1964); State v. Ward, 263 N.C. 93, 138 S.E.2d 779 (1964); State v. Wright, 263 N.C. 129, 139 S.E.2d 10 (1964); State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965); State v. Cox, 272 N.C. 140, 157 S.E.2d 717 (1967); State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937); State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938).

Cited in State v. Reid, 230 N.C. 561, 53 S.E.2d 849 (1949).

§ 14-178. Incest between certain near relatives.—The parties shall be guilty of a felony in all cases of carnal intercourse between (i) grandparent and grandchild, (ii) parent and child or stepchild or legally adopted child, or (iii) brother and sister of the half or whole blood. Punishment for every such offense shall be by imprisonment in the State prison for a term of not more than fifteen years, in the discretion of the court. (1879, c. 16, s. 1; Code, s. 1060; Rev., s. 3351; 1911, c. 16; C. S., s. 4337; 1965, c. 132.)

In General. — Incest was not indictable at common law. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925). The amendment of 1911 increasing the punishment was held not retroactive. State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Carnal intercourse by the father with his illegitimate daughter constitutes the offense. State v. Lawrence, 95 N.C. 659 (1886). Both parties are not necessarily guilty. Strider v. Lewey, 176 N.C. 448, 97 S.E. 398 (1918).

The crime of incest is purely statutory. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Incest, although punished by the ecclesiastical courts of England as an offense against good morals, is not at common law an indictable offense. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Failure to Charge "Carnal" Knowledge. —The mere fact that indictment failed to charge "carnal" knowledge is not a fatal defect that would sustain the defendant's motion to quash the indictment. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925).

Intercourse with Illegitimate Daughter. — A father violates this section and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter in fact, regardless of whether she is his legitimate or his illegitimate child. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952); State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Prosecutrix May Not Be Bastardized by Mother.—In a prosecution under this section, the married mother of the prosecutrix may not testify that defendant, a person not her husband, is the natural father of the prosecutrix, since a mother will not be permitted to bastardize her own issue and testify to illicit relations, except in an action which directly involves the parentage of the child, and, the prosecutrix having been born in wedlock, the law will conclusively presume legitimacy in the absence of evidence that the father was impotent or could not have had access. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Evidence. — Confessions of the wife to the husband are not admissible in a trial for incest. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895). But proof of other similar acts is competent in corroboration. State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

In a prosecution under this section for an offense allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. State v. Edwards, 224 N.C. 527, 31 S.E.2d 516 (1944).

Corroboration of Prosecutrix' Testimony Not Required. — There is no statute providing that the testimony of the prosecutrix must be corroborated by the evidence of others in a prosecution for incest. In consequence, a conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all of the elements of the offense beyond a reasonable doubt. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952).

§ 14-179. Incest between uncle and niece and nephew and aunt.—In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, in the discretion of the court. (1879, c. 16, s. 2; Code, s. 1061; Rev., s. 3352; C. S., s. 4338.)

With Daughter of Half Sister.—It has been held under this section that carnal intercourse of a man with the daughter of his half sister is incest. State v. Harris, 149 N.C. 513, 62 S.E. 1090 (1908).

§ 14-180. Seduction.—If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the State prison not exceeding the term of five years: Provided, the unsupported testimony of the woman shall not be sufficient to convict: Provided further, that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of nolo contendere, and the defendent shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same. (1885, c. 248; Rev., s. 3354; 1917, c. 39; C. S., s. 4339.)

Who May Be Convicted. — A male, at the marriageable age of 18 years, is indictable for seduction under this section. State v. Creed, 171 N.C. 837, 88 S.E. 511 (1916).

Distinguishing Civil and Criminal Action. — It is only necessary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under this section that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose. Hardin v. Davis, 183 N.C. 46, 110 S.E. 602 (1922).

Three Elements of Offense.—To convict the defendant of seduction, it is incumbent upon the State to satisfy the jury beyond a reasonable doubt of every element essential to the offense. The three elements are: (1) The innocence and virtue of the prosecutrix; (2) the promise of marriage; and (3) the carnal intercourse induced by such promise. State v. Pace, 159 N.C. 462, 74 S.E. 1018 (1912); State v. Crook, 189 N.C. 545, 127 S.E. 579 (1925); State v. Brackett, 218 N.C. 369, 11 S.E.2d 146 (1940); State v. Smith, 223 N.C. 199, 25 S.E.2d 619 (1943). If any one of these elements is lacking there can be no seduction. State v. Ferguson, 107 N.C. 841, 12 S.E. 574 (1890). See also State v. McDade, 208 N.C. 197, 179 S.E. 755 (1935).

Deceit is the very essence of this offense, the warp and woof of it, so to speak. State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895). The promise of marriage alone makes the seduction criminal. State v. Whitley, 141 N.C. 823, 53 S.E. 820 (1906). Consent is no defense. State v. Horton, 100 N.C. 443, 6 S.E. 238 (1888).

Meaning of "Innocent and Virtuous".—Should any woman committing the act of adultery induced by her own lascivious desires, with or without the promise, her conduct is not such as to bring her within the intent and meaning of this section as an innocent and virtuous woman. State v. Johnson, 182 N.C. 883, 109 S.E. 786 (1921). See State v. Ferguson, 107 N.C. 841, 12 S.E. 574 (1890). State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

Permitting familiarities not amounting to incontinence may be considered by the jury in determining whether the prosecutrix was virtuous. State v. Whitley, 141 N.C. 823, 53 S.E. 820 (1906). But when permitted by the prosecutrix after the act they do not negative evidence that she was innocent and virtuous prior thereto, though they may be properly considered by the jury with reference to the weight of her evidence. State v. Lang, 171 N.C. 778, 87 S.E. 957 (1916).

An adulteress may reform and become innocent and even virtuous, and the statute protects her just as much as if she had never fallen. State v. Johnson, 182 N.C. 883, 109 S.E. 786 (1921).

Where there was evidence of the good reputation of prosecutrix before and at the time of the alleged illicit intercourse, it was held that this meets the requirement of this section on the element of innocence and virtue. State v. Smith 223 N.C. 199, 25 S.E.2d 619 (1943).

Promise of Marriage Must Be Unconditional.—In order for conviction under this section, the promise of marriage must be absolute and unconditional, and a promise at the time to marry the woman in the

event "anything should happen to her," is insufficient for a conviction under the statute. State v. Shatley, 201 N.C. 83, 159 S.E. 362 (1931).

Testimony of Woman Must Be Corroborated as to Each Element.—The statute provides that the unsupported testimony of the woman shall not be sufficient to convict. This proviso has been construed to mean that the prosecutrix must be supported by independent facts and circumstances as to each element of the offense. State v. Crook, 189 N.C. 545, 127 S.E. 579 (1925). See State v. Maness, 192 N.C. 708, 135 S.E. 777 (1926); State v. Forbes, 210 N.C. 567, 187 S.E. 760 (1936); State v. Brewington, 212 N.C. 244, 193 S.E. 24 (1937).

To convict defendant of seduction as defined in this statute, the testimony of prosecutrix alone is not sufficient. There must be independent supporting evidence of each essential element of the crime. State v. Smith, 223 N.C. 199, 25 S.E.2d 619 (1943).

For cases setting out facts held either sufficient or insufficient to support, see State v. Raynor, 145 N.C. 472, 59 S.E. 344 (1907); State v. Malonee, 154 N.C. 200, 69 S.E. 786 (1910); State v. Pace, 159 N.C. 462, 74 S.E. 1018 (1912); State v. Cooke, 176 N.C. 731, 97 S.E. 171 (1918); State v. Brackett, 218 N.C. 369, 11 S.E.2d 146 (1940).

The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under this section, is for the jury, if it comes within the requirement of being legal evidence, however slight it may be. State v. Doss, 188 N.C. 214, 124 S.E. 156 (1924).

Supporting Evidence Need Not Be Direct.—It is not required that the "supporting evidence" of the promise of marriage coincide with the testimony of the prosecutrix as to the time the promise was made, since it is not required that the "supporting evidence" be direct, adminicular proof being sufficient. State v. Smith, 217 N.C. 591, 9 S.E.2d 9 (1940).

Testimony supporting prosecutrix, on an indictment for seduction under this section, need not be in the form of direct evidence, for it is seldom possible to produce such proof in respect to some of the elements of the offense. Facts and circumstances tending to support her statements are sufficient. State v. Smith, 223 N.C. 199, 25 S.E.2d 619 (1943).

The proviso that "the unsupported testimony of the woman shall not be sufficient to convict" is fully met where the testimony of the prosecutrix was corroborated in respect to each essential element of the offense charged; as to the promise of marriage by evidence of the prosecutrix' statements to others, and by the witness who "heard them talking," and by the further circumstance of the long and constant association of the defendant with the prosecutrix; as to her innocence and virtue by the evidence of her good character; and as to the intercourse by the admission of the defendant. State v. Tuttle, 207 N.C. 649, 178 S.E. 76 (1935).

Resemblance of Child to Defendant.—It is not error to permit a child to be exhibited to the jury that they may trace a resemblance to one charged with having begotten it; and such evidence is admissible on an indictment for seduction. State v. Horton, 100 N.C. 443, 6 S.E. 238 (1888).

Effect of Marriage upon Consent Judgment.—Where, in a prosecution for seduction a consent judgment is entered requiring the defendant to pay a certain sum to the prosecutrix, a subsequent marriage of the parties before the whole sum is paid does not discharge the judgment, the consent of all parties being necessary to set aside such judgment. For the defendant to get the benefit of this section the marriage must be before he is adjudged guilty. State v. McKay, 202 N.C. 470, 163 S.E. 586 (1932).

Indictments—No Set Form of Words.—In the trial of an indictment for seduction under this section, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse. State v. Malonee, 154 N.C. 200, 69 S.E. 786 (1910).

Limitation of Action.—Deceit being the very essence of the offense of seduction, § 15-1 exempting certain crimes, including deceit, from the two-year statute of limitations, applies to the offense of seduction under promise of marriage. State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

Insufficient Evidence to Show Promise of Marriage.—In prosecution for seduction, the only evidence in support of the testimony of prosecutrix on the essential element of promise of marriage was the testimony of a witness that prosecutrix had told the witness that she and defendant were going to be married, and the further testimony that she had seen prosecutrix and defendant together over a certain period. No other witness testified that prosecutrix and defendant had been seen together. This is not sufficient to constitute proof of the promise of marriage by facts and circumstances independent of the testimony of prosecutrix, and defendant's mo-

tion to nonsuit should have been granted. State v. Forbes, 210 N.C. 567, 187 S.E. 760 (1936).

Burden of Proof on State.—In order to convict, the burden of proof is upon the State to show beyond a reasonable doubt that the seduction was accomplished under and by means of the promise of marriage, and that the prosecutrix was at that time an innocent and virtuous woman. It must affirmatively appear that the inducing promise preceded the intercourse, and that the promise was absolute and not conditional. State v. Wells, 210 N.C. 738, 188 S.E. 326 (1936), holding evidence insufficient to establish that seduction was induced by previous unconditional promise of marriage.

Punishment. — This section, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment. State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, is untenable, since the letter to the parole commissioner and the instructions to the solicitor are not parts of the sentence imposed. State v. Brackett, 218 N.C. 369, 11 S.E.2d 146 (1940).

Applied in State v. Leggett, 255 N.C. 358, 121 S.E.2d 533 (1961).

Cited in State v. Wade, 197 N.C. 571, 150 S.E. 32 (1929); State v. Hill, 223 N.C. 711, 28 S.E.2d 100 (1943).

§ **14-181. Miscegenation.** — All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court. (Const., art. 14, s. 8; 1834, c. 24; 1838-9, c. 24; R. C., c. 68, s. 7; Code, s. 1084; Rev., s. 3369; C. S., s. 4340.)

Virginia antimiscegenation statutes held unconstitutional.—See Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

Domicile in Another State.—A marriage solemnized in a state whose laws permit such marriage between a negro and a white person domiciled in such state is valid in this State. State v. Ross, 76 N.C. 242 (1877).

§ **14-182. Issuing license for marriage between white person and negro; performing marriage ceremony.**—If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor. (1830, c. 4, s. 2; R. C., c. 34, s. 80; Code, s. 1085; Rev., s. 3370; C. S., s. 4341.)

§ **14-183. Bigamy.**—If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been

known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (See 9 Geo. IV, c. 31, s. 22; 1790, c. 323, P. R.; 1809, c. 783, P. R.; 1829, c. 9; R. C., c. 34, s. 15; Code, s. 988; Rev., s. 3361; 1913, c. 26; C. S., s. 4342.)

Editor's Note.—For note as to consequences of a voidable divorce decree, see 35 N.C.L. Rev. 409 (1957).

Offense against Society. — At common law and under this section bigamy is an offense against society rather than against the lawful spouse of the offender. State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), rev'd on other grounds, Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

Constitutes a Felony. — While at common law bigamy was not an indictable offense, and even as late as the enactment of 1885, it was only a misdemeanor, it is now a felony under this statute. State v. Burns, 90 N.C. 707 (1884).

Necessity of Valid Marriage.—That the first marriage was celebrated without procurement of a license, while subjecting the parties to punishment, will not so invalidate the marriage that bigamy cannot be predicated thereon. State v. Robbins, 28 N.C. 23 (1845).

In a trial for bigamy, an instruction that defendant could not be convicted, unless the jury was satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was a "duly appointed, qualified, and acting justice of the peace," was properly refused, it being sufficient if such justice was a de facto officer. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

The evidence showing that there were a number of eyewitnesses to the marriage, and a certified copy of the license with return endorsed being produced, it was not error to charge the jury that it would be presumed the ceremony was valid. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

Belief That First Wife Is Dead.—A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense in a prosecution for bigamy. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Absence of Wife. — The burden is on the defendant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Admissions as to Prior Marriage.—In a prosecution for bigamy an admission of the defendant is competent to prove the first marriage. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Where a defendant charged with bigamy, upon the preliminary examination before a justice of peace, and after being cautioned that his statements could be used against him, stated that he had been married to his former wife while a slave in South Carolina, had children by her and was subsequently married in North Carolina to his present wife, such admissions were competent to go to the jury, on his trial in the superior court, as to his guilt. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Testimony of First Wife.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

By the express provisions of § 8-57, defendant's legal wife was a competent witness before the grand jury, which was considering an indictment against defendant charging him with a violation of the provisions of this section. State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54 (1965).

The record book of marriage for the county or the original marriage license signed by the justice solemnizing the marriage is admissible to prove a marriage. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Second Marriage out of State.—It was held formerly that the courts of this State could not take jurisdiction of the case where the second marriage took place out of the State. See State v. Barnett, 83 N.C. 615 (1880). Subsequent to this decision a clause was inserted in the section in furtherance of a purpose to make the offense cognizable "whether the second marriage shall have taken place in the State of North Carolina, or elsewhere." This clause, in State v. Cutshall, 110 N.C. 538, 15 S.E. 261 (1892), was held unconstitutional insofar as it attempted to make a second marriage bigamous which occurred out of the State without proving that the parties afterwards cohabited in North Carolina. The constitutionality of the section was

upheld in State v. Long, 143 N.C. 671, 57 S.E. 349 (1907), but from the statement of facts in that case it appears that while the second marriage took place in South Carolina the parties subjected themselves to the jurisdiction of this State by living here for four weeks thereafter. In State v. Ray, 151 N.C. 710, 66 S.E. 204 (1909), the authorities are reviewed and it is held that the words "or elsewhere," in the clause just quoted, were void. In recognition of these decisions the legislature, by the Public Laws of 1913, c. 26, amended the section and added the words "shall thereafter cohabit with such person in this State," which qualify and constitute a requisite to the jurisdiction when the second marriage is not in North Carolina. It has been held that this amendment is constitutional and does not confer extraterritorial jurisdiction upon the courts. See State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917); State v. Moon, 178 N.C. 715, 100 S.E. 614 (1919).

This section, making bigamous cohabitation in this State a felony is valid and offends neither the federal nor State Constitutions. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 26, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Same—Pleading and Proof.—If the defendant wishes to rely upon the fact that the offense of bigamy was committed outside the State, he cannot move to quash or in arrest, but must prove the fact in defense under his plea of not guilty. State v. Mitchell, 83 N.C. 674 (1880); State v. Burton, 138 N.C. 575, 50 S.E. 214 (1905); State v. Barrington, 141 N.C. 820, 53 S.E. 663 (1906); State v. Long, 143 N.C. 671, 57 S.E. 349 (1907).

In a prosecution for bigamous cohabitation based upon a second marriage in another state, the State must prove beyond a reasonable doubt, each of the essential elements of the offense. State v. Setzer, 226 N.C. 216, 37 S.E.2d 513 (1946).

Aiding and Abetting by Marrying Outside of State.—In a prosecution upon an indictment charging defendant with aiding and abetting bigamy by entering into a marriage with a person then married and not divorced, evidence tending to show that the bigamous marriage was contracted in another state ousts the jurisdiction of the courts and requires dismissal. State v. Jones, 227 N.C. 94, 40 S.E.2d 700 (1946).

Foreign Divorces.—Where a decree of divorce in another state, which is attacked by the prosecution for insufficient residence in such other state, is relied upon as the only defense on a trial for bigamy, the defendant must satisfy the jury, but not beyond a reasonable doubt, of the bona fides of his residence in the other state. State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917).

A man and a woman went from this State to Nevada and, after residing there for a time sufficient to meet the requirement of a Nevada statute, secured decrees from a Nevada court, divorcing them from their respective spouses, in this State, in which they had been married and domiciled. They then married each other in Nevada, returned to this State and cohabited there as man and wife. Prosecuted under this section for bigamous cohabitation, they set up in defense the Nevada decrees. A general verdict was returned, after instructions permitting that the decrees be disregarded upon either of two grounds, (1) that a Nevada divorce decree based on substituted service, where defendant made no appearance, could not be recognized in this State, and (2) that defendants went to Nevada, not to establish bona fide residence, but solely for the purpose of taking advantage of the laws of that state to obtain a divorce through a fraud upon the Nevada court. It was held that, as it could not be determined on the record that the verdict was not based solely upon the first ground—involving a construction and application of the federal Constitution—the review in the Supreme Court of the United States must be of that ground, leaving the other out of consideration. Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942), rev'g State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941).

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as prima facie valid, they are not conclusive; and, when challenged in a prosecution under this section for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired bona fide domiciles in the state granting their divorces and that such divorces are valid. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

A man and a woman, domiciled in North Carolina, left their spouses in North Carolina, obtained decrees of divorce in Nevada, married and returned to North Carolina to live. Prosecuted in North Carolina for bigamous cohabitation, they pleaded the Nevada divorce decrees in defense but were convicted. The court held that, upon the record, the judgments of

conviction were not invalid as denying the Nevada divorce decrees the full faith and credit required by Art. IV, § 1 of the U.S. Constitution. Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945), aff'd, State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944).

Proof of a divorce granted in another state, upon a trial for bigamy, in our own courts is only evidence which should be submitted to the jury under proper instructions. State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917).

The Indictment. — An indictment for bigamy which charges that defendant "wilfully, unlawfully and feloniously, being a married man, did marry one W. during the life of his first wife," sufficiently avers the first marriage. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

Same—Name of First Wife.—It is not necessary, in an indictment for bigamy, to set out the name of the first wife. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

Same — Negativing Divorce Unnecessary.—It was not necessary that an indictment for bigamy should contain an averment that the defendant had not been divorced from his wife. State v. Norman, 13 N.C. 222 (1828); State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891); State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Same—Time and Place of Marriage.—This section does not by its language make it necessary for the indictment to state the dates of the marriages, and § 15-155 expressly enacts that such a statement shall not be necessary. State v. Long, 143 N.C. 671, 57 S.E. 349 (1907).

Under this section it is unnecessary to state where the second marriage took place, and it is not necessary that the offense should be committed in the county where the bill is found to confer jurisdiction. State v. Long, 143 N.C. 671, 57 S.E. 349 (1907).

Bill of Particulars.—As in other offenses a bill of particulars is necessary if the defendant desires further information upon which to prepare his defense. State v. Long, 143 N.C. 671, 57 S.E. 349 (1907).

Venue. — Defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the bigamous cohabitation takes place. State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), rev'd on other grounds, Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution may be instituted in the county of their apprehension. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Plea of Former Jeopardy Properly Overruled. — Where, in a criminal prosecution for bigamous cohabitation, there is a conviction and judgment chiefly on the grounds of insufficient service, which on appeal is affirmed by the Supreme Court and reversed by the Supreme Court of the United States and remanded, upon the second trial on the issue of domicile only, the plea of former jeopardy and motion to dismiss were properly overruled. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Prima Facie Case Made Out. — Upon issues of traverse on indictment for bigamous cohabitation, the prosecution offering evidence tending to show that defendants had been previously married, that their respective spouses were still living, that defendants had undertaken to contract a marriage in another state and thereafter had cohabited with each other in this State, a prima facie case is made out and a demurrer to the evidence was properly overruled. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Evidence Sufficient for Jury.—Evidence of guilt of bigamous cohabitation held sufficient to be submitted to jury. State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54 (1965).

Applied in State v. Hill, 241 N.C. 409, 85 S.E.2d 411 (1955).

§ 14-184. Fornication and adultery.—If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or

both. (1805, c. 684, P. R.; R. C., c. 34, s. 45; Code, s. 1041; Rev., s. 3350; C. S., s. 4343; 1969, c. 1224, s. 9.)

Editor's Note. — The 1969 amendment added the last sentence.

History of Section.—See State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

General Consideration. — Adultery is an aggravated species of fornication. State v. Crowell, 26 N.C. 231 (1844). Fornication occurs upon cohabitation after miscegenation. See § 14-181 and note thereto.

Offense Is Statutory. — The offense of fornication and adultery is statutory. State v. Ivey, 230 N.C. 172, 52 S.E.2d 346 (1949).

"Lewdly and lasciviously cohabit" implies habitual intercourse in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945); State v. Ivey, 230 N.C. 172, 52 S.E.2d 346 (1949); State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

Warrant or Indictment. — The warrant or indictment must set forth the essential elements of the offense of fornication and adultery. State v. Ivey, 230 N.C. 172, 52 S.E.2d 346 (1949).

A warrant charging that defendant did lewdly and lasciviously associate with a woman to whom he was not married and "did engage in an act of intercourse" with her, fails to charge the statutory offense of fornication and adultery, and judgment against defendant was arrested by the Supreme Court ex mero motu. State v. Ivey, 230 N.C. 172, 52 S.E.2d 346 (1749).

The use of the word "adulterously" dispenses with the necessity of alleging that the parties were not married (State v. McDuffie, 107 N.C. 885, 12 S.E. 83 (1890)) and were of different sex. The words "lewdly and lasciviously" need not be used. State v. Britt, 150 N.C. 811, 62 S.E. 1056 (1909). The State is not called upon to allege or prove the criminal intent. State v. Cutshall, 109 N.C. 764, 14 S.E. 107 (1891). The fact that the female is erroneously alleged to be a "spinster" is not ground of arrest of judgment. State v. Guest, 100 N.C. 410, 6 S.E. 253 (1888).

The admissions or confessions of one party are not to be received against the codefendant. State v. Rhinehart, 106 N.C. 787, 11 S.E. 512 (1890). However, it has been held that under certain circumstances such declarations are admissible when made by the female defendant in the presence of the male. See State v. Roberts, 188 N.C. 460, 124 S.E. 833 (1924).

But the proviso in this section relates to extra-judicial declarations, and does not prevent a woman jointly charged with the offense from testifying as a witness at the trial of her paramour to facts, otherwise competent, which are within her personal knowledge, where at the time she testifies her plea of nolo contendere has been accepted by the State, and she is no longer on trial. The prohibition of the proviso is directed not to the person testifying but against the use in evidence of such person's previous admissions or confessions. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948), discussed in 27 N.C.L. Rev. 365.

Corroboration of Paramour.—Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the facts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

It is competent to prove that either defendant had a living spouse. State v. Manly, 95 N.C. 661 (1886).

Statements and conduct prior to the offense charged are admissible. State v. Austin, 108 N.C. 780, 13 S.E. 219 (1891), as is also testimony as to conduct of the parties after indictment. State v. Stubbs, 108 N.C. 774, 13 S.E. 90 (1891).

Testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party, is competent as an admission of acts which with other similar acts tend to prove the offense of fornication and adultery. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Improper Advances Made by Defendant to Another Woman. — Where defendant was charged with fornication and adultery with one of the orphanage girls under his supervision, testimony of another orphanage girl that defendant made improper advances to her is competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the State's case. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Circumstantial Evidence. — The guilt of defendants or of a defendant, in a prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of inter-

course be shown by direct testimony. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

The acts of illicit intercourse may be proved by circumstantial evidence, and it is not required that even one such act be directly proven. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

A single act of illicit sexual intercourse does not constitute fornication and adultery as defined by this section, the offense being habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other. However, the duration of the association is immaterial if the requisite habitual intercourse is established and it has been held that a period of two weeks is sufficient to constitute the offense. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

Acquittal as to One Party.—Where only one party is convicted and the other acquitted, there can be no judgment against the one convicted. State v. Mainor, 28 N.C. 340 (1846). This holding was followed in the case of State v. Lyerly, 52 N.C. 158 (1859), and was held as law in this State until doubted in State v. Rhinehart, 106 N.C. 787, 11 S.E. 512 (1890). The question came before the court again in State v. Cutshall, 109 N.C. 764, 14 S.E. 107 (1891), when it was held that an acquittal of one defendant did not work the same result as to the other, or prevent the court from rendering judgment. This seems to be the present status of the law on this point. It was followed in State v. Simpson, 133 N.C. 676, 45 S.E. 567 (1903).

Both defendants need not be convicted of mutual intent to violate the law before conviction of one of them can be sustained. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

Both Convicted—New Trial as to One. —If both defendants are convicted, a new trial may be granted as to one party without disturbing the verdict as to the other. State v. Parham, 50 N.C. 416 (1858).

Proper Instructions. — In a prosecution for fornication and adultery, an instruction that if the jury found beyond a reasonable doubt that defendant and his alleged paramour, not being married to each other, engaged in sexual intercourse with each other, with such frequency during the period to which the testimony related, that these illicit relations were habitual, they should return a verdict of guilty, is without error. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Instruction as to the elements of the offense of fornication and adultery under this section held without error. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

Evidence Held Sufficient for Jury.— Evidence held sufficient to be submitted to the jury in a prosecution of fornication and adultery. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

Evidence Held Sufficient to Support Conviction. — On a prosecution upon indictment charging fornication and adultery, where the State's evidence tended to show that defendants were constantly together, day and night, on the streets and in several different homes maintained by the male defendant, and that they were arrested late at night in one of these homes, no other person being in the house at the time, both defendants coming out of the same bedroom, there was sufficient evidence to support a conviction. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

State Need Not Prove That Male Defendant and Wife Were Separated.—In a prosecution under this section, it is not required that the State prove that the male defendant and his wife were separated. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

Punishment. — Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the court. State v. Manly, 95 N.C. 661 (1886), citing State v. McNeal, 75 N.C. 15 (1876); State v. Jackson, 82 N.C. 565 (1880).

The court has power, during the term, to correct or modify an unexecuted judgment in a criminal as well as in civil actions. State v. Manly, 95 N.C. 661 (1886). See In re Brittain, 93 N.C. 587 (1885).

Applied in State v. Miller, 214 N.C. 317, 199 S.E. 89 (1938).

§ 14-185. Inducing female persons to enter hotels or boarding-houses for immoral purposes.—Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter a hotel, public inn or boardinghouse for the purpose of prostitution or debauchery or for any other immoral purpose, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 1; C. S., s. 4344.)

§ 14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.—Any man and woman found occupying the same bedroom in any hotel, public inn or boardinghouse for any immoral purpose, or any man and woman falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel, public inn or boardinghouse, shall be deemed guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1917, c. 158, s. 2; C. S., s. 4345; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

§ 14-187. Permitting unmarried female under eighteen in house of prostitution.—Whoever, being the keeper of a house of prostitution, or assignation house, building or premises in this State where prostitution, fornication or concubinage is allowed or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop, or room in such house, building or premises, shall be guilty of a misdemeanor. (Pub. Loc. 1913, c. 761, s. 18; 1919, c. 288; C. S., s. 4346.)

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.—(a) On a prosecution in any court for keeping a disorderly house or bawdy house, or permitting a house to be used as a bawdy house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy house is the "keeper" thereof, and one who employs another to manage and conduct a disorderly house or bawdy house is also "keeper" thereof.

(b) On a prosecution in any court for keeping a disorderly house or a bawdy house, or permitting a house to be used as a bawdy house or used in such a way to make it disorderly or a common nuisance, the offense shall constitute a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1907, c. 779; C. S., s. 4347; 1969, c. 1224, s. 22.)

Editor's Note. — The 1969 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

Constitutionality. — This section is constitutional. State v. Price, 175 N.C. 804, 95 S.E. 478 (1918).

Disorderly House Defined — Illustrations.—A disorderly house is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passersby. State v. Wilson, 93 N.C. 608 (1885).

The following have been held to constitute disorderly houses: A shop in which disorderly crowds assemble. State v. Robertson, 86 N.C. 628 (1882). A store in which persons collect and disturb the neighborhood. State v. Thornton, 44 N.C. 252 (1853).

The following have been held not to constitute disorderly houses: A private dwelling wherein an uproar was frequently raised but which disturbed few people. State v. Wright, 51 N.C. 25 (1859). The residence of an unchaste woman. State v. Evans, 27 N.C. 603 (1845).

Persons Leasing Premises as a "Keeper". —A person who leases a house knowing that it is to be used for disorderly and unlawful purposes is treated as a direct offender. State v. Boyd, 175 N.C. 791, 95 S.E. 161 (1918).

Powers of City Authorities. — The extent of the powers of the authorities of a municipality to enact ordinances concerning houses of ill fame is discussed in State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890).

Evidence.—This section authorizes the admission of evidence tending to show the lewd, dissolute, and boisterous conversa-

tion of the inmates and frequenters of the house, and especially provides that evidence of the general reputation or character of the house shall be admissible and competent. State v. Hilderbran, 201 N.C. 780, 161 S.E. 488 (1931).

§ **14-189. Obscene literature.**—It shall be unlawful for any person, firm or corporation to exhibit for the purpose of gain, or display for sale, lend or hire, or otherwise publish or sell for the purpose of gain, or exhibit in any school, college, or other institution of learning, or have in his posession for the purpose of sale or distribution, any obscene literature, as determined and defined in the postal laws and regulations of the United States Post Office Department, in the form of book, paper writing, print, drawing, or other representation, at any newsstand, book store, drugstore or other public or private places; or if any person shall post any indecent placards, writings, pictures or drawings on walls, fences, billboards or other public or private places, he shall be guilty of a misdemeanor.

It shall be unlawful for any person, firm or corporation to possess for the purpose of sale or to sell any crime comic books or crime comic publications which through the medium of pictures portray mayhem, acts of sex or use or narcotics. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1885, c. 125; Rev., s. 3731; 1907, c. 502; C. S., s. 4348; 1935, c. 57; 1955, c. 1204.)

Scope.—This section and §§ 14-189.1 and 14-189.2 are not to be interpreted as granting state-wide permission to publish or display all pictures and writings not therein forbidden. State v. Furio, 267 N.C. 353, 148 S.E.2d 275 (1966).

Test of Immorality.—It has been suggested that the test of immorality is whether the literature "has a tendency to shock the moral sense of the average, normal head of a family." If such a test would prevent the publication of writings of an educational value on sex hygiene, commercialized vice and the like, the remedy would be a matter for the legislature, since the Constitution only prevents restrictions upon, and not enlargement of, the right to publish. 4 N.C.L. Rev. 33.

City Ordinance Not Forbidden. — It can not be fairly implied from this section and §§ 14-189.1, 14-189.2 and 14-190 that the legislature intended to preempt the entire subject of obscene displays and publications so as to forbid a city to enact an ordinance, otherwise within its authority, which forbids publications or displays neither forbidden nor permitted by these statutes. State v. Furio, 267 N.C. 353, 148 S.E.2d 275 (1966).

§ **14-189.1. Obscene literature and exhibitions.** — (a) Description of Obscene Matter Prohibited.—It shall be unlawful for any person, firm or corporation to purposely, knowingly or recklessly disseminate obscenity and except as provided in subsection (c) hereafter, he shall be guilty of a misdemeanor. A person disseminates obscenity if he

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene.

(4) Exhibits, broadcasts, televises, presents, rents, leases as lessee or lessor, sells, delivers, or provides; or offers or agrees to exhibit, broadcast, televise, present, rent, lease as lessee or lessor, sell, deliver, or to provide; any obscene still or motion picture, film, film strip, or projection slide, or sound recording, sound tape, or sound track, which is a representation, embodiment, performance, or publication of the obscene.

(b) Obscene Defined; Method of Adjudication.—A thing is obscene if considered as a whole its predominant appeal is to the prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or presentation of such

matters. A thing is obscene if its obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other especially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such an audience. In any prosecution for an offense under this section, evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;
(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;
(3) Artistic, literary, scientific, educational or other merits of the material;
(4) The degree of public acceptance of the material throughout the United States;
(5) Appeal to prurient interest, or absence thereof, in advertising or to the promotion of the material.

Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible.

(c) Noncriminal Dissemination.—The following shall not be criminal offenses under this section:

(1) Dissemination, not for gain, to personal associates other than children under sixteen.
(2) Dissemination, not for gain, by an actor below the age of twenty-one to a child not more than five years younger than the actor.
(3) Dissemination to institutions or individuals having scientific or other special justification for possessing such material.

(d) Preparation to Disseminate Unlawfully. — A person, firm or corporation who knowingly and intentionally creates, buys, procures or possesses obscene matter with the purpose of disseminating it unlawfully shall be guilty of a misdemeanor. A person, firm or corporation who knowingly and intentionally creates, buys, procures or possesses a mold, engraved plate or other embodiment of obscenity especially adapted for reproducing multiple copies or who knowingly and intentionally possesses more than three copies of the obscene material is presumed to have the purpose to disseminate obscenity unlawfully.

(e) Promoting Sale of Material Represented as Obscene.—A person, firm or corporation who advertises or otherwise promotes the sale of material represented or held out by him to be obscene shall be deemed guilty of a misdemeanor.

(f) Awareness That Material Is Obscene; Presumption. — A person, firm or corporation who unlawfully disseminates obscenity or who, with purpose so to disseminate, creates, buys, possesses, or procures obscenity is presumed to know the existence of its parts, features or content of the material which render it obscene.

(g) Section Supplementary.—The provisions of this section do not repeal but supplement existing statutes relating to the subject matter herein contained.

(h) Libraries and Art Museums Excepted.—The provisions of this section shall not apply to the contents of any public, or private library, nor to any art museum. (1957, c. 1227; 1965, c 164.)

Cross Reference.—See note to § 14-189.

Editor's Note.—For note on this section and the regulation of obscene matter, see 36 N.C.L. Rev. 189 (1958).

Sufficiency of Warrant or Indictment.—In a prosecution under this section it is not necessary that the pictures or photographs be particularly described, and the obscene material need not be attached to the warrant or indictment, but it is required that they be sufficiently described so that they may be identified, and a warrant which merely characterizes them in general terms as appealing to prurient in-

terest in nudity and sex, is insufficient to charge the offense with sufficient definiteness. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

§ 14-189.2. Transmittal of obscenity into State. — Any person, firm or corporation who is absent from the State and has not qualified to do business within the State, or who is not otherwise amenable to the legal processes of the State, and who shall originate, publish or otherwise create any obscenity, as defined in G.S. 14-189.1, knowing or having reasonable grounds to believe that the same will be transmitted, forwarded, or dispatched to the State of North Carolina shall, if the same is ultimately transmitted, forwarded, or dispatched to the State, be subject to a penalty of not less than five hundred dollars ($500.00) for each shipment or group of such obscene materials transmitted under one order of shipment; and any properties, including any chose in action, of such person, firm or corporation which may be found within this State shall be subject to execution in satisfaction of said penalty. Suit for the collection of the penalty may be brought by the solicitor in the name of the State in the superior court of any county of the State upon complaint and affidavit to be served on such nonresident person, firm or corporation, under the provisions of G.S. 1-98.1 et seq. and upon collection the penalty shall be payable to the public school fund of the county in which the suit is commenced.

Any person, firm or corporation against whom seizure, attachment or levy is brought for the satisfaction of the penalty herein provided against a nonresident may plead such seizure, attachment or levy in bar of any action for the enforcement of any obligation due to the nonresident, and recovery by the nonresident shall be barred to the extent of any payment made pursuant to such seizure, levy or attachment. (1961, c. 1193.)

Cross Reference.—See note to § 14-189.

§ 14-190. Indecent exposure; immoral shows, etc.—Any person who in any place wilfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed, or who aids or abets in any such act, or who procures another so as to expose his person, or the private parts thereof, or take part in any immoral show, exhibition or performance where indecent, immoral or lewd dances or plays are conducted in any booth, tent, room or other public or private place to which the public is invited; or any person, who, as owner, manager, lessee, director, promoter or agent, or in any other capacity, hires, leases or permits the land, buildings, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for any such immoral purposes, shall be guilty of a misdemeanor. Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place or highway shall be guilty of a misdemeanor. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1885, c. 125; Rev., s. 3731; 1907, c. 502; C. S., s. 4348(a); 1935, c. 57; 1941, c. 273; 1969, c. 1224, s. 9.)

Cross Reference.—See note to § 14-189.

Editor's Note. — The 1969 amendment added the last sentence.

An intentional act of lewd exposure offensive to one or more persons is sufficient. State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966).

The offense does not depend upon the number of people present. State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966).

Nor Is It Essential That the Exposure Have Been Seen.—It is not essential to the crime of indecent exposure that someone shall have seen the exposure, provided it was intentionally made in a public place and persons were present who could have seen if they had looked. State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966).

"Public place" means a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have re-

sort, a place which is accessible to the public and visited by many persons. State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966).

Hence, a mercantile establishment and the premises thereof is a public place during business hours when customers are coming and going. State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966).

Intentional exposure of private parts while sitting in an automobile on a public street in such manner that they could be seen by members of the passing public using the street, and were seen by a passerby, constitutes the common-law offense of indecent exposure. State v. Lowery, 268 N.C. 162, 150 S.E.2d 23 (1966); State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966).

Applied in State v. Edwards, 233 N.C. 492, 64 S.E.2d 421 (1951).

§ 14-191. Sheriffs and deputies to report violations of §§ 14-189 and 14-190.—It shall be the duty of the sheriffs and their deputies of the various counties to see that the provisions of §§ 14-189 and 14-190 are enforced by reporting violations of said sections to the presiding judge of a superior court, county or municipal court, or justice of the peace, who shall have warrants issued to cause such violators to come before their courts for immediate trial. (1935, c. 57.)

Powers of Officers.—The chief of police and his lawful officers or subordinates had the right to prevent or suppress an indecent or immoral show, given in any public place or in any place to which the public were invited and, in the proper discharge of these duties, they could act immediately whenever such exhibitions were taking place in their presence or were imminent and their interference was required to prevent them. Brewer v. Wynne, 163 N.C. 319, 79 S.E. 629 (1913).

Ordinance Banning Obscene Pictures or Words.—An ordinance of the city of High Point banning the display of obscene pictures or words is not void for the reason that this section vests the sheriff of Guilford County with sole authority to determine what pictures or words may be displayed within the county. State v. Furio, 267 N.C. 353, 148 S.E.2d 275 (1966).

§ 14-192. Cutting or painting obscene words or pictures near public places.—It shall be unlawful for any person to write, cut or carve any indecent word, or to paint, cut or carve any obscene or lewd picture or representation, on any tree or other object near the public highways or other public places. Any person guilty of violating this section shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (1907, c. 344; C. S., s. 4349.)

§ 14-193. Exhibition of obscene or immoral pictures; posting of advertisements.—If any person, firm, or corporation shall, for the purpose of gain or otherwise, exhibit any obscene or immoral motion pictures; or if any person, firm or corporation shall post any obscene or immoral placard, writings, pictures, or drawings on walls, fences, billboards, or other places, advertising theatrical exhibitions or moving picture exhibitions or shows; or if any person, firm, or corporation shall permit such obscene or immoral exhibitions to be conducted in any tent, booth, or other place or building owned or controlled by said person, firm, or corporation, the person, firm, or corporation performing either one or all of the said acts shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. For the purpose of enforcing this statute any spectator, at the exhibition of an obscene or immoral moving picture may make the necessary affidavit upon which the warrant for said offense is issued. (1921, c. 212; C. S., s. 4349(a); 1969, c. 1224, s. 4.)

Editor's Note. — The 1969 amendment rewrote the provisions of the first sentence relating to punishment.

§ 14-194. Circulating publications barred from the mails.—It shall be unlawful for any newsagent, news dealer, bookseller, or any other person, firm, or corporation to offer for sale, sell, or cause to be circulated within the State

of North Carolina any magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

It shall be unlawful for any person, firm, or corporation to offer for sale, sell, or give to any person under the age of twenty-one years any such magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

This section shall not be construed to in any way conflict with or abridge the freedom of the press, and shall in no way affect any publication which is permitted to be sent through the United States mails.

Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (Ex. Sess. 1924, c. 45; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

A practical criticism of the effect of this section upon the freedom of the press will be found in 4 N.C.L. Rev. 35. See also the review in 3 N.C.L. Rev. 26.

§ 14-195. Using profane or indecent language on passenger trains. —It shall be unlawful for any person to curse or use profane or indecent language on any passenger train. Any person so offending shall upon conviction be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 470, ss. 1, 2; C. S., s. 4350.)

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.—(a) It shall be unlawful for any person:

(1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation;

(2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person;

(3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number;

(4) To make a telephone call and fail to hang up or disengage the connection with the intent to disrupt the service of another;

(5) To telephone another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct or criminal conduct of the person telephoned or of any member of his family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass;

(6) To knowingly permit any telephone under his control to be used for any purpose prohibited by this section.

(b) Any of the above offenses may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

(c) Anyone violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine or imprisonment, or both, in the discretion of the court. (1913, c. 35; 1915, c. 41; C. S., s. 4351; 1967, c. 833, s. 1.)

Editor's Note.—The 1967 amendment rewrote this section.

Failure of Court to Define "Annoy" and "Harass".—See State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Consent by the victim is not an essential element bearing on the offense. State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967), decided under former § 14-196.1.

The use of a diode device, which prevents the originator of a telephone call from breaking the connection so that his telephone can be identified, in an effort to catch persons violating a statute such as this section, does not violate the federal prohibition against wiretapping. State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967), decided under former § 14-196.1.

Tape recordings allegedly containing telephone conversations by the defendant with the prosecuting witness made by a recorder attached to the witness's telephone are not incompetent in prosecuting for annoying a female by repeated telephoning because they violate the North Carolina Wiretapping Statute (§ 14-155) and also §§ 14-372 and 15-27; these statutes were not enacted to prevent introduction of evidence obtained in such a case and are not relevant in such prosecution. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

The State has laid the requisite foundation for the admissibility of tape recordings allegedly containing telephone conversations by the defendant with the prosecuting witness where the witness identified them as being the voice of the defendant, and stated that they were a fair and accurate representation of the conversations she had with the defendant. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Evidence of Intent.—It is competent for the purpose of showing the intent of the defendant and her attitude toward the prosecuting witness for the court to permit the witness to testify that the defendant had attempted to block her car in the parking lot of the supermarket, that she had frequently followed her to such places as the hospital, school, etc., and would cut her car in front of the witness's "at least once a week, sometimes more than that, and many times was very very close." Her conduct in blocking the witness's car and cutting in front of it showed the defendant's intent to harass, annoy, and molest her and is competent as interpreting the reasons for her frequent telephone calls which were alleged to be for the same purpose. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Entrapment. — Where police placed a want ad in the newspapers, similar to ads which had been placed by women who subsequently received obscene telephone calls, and used an electronic device to identify the telephone number of the caller, they merely set a trap to catch defendant in the execution of a crime which had its genesis in his own mind, and the defense of entrapment was not available to him in a prosecution for violating former § 14-196.1. State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967).

§§ 14-196.1, 14-196.2: Repealed by Session Laws 1967, c. 833, s. 3.

Editor's Note.—Repealed § 14-196.1 was amended by Session Laws 1967, c. 837 to include annoying, molesting or harassing female by repeated telephoning. Repealed § 14-196.2 which derived from Session Laws 1959, c. 769, amended by Session Laws 1965, c. 836, related to the use of profane or threatening language over telephone and to annoying by repeated telephoning.

§ 14-197. Using profane or indecent language on public highways, counties exempt.—If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempt from the provisions of this section: Brunswick, Camden, Craven, Macon, Pitt, Stanly, Swain and Tyrrell. (1913, c. 40; C. S., s. 4352; Pub. Loc. Ex. Sess., 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959; 1949, c. 845; 1957, c. 348; 1959, c. 733; 1963, cc. 39, 123; 1969, c. 300.)

Editor's Note. — The 1969 amendment deleted "Dare" from the list of exempt counties.

For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

Sufficiency of Warrant or Indictment.—A bill of indictment charging that defendant "unlawfully and willfully did appear in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons" is insufficient to charge a violation of this section in failing to charge

that the indecent or profane language was spoken on a public road or highway and in a loud and boisterous manner. State v. Smith, 262 N.C. 472, 137 S.E.2d 819 (1964).

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina "by disorderly conduct by using profane and indecent language" is insufficient to charge the statutory crime proscribed by this section, since it fails to charge that defendant used the profane language (1) on a public road or highway, (2) in the hearing of two or more persons, or (3) in a loud and boisterous manner. State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953).

§ 14-198. Lewd women within three miles of colleges and boarding schools.—If any loose woman or woman of ill fame shall commit any act of lewdness with or in the presence of any student, who is under twenty-one years old, of any boarding school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Upon the trial of any such case students may be competent but not compellable to give evidence. No prosecution shall be had under this section after the lapse of six months. (1889, c. 523; Rev., s. 3353; C. S., s. 4353.)

§ 14-199. Obstructing way to places of public worship.—If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1785, c. 241, P. R.; R. C., c. 97, s. 5; Code, s. 3669; Rev., s. 3776; C. S., s. 4354; 1945, c. 635; 1969, c. 1224, s. 1.)

Cross References.—As to procedure for laying out church roads, see § 136-71. As to obstruction of such highway, see § 136-90 and note thereto.

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

§ 14-200. Disturbing religious assembly by certain exhibitions.—If any person shall bring within half a mile of any place where the people are assembled for divine worship, and stop for exhibition, any stallion or jack, or shall bring within that distance any natural or artificial curiosities and there exhibit them, he shall forfeit and pay to anyone who will sue therefor the sum of twenty dollars and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time if made within the limits of any incorporated town, or without such limits if made before the hour of ten o'clock in the forenoon or after three o'clock in the afternoon. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1809, c. 779, s. 1, P. R.; R. C., c. 97, s. 6; Code, s. 3670; Rev., s. 3705; 1907, c. 412; C. S., s. 4355; 1969, c. 1224, s. 9.)

Local Modification. — Dare, Hatteras township: C.S. 4355.

Editor's Note. — The 1969 amendment added the last sentence.

§ 14-201. Permitting stone-horses and stone-mules to run at large.—If any person shall let any stone-horse or stone-mule of two years old or upwards run at large, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (R. C., c. 17, s. 6; Code, s. 2325; Rev., s. 3323; 1907, c. 412; C. S., s. 4356.)

Local Modification. — Dare, Hatteras township: C.S. 4356.

§ 14-202. Secretly peeping into room occupied by female person.—Any person who shall peep secretly into any room occupied by a female person

shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 78; C. S., s. 4356(a); 1957, c. 338.)

Editor's Note.—It was suggested in 1 N.C.L. Rev. 286 that although this law is made to apply generally to all persons, it is believed that it will not interfere with police officers or detectives who may be compelled to violate the letter of the law to get evidence.

"Peep". —The word "peep" means to look cautiously or slyly—as if through a crevice—out from chinks and knotholes. State v. Bivins, 262 N.C. 93, 136 S.E.2d 250 (1964).

Sufficiency of Warrant.—The warrant is defective in that it fails to name the victim of the peeping misdemeanant, and may not be cured by a bill of particulars supplying the name. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

Defendant is entitled to know identity of female person whose privacy he is charged with having invaded. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

Length of Blind Irrelevant.—The fact that a venetian blind lacks some six to ten inches of reaching the window sill is entirely irrelevant in a prosecution of defendant for peeping into a room occupied by a female. State v. Bivins, 262 N.C. 93, 136 S.E.2d 250 (1964).

Evidence in prosecution of defendant for peeping secretly into a room occupied by a woman, was held sufficient to be submitted to the jury where a witness for the State testified that the room was usually occupied by a woman and he saw someone in the room immediately after defendant left the window. State v. Peterson, 232 N.C. 332, 59 S.E.2d 635 (1950).

Evidence Held Insufficient. — Evidence tending to show that shoeprints were found six or eight feet from the window of a house in which a woman lived alone, that shoeprints were also found in the edge of a field nearby, and that bloodhounds were put on the trail at the edge of the field and followed the scent to defendant's house, without evidence as to when or by whom the tracks were made, is insufficient evidence of the corpus deliciti, aliunde the confession of the defendant, to be submitted to the jury in a prosecution under this section. State v. Bass, 253 N.C. 318, 116 S.E.2d 772 (1960).

§ **14-202.1. Taking indecent liberties with children.** — Any person over 16 years of age who, with intent to commit an unnatural sexual act, shall take, or attempt to take, any immoral, improper or indecent liberties with any child of either sex, under the age of 16 years, or who shall, with such intent, commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, shall, for the first offense, be guilty of a misdemeanor and for a second or subsequent offense shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court. (1955, c. 764.)

Intent to commit an unnatural sexual act is an essential element in this crime and must be proved by the State. State v. Richmond, 266 N.C. 357, 145 S.E.2d 915 (1966).

This section and § 14-177 are complementary rather than repugnant or inconsistent. State v. Lance, 244 N.C. 455, 94 S.E.2d 355 (1956). See note to § 14-177; State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section supplements § 14-177. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

It is clear that there was no legislative intent in enacting this section to repeal § 14-177 in any aspect; the intent was to supplement it and to give even broader protection to children. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of § 14-177. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section and § 14-177 are complementary rather than repugnant or inconsistent. Section 14-177 condemns crimes against nature whether committed against adults or children. This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of § 14-177. This section, of course, condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

Applied in State v. Cox, 272 N.C. 140, 157 S.E.2d 717 (1967).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Article 27.

Prostitution.

§ 14-203. Definition of terms.—The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term "assignation" shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement. (1919, c. 215, s. 2; C. S., s. 4357.)

Quoted in State v. Johnson, 220 N.C. 773, 18 S.E.2d 358 (1942).

Cited in State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930); State v. Harrill, 224 N.C. 477, 31 S.E.2d 353 (1944).

§ 14-204. Prostitution and various acts abetting prostitution unlawful.—It shall be unlawful:

(1) To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.

(2) To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

(3) To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

(4) To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

(5) To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

(6) To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

(7) To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever. (1919, c. 215, s. 1; C. S., s. 4358.)

Cross Reference. — As to declaring houses of prostitution to be nuisances, see § 19-1.

Transporting. — Where defendants, taxi drivers, were apprehended in a clearing in the woods, each under the wheel of his taxi with motor running, and carrying soldiers, the evidence of the character of the scene and the other circumstantial evidence was sufficient to support the inference that defendants knew their destination and brought their passengers to the place for the purpose of engaging in prostitution. State v. Willis, 220 N.C. 712, 18 S.E.2d 118 (1942).

Aiding and Abetting.—A warrant alleging that defendant on a particular day in the designated county "did unlawfully, and willfully aid and abet in the prostitution and assignation contrary to the form of the statute and against the peace and dignity of the State" follows the language of subdivision (7) of this section, and is sufficient to charge the offense therein proscribed. State v. Johnson, 220 N.C. 773, 18 S.E.2d 358 (1942).

A warrant which charged that defendant did "aid and abet in prostitution and assignation" was defective since it failed to state wherein the defendant aided and abetted, and defendant's motion in arrest of judgment should have been granted. State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956), overruling State v. Johnson, 220 N.C. 773, 18 S.E.2d 358 (1942) so far as in conflict.

It is to be noted that subdivision (7) does not merely say "to aid or abet prostitution or assignation," but there are added

the descriptive words "by any means whatsoever," thereby covering a multitude of acts. Thus, it is manifest that the legislature intended that these supplemental words should be given a meaning, and catch all other acts of aiding and abetting prostitution or assignation. Therefore in order to determine whether any offense be committed, it is essential that for the words of the statute "by any means whatsoever" to be given force and effect, there must be stated in the warrant the acts and circumstances of the particular charge, so that the court can see as a matter of law that a crime is charged. State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).

Competency of Evidence.—Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, is competent in a prosecution under this section. State v. Waggoner, 207 N.C. 306, 176 S.E. 566 (1934).

Sufficiency of Evidence.—In a criminal prosecution for permitting property to be used for prostitution where the State's evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant's wife was one of the operators of the place of ill fame and that its general reputation was bad, motion for judgment as of nonsuit was held properly denied. State v. Herndon, 223 N.C. 208, 25 S.E.2d 611 (1943).

Applied in State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954).

Quoted in State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

Cited in State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961); In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962); State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930).

§ 14-205. Prosecution: In what courts.—Prosecutions for the violation of any of the provisions of this article shall be tried in the courts of this State wherein misdemeanors are triable except those courts the jurisdiction of which is so limited by the Constitution of this State that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described. (1919, c. 215, s. 6; C. S., s. 4359.)

§ 14-206. Reputation and prior conviction admissible as evidence.—In the trial of any person charged with a violation of any of the provisions of this article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge. (1919, c. 215, s. 3; C. S., s. 4360.)

Stated in State v. Harrill, 224 N.C. 477, 31 S.E.2d 353 (1944).

§ 14-207. Degrees of guilt.—Any person who shall be found to have committed two or more violations of any of the provisions of § 14-204 of this article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree. (1919, c. 215, s. 4; C. S., s. 4361.)

Province of Judge.—When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the terms of imprisonment within the limits of the statute; but this right does not extend to or include the finding by the judge of the degree of the offender's guilt. State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926); State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

§ 14-208. Punishment; probation; parole.—Any person who shall be deemed guilty in the first degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and may be fined or imprisoned in the discretion of the court, or may be committed to any penal or reformatory institution in this State: Provided, that in case of a commitment to a reformatory institution, the commitment shall be made for an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reforma-

tory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term or any part thereof, and to require the return to said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Any person who shall be deemed guilty in the second degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court: Provided, that the defendant may be placed on probation in the care of a probation officer designated by law, or theretofore appointed by the court.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this article shall be placed on probation or on parole in the care or charge of any person except a woman probation officer. (1919, c. 215, s. 5; C. S., s. 4362; 1921, c. 101.)

Admission of Guilt — Effect on Time Limitation. — A defendant sentenced for the crime of prostitution upon his own admission of guilt, may not successfully resist a sentence therefor upon the ground that the offense charged in the indictment did not come within the period of time prescribed by the statute. State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. Punishment for perjury.—If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or State's prison not less than four months nor more than ten years. (1791, c. 338, s. 1, P. R.; R. C., c. 34, s. 49; Code, s. 1092; Rev., s. 3615; C. S., s. 4364.)

Cross References.—As to form of bill for perjury, see § 15-145. As to false swearing by creditor in assignment for benefit of creditors, see § 23-9. As to false swearing in an investigation before the Commissioner of Insurance, see § 69-3. As to false swearing in an investigation of trusts and combinations in restraint of trade, see § 75-12. As to making false affidavits in applications for motor vehicle licenses, see § 20-31. As to perjury in application for oyster license, see § 113-203. As to swearing falsely to official reports, see § 14-232.

Definition of Perjury.—Perjury, as defined by common law and enlarged by this section, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949); State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954); State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. Arthur, 244 N.C. 582, 94 S.E.2d 646 (1956).

Essential Elements. — The administration of an oath is an essential element of perjury. State v. Glisson, 93 N.C. 506 (1885). Another is jurisdiction of the court. Governor ex rel. Halcombe v. Deaver, 3 N.C. 56 (1798); Boling v. Luther, 4 N.C. 635 (1817); State v. Alexander, 11 N.C. 182 (1825). The false testimony given must be material. State v. Cline, 146 N.C. 640, 61 S.E. 522 (1908); State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

This section does not specifically define perjury or state all the elements essential to constitute the crime. It enlarges the

scope of the criminality of a false oath, and prescribes punishment. The definition is derived from the common law. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

Elements essential to constitute perjury are substantially these: A false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. To constitute materiality essential to sustain a charge of perjury the false testimony must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact. State v. Chaney, 256 N.C. 255, 123 S.E.2d 498 (1962).

False Statement Must Be Material to Issue.—A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact, in order to be material to the issue and constitute a basis for a prosecution for perjury. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

In a prosecution for willful failure of defendant to support his illegitimate child, defendant swore he had not had sexual intercourse with prosecutrix and was not the father of her child, and testified as to the number of times he had visited prosecutrix. In a subsequent prosecution for perjury it was made to appear that defendant had visited prosecutrix or had been seen with her more times than he had admitted under oath, but there was no evidence that he was the father of the child. It was held that the proof of false testimony did not relate to matters determinative of the issue in the first prosecution, and the evidence was insufficient to withstand nonsuit in the prosecution for perjury. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

One of the essential elements of the crime of perjury is that the false statement must be material to an issue or point in question. State v. Chaney, 256 N.C. 255, 123 S.E.2d 498 (1962).

Civil Action Will Not Lie.—Aside from defamation and malicious prosecution, the courts refuse to recognize any injury from false testimony on which a civil action for damages can be maintained, and no action for damages lies for false testimony in a civil suit, whereby the plaintiff fails to recover a judgment, or a judgment is rendered against him. Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960).

It seems to be the general rule that a civil action in tort cannot be maintained upon the ground that a defendant gave false testimony or procured other persons to give false or perjured testimony. Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960).

Perjured testimony and the subornation of perjured testimony are criminal offenses, but neither are torts supporting a civil action for damages. Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

Vacating Judgment Because of Perjured Testimony.—A judgment cannot be vacated because of perjured testimony unless the party charged with perjury has been indicted and convicted or he has passed beyond the jurisdiction of courts and is not amenable to criminal process. Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

Acquittal No Shield from Charge of Perjury.—To hold that a person could go into a court of justice and by perjured testimony secure an acquittal and by that acquittal be shielded from a charge of perjury would be a dangerous doctrine. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

A verdict of acquittal is not equivalent to an affirmative finding that all of defendant's testimony at a former trial was true. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

Former acquittal of malicious injury to personal property under § 14-160 would not support a plea of former jeopardy in a prosecution for perjury committed at the trial, since the crimes are not the same either in fact or in law and the charge of perjury was not based on the assumption that defendant was guilty of the charge of malicious injury, and his acquittal upon the latter charge did not necessarily establish the fact that all material evidence given by him in that case was true. State v. Leonard, 236 N.C. 126, 72 S.E.2d 1 (1952).

Irregularity of Warrant Immaterial. — When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

Burden of Proof on State.—The burden is not on the defendant in perjury to show the truth of the matter at issue, but the burden is on the State to show that it is false. State v. Cline, 150 N.C. 854, 64 S.E. 591 (1909).

Evidence Must Relate to Statement upon Which Indictment Predicated. — Testi-

mony of two or more witnesses as to conflicting statements made by defendant while under oath in courts of competent jurisdiction, but without evidence that the statement upon which the bill of indictment was predicated was the false testimony, is insufficient to be submitted to the jury in a prosecution for perjury. State v. Allen, 260 N.C. 220, 132 S.E.2d 302 (1963).

Sufficient Evidence.—To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

The direct oath of one witness and proof of declarations of the prisoner in an action for perjury are sufficient to convict. State v. Molier, 12 N.C. 263 (1827).

In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath. State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954). See State v. Arthur, 244 N.C. 582, 94 S.E.2d 646 (1956); State v. Allen, 260 N.C. 220, 132 S.E.2d 302 (1963).

Where the defendant swears to an answer in a civil action before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of this section it must be shown that he "willfully and corruptly" committed the offense. State v. Dowd, 201 N.C. 714, 161 S.E. 205 (1931).

Formerly Called Misdemeanor. — The former provision in this section that the offense was a misdemeanor did not make it so for the punishment was felony punishment, and the offense was treated as a felony. State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913).

The Indictment. — See § 15-145 and note thereto.

Cited in Grudger v. Penland, 108 N.C. 593, 13 S.E. 168 (1891).

§ **14-210. Subornation of perjury.**—If any person shall, by any means, procure another person to commit such willful and corrupt perjury as is mentioned in § 14-209, the person so offending shall be punished in like manner as the person committing the perjury. (1791, c. 338, s. 2, P. R.; R. C., c. 34, s. 50; Code, s. 1093; Rev., s. 3616; C. S., s. 4365.)

Cross Reference.—As to bill for subornation of perjury, see § 15-146. As to form of indictment for subornation of perjury, see § 15-146.

Elements of Offense. — The crime of subornation of perjury consists of two elements—the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury. State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954); State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956).

In a prosecution under this section, the State was required to establish, inter alia, that the alleged perjurer made the alleged false statement under oath in a court of competent jurisdiction and that such false statement was material to the matter then in issue. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

The commission of the crime of perjury is the basic element in the crime of subornation of perjury. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

The crime of subornation of perjury consists of two elements, the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

Civil Action Will Not Lie.—See note to § 14-209.

The guilt of both the suborned and the suborner must be proved on the trial of the latter. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

How Falsity of Alleged Perjurer's Oath Established.—In a prosecution for subornation of perjury, the falsity of the oath of the alleged perjurer must be established by the testimony of two witnesses, or one witness and corroborating circumstances. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

In a prosecution for perjury or subornation of perjury, it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances, sometimes called adminicular circumstances. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

Competency of Corroborative Evidence. —See State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Instructions held erroneous for failure to instruct the jury that the alleged perjury must be established by the testimony

of two witnesses, or by one witness and corroborating circumstances and failure to instruct that the State was required to establish, inter alia, that the alleged perjurer testified as charged in the bill of indictment. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

The suborner of perjury and the perjurer stand on an equal footing, especially in respect of turpitude and punishment. State v. Cannon, 227 N.C. 338, 42 S.E.2d 344 (1947).

§ 14-211. Perjury before legislative committees.—If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee of either house of the General Assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the Superior Court of Wake County, shall be confined in the State's prison for the time prescribed by law for perjury. (1869-70, c. 5, s. 4; Code, s. 2857; Rev., s. 3611; C. S., s. 4366.)

§ 14-212. Perjury in court-martial proceedings.—If any person shall willfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be liable to the pains and penalties of perjury. (1812, c. 828, s. 3, P. R.; R. C., c. 70, s. 73; Code, s. 3235; Rev., s. 3612; C. S., s. 4367.)

§ 14-213. False oath to statement of insurance company.—Any person who shall make oath to a willfully false statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury. (1899, c. 54, s. 97; Rev., s. 3493; C. S., s. 4368.)

§ 14-214. False statement to procure benefit of insurance policy or certificate.—Any person who shall wilfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon any contract of insurance or certificate of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other documents of writing, with intent that the same may be presented or used in support of such claim, shall be guilty of a felony punishable by imprisonment for not more than five years or by a fine of not more than five thousand dollars ($5,000.00), or by both such fine or imprisonment in the discretion of the court. (1899, c. 54, s. 60; Rev., s. 3487; 1913, c. 89, s. 28; C. S., s. 4369; 1937, c. 248; 1967, c. 1088, s. 1.)

Editor's Note. — The 1967 amendment inserted "or certificate of insurance," inserted "guilty of a felony," substituted "five thousand dollars ($5,000.00)" for "five hundred ($500.00) dollars" and substituted "in the discretion" for "within the discretion."

Section 4 of the amendatory act makes it effective from and after ratification, but provides that it shall not apply to actions or indictments pending in courts in the State. The act was ratified July 3, 1967.

Meaning of "Willfully" and "Knowingly".—The word "willfully" as used in this section means something more than an intention to commit the offense. It implies committing the offense purposely and designedly in violation of law. The word "knowingly" as so used means that defendant knew what he was about to do, and with such knowledge, proceeded to do the act charged. These words combined in the phrase "willfully and knowingly" in reference to violation of the statute, mean intentionally and consciously. One does not "willfully and knowingly" violate a statute when he does that which he believes he has a bona fide right to do. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

The existence of unreported liens or other insurance upon the property is a civil matter governed by §§ 58-178 and 58-180, but does not tend to show criminal intent in connection with the filing of proofs of claim within the meaning of this section. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

Conspiracy to Procure Insurance by Means of False Claim. — Evidence held sufficient to be submitted to jury in prosecution for conspiracy to procure insurance benefits by means of false claim. State v. Hedrick, 236 N.C. 727, 73 S.E.2d 904 (1953).

Burden on the State.—The gravamen of the offense defined by this section is the willfully and knowingly presenting a false or fraudulent proof of claim for a loss upon a contract of insurance; and in the prosecution thereunder the burden is upon the State to prove that the claim for loss was false, that defendant knew it was false, and that, with such knowledge, he proceeded to make the claim for payment of insurance thereon. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940).

In a prosecution under this section, the burden is upon the State to prove that defendant "willfully and knowingly" presented a false and fraudulent claim and presented proof in support of such claim and when the evidence considered in the light most favorable to the State raises no more than a suspicion or conjecture of defendant's guilt of the charge under the statute, defendant's motion to nonsuit must be allowed. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

Evidence held insufficient to show that defendant willfully and knowingly presented fraudulent claim for insurance loss and proofs in support thereof. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

Cited in Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950).

§ 14-215. False oath to statement required of fraternal benefit societies.—Any person who shall willfully make any false statement in any verified report or declaration under oath, required or authorized by law from fraternal benefit societies, shall be guilty of perjury. (1913, c. 89, s. 28; C. S., s. 4370.)

Cross Reference.—See § 58-302.

§ 14-216. False oath to certificate of mutual fire insurance company.—Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company, that every subscription for insurance is genuine and made with an agreement that every subscriber will take the policies subscribed for by him within thirty days after granting a license to such company, shall be guilty of perjury. (1899, c. 54, s. 32; 1901, c. 391, ss. 3, 4; 1903, c. 438, s. 4; Rev., ss. 4738, 4834; C. S., s. 4371.)

Cross Reference. — As to the oaths required of officers of a mutual fire insurance company, see § 58-92.

ARTICLE 29.

Bribery.

§ 14-217. Bribery of officials.—If any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court. (1868-9, c. 176, s. 2; Code, s. 991; Rev., s. 3568; C. S., s. 4372.)

Cross References. — As to bank examiners accepting bribes, see § 14-233. As to bribing agents and servants to violate duties owed employers, see § 14-353. As to bribery of baseball players, umpires, and officials, see § 14-373 et seq. As to when costs of prosecuting charges of bribery shall be paid by the State, see § 6-16.

Bribery Defined. — Bribery is the voluntary offering, giving, receiving or soliciting of any sum of money or thing of value with the corrupt intent to influence the recipient's action as a public officer or official in the discharge of a public legal duty. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office. State v. Pritchard, 107 N.C. 921, 12 S.E. 50 (1890).

Sufficiency of Indictment. — An allegation in an indictment against a public officer for unlawfully receiving compensation for the performance of his duty, that defendant "did receive and consent to re-

ceive" such compensation, is sufficient and is not defective because of the use of "and" instead of "or" as used in the statute. State v. Wynne, 118 N.C. 1206, 24 S.E. 216 (1896).

Necessity of Proving Corrupt Intent.— On the trial of an officer for bribery in taking unlawful fees, it is necessary to prove a corrupt intent. State v. Pritchard, 107 N.C. 921, 12 S.E. 50 (1890).

Receipt of Anything of Value Influencing Official Acts.—This section has an essential element of the offense of bribery of officials the receipt of anything of value with the express or implied understanding that his official acts are to be in any degree influenced thereby. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Evidence Sufficient for Submission to Jury. — Evidence in this case of one defendant's guilt of paying or delivering money or merchandise, directly and through agents, to each of defendant policemen to influence them in the performance of their duties, and of the acceptance by each defendant policeman of such payments or delivering with intent and understanding that his actions as a police officer would be influenced thereby, was held sufficient to be submitted to the jury as to each defendant. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Applied in State v. Cofer, 205 N.C. 653, 172 S.E. 176 (1934).

§ 14-218. Offering bribes.—If any person shall offer a bribe, whether it be accepted or not, he shall be guilty of a felony, and shall be punished by imprisonment for a term not less than one year nor more than five years in the State's prison or county jail, in the discretion of the court. (1870-1, c. 232; Code, s. 992; Rev., s. 3569; C. S., s. 4373.)

Indictment.—The general rule that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words, does not apply where the words of the statute, as in this section, do not set forth all the essential elements necessary to constitute the offense sought to be charged. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

An indictment for offering a bribe or bribery must allege by definite and particular statement, and not as a mere conclusion, that the acts were done to influence the performance of some public legal duty, and it must further appear, at least as a reasonable inference, that defendant had knowledge of the official character of him to whom the bribe was offered. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Where an indictment for bribing or offering a bribe to a State highway patrolman fails to allege the official act the accused intended to influence, defendant's motion to quash should be allowed. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Not Necessary That Bribed Juror Received Fee.—In a prosecution under this section it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery and an offer to bribe. State v. Noland, 204 N.C. 329, 168 S.E. 412 (1933). As to venue, see note to § 15-134.

Competency of Evidence. — Evidence is competent which shows the quo animo, intent, design, guilty knowledge or scienter with which the defendant charged under this section gave money or other things of value to an official. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Cited in State v. Stonestreet, 243 N.C. 28, 89 S.E.2d 734 (1955); State v. Barkley, 198 N.C. 349, 151 S.E. 733 (1930).

§ 14-219. Bribery of legislators.—If any person shall directly or indirectly promise, offer or give, or cause or procure to be promised, offered or given, any money, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the Senate or House of Representatives of this State after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause

or proceeding which may then be pending before the General Assembly, or which may come before him for action in his capacity as a member of the General Assembly, such person so offering, promising or giving, or causing or procuring to be promised, offered or given any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof, shall be guilty of a felony, and shall be fined not exceeding double the amount so offered, promised or given, and imprisoned in the State's prison not exceeding five years, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the General Assembly and shall be forever disqualified to hold any office of honor, trust or profit under this State. (1868-9, c. 176, s. 5; Code, s. 2852; Rev., s. 3570; C. S., s. 4374.)

§ 14-220. Bribery of jurors.—If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a State prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years. (5 Edw. III, c. 10; 34 Edw. III, c. 8; 38 Edw. III, c. 12; R. C., c. 34, s. 34; Code, s. 990; Rev., s. 3697; C. S., s. 4375.)

Article 30.

Obstructing Justice.

§ 14-221. Breaking or entering jails with intent to injure prisoners.—If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the State's prison or the county jail not less than two nor more than fifteen years. (1893, c. 461, s. 1; Rev., s. 3698; C. S., s. 4376.)

Cross References.—As to cost of investigating lynchings, see § 6-43. As to sheriff's duty to protect prisoner, see § 162-23. As to investigation of lynchings, see § 15-98 and § 114-15. As to venue, see § 15-128.

Conviction of Attempt. — On an indictment under this section as construed with §§ 15-128 and 15-170, the defendant may be found guilty of an attempt. State v. Rumple, 178 N.C. 717, 100 S.E. 622 (1919).

Indictment Need Not Charge Accomplices.—It was error to quash a bill of indictment under this section which charged the defendant with conspiring "with others" to commit the crime of lynching, because it did not name the others or charge that they were unknown. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906). As to effect of splitting act of 1893, see note of this case under § 6-43.

Indictment in Adjoining County.—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. See § 15-128. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

§ 14-222. Refusal of witness to appear or to testify in investigations of lynchings.—If any person summoned as a witness in the investigation of a charge of lynching shall willfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he shall refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall

be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court. (1893, c. 461, s. 3; Rev., s. 3699; C. S., s. 4377.)

Cross Reference. — As to privilege of witnesses, see § 15-99.

§ 14-223. Resisting officers.—If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1889, c. 51, s. 1; Rev., s. 3700; C. S., s. 4378; 1969, c. 1224, s. 1.)

Cross References. — As to powers and duties of constable, see §§ 151-7 and 160-18. As to criminal authority of policemen, see § 160-21. As to arrest in general, see § 15-39 et seq.

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

For note on interfering with police officer as obstructing justice, see 36 N.C.L. Rev. 489 (1958).

An alcoholic beverage control officer is a "public officer" within the meaning of this section. State v. Taft, 256 N.C. 441, 124 S.E.2d 169 (1962).

The offense of resisting arrest presupposes a lawful arrest both at common law and under this section. And every person has the right to resist an unlawful arrest by the use of force. But such right to use force is not unlimited, and only such force may be used as reasonably appears to be necessary to prevent unlawful restraint of liberty. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954).

Resisting in Self-Defense. — When an officer attempts to make an arrest without a warrant and in so doing exceeds his lawful authority, he may be resisted as in self-defense and in such case the person resisting cannot be convicted under this section of the offense of resisting an officer engaged in the discharge of his duties. State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56 (1968).

Sufficiency of Warrant or Indictment.—A warrant or bill of indictment charging a violation of this section must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer. State v. Smith, 262 N.C. 472, 137 S.E.2d 819 (1964).

A warrant charging a violation of this section must, in addition to formal parts, the name of accused, the date of the offense, and the county or locality in which it was alleged to have been committed: (a) identity by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute; (b) indicate the official duty he was discharging or attempting to discharge; and (c) state in a general way the manner in which accused resisted or delayed or obstructed such officer. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967).

A bill of indictment is defective that does not charge the official duty the named officer was discharging or attempting to discharge. State v. Dunston, 256 N.C. 203, 123 S.E.2d 480 (1962).

An indictment charging that defendant did unlawfully "resist, delay and obstruct a public officer in discharge and attempting to discharge the duty of his office . . ." is insufficient to charge the offense of resisting arrest. State v. Scott, 241 N.C. 178, 84 S.E.2d 654 (1954).

The charge that defendant "did resist arrest" neither charges the offense in the language of this section, nor specifically sets forth the facts constituting the offense created by the section. It is wholly insufficient to support the verdict and judgment rendered. State v. Raynor, 235 N.C. 184, 69 S.E.2d 155 (1952).

Indictment is fatally defective though it identifies public officer by name where it fails to indicate the official duty he was discharging or attempting to discharge and does not point out even in a general way the manner in which the defendant is charged with having resisted or delayed or obstructed such public officer. State v. Harvey, 242 N.C. 111, 86 S.E.2d 793 (1955); State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955). See State v. Stonestreet, 243 N.C. 28, 89 S.E.2d 734 (1955).

An indictment charging defendant with resisting an officer in the language of this section is insufficient. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

A warrant alleging that defendant unlawfully and willfully violated the laws of North Carolina by resisting arrest is insufficient to charge the offense proscribed by this section. State v. Raynor, 235 N.C. 184, 69 S.E.2d 155 (1952); State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953). This allegation and the additional allegation that the defendant interfered "with an officer while legally performing the duties of his office" do not suffice to impute to defendant a violation of the section. These allegations do not describe the official character of the person alleged to have been resisted with sufficient certainty to show that he was a public officer within the purview of the statute. State v. Jenkins, 238 N.C. 396, 77 S.E.2d 796 (1953).

Warrant held insufficient to charge a violation of this section. State v. White, 266 N.C. 361, 145 S.E.2d 872 (1966).

Warrant charging that defendant did resist, delay, and obstruct named police officers in the making of a lawful arrest "by shoving said officers and refusing to go" is sufficient to charge a violation of this section. State v. White, 3 N.C. App. 443, 165 S.E.2d 19 (1969).

In charging a violation of this section, it is necessary that the warrant or indictment, in addition to other essentials, set forth the official duty the designated officer was discharging or attempting to discharge, and must point out, in a general way at least, the manner in which defendant is charged with having resisted or delayed or obstructed such public officer. It must also allege the identity of the officer alleged to have been resisted and describe his official character with sufficient certainty to show that he is a public officer. State v. White, 3 N.C. App. 443, 165 S.E.2d 19 (1969).

Indictment in Two Counts.—An indictment having two counts, one against one person under this section, and the other against several persons under § 14-224, is defective, but if not objected to before a verdict which convicts on one count and acquits on the other, is not sufficient grounds for arrest of judgment, as the acquittal is equivalent to a nol. pros. State v. Perdue, 107 N.C. 853, 12 S.E. 253 (1890).

Quashing Indictment if Sufficient to Convict of Assault.—Where an indictment for resisting an officer is defective, as such, it ought not to be quashed if the defendant may be convicted thereon for a simple assault. State v. Dunn, 109 N.C. 839, 13 S.E. 881 (1891).

Process Must Be Legal.—A person is not liable for resisting an unlawful arrest, as where the warrant lacked a seal and the officer did not state what he arrested him for. State v. Curtis, 2 N.C. 471 (1797).

Defective Process Sufficient on Its Face.—A person may not resist an arrest by an officer acting under authority of a court process which is sufficient on its face to show its purpose, even though the process may be defective or irregular in some respect. State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56 (1968).

Authority of Officer and Notice to Party.—If the officer has no authority to make the arrest, or having the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person. State v. Kirby, 24 N.C. 201 (1842); State v. Bryant, 65 N.C. 327 (1871); State v. Belk, 76 N.C. 10 (1877).

Collector of Back Tax. — See State v. Alston, 127 N.C. 518, 37 S.E. 137 (1900).

Preventing Road Overseer Cutting Ditch. —See State v. New, 130 N.C. 731, 41 S.E. 1033 (1902).

Resisting Second Service of Warrant. —Defendant is not liable for assault and battery for resisting an entry into her house by an officer armed with a warrant which had once been served and returned, though defendant had entered into a recognizance and failed to appear. State v. Queen, 66 N.C. 615 (1872).

Persons Aiding and Abetting. — See State v. Morris, 10 N.C. 388 (1824).

An order granting motion to amend warrant so as to charge the violation in the words of the statute cannot cure fatal defects in the warrant in failing to charge the offense when the amendment is not actually made, since neither the motion nor the order sets out the contemplated wording of the proposed amendment and therefore could not be self-executing. State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953); State v. Jenkins, 238 N.C. 396, 77 S.E.2d 796 (1953).

Failure of State to introduce evidence tending to prove validity of warrant of arrest, in a prosecution for resisting arrest, does not justify nonsuit when defendant does not challenge the validity of the warrant, since, in the absence of a showing to the contrary, it will be presumed that the warrant and order of arrest were legally adequate. State v. Honeycutt, 237 N.C. 595, 75 S.E.2d 525 (1953).

Instructions. — In prosecution charging resisting lawful arrest in violation of this section, statement of the trial court during the instructions that "the offense charged here was committed in violation of § 14-223" was held to constitute an expression of opinion. State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Applied in State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963); State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964); State v. Maness, 264 N.C. 358, 141 S.E.2d 470 (1965).

Cited in State v. Waddell, 4 N.C. App. 517, 167 S.E.2d 6 (1969); State v. McClure, 166 N.C. 321, 81 S.E. 458 (1914); State v. Scoggins, 199 N.C. 821, 155 S.E. 927 (1930); State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Wray, 217 N.C. 167, 7 S.E.2d 468 (1940).

§ 14-224. Failing to aid police officers.—If any person, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1889, c. 51, s. 2; Rev., s. 3701; C. S., s. 4379; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Sheriff cannot lawfully command person to assist him in arresting for trespass either by statute or by common law. State v. Brown, 264 N.C. 191, 141 S.E.2d 311 (1965).

Indictment in Two Counts.—See same catchline in note to § 14-223.

Guilt or Name of Party Arrested Immaterial.—The guilt or innocence of the party charged, or the false evidence on which the warrant was based, does not impair the officer's authority. Meeds v. Carver, 30 N.C. 298 (1848); State v. James, 80 N.C. 370 (1879).

To the person summoned by a lawful officer to come to his aid in making an arrest it is absolutely immaterial and irrelevant what is the name of the party to be arrested or the nature of the offense. State v. Ditmore, 177 N.C. 592, 99 S.E. 368 (1919).

Stated in Tomlinson v. Town of Norwood, 208 N.C. 716, 182 S.E. 659 (1935).

§ 14-225. False, etc., reports to police radio broadcasting stations.—Any person who shall willfully make or cause to be made to a police radio broadcasting station any false, misleading or unfounded report, for the purpose of interfering with the operation thereof, or to hinder or obstruct any peace officer in the performance of his duty, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1941, c. 363; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

For comment on this enactment, see 19 N.C.L. Rev. 477.

§ 14-226. Intimidating or interfering with jurors and witnesses.—If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a juror or witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1891, c. 87; Rev., s. 3696; C. S., s. 4380.)

In General.—This section is additional to and not a repeal of the inherent power of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses in both civil and criminal cases. In re Young, 137 N.C. 552, 50 S.E. 220 (1905).

The gist of the offense under this section is the obstruction of justice. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

It is an offense, at common law, to dissuade or prevent, or to attempt to dissuade or prevent, a witness from attending or testifying on the trial of a cause, and such conduct may be made an offense by stat-

ute. The gist of the offense is the willful and corrupt attempt to interfere with and obstruct the administration of justice. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

It is immaterial that person procured to absent himself was not regularly summoned or legally bound to attend as a witness. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

Cited in State v. Hodge, 142 N.C. 665, 55 S.E. 626 (1906).

§ **14-226.1. Violating orders of court.**—Any person who shall wilfully disobey or violate any injunction, restraining order, or any order lawfully issued by any court for the purpose of maintaining or restoring public safety and public order, or to afford protection for lives or property during times of a public crisis, disaster, riot, catastrophe, or when such condition is imminent, or for the purpose of preventing and abating disorderly conduct as defined in G.S. 14-288.4 shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than two hundred fifty dollars ($250.00) or imprisoned for not more than thirty days, or both, in the discretion of the court. This section shall not in any manner affect the court's power to punish for contempt. (1969, c. 1128.)

§ **14-227. Failing to attend as witness before legislative committees.**—If any person shall willfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the General Assembly, either select or committee of the whole, he shall be guilty of a misdemeanor, and on conviction in the superior court of the county in which such witness may reside or be found, he shall be fined not less than five hundred dollars nor more than one thousand dollars, and shall be subject to imprisonment at the discretion of the court. (1869-70, c. 5, s. 2; Code, s. 2854; Rev., s. 3692; C. S., s. 4381.)

ARTICLE 30A.

Secret Listening.

§ **14-227.1. Secret listening to conference between prisoner and his attorney.**—(a) It shall be unlawful for any person wilfully to overhear, or procure any other person to overhear, or attempt to overhear any spoken words between a person who is in the physical custody of a law-enforcement agency or other public agency and such person's attorney, by using any electronic amplifying, transmitting, or recording device, or by any similar or other mechanical or electrical device or arrangement, without the consent or knowledge of all persons engaging in the conversation.

(b) No evidence procured in violation of this section shall be admissible over objection against any person participating in such conference in any court in this State. (1967, c. 187, s. 1.)

§ **14-227.2. Secret listening to deliberations of grand or petit jury.**—It shall be unlawful for any person wilfully to overhear, or procure any other person to overhear, or attempt to overhear the investigations and deliberations of, or the taking of votes by, a grand jury or a petit jury in a criminal case, by using any electronic amplifying, transmitting, or recording device, or by any similar or other mechanical or electrical device or arrangement, without the consent or knowledge of said grand jury or petit jury. (1967, c. 187, s. 1.)

§ **14-227.3. Violation made misdemeanor.**—All persons violating the provisions of G.S. 14-227.1 or G.S. 14-227.2 shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1967, c. 187, s. 2; 1969, c. 1224, s. 6.)

Editor's Note. — The 1969 amendment substituted the present provisions as to punishment for provisions for fine or imprisonment in the discretion of the court.

Article 31

Misconduct in Public Office.

§ 14-228. Buying and selling offices.—If any person shall bargain away or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or other profit, for an office or the deputation of an office, or any part thereof, which office, or any part thereof, shall touch or concern the administration or execution of justice, or the receipt, collection, control or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court. (5, 6 Edw. VI, c. 16, ss. 1, 5; R. C., c. 34, s. 33; Code, s. 998; Rev., s. 3571; C. S., s. 4382.)

Cross References.—As to sheriff letting to farm his office, see § 162-24. As to validity of bargain to sell an office, see § 128-3.

§ 14-229. Acting as officer before qualifying as such.—If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor and shall be ejected from his office. (Code, s. 79; Rev., s. 3565; C. S., s. 4383.)

§ 14-230. Willfully failing to discharge duties.—If any clerk of any court of record, sheriff, justice of the peace, recorder, prosecuting attorney of any recorder's court, county commissioner, county surveyor, coroner, treasurer, constable or official of any of State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court. (1901, c. 270, s. 2; Rev., s. 3592; C. S., s. 4384; 1943, c. 347.)

Cross References. — As to failure of county commissioners to perform duty, see § 153-15. As to failure of sheriff to make return, see § 14-242. As to prosecution of officers failing to discharge duties, see § 128-16 et seq.

History of Section.—See State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

In General.—The law will not countenance or condone any attempt to defy its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. State v. Commissioners of Fayetteville, 4 N.C. 419 (1816); State v. Williams, 34 N.C. 172 (1851); State v. Commissioners, 48 N.C. 399 (1856); State v. Furguson, 76 N.C. 197 (1877). If the neglect, omission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty,

to removal from office. State ex rel. Battle v. City of Rocky Mount, 156 N.C. 329, 72 S.E. 354 (1911).

Effect of Section on Common-Law Crime of Official Oppression.—It is futile to attempt to mark the extent, if any, the common-law crime of official oppression has been modified or superseded by this section, as there is no exact common-law definition of official oppression, and the possible acts which may constitute the crime are as many and varied as the forms of corruption that may exist in public office. State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967).

An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power. State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

A duly appointed policeman of a city is an officer of such city within the meaning of this section. State v. Fesperman, 264 N.C. 160, 141 S.E.2d 255 (1965); State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Stogner, 264 N.C. 163, 141 S.E.2d 248 (1965); State v. Fesperman, 264 N.C. 168, 141 S.E.2d 252 (1965).

As Is Chief of Police.—A chief of police as well as a policeman is an officer of the municipality which engages his services, within the meaning of the provisions of this section. State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

And Captain of Detectives.—A captain of detectives of a police department of a city is an officer of such city within the meaning of this section. State v. McCall, 264 N.C. 165, 141 S.E.2d 250 (1965).

Justices Not Exempted from Prosecution by § 128-16.—It may not be reasonably implied that, by bringing justices of the peace within the provisions of § 128-16, the General Assembly intended to exempt justices of the peace from indictment and prosecution for the criminal offenses defined in this section. State v. Hockaday, 265 N.C. 688, 144 S.E.2d 867 (1965).

Sufficiency of Bill of Indictment. — See State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965); State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Stogner, 264 N.C. 163, 141 S.E.2d 248 (1965); State v. McCall, 264 N.C. 165, 141 S.E.2d 250 (1965).

Warrant Falling Short of Alleging Malfeasance in Office in Violation of Section —See Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

Proceedings of Forfeiture under § 1-515. —Forfeiture cannot be enforced by judgment of a motion from office as a part of the punishment, where the clerk has been convicted of a misdemeanor, under this section in willfully neglecting to discharge the duties of his office, but proceedings of forfeiture must be under § 1-515. State v. Norman, 82 N.C. 687 (1880).

Willful Neglect and Injury to Public.— It is to be observed that the essentials of the crime as prescribed are: first, a willful neglect in the discharge of official duty; and second, injury to the public. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

Corrupt Intent Not Necessary. — It is not necessary to allege corrupt intent in a bill of indictment against county commissioners for neglect of duty in providing a necessary courthouse, and it is sufficient if the words of the statute are followed. State v. Loeper, 146 N.C. 655, 61 S.E. 585 (1908).

However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929), quoting from State v. Hatch, 116 N.C. 1003, 21 S.E. 436 (1895).

Liability for Honest Errors. — It is so well settled that there is nothing to the contrary that an officer who has to exercise his judgment or discretion is not liable criminally for any error which he commits, provided he acts honestly. State v. Powers, 75 N.C. 281 (1876).

If the illegal act be done mala fide, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only. State v. Snuggs, 85 N.C. 541 (1881).

Accused Must Show Good Faith. — Where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is willful, and makes it incumbent upon him to rebut the presumption. State v. Heaton, 77 N.C. 505 (1877).

Indictment. — It is required that the indictment under this section sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defen-

dant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

Applied in State v. Hucks, 264 N.C. 160, 141 S.E.2d 299 (1965).

Cited in Moffitt v. Davis, 205 N.C. 565, 172 S.E. 317 (1934).

§ 14-231. Failing to make reports and discharge other duties.—If any State or county officer shall fail, neglect or refuse to make, file or publish any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a misdemeanor. (Rev., s. 3576; C. S., s. 4385.)

Cross References. — As to mandamus generally, see § 1-511 et seq. As to failure of sheriff to make return, see § 14-242. As to embezzlement by officers, see § 14-92. As to failure of a county officer to account for public funds, see §§ 153-47, 109-36, and 109-37.

Injurious Effect Not Necessary. — The crime exists although no injurious effects result to any individual because of the misconduct of the officer. State v. Glasgow, 1 N.C. 176 (1800).

Honesty of Purpose. — There may be neglect without corruption. Therefore honesty of purpose is not a full defense under this section. Turner v. McKee, 137 N.C. 251, 49 S.E. 330 (1904).

Enforcing Unconstitutional Law. — An officer is not liable for obeying the mandates of an unconstitutional statute. State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

Liability on Official Bonds.—See § 109-33 et seq. and notes thereto.

Manager of Elections.—Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under this section. State v. Cole, 156 N.C. 618, 72 S.E. 221 (1911).

§ 14-232. Swearing falsely to official reports.—If any clerk, sheriff, register of deeds, county commissioner, county treasurer, justice of the peace, constable or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, State or school revenue, he shall be guilty of a misdemeanor. (1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4; Code, s. 731; Rev., s. 3605; C. S., s. 4386.)

§ 14-233. Making of false report by bank examiners; accepting bribes.—If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the State prison for not less than four months nor more than ten years. (1903, c. 275, s. 24; Rev., s. 3324; 1921, c. 4, s. 79; C. S., s. 4387.)

Cross Reference.—See also § 53-124.

§ 14-234. Director of public trust contracting for his own benefit.—If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board.

Nothing in this section nor in any general principle of common law shall render unlawful the acceptance of remuneration from a governmental board, agency or commission for services, facilities, or supplies furnished directly to needy individuals by a member of said board, agency or commission under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by such board, agency or commission; provided, however, that such programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; and provided further that the board, agency or commission, nor any of its employees or agents, shall have no control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance, and that the remuneration for such services, facilities or supplies shall be in the same amount as would be paid to any other provider; and provided further that, although the board, agency or commission member may participate in making determinations of eligibility of needy persons to receive the assistance, he shall take no part in approving his own bill or claim for remuneration. (1825, c. 1269, P. R.; 1826, c. 29; R. C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C. S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027.)

Local Modification. — City of Greensboro: 1951, c. 707, s. 3.

Cross Reference. — As to Member of State Highway Commission selling materials to the Commission, see § 136-14.

Editor's Note. — The 1969 amendment added the second paragraph.

Opinions of Attorney General. — Mr. Terry R. Hutchins, Pembroke State University, 10/23/69; Mr. Cameron S. Weeks, Attorney, Edgecombe County Board of Alcohol Control, 10/24/69.

Public Policy of State. — The General Assembly in adopting this section made the condemnation of the transactions embraced within its terms a part of the public policy of the State so as to remove from public officials the temptation to take advantage of their official positions to "feather their own nests" by letting to themselves or to firms or corporations in which they are interested contracts for services, materials, supplies, or the like. Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Effect of Special Validating Act. — Although municipal bonds were sold to a corporation controlled by the mayor, an act passed by the legislature expressly confirming and validating the sale removes all objections based upon the violation of the provisions of this section. Starmount Co. v. Ohio Sav. Bank & Trust Co., 55 F.2d 649 (4th Cir. 1932).

Additional Service. — A member of the board of county commissioners cannot recover for services rendered the board in inspecting a bridge. Davidson v. Guilford County, 152 N.C. 436, 67 S.E. 918 (1910).

Officer of City and Corporation. — The prohibition of this section extends to an officer of a corporation in making contracts between the corporation and the city of which he is commissioner or alderman. State v. Williams, 153 N.C. 595, 68 S.E. 900 (1910); Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Contracts with city when an alderman is an employee of the other contracting party are not covered by the section. State v. Weddell, 153 N.C. 587, 68 S.E. 897 (1910).

Contracts for Benefit of County. — A sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners. State v. Garland, 134 N.C. 749, 47 S.E. 426 (1904).

Sale to Corporation Organized by Advisor to Municipality.—Under this statute a contract of sale does not become void because the purchasing corporation was organized through the efforts of a person who had a merely advisory relationship to a municipal corporation. Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960).

Denial of Recovery on Quantum Meruit Basis. — The courts not only will declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a quantum meruit basis. Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

§ 14-235. Speculating in claims against towns, cities and the State. —If any clerk, sheriff, register of deeds, county treasurer or other county, city,

town or State officer shall engage in the purchasing of any county, city, town or State claim, including teacher's salary voucher, at a less price than its full and true value or at any rate of discount thereon, or be interested in any speculation on any such claim, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1868-9, c. 260; Code, s. 1009; Rev., s. 3575; C. S., s. 4389; 1923, c. 136, s. 208; 1969, c. 1224, s. 6.)

Editors' Note. — The 1969 amendment substituted the present provisions as to punishment for provisions for fine, imprisonment and removal from office at the discretion of the court.

§ 14-236. Acting as agent for those furnishing supplies for schools and other State institutions.—If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the State, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any school or other institution supported in whole or in part from any of the public funds of the State, or any officer, agent, manager, teacher or employee of such boards, shall have any pecuniary interest, either directly or indirectly, proximately or remotely in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or State or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court. (1897, c. 543; 1899, c. 732, s. 73; Rev., s. 3833; C. S., s. 4390.)

Purchase of Property from Company Owned by Wife.—A member of the board of education of a county is not guilty under this section for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. State v. Debnam, 196 N.C. 740, 146 S.E. 857 (1929).

§ 14-237. Buying school supplies from interested officer.—If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, the members of such board shall be removed from their positions in the public service and shall, upon conviction, be deemed guilty of a misdemeanor. (1901, c. 4, s. 69; Rev., s. 3835; C. S., s. 4391.)

§ 14-238. Soliciting during school hours without permission of school head.—No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission and consent of the superintendent, principal or person actually in charge of the school and responsible for it.

Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1933, c. 220; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

Quoted in Eastern Carolina Tastee-Freez. Inc. v. Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

§ 14-239. Allowing prisoners to escape; burden of proof.—If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any capias issuing on a bill of indictment, information or other criminal proceeding, and such sheriff, deputy sheriff, coroner, constable or jailer, willfully or negligently, shall suffer such person, so charged or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had. (1791, c. 343, s. 1, P. R.; R. C., c. 34, s. 35; Code, s. 1022; 1905, c. 350; Rev., s. 3577; C. S., s. 4393.)

Cross References. — See § 14-257. As to liability for escape under civil process, see § 162-21.

General Consideration.—This is a common-law offense. State v. Ritchie, 107 N.C. 857, 12 S.E. 251 (1890). The statute contemplates two offenses—negligently permitting or willfully promoting the escape—but charging negligence alone will suffice. State v. McLain, 104 N.C. 894, 10 S.E. 518 (1889). The section changes the ordinary rule of the burden of proof by shifting such burden to the defendant. State v. Hunter, 94 N.C. 829 (1886); State v. Lewis, 113 N.C. 622, 18 S.E. 69 (1893). The question of good faith and diligence of the officer is for the jury. State v. Blackley, 131 N.C. 726, 42 S.E. 569 (1902).

Right to Kill to Prevent Escape.—The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or, anything that would suggest danger to the person of the guard. Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

Where the escape is due to the negligence of an assistant the only question presented is whether the defendant has exercised due care in his selection. State v. Lewis, 113 N.C. 622, 18 S.E. 69 (1893).

Example of Specific Language Shifting Burden of Proof. — This section provides an example of specific language used by the legislature when it intended to shift the burden of proof to a defendant. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

Cited in Sutton v. Williams, 199 N.C. 546, 155 S.E. 160 (1930).

§ 14-240. Solicitor to prosecute officer for escape.—It shall be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the State, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (1791, c. 343, s. 2, P. R.; R. C., c. 34, s. 36; Code, s. 1023; Rev., s. 2822; C. S., s. 4394.)

§ 14-241. Disposing of public documents or refusing to deliver them over to successor.—It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the General Assembly, appellate division reports or other public documents are transmitted or deposited for the use of the county or the State, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or

both, at the discretion of the court. (1881, c. 151; Code, s. 1073; Rev., s. 3598; C. S., s. 4395; 1969, c. 44, s. 26.)

Editor's Note.—The 1969 amendment substituted "appellate division reports" for "Supreme Court reports" near the beginning of the section.

§ 14-242. Failing to return process or making false return.—If any sheriff, constable or other officer, whether State or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor. (1818, c. 980, s. 3, P. R.; 1827, c. 20, s. 4; R. C., c. 34, s. 118; Code, s. 1112; Rev., s. 3604; C. S., s. 4396.)

Cross Reference. — See § 162-14 and note thereto.

Civil Process.—This section applies to failure to return civil as well as criminal process. State v. Berry, 169 N.C. 371, 85 S.E. 387 (1915), overruling Harrell v. Warren, 100 N.C. 259, 6 S.E. 777 (1888); Piedmont Mfg. Co. v. Buxton, 105 N.C. 74, 11 S.E. 264 (1890).

Process That Could Not Be Served.—An officer is not subject to the penalty under this section for declining to receive process which, at the time it was tendered, he could not have executed. Fentress v. Brown, 61 N.C. 373 (1867).

Cited in State v. Brown, 119 N.C. 825, 25 S.E. 820 (1896).

§ 14-243. Failing to surrender tax list for inspection and correction.—If any sheriff or tax collector shall refuse or fail to surrender his tax list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand dollars, at the discretion of the court. (1870-1, c. 177, s. 2; Code, s. 3823; Rev., s. 3788; C. S., s. 4397.)

§ 14-244. Failing to file report of fines or penalties.—If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor. (1901, c. 4, s. 62; Rev., s. 3579; C. S., s. 4398.)

§ 14-245. Justices of the peace soliciting official business or patronage.—If any justice of the peace shall solicit official business, and/or patronage for his or her office, he or she shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1935, c. 58.)

§ 14-246. Failure of ex-justice of the peace to turn over books and papers.—If any justice of the peace, on expiration of his term of office, or if any personal representative of a deceased justice of the peace shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor. (Code, ss. 828, 829; 1885, c. 402; Rev., s. 3578; C. S., s. 4399.)

Cited in Bailey v. Hester, 101 N.C. 538, 8 S.E. 164 (1888); Whitehurst v. Merchants & Farmers Transp. Co., 109 N.C. 342, 13 S.E. 937 (1891).

§ 14-247. Private use of publicly owned vehicle.—It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. (1925, c. 239, s. 1.)

Elements of Offense. — The elements of the offense created by §§ 14-247 and 14-252 are (1) the use of a vehicle belonging to the State or one of the political subdivi-

sions named in the statute (2) by a public official or employer answering to the statutory description (3) for a private purpose. A warrant which fails to charge that the use of a police car by a policeman of a municipality was for a private purpose, is insufficient to charge the offense. Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

§ 14-248. Obtaining repairs and supplies for private vehicle at expense of State.—It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

§ 14-249. Limitation of amount expended for vehicle.—It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State, to expend from the public treasury an amount in excess of two thousand five hundred dollars ($2,500.00) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: Provided, that nothing in §§ 14-247 through 14-251 shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so: Provided further, that the limitation prescribed by this section shall not be applicable to the purchase of any motor vehicle by any county, city or town in this State, where such motor vehicle is purchased in accordance with the provisions of article 8 of chapter 143 of the General Statutes of North Carolina. (1925, c. 239, s. 3; 1957, c. 862, s. 6; c. 1345; 1959, c. 172.)

§ 14-250. Publicly owned vehicle to be marked.—It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement that such car belongs to the State or to some county, or institution or agency of the State. Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking motor vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof, above the license number, the words "State Owned" and that such vehicles have affixed to the front thereof a plate with the statement "State Owned." Provided, further, that in lieu of the above method of marking vehicles owned by any county, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the seal of such county. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866; 1957, c. 1249; 1961, c. 1195; 1965, c. 1186.)

§ 14-251. Violation made misdemeanor.—Any person, firm or corporation violating any of the provisions of §§ 14-247 to 14-250 shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars ($100.00) and not more than five hundred dollars ($500.00), imprisonment for not more than six months, or both such fine and imprisonment. Nothing in §§ 14-247 through 14-251 shall apply to the purchase, use or upkeep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5; 1969, c. 1224, s. 16.)

Editor's Note. — The 1969 amendment rewrote the provisions as to punishment in the first sentence.

§ 14-252. Five preceding sections applicable to cities and towns.—Sections 14-247 through 14-251 in every respect shall also apply to cities and incorporated towns. (1931, c. 31.)

Cross Reference. — See note to § 14-247.

ARTICLE 32.

Misconduct in Private Office.

§ 14-253. Failure of certain railroad officers to account with successors.—If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony, and shall be punished by imprisonment in the State's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and shall be punished in like manner. The Governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (1870-1, c. 72, ss. 1-3; Code, ss. 2001, 2002; Rev., s. 3760; C. S., s. 4400.)

Not Applicable to Tax Bond. — As this section has reference only to money, books, choses, etc., an indictment cannot be sustained against a former president of a railroad, for refusing to transfer to his successor in office certain special tax bonds. State v. Jones, 67 N.C. 210 (1872).

§ 14-254. Malfeasance of corporation officers and agents.—If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any officer of the corporation, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison for not less than four months nor more than fifteen years, and likewise fined, at the discretion of the court. (1903, c. 275, s. 15; Rev., s. 3325; C. S. s. 4401.)

Cross Reference.—As to misapplication of funds by bank officers, see § 53-129.

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-255. Escape of hired prisoners from custody.—If any prisoner, who shall be removed from the prison of the respective counties, cities and towns under the law providing for the hiring out of prisoners by counties and towns, shall escape from the person or company having him in custody, he shall be guilty of a misdemeanor, and shall be imprisoned at hard labor not more than thirty days, or fined not more than fifty dollars. (1876-7, c. 196, s. 4; Code, s. 3455; Rev., s. 3658; C. S., s. 4403.)

Cross Reference.—As to power of counties, cities and towns to hire out prisoners, see §§ 153-191 through 153-193.

§ 14-256. Prison breach and escape from county or municipal confinement facilities or officers.—If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a misdemeanor. (1 Edw. II, st. 2d; R. C., c. 34, s. 19; Code, s. 1021; Rev., s. 3657; 1909, c. 872; C. S., s. 4404; 1955, c. 279, s. 1.)

Cross Reference.—As to penalty for escaping or assisting in an escape from the State prison, see § 148-45.

Editor's Note. — The 1955 amendatory act provided in § 4: "The provisions of this act shall be construed to be mandatory rather than directive."

Common Law.—The offense of breaking jail was a felony at common law, but by this section, all cases, no matter what the person is confined for, are reduced to a misdemeanor. State v. Brown, 82 N.C. 585 (1880).

Escape from Officer.—This section applies only to breaking prison or escaping therefrom and does not, because of its wording, include escape from an officer before being confined to prison. State v. Brown, 82 N.C. 585 (1880).

Cost of Recapture May Not Be Recovered from Prisoner.—The State may not recover of a prisoner moneys expended by it to recapture him after escape from custody, since the escape does not invade any property right of the State, but the expenditure of the sums is voluntary and made by it for the protection of the people of the State in preserving the integrity of the penal system. State Highway & Pub. Works Comm'n v. Cobb, 215 N.C. 556, 2 S.E.2d 565 (1939).

Applied in State v. Abernathy, 1 N.C. App. 625, 162 S.E.2d 114 (1968); State v. Whitt, 2 N.C. App. 601, 163 S.E.2d 531 (1968).

Cited in State v. Jordan, 247 N.C. 253, 100 S.E.2d 497 (1957); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

§ 14-257. Permitting escape of or maltreating hired convicts.—If any person charged in any way with the control or management of convicts, hired for service outside of the State's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any other criminal liability. (1881, c. 127, s. 2; Code, s. 3450; Rev., s. 3659; C. S., s. 4405; 1947, c. 781.)

Cross Reference.—As to escape of prisoners from negligent officer's custody, see § 14-239.

Negligence Test of Guilt.—Officers and public agents will not be held to the rigorous common-law rule of responsibility for the custody of convicts employed in labors outside of the penitentiary, actual negligence being the test of guilt. State v. Johnson, 94 N.C. 924 (1886).

Negligence Implied. — It is not necessary to prove negligence of the person having lawful custody of prisoners, for it is implied, unless occasioned by the act of God, or irresistible adverse force. State v. Johnson, 94 N.C. 924 (1886).

Cited in State v. Sneed, 94 N.C. 806 (1886).

§ 14-258. Conveying messages and weapons to or trading with convicts and other prisoners.—If any person shall convey to or from any convict any letters or oral messages, or shall convey to any convict or person imprisoned, charged with crime and awaiting trial any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a misdemeanor: Provided, that when a murder, an assault or an escape is effected with the means furnished, the person convicted of furnishing the means shall be sentenced to not less than four years hard labor in the State's prison. (1873-4, c. 158; s. 12; Code, s. 3441; Rev., s. 3662; 1911, c. 11; C. S., s. 4406.)

Cross Reference. — As to furnishing prisoners with intoxicating liquors, narcotics, firearms, etc., see §§ 14-390, 14-390.1.

§ 14-259. Harboring or aiding escaped prisoners.—It shall be unlawful for any person knowing, or having reasonable cause to believe, that any other

person has escaped from any prison, jail, reformatory, or from the criminal insane department of any State hospital, or from the custody of any peace officer who had such person in charge, or that such person is a convict or prisoner whose parole has been revoked, to conceal, hide, harbor, feed, clothe, or offer aid and comfort in any manner to any such person.

Every person who shall conceal, hide, harbor, feed, clothe, or offer aid and comfort to any other person in violation of this section shall be guilty of a felony, if such other person has been convicted of, or was in custody upon the charge of a felony, and shall be punished by imprisonment in the State prison not more than five years; and shall be guilty of a misdemeanor, if such other person had been convicted of, or was in custody upon a charge of a misdemeanor, and shall be punished in the discretion of the court.

The provisions of this section shall not apply to members of the immediate family of such escapee. For the purposes of this section "immediate family" shall be defined to be the mother, father, brother, sister, wife, husband and child of said escapee. (1939, c. 72.)

Editor's Note. — For comment on this enactment, see 17 N.C.L. Rev. 348.

Sufficiency of Indictment. — An indictment charging that the defendant unlawfully, wilfully, and feloniously harbored an escapee who was serving a sentence of imprisonment when he escaped, is fatally defective in omitting the words "knowing or having reasonable cause to believe that said person was an escapee." State v. Kirkman, 272 N.C. 143, 157 S.E.2d 716 (1967).

§ 14-260. Injury to prisoner by jailer.—If the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor. (1795, c. 433, s. 6, P. R.; R. C., c. 87, s. 8; Code, s. 3463; Rev., s. 3661; C. S., s. 4407.)

Cross Reference.—As to the degree of protection against violence allowed the jailer in the State prison system, see § 148-46.

Evidence Sufficient for Jury. — Evidence that the plaintiff's thumb had inadvertently been placed against the door jamb when jailer started to close door of cell, and that when plaintiff pushed against the door to release his thumb the jailer pushed the door shut with his shoulder, thereby cutting off plaintiff's thumb, is sufficient to be submitted to the jury on the issue of the jailer's negligent injury to the plaintiff. Davis v. Moore, 215 N.C. 449, 2 S.E.2d 366 (1939).

Cited in Threatt v. North Carolina, 221 F. Supp. 858 (W.D.N.C. 1963).

§ 14-261. Confining prisoners to improper apartments. — If the sheriff or jailer shall wantonly or unnecessarily confine those committed to his custody in any apartment, other than that provided and designated by law for persons of the description of the prisoner, he shall be guilty of a misdemeanor. (1795, c. 433, s. 4; R. C., c. 87, s. 16; Code, s. 3471; Rev., s. 3660; C. S., s. 4408.)

§ 14-262. Requiring female prisoners to work in chain gang. — If any officer, either judicial, executive or ministerial, shall order or require the working of any female on the streets or roads in any group or chain gang in this State, he shall be deemed guilty of a misdemeanor. (1897, c. 270; Rev., s. 3596; C. S., s. 4409.)

§ 14-263. Classification and commutation of time for prisoners other than State prisoners.—The board of county commissioners, or such governing body as may have charge of prisoners in any county, city or town in the State of North Carolina, shall divide all prisoners into three classes, or grades, as follows:

In the first class shall be included all those prisoners who have given evidence that they will, or who it is believed will observe the rules and regulations and work diligently and are likely to maintain themselves by honest industry after their discharge. These shall be known as Class A prisoners and shall receive a com-

mutation of their sentences at the rate of one hundred and four days for each year served.

In the second class shall be included those prisoners who have not as yet given evidence that they can be trusted entirely, but are reasonably obedient to the rules and regulations. These shall be known as Class B prisoners and shall receive a commutation of their sentences of seventy-eight days for each year served.

In the third class shall be those prisoners who have demonstrated that they are incorrigible, have no respect for the rules and regulations and seriously interfere with the discipline and the effectiveness of the labor of the other prisoners. Such prisoners shall receive no commutation of their sentences.

All prisoners shall be admitted into Class B except where it is known by the superintendent of the prison that a prisoner is serving for a second offense. In such cases the superintendent may put the prisoner in Class C in his discretion.

Prisoners of Class A shall be known as honor prisoners and shall be worked in the discretion of the superintendent of the prison without guards. When in prison camps or in any other place of detention they may not be chained or under armed guards.

Prisoners in Class B shall be under guard and may or may not be chained in the discretion of the superintendent.

Prisoners in Class C shall wear chains during the day or night as in the opinion of the superintendent may be necessary.

Preference in assignment of work shall be given Class A prisoners.

The purpose of §§ 14-263 through 14-265 is to unify the regulations pertaining to county prisoners and to encourage industriousness among the prisoners. (1927, c. 178, s. 1; 1937, c. 88, s. 2.)

§ **14-264. Record to be kept; items of record.**—The superintendent or other person having charge of prisoners shall keep a record showing, the name, age, date of sentence, length of sentence, crime for which convicted, home address, next of kin, and the conduct of each prisoner received. (1927, c. 178, s. 2.)

§ **14-265. Commutation of sentences for Sunday work.** — All prisoners in the State's prison, or in any county jail or county convict camp, who shall be assigned to regular work which requires the performance of the same, or substantially the same duties on Sundays as on other days of the week, shall be allowed a commutation of their sentences for each Sunday, or fractional part of a Sunday on which they shall be required to perform the duties of the task assigned to them. The commutation of sentence provided for in this section shall be in addition to all other commutations of sentence allowed such prisoners under existing statutes and laws of the State. (1931, c. 198, s. 1.)

ARTICLE 34.

Custodial Institutions.

§ **14-266. Persuading inmates to escape.**—It shall be unlawful for any parent, guardian, brother, sister, uncle, aunt, or any person whatsoever to persuade or induce to leave, carry away, or accompany from any State institution, except with the permission of the superintendent or other person next in authority, any boy or girl, man or woman, who has been legally committed or admitted under suspended sentence to said institution by juvenile, recorder's, superior or any other court of competent jurisdiction. (1935, c. 307, s. 1; 1937, c. 189, s. 1.)

§ **14-267. Harboring fugitives.**—It shall be unlawful for any person to harbor, conceal, or give succor to, any known fugitive from any institution whose inmates are committed by court or are admitted under suspended sentence. (1935, c. 307, s. 2; 1937, c. 189, s. 2.)

§ **14-268. Violation made misdemeanor.** — Any person violating the provisions of this article shall be guilty of a misdemeanor, and fined or imprisoned, in the discretion of the court. (1935, c. 307, s. 3.)

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ **14-269. Carrying concealed weapons.**—If anyone, except when on his own premises, shall wilfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, sling shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like kind, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C. S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; 1959, c. 1073, s. 1; 1965, c. 954, s. 1; 1969, c. 1224, s. 7.)

Local Modification. — Caswell: 1941, c. 90; Halifax: 1943, c. 34.

Cross References.—As to counties still governed by former subdivision (b) of this section, which was eliminated by the 1965 amendment, see note to § 14-269.1. As to tramps carrying weapons, see § 14-339. As to going armed on Sunday, see § 103-2.

Editor's Note. — The 1969 amendment substituted, at the end of the first sentence, the present provisions as to punishment for a provision for punishment by fine or imprisonment at the discretion of the court.

For note on control of firearms, see 35 N.C.L. Rev. 149 (1956).

Purpose.—The purpose of this section is to reduce the likelihood a concealed weapon may be resorted to in a fit of anger. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Elements of Offense.—In order to be guilty of violating this section the accused must be off his own premises, carrying a deadly weapon, and the weapon must be concealed about his person. State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953).

An information charging that defendant, on a specified date, unlawfully and wilfully carried a concealed weapon, to wit, a pistol, about his person, the defendant not being at the time on his own premises, is an accurate and sufficient charge of violating this section. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

Section Includes Butcher Knife. — This section making it indictable for one to carry concealed about his person any pistol, bowie knife, razor or other deadly weapon of like kind, embraces a butcher's knife. State v. Erwin, 91 N.C. 545 (1884).

"Concealed About His Person". — The language is not "concealed on his person," but "concealed about his person"; that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Concealment Is Gist of Offense. — The mischief provided against is the practice of wearing weapons concealed about the person to be used upon any emergency. State v. Broadnax, 91 N.C. 543 (1884). The intent to carry, not the intent to use, determines the guilt. State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897). But the weapon carried must be concealed. State v. Lilly, 116 N.C. 1049, 21 S.E. 563 (1895). If the weapon is carried openly the defendant could not be guilty under this section. State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind and a purpose to so carry it that it may not be seen. State v. Gilbert, 87 N.C. 527 (1882).

The question is as to the manner of carrying, whether concealed or not, and it might be shown, in defense, that there was no intent to conceal it. State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

But if from defendant's own testimony it appears that he necessarily knew that he was carrying it concealed intent is immaterial. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of this section, although the statute makes such possession prima facie evidence of the concealment thereof. State v. Vanderburg, 200 N.C. 713, 158 S.E. 248 (1931).

Same—Weapon on Person Prima Facie Evidence.—The fact that defendant had a pistol about his person, off of his own premises, was prima facie evidence of concealment, which shifted the burden upon the defendant to rebut or disprove. State v. McManus, 89 N.C. 555 (1883); State v. Lilly, 116 N.C. 1049, 21 S.E. 563 (1895); State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897); State v. Hamby, 126 N.C. 1066, 35 S.E. 614 (1900).

Same — Presumption Rebutted.—To rebut the statutory presumption arising from the concealment, the absence of intent to conceal must be affirmatively found. State v. Gilbert, 87 N.C. 527 (1882); State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

Same—Concealment Question for Jury. —Whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897). See State v. Lilly, 116 N.C. 1049, 21 S.E. 563 (1895).

Ready Access to Weapon Sufficient. — To be criminal, the weapon must be concealed, not necessarily on the person of the accused, but in such position as gives him ready access to it. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Carrying on Own Premises. — The use of the words, "on his own premises," and not being "on his own lands," in this section, shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted, on a sudden quarrel, to use the great advantage a concealed weapon gives. State v. Perry, 120 N.C. 580, 26 S.E. 915, 1008 (1897).

A superintendent or overseer of a department of a cotton mill, is not, while therein, "on his premises," within the meaning of this section. State v. Bridgers, 169 N.C. 309, 84 S.E. 689 (1915).

A person in his own automobile on a public highway is not on his own premises within the meaning of this section. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Same — Servant on Employer's Premises.—A mere servant or hireling who carries concealed weapons on the premises of his employer is indictable. State v. Deyton, 119 N.C. 880, 26 S.E. 159 (1896).

Warrant Must State Defendant Carried Weapon Off His Own Premises. — In prosecution for carrying a concealed weapon, the warrant is held fatally defective in failing to embrace in the charge the essential element of the offense that the weapon was carried concealed by defendant off his own premises, the warrant itself excluding the charge that the weapon was carried off the premises by charging that defendant carried an unconcealed weapon off his premises. State v. Bradley, 210 N.C. 290, 186 S.E. 240 (1936).

Illustrations—Not on Person but within Reach.—The language of the statute is, not "concealed on his person," but "concealed about his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. State v. McManus, 89 N.C. 555 (1883).

Same — Pistol in Coat on Shoulder. — Upon evidence tending to show that the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of this section. State v. Mangum, 187 N.C. 477, 121 S.E. 765 (1924).

Same—Carrying to Deliver to Another. —One is not guilty of a violation of this section where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. State v. Broadnax, 91 N.C. 543 (1884).

Same — Apprehension of Assault. — Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and

may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by this section. State v. Woodlief, 172 N.C. 885, 90 S.E. 137 (1916).

Same—Acting upon Advice of Attorney. —A person acting in ignorance of the law in good faith and upon advice of the clerk of the court or of an attorney, but in violation of this section, is not excused. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

Exceptions—Necessity of Being in Performance of Duties. — In order to come within the exception of this section, the defendant, otherwise having the authority, must have been in the actual performance of his duties at the time. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

Same—Officials of Transportation Companies.—The exception in this section does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use their lines of travel. State v. Perry, 120 N.C. 580, 26 S.E. 915, 1008 (1897).

Same—United States Mail Carrier.—A United States mail carrier is indictable under this section for carrying a concealed weapon while carrying the mail and while returning to his home after delivering the mail. State v. Boone, 132 N.C. 1107, 44 S.E. 595 (1903).

Same—Night Watchman. — A private night watchman is not guilty of carrying a concealed weapon, under this section, while on duty upon the premises he is employed to watch. State v. Anderson, 129 N.C. 521, 39 S.E. 824 (1901).

Former Conviction of Assault.—A conviction of assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. State v. Robinson, 116 N.C. 1046, 21 S.E. 701 (1895).

Time Not Essence of Offense. — Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N.C. 765, 117 S.E. 803 (1923).

Sufficiency of Evidence. — Testimony to the effect that defendant was off his premises in full view of persons near enough to him to see a weapon if it were not concealed, and that the pistol carried by defendant was hidden from their observation, is held sufficient to overrule defendant's motion to nonsuit in a prosecution under this section. State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953).

Punishment.—When the punishment does not exceed the limits fixed by this section, it cannot be considered cruel and unusual punishment in a constitutional sense. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

A judgment of ten years' imprisonment on the charge of carrying a concealed weapon is in excess of that permitted by statute. State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

Stated in State v. Burgess, 2 N.C. App. 677, 163 S.E.2d 662 (1968).

Cited in State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Divine, 98 N.C. 778, 4 S.E. 477 (1887); State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905); State v. Sauls, 199 N.C. 193, 154 S.E. 28 (1930).

§ 14-269.1. Confiscation and disposition of deadly weapons. —Upon conviction of any person for violation of G.S. 14-269 or any other offense involving the use of a deadly weapon of a type referred to in G.S. 14-269, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered confiscated and disposed of by the presiding judge at the trial in one of the following ways in the discretion of the presiding judge.

(1) By ordering the weapon returned to its rightful owner, but only when such owner is a person other than the defendant and has filed a petition for the recovery of such weapon with the presiding judge at the time of the defendant's conviction, and upon a finding by the presiding judge that petitioner is entitled to possession of same and that he was unlawfully deprived of the same without his consent.

(2) By ordering the weapon turned over to a law enforcement agency in the county of trial for the official use of such agency, but only upon the written request by the head or chief of such agency. The clerk of the superior court of such county shall maintain a record of such weapons and the law enforcement agency receiving them.

(3) By ordering the weapon turned over to the sheriff of the county in which the trial is held to be sold as herein provided. Under the direction of the sheriff, the weapon shall be sold at public auction after one ad-

vertisement in a newspaper having general circulation in the county which advertisement shall be at least seven days prior to sale. The proceeds of such sale shall go to the general fund of the county in which such weapons are sold. The sheriff shall maintain a record and inventory of all such weapons received and sold by him. Sales of such weapons by the sheriff shall be held at least once each year.

(4) By ordering such weapon turned over to the sheriff of the county in which the trial is held or his duly authorized agent to be destroyed. The sheriff shall maintain a record of the destruction thereof. (1965, c. 954, s. 2; 1967, c. 24, s. 3.)

Editor's Note. — The 1967 amendment corrected an error by inserting "be" following "shall" near the middle of subdivision (3). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

Certain Counties Governed by Former § 14-269 (b).—Cumberland, Halifax, Harnett, Pamlico, Perquimans, Rockingham, Scotland and Warren Counties were excepted from the provisions of this section by Session Laws 1965, c. 954, s. 2½. (Dare County was deleted from the list of excepted counties by Session Laws 1969, c. 301.) Session Laws 1969, c. 1117, amended the 1965 act by adding to s. 2½ the following sentence: "The provisions of G.S. 14-269 (b) prior to amendment by this Act shall be effective as to these counties." Former § 14-269 (b) provided:

"(b) If the deadly weapon with reference to which the defendant shall have been convicted is a bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor or weapon of like kind, the same shall be destroyed. However, pistols or guns may be confiscated and ordered turned over to the sheriff of the county in which the trial is held by the judge presiding at the trial. Under the direction of said sheriff the weapon shall be sold after one advertisement in a newspaper having a general circulation in the county, at public auction, which shall be held at least once a year. The proceeds of the sale of the weapon or weapons shall go to the general fund of the county in which the weapon or weapons were confiscated and sold. The sheriff shall keep a record and inventory of all weapons received by him and sold under his direction; provided, however, that in any case the presiding judge may, if the facts so justify, order any pistol or gun returned to the defendant."

In former § 14-269 (b) as set out above, the word "sheriff" was substituted for the words "clerk of the superior court" in three places by Session Laws 1959, c. 1073, the intent of the amendatory act being to transfer to the sheriffs the duties theretofore performed by the clerks of the superior court in disposing of confiscated weapons. Of the counties presently governed by former § 14-269 (b), the following are excepted from the application of the 1969 amendment: Halifax, Perquimans, Rockingham and Warren. (Harnett and Pamlico, originally among those excepted, were brought under the 1959 act by Session Laws 1967, cc. 470 and 6, respectively.) As to the counties excepted from the 1969 act, the word "sheriff" in former § 14-469 (b) as set out above should be read "clerk of the superior court."

Former § 14-269 (b) was also modified, as to three of the counties in which it remains applicable, as follows: Halifax: 1953, c. 1213; 1955, c. 124; 1961, c. 526; Rockingham: 1957, c. 939; Scotland: 1955, c. 569.

§ 14-270. Sending, accepting or bearing challenges to fight duels. —If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and shall, moreover, be ineligible to any office of trust, honor or profit in the State, any pardon or reprieve notwithstanding. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1802, c. 608, s. 1, P. R.; R. C., c. 34, s. 48; Code, s. 1012; Rev., s. 3628; C. S., s. 4411; 1969, c. 1224, s. 9.)

Cross References. — As to killing adversary in duel, see § 14-20. See also N.C. Const., Art. XIV, § 2.

Editor's Note. — The 1969 amendment added the last sentence.

See State v. Farrier, 8 N.C. 487 (1821); State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

§ 14-271. Engaging in and betting on prize fights.—If any two or more persons engage in a prize fight, sparring match or glove or fist contest for money or other valuable prize or stake; or if any person bet or lay a wager on the result thereof or advise, aid or abet in any way whatever in promoting the same, he shall be fined not less than five hundred dollars, or imprisoned in the State's prison or jail for not less than one year nor more than five years, or both, in the discretion of the court. (1895, c. 28, ss. 1-4; Rev., s. 3707; C. S., s. 4412.)

Local Modification. — Carteret: 1947, c. 174; Durham: 1953, c. 1287; Robeson: Pub. Loc. 1925, c. 270; Vance: Pub. Loc. 1927, c. 497.

Cross Reference. — As to power of the Governor to prevent prizefights, see § 14-12, subdivision (6).

§ 14-272. Disturbing picnics, entertainments and other meetings.—If any person shall willfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainment, political meeting or other meeting or organization is held, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1897, c. 213; Rev., s. 3704; C. S., s. 4413; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

Section applies to disturbing Sunday school, State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908).

And to Disturbing Family Reunions.—See State v. Starnes, 151 N.C. 724, 66 S.E. 347 (1909).

§ 14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies. — If any person shall wilfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furniture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (Code, s. 2592; 1885, c. 140; 1901, c. 4, s. 28; Rev., s. 3838; C. S., s. 4414; 1959, c. 555, s. 2; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

Constitutionality.—Neither the enactment of this section nor its enforcement against certain defendants violated the law of the land clause of N.C. Const., Art. I, § 17. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

This section is not discriminatory upon its face. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

This section does not undertake censorship of speech or protest. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

This section does not have the objectionable quality of vagueness and overbreadth. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

This section is not susceptible of sweeping and improper application so as to prevent the advocacy of unpopular ideas and criticisms of public schools or public officials. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

Elements of Offense.—The elements of the offense punishable under this section are: (1) some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose of intent on the part of the defendant that his act or conduct have

that effect. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

"**Interrupt**" means "to break the uniformity or continuity of; to break in upon an action." State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

"**Disturb**" means "to throw into disorder." State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a substantial interference with, disruption of, and confusion of the operation of the school in its program of instruction and training of students there enrolled. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

Motive No Defense.—Nothing else appearing, the defendant's motive for doing wilfully an act forbidden by this section is no defense to the charge of violation of such section. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967).

Preventing Use of School Building.—To take possession of a schoolhouse when there are no pupils present, and forbid the teacher to use the building, though the school is thereby prevented from assembling, is not a violation of this section. State v. Spray, 113 N.C. 686, 18 S.E. 700 (1893).

Applied in State v. Guthrie, 265 N.C. 659, 144 S.E.2d 891 (1965).

§ **14-274. Disturbing students at schools for women.**—It shall be unlawful for any male person to willfully disturb, annoy or harass the students of any boarding school or college for women situated anywhere in North Carolina by rude conduct or by persistent unnecessary presence on or near the property of the school or college; or by the willful addressing or communicating orally or otherwise with said students while on school property, or while elsewhere when in charge of a teacher, officer or student of said school. The violation of this section shall be deemed a misdemeanor punishable by a fine of not less than five dollars ($5) nor more than fifty dollars ($50), or by imprisonment not to exceed thirty days. (1925, c. 189, s. 1.)

Editor's Note. — For a criticism of the wisdom and necessity for this law, see 3 N.C.L. Rev. 143.

§ **14-275. Disturbing religious congregations.**—If any person shall be intoxicated or shall be guilty of any rude and disorderly conduct at any place where people are accustomed to meet for divine worship, and while the people are there assembled for such worship, whether such worship should have begun or not, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1901, c. 738; Rev., s. 3706; C. S., s. 4415; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

In General.—In order to render indictable the disturbance of persons assembled for divine worship, the people, or some considerable number, must be collected at or about the time when worship is about to commence, and in the place where it is to be celebrated. State v. Bryson, 82 N.C. 576 (1880). But the congregation need not be engaged in the act of worship. State v. Ramsey, 78 N.C. 448 (1878). However the indictment will not lie after the congregation has dispersed. State v. Davis, 126 N.C. 1059, 35 S.E. 600 (1900). The act itself must disturb the congregation —information of the act, for example that a fight is in progress, will not suffice. State v. Kirby, 108 N.C. 772, 12 S.E. 1045 (1891).

Persistent speaking in church after remonstrance from the minister has been held sufficient to sustain a verdict under this section (see State v. Ramsey, 78 N.C. 448 (1878)) but not persistence in singing off the key where the intention is not to disturb. State v. Linkhaw, 69 N.C. 214 (1873).

Section Not General Law Respecting Public Drunkenness.—See note to § 14-335.

Disturbing Sunday School.—See note to § 14-272.

Disturbing Family Gathering.—See State v. Starnes, 151 N.C. 724, 66 S.E. 347 (1909).

Indictment. — The indictment should charge that the assembly had met "for divine worship," "divine service," "religious worship or service," or something of the same import. State v. Fisher, 25 N.C. 111 (1842).

Where the charge against the defendant is disturbing a congregation actually engaged in divine worship, it is variance to show merely the disturbance of parties assembled for such worship. State v. Bryson, 82 N.C. 576 (1880).

Stated in State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

§ 14-275.1. Disorderly conduct at bus or railroad station or airport.—Any person shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than thirty days, in the discretion of the court, if such person while at, or upon the premises of,

(1) Any bus station, depot or terminal, or
(2) Any railroad passenger station, depot or terminal, or
(3) Any airport or air terminal used by any common carrier, or
(4) Any airport or air terminal owned or leased, in whole or in part, by any county, municipality or other political subdivision of the State, or privately owned airport

shall

(1) Engage in disorderly conduct, or
(2) Use vulgar, obscene or profane language, or
(3) On any one occasion, without having necessary business there, loiter and loaf upon the premises after being requested to leave by any peace officer or by any person lawfully in charge of such premises. (1947, c. 310.)

Editor's Note.—The title of the act inserting this section refers only to airports and airport terminals.

§ 14-276. Detectives going armed in a body.—If any body of men composed of more than three persons, calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives, shall go armed, they shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1893, c. 191; Rev., s. 3703; C. S., s. 4416.)

§ 14-277. Impersonation of peace officers.—It shall be unlawful for any person other than duly authorized peace officers or officers of the court to represent to any person that they are duly authorized peace officers, and acting upon such representation to arrest any person, search any building, or in any way impersonate a peace officer or act in accordance with the authority delegated to duly authorized peace officers. Nothing in this section shall be construed to prohibit a private citizen in whose presence a felony has been committed from arresting such person or persons participating in the commission of said felony when such arrest is deemed necessary, or to prohibit any private citizen in whose presence an act, which would constitute a breach of the peace and for which an indictment would lie, is committed from arresting such person or persons committing said breach of the peace when such arrest is deemed necessary. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction may be fined or imprisoned at the discretion of the court. (1927, c. 229.)

The offense defined by this section consists of two material elements, both of which must be made to appear before the person charged can be convicted. He must have made a false representation that he is a duly authorized peace officer, and acting upon such representation he must have arrested some person, searched a building, or done some act in accordance with the authority delegated to duly authorized officers. State v. Church, 242 N.C. 230, 87 S.E.2d 256 (1955).

When Nonsuit Proper.—Where the defendant made no oral representation that he was a peace officer, but merely exhibited a courtesy card, which the witness examined, but was not misled, and the defendant used no words or action which would indicate he intended or attempted to arrest him, a motion for judgment as of nonsuit should have been allowed. State v. Church, 242 N.C. 230, 87 S.E.2d 256 (1955).

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36.

Offenses against the Public Safety.

§ 14-278. Wilful injury to property of railroads. — If any person shall unlawfully and wilfully, with intent to cause injury to any person passing over the railroad or damage to the equipment traveling on such road, put or place any matter or thing upon, over or near any railroad track, or destroy, injure, tamper with, or remove the roadbed, or any part thereof, or any rail, sill or other part of the fixtures appurtenant to or constituting or supporting any portion of the track of such railroad, the person so offending shall be guilty of a felony and shall be imprisoned in the State's prison not less than four months nor more than 10 years, or fined, or both. (1838, c. 38; R. C., c. 34, ss. 99, 100; 1879, c. 255, s. 2; Code, s. 1098; Rev., s. 3754; 1911, c. 200; C. S., s. 4417; 1967, c. 1082, s. 1.)

Editor's Note. — The 1967 amendment rewrote this section.

Cited in State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); State v. Freeman, 230 N.C. 725, 55 S.E.2d 500 (1949).

§ 14-279. Unlawful injury to property of railroads. — If any person shall unlawfully, but without intent to cause injury to any person or damage to equipment, commit any of the acts referred to in § 14-278, he shall be guilty of a misdemeanor. (R. C., c. 34, s. 101; Code, s. 1099; Rev., s. 3755; C. S., s. 4418; 1967, c. 1082, s. 2.)

Editor's Note. — The 1967 amendment rewrote this section.

§ 14-280. Shooting or throwing at trains or passengers. — If any person shall willfully and unlawfully cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment in the county jail or State's prison, at the discretion of the court. (1876-7, c. 4; Code, s. 1100; 1887, c. 19; Rev., s. 3763; 1911, c. 179; C. S., s. 4419.)

Intent a Question for Jury. — Where a defendant was indicted for shooting at a train with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. State v. Barbee, 92 N.C. 820 (1885).

Proof That Gun Was Loaded Unnecessary. — If a gun be unloaded and this is relied on as a defense, in an action for shooting at a train, the fact must be shown by the defendant. State v. Hinson, 82 N.C. 597 (1880).

Proof of Conspiracy. — Upon trial for throwing stones at a train, it is not necessary to show a conspiracy, it appearing that the several defendants were not only present, but threw stones at different coaches of the same train. State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

Indictment. — Upon a trial for throwing stones at a train, a charge in the bill that it was done "from one station to another" follows the form set out in the statute, and is not void for vagueness and uncertainty. It is not necessary that the indictment contain the word "feloniously." State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

But it must charge that the train was in actual motion or stopped for a temporary purpose. State v. Boyd, 86 N.C. 634 (1882).

§ 14-281. Operating trains and streetcars while intoxicated. — Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or interurban railway company, who shall be intoxicated while engaged in running

or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1871-2, c. 138, s. 38; Code, s. 1972; 1891, c. 114; Rev., s. 3758; 1907, c. 330; C. S., s. 4420; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

§ 14-282. Displaying false lights on seashore.—If any person shall make or display, or cause to be made or displayed, any false light or beacon on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby putting them in danger of shipwreck, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than four months nor more than ten years. (1831, c. 42; R. C., c. 34, s. 58; Code, s. 1024; Rev., s. 3430; C. S., s. 4421.)

§ 14-283. Exploding dynamite cartridges and bombs.—If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a misdemeanor. (1887, c. 364, s. 53; Rev., s. 3794; C. S., s. 4423.)

Cross References.—As to burglary with explosives, see § 14-57. As to wilful injury with explosives, see § 14-49.

§ 14-284. Keeping for sale or selling explosives without a license.—If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a misdemeanor. (1887, c. 364, ss. 1, 4; Rev., s. 3817; C. S., s. 4425.)

§ 14-284.1. Regulation of sale of explosives; reports; storage.—(a) No person shall sell or deliver any dynamite or other powerful explosives as hereinafter defined without being satisfied as to the identity of the purchaser or the one to receive such explosives and then only upon the written application signed by the person or agent of the person purchasing or receiving such explosive, which application must contain a statement of the purpose for which such explosive is to be used.

(b) All persons delivering or selling such explosives shall keep a complete record of all sales or deliveries made, including the amounts sold and delivered, the names of the purchasers or the one to whom the deliveries were made, the dates of all such sales or such deliveries and the use to be made of such explosive, and shall preserve such record and make the same available to any law enforcement officer during business hours for a period of 12 months thereafter.

(c) All persons having dynamite or other powerful explosives in their possession or under their control shall at all times keep such explosives in a safe and secure manner, and when such explosives are not in the course of being used they shall be stored and protected against theft or other unauthorized possession.

(d) As used in this section, the term "powerful explosives" includes, but shall not be limited to, nitroglycerin, trinitrotoluene, and blasting caps, detonators and fuses for the explosion thereof.

(e) Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

(f) The provisions of this section are intended to apply only to sales to those who purchase for use. Nothing herein contained is intended to apply to a sale

made by a manufacturer, jobber, or wholesaler to a retail merchant for resale by said merchant.

(g) Nothing herein contained shall be construed as repealing any law now prohibiting the sale of fire crackers or other explosives; nor shall this section be construed as authorizing the sale of explosives now prohibited by law. (1953, c. 877; 1969, c. 1224, s. 6.)

Editor's Note. — The 1969 amendment substituted, in subsection (e), the present provisions as to punishment for provisions for fine or imprisonment, or both, in the discretion of the court.

Only the highest degree of care is commensurate with the dangerous nature of dynamite. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Such Care Is Required by Common Law and Statutes.—Both the common law and the statutes of North Carolina require persons having possession and control of dynamite to use the highest degree of care to keep the explosive safe and secure and to guard others against injury from it. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Discarding Dynamite Cap Is Negligence.—To discard or leave a dynamite cap where either a child or an unversed adult might pick it up and cause it to explode is positive negligence. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Dynamite Must Be Shown to Have Been Defendant's Property.—To hold a defendant liable for injury caused by dynamite there must be evidence, direct or circumstantial, sufficient to support a finding that it was his property, or property he had abandoned; otherwise, the verdict is a mere guess, which cannot be permitted. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

§ **14-285. Failing to enclose marl beds.**—If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this shall not apply to any person whose marl bed is situated inside his own inclosure. (1887, cc. 235, 268; Rev., s. 3796; C. S., s. 4426.)

§ **14-286. Giving false fire alarms; molesting fire alarm system.**—It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet anyone in giving a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever of any station or signal box of any fire alarm system, except in case of fire, or in any way to willfully interfere with, damage, deface, molest, or injure any part or portion of any fire alarm system. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1921, c. 46; C. S., s. 4426(a); 1961, c. 594; 1969, c. 1224, s. 5.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ **14-286.1. Making false ambulance request.**—It shall be unlawful for any person to wilfully summon an ambulance or wilfully report that an ambulance is needed when such person does not have good cause to believe that the services of an ambulance are needed. Every person convicted of wilfully violating this section shall upon conviction be punished by a fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed 30 days or both such fine and imprisonment. (1967, c. 343, s. 6.)

§ **14-287. Leaving unused well open and exposed.**—It shall be unlawful for any person, firm or corporation, after discontinuing the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punish-

able by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1923, c. 125; C. S., s. 4426(c); 1969, c. 1224, s. 5.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

This section is said to be a sensible regulation in 1 N.C.L. Rev. 300.

Cited in Wellons v. Sherrin, 217 N.C. 534, 8 S.E.2d 820 (1940).

§ 14-288. Unlawful to pollute any bottles used for beverages.—It shall be unlawful for any person, firm or corporation having custody for the purpose of sale, distribution or manufacture of any beverage bottle, to place, cause or permit to be placed therein turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, or to send, ship, return and deliver or cause or permit to be sent, shipped, returned or delivered to any producer of beverages, any bottle used as a container for beverages, and containing any turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined on the first offense, one dollar for each bottle so defiled, and for any subsequent offense not more than ten dollars for each bottle so defiled. (1929, c. 324, s. 1.)

Cross Reference.—As to destruction or taking of soft drink bottles, see § 14-86.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.1. Definitions.—Unless the context clearly requires otherwise, the definitions in this section apply throughout this article:

(1) "Chairman of the board of county commissioners": The chairman of the board of county commissioners or, in case of his absence or disability, the person authorized to act in his stead. Unless the governing body of the county has specified who is to act in lieu of the chairman with respect to a particular power or duty set out in this article, the term "chairman of the board of county commissioners" shall apply to the person generally authorized to act in lieu of the chairman.

(2) "Dangerous weapon or substance": Any deadly weapon, ammunition, explosive, incendiary device, or any instrument or substance designed for a use that carries a threat of serious bodily injury or destruction of property; or any instrument or substance that is capable of being used to inflict serious bodily injury, when the circumstances indicate a probability that such instrument or substance will be so used; or any part or ingredient in any instrument or substance included above, when the circumstances indicate a probability that such part or ingredient will be so used.

(3) "Declared state of emergency": A state of emergency found and proclaimed by the Governor under the authority of § 14-288.15, by any mayor or other municipal official or officials under the authority of § 14-288.12, by any chairman of the board of commissioners of any county or other county official or officials under the authority of § 14-288.13, by any chairman of the board of county commissioners acting under the authority of § 14-288.14, by any chief executive official or acting chief executive official of any county or municipality acting under the authority of any other applicable statute or provision of the common law to preserve the public peace in a state of

emergency, or by any executive official or military commanding officer of the United States or the State of North Carolina who becomes primarily responsible under applicable law for the preservation of the public peace within any part of North Carolina.

(4) "Disorderly conduct": As defined in § 14-288.4 (a).

(5) "Law-enforcement officer": Any officer of the State of North Carolina or any of its political subdivisions authorized to make arrests; any other person authorized under the laws of North Carolina to make arrests and either acting within his territorial jurisdiction or in an area in which he has been lawfully called to duty by the Governor or any mayor or chairman of the board of county commissioners; any member of the armed forces of the United States, the North Carolina national guard, or the State defense militia called to duty in a state of emergency in North Carolina and made responsible for enforcing the laws of North Carolina or preserving the public peace; or any officer of the United States authorized to make arrests without warrant and assigned to duties that include preserving the public peace in North Carolina.

(6) "Mayor": The mayor or other chief executive official of a municipality or, in case of his absence or disability, the person authorized to act in his stead. Unless the governing body of the municipality has specified who is to act in lieu of the mayor with respect to a particular power or duty set out in this article, the word "mayor" shall apply to the person generally authorized to act in lieu of the mayor.

(7) "Municipality": Any active incorporated city or town, but not including any sanitary district or other municipal corporation that is not a city or town. An "active" municipality is one which has conducted the most recent election required by its charter or the general law, whichever is applicable, and which has the authority to enact general police-power ordinances.

(8) "Public disturbance": Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(9) "Riot": As defined in § 14-288.2 (a).

(10) "State of emergency": The condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent. (1969, c. 869, s. 1.)

§ 14-288.2. Riot; inciting to riot; punishments.—(a) A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

(b) Any person who wilfully engages in a riot is guilty of a misdemeanor punishable as provided in § 14-3 (a).

(c) Any person who wilfully engages in a riot is guilty of a felony punishable by a fine not to exceed ten thousand dollars ($10,000.00) or imprisonment for not more than five years, or both such fine and imprisonment, if:

(1) In the course and as a result of the riot there is property damage in excess of fifteen hundred dollars ($1,500.00) or serious bodily injury; or

(2) Such participant in the riot has in his possession any dangerous weapon or substance.

(d) Any person who wilfully incites or urges another to engage in a riot, so that as a result of such inciting or urging a riot occurs or a clear and present danger of a riot is created, is guilty of a misdemeanor punishable as provided in § 14-3 (a).

(e) Any person who wilfully incites or urges another to engage in a riot, and such inciting or urging is a contributing cause of a riot in which there is property damage in excess of fifteen hundred dollars ($1,500.00) or serious bodily injury, is guilty of a felony punishable as provided in § 14-2. (1969, c. 869, s. 1.)

§ 14-288.3. Provisions of article intended to supplement common law and other statutes.—The provisions of this article are intended to supersede and extend the coverage of the common-law crimes of riot and inciting to riot. To the extent that such common-law offenses may embrace situations not covered under the provisions of this article, however, criminal prosecutions may be brought for such crimes under the common law. All other provisions of this article are intended to be supplementary and additional to the common law and other statutes of this State and, except as specifically indicated, shall not be construed to abrogate, abolish, or supplant other provisions of law. In particular, this article shall not be deemed to abrogate, abolish, or supplant such common-law offenses as unlawful assembly, rout, conspiracy to commit riot or other criminal offenses, false imprisonment, and going about armed to the terror of the populace and other comparable public-nuisance offenses. (1969, c. 869, s. 1.)

§ 14-288.4. Disorderly conduct.—(a) Disorderly conduct is a public disturbance caused by any person who:

(1) Engages in fighting or in violent, threatening, or tumultuous behavior; or

(2) Makes any offensively coarse utterance, gesture, or display or uses abusive language, in such manner as to alarm or disturb any person present or as to provoke a breach of the peace; or

(3) Wilfully or wantonly creates a hazardous or physically offensive condition; or

(4) Takes possession of, exercises control over, seizes, or occupies any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative; or

(5) Refuses to vacate any building or facility of any public or private educational institution in obedience to:

a. An order of the chief administrative officer of the institution, or his authorized representative; or

b. An order given by any fireman or public health officer acting within the scope of his authority; or

c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of his authority; or

(6) Shall, after being forbidden to do so by the chief administrative officer, or his authorized representative, of any public or private educational institution:

a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or

b. Congregate, assemble, form groups or formations (whether organized or not), block, or in any manner otherwise interfere

with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or facility.

As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(b) Any person who wilfully engages in disorderly conduct is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months. (1969, c. 869, s. 1.)

§ 14-288.5. Failure to disperse when commanded, misdemeanor; prima facie evidence.—(a) Any law-enforcement officer or public official responsible for keeping the peace may issue a command to disperse in accordance with this section if he reasonably believes that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring. The command to disperse shall be given in a manner reasonably calculated to be communicated to the assemblage.

(b) Any person who fails to comply with a lawful command to disperse is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months.

(c) If any person remains at the scene of any riot, or disorderly conduct by an assemblage of three or more persons, following a command to disperse and after a reasonable time for dispersal has elapsed, it is prima facie evidence that the person so remaining is wilfully engaging in the riot or disorderly conduct, as the case may be. (1969, c. 869, s. 1.)

§ 14-288.6. Looting; trespass during emergency. — (a) Any person who enters upon the premises of another without legal justification when the usual security of property is not effective due to the occurrence or aftermath of riot, insurrection, invasion, storm, fire, explosion, flood, collapse, or other disaster or calamity is guilty of the misdemeanor of trespass during emergency and is punishable as provided in § 14-3 (a).

(b) Any person who commits the crime of trespass during emergency and, without legal justification, obtains or exerts control over, damages, ransacks, or destroys the property of another is guilty of the felony of looting and is punishable by a fine not to exceed ten thousand dollars ($10,000.00) or imprisonment for not more than five years, or both such fine and imprisonment. (1969, c. 869, s. 1.)

§ 14-288.7. Transporting dangerous weapon or substance during emergency; possessing off premises; exceptions.—(a) Except as otherwise provided in this section, it is unlawful for any person to transport or possess off his own premises any dangerous weapon or substance in any area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring.

(b) This section does not apply to persons exempted from the provisions of § 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

(c) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in § 14-3 (a). (1969, c. 869, s. 1.)

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.—(a) Except as otherwise provided in this section, it is unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction.

(b) This section does not apply to:

(1) Persons exempted from the provisions of § 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

(2) Importers, manufacturers, dealers, and collectors of firearms, ammunition, or destructive devices validly licensed under the laws of the United States or the State of North Carolina, while lawfully engaged in activities authorized under their licenses.

(3) Persons under contract with the United States, the State of North Carolina, or any agency of either government, with respect to any activities lawfully engaged in under their contracts.

(4) Inventors, designers, ordnance consultants and researchers, chemists, physicists, and other persons lawfully engaged in pursuits designed to enlarge knowledge or to facilitate the creation, development, or manufacture of weapons of mass death and destruction intended for use in a manner consistent with the laws of the United States and the State of North Carolina.

(c) The term "weapon of mass death and destruction" includes:

(1) Any explosive, incendiary, or poison gas:

a. Bomb; or

b. Grenade; or

c. Rocket having a propellant charge of more than four ounces; or

d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or

e. Mine; or

f. Device similar to any of the devices described above; or

(2) Any type of weapon (other than a shotgun or a shotgun shell of a type particularly suitable for sporting purposes) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or

(3) Any machine gun, sawed-off shotgun, or other weapon designed for rapid fire or inflicting widely dispersed injury or damage (other than a weapon of a type particularly suitable for sporting purposes); or

(4) Any combination of parts either designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled.

The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with chapter 44 of Title 18 of the United States Code.

(d) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in § 14-3 (a). (1969, c. 869, s. 1.)

§ 14-288.9. Assault on emergency personnel; punishments. — (a) An assault upon emergency personnel is an assault upon any person coming within the definition of "emergency personnel" which is committed in an area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring or is imminent.

(b) The term "emergency personnel" includes law-enforcement officers, firemen, ambulance attendants, utility workers, doctors, nurses, and other persons lawfully engaged in providing essential services during the emergency.

(c) Any person who commits an assault upon emergency personnel is guilty of a misdemeanor punishable as provided in § 14-3 (a). Any person who commits an assault upon emergency personnel with or through the use of any dangerous weapon or substance is guilty of a felony punishable by a fine not to exceed ten thousand dollars ($10,000.00) or imprisonment for not more than five years, or both such fine and imprisonment. (1969, c. 869, s. 1.)

§ 14-288.10. Frisk of persons during violent disorders; frisk of curfew violators.—(a) Any law-enforcement officer may frisk any person in order to discover any dangerous weapon or substance when he has reasonable grounds to believe that the person is or may become unlawfully involved in an existing riot and when the person is close enough to such riot that he could become immediately involved in the riot. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession.

(b) Any law-enforcement officer may frisk any person he finds violating the provisions of a curfew proclaimed under the authority of §§ 14-288.12, 14-288.13, 14-288.14, or 14-288.15 or any other applicable statutes or provisions of the common law in order to discover whether the person possesses any dangerous weapon or substance. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession. (1969, c. 869, s. 1.)

§ 14-288.11. Warrants to inspect vehicles in riot areas or approaching municipalities during emergencies. — (a) Notwithstanding the provisions of article 4 of chapter 15, any law-enforcement officer may, under the conditions specified in this section, obtain a warrant authorizing inspection of vehicles under the conditions and for the purpose specified in subsection (b).

(b) The inspection shall be for the purpose of discovering any dangerous weapon or substance likely to be used by one who is or may become unlawfully involved in a riot. The warrant may be sought to inspect:

(1) All vehicles entering or approaching a municipality in which a state of emergency exists; or

(2) All vehicles which might reasonably be regarded as being within or approaching the immediate vicinity of an existing riot.

(c) The warrant may be issued by any judge or justice of the General Court of Justice.

(d) The issuing official shall issue the warrant only when he has determined that the one seeking the warrant has been specifically authorized to do so by the head of the law-enforcement agency of which the affiant is a member, and:

(1) If the warrant is being sought for the inspection of vehicles entering or approaching a municipality, that a state of emergency exists within the municipality; or

(2) If the warrant being sought is for the inspection of vehicles within or approaching the immediate vicinity of a riot, that a riot is occurring within that area.

Facts indicating the basis of these determinations must be stated in an affidavit and signed by the affiant under oath or affirmation.

(e) The warrant must be signed by the issuing official and must bear the hour and date of its issuance.

(f) The warrant must indicate whether it is for the inspection of vehicles entering or approaching a municipality or whether it is for the inspection of vehicles within or approaching the immediate vicinity of a riot. In either case, it must also specify with reasonable precision the area within which it may be exercised.

(g) The warrant shall become invalid twenty-four hours following its issuance and must bear a notation to that effect.

(h) Warrants authorized under this section shall not be regarded as search warrants for the purposes of application of article 4 of chapter 15.

(i) Nothing in this section is intended to prevent warrantless frisks, searches, and inspections to the extent that they may be constitutional and consistent with common law and governing statutes. (1969, c. 869, s. 1.)

§ 14-288.12. Powers of municipalities to enact ordinances to deal with states of emergency.—(a) The governing body of any municipality may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

(b) The ordinances authorized by this section may permit prohibitions and restrictions:

(1) Of movements of people in public places;
(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate;
(3) Upon the possession, transportation, sale, purchase, and consumption of intoxicating liquors;
(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline; and
(5) Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

The ordinances may delegate to the mayor of the municipality the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) This section is intended to supplement and confirm the powers conferred by §§ 160-52, 160-200 (7), and all other general and local laws authorizing municipalities to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency.

(d) Any ordinance of a type authorized by this section promulgated prior to June 19, 1969 shall, if otherwise valid, continue in full force and effect without reenactment.

(e) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a misdemeanor punishable as provided in § 14-4. (1969, c. 869, s. 1.)

§ 14-288.13. Powers of counties to enact ordinances to deal with states of emergency.—(a) The governing body of any county may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

(b) The ordinances authorized by this section may permit the same prohibitions and restrictions to be imposed as enumerated in § 14-288.12 (b). The ordinances may delegate to the chairman of the board of county commissioners the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) No ordinance enacted by a county under the authority of this section shall apply within the corporate limits of any municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless the municipality by resolution consents to its application.

(d) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a misdemeanor punishable as provided in § 14-4. (1969, c. 869, s. 1.)

§ 14-288.14. Power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality.—(a) The chairman of the board of commissioners of any county who has been requested to do so by a mayor may by proclamation extend the effect of any one or more of

the prohibitions and restrictions imposed in that mayor's municipality pursuant to the authority granted in § 14-288.12. The chairman may extend such prohibitions and restrictions to any area within his county in which he determines it to be necessary to assist in controlling the state of emergency within the municipality. No prohibition or restriction extended by proclamation by the chairman under the authority of this section shall apply within the limits of any other municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless that other municipality by resolution consents to its application.

(b) Whenever any chairman of the board of county commissioners extends the effect of municipal prohibitions and restrictions under the authority of this section to any area of the county, it shall be deemed that a state of emergency has been validly found and declared with respect to such area of the county.

(c) Any chairman of a board of county commissioners extending prohibitions and restrictions under the authority of this section must take reasonable steps to give notice of its terms to those likely to be affected. The chairman of the board of commissioners shall proclaim the termination of any prohibitions and restrictions extended under the authority of this section upon:

(1) His determination that they are no longer necessary; or

(2) The determination of the board of county commissioners that they are no longer necessary; or

(3) The termination of the prohibitions and restrictions within the municipality.

(d) The powers authorized under this section may be exercised whether or not the county has enacted ordinances under the authority of § 14-288.13. Exercise of this authority shall not preclude the imposition of prohibitions and restrictions under any ordinances enacted by the county under the authority of § 14-288.13.

(e) Any person who violates any provision of any prohibition or restriction extended by proclamation under the authority of this section is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than thirty days. (1969, c. 869, s. 1.)

§ 14-288.15. Authority of Governor to exercise control in emergencies.—(a) When the Governor determines that a state of emergency exists in any part of North Carolina, he may exercise the powers conferred by this section if he further finds that local control of the emergency is insufficient to assure adequate protection for lives and property.

(b) Local control shall be deemed insufficient only if:

(1) Needed control cannot be imposed locally because local authorities responsible for preservation of the public peace have not enacted appropriate ordinances or issued appropriate proclamations as authorized by §§ 14-288.12, 14-288.13, or 14-288.14; or

(2) Local authorities have not taken implementing steps under such ordinances or proclamations, if enacted or proclaimed, for effectual control of the emergency that has arisen; or

(3) The area in which the state of emergency exists has spread across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered; or

(4) The scale of the emergency is so great that it exceeds the capability of local authorities to cope with it.

(c) The Governor when acting under the authority of this section may:

(1) By proclamation impose prohibitions and restrictions in all areas affected by the state of emergency; and

(2) Give to all participating State and local agencies and officers such direc-

tions as may be necessary to assure coordination among them. These directions may include the designation of the officer or agency responsible for directing and controlling the participation of all public agencies and officers in the emergency. The Governor may make this designation in any manner which, in his discretion, seems most likely to be effective. Any law-enforcement officer participating in the control of a state of emergency in which the Governor is exercising control under this section shall have the same power and authority as a sheriff throughout the territory to which he is assigned.

(d) The Governor in his discretion, as appropriate to deal with the emergency then occurring or likely to occur, may impose any one or more or all of the types of prohibitions and restrictions enumerated in § 14-288.12 (b), and may amend or rescind any prohibitions and restrictions imposed by local authorities.

(e) Any person who violates any provision of a proclamation of the Governor issued under the authority of this section is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months. (1969, c. 869, s. 1.)

§ 14-288.16. Effective time, publication, amendment, and recision of proclamations.—(a) This section applies to proclamations issued under the authority of §§ 14-288.12, 14-288.13, 14-288.14, and 14-288.15, and any other applicable statutes and provisions of the common law.

(b) All prohibitions and restrictions imposed by proclamation shall take effect immediately upon publication of the proclamation in the area affected unless the proclamation sets a later time. For the purpose of requiring compliance, publication may consist of reports of the substance of the prohibitions and restrictions in the mass communications media serving the affected area or other effective methods of disseminating the necessary information quickly. As soon as practicable, however, appropriate distribution of the full text of any proclamation shall be made. This subsection shall not be governed by the provisions of § 1-597.

(c) Prohibitions and restrictions may be extended as to time or area, amended, or rescinded by proclamation. Prohibitions and restrictions imposed by proclamation under the authority of §§ 14-288.12, 14-288.13, and 14-288.14 shall expire five days after their last imposition unless sooner terminated under § 14-288.14 (c) (3), by proclamation, or by the governing body of the county or municipality in question. Prohibitions and restrictions imposed by proclamation of the Governor shall expire five days after their last imposition unless sooner terminated by proclamation of the Governor. (1969, c. 869, s. 1.)

§ 14-288.17. Municipal and county ordinances may be made immediately effective if state of emergency exists or is imminent.—(a) Nothwithstanding any other provision of law, whether general or special, relating to the promulgation or publication of ordinances by any municipality or county, this section shall control with respect to any ordinances authorized by §§ 14-288.11 and 14-288.12.

(b) Upon proclamation by the mayor or chairman of the board of county commissioners that a state of emergency exists within the municipality or the county, or is imminent, any ordinance enacted under the authority of this article shall take effect immediately unless the ordinance sets a later time. If the effect of this section is to cause an ordinance to go into effect sooner than it otherwise could under the law applicable to the municipality or county, the mayor or chairman of the board of county commissioners, as the case may be, shall take steps to cause reports of the substance of any such ordinance to be disseminated in a fashion that such substance will likely be communicated to the public in general, or to those who may be particularly affected by the ordinance if it does not affect the public generally. As soon as practicable thereafter, appropriate distribution or publication of the full text of any such ordinance shall be made. (1969, c. 869, s. 1.)

§ 14-288.18. Injunction to cope with emergencies at public and private educational institutions.—(a) The chief administrative officer, or his authorized representative, of any public or private educational institution may apply to any superior court judge for injunctive relief if a state of emergency exists or is imminent within his institution. For the purposes of this section, the superintendent of any city or county administrative school unit shall be deemed the chief administrative officer of any public elementary or secondary school within his unit.

(b) Upon a finding by a superior court judge, to whom application has been made under the provisions of this section, that a state of emergency exists or is imminent within a public or private educational institution by reason of riot, disorderly conduct by three or more persons, or the imminent threat of riot, the judge may issue an injunction containing provisions appropriate to cope with the emergency then occurring or threatening. The injunction may be addressed to named persons or named or described groups of persons as to whom there is satisfactory cause for believing that they are contributing to the existing or imminent state of emergency, and ordering such persons or groups of persons to take or refrain or desist from taking such various actions as the judge finds it appropriate to include in his order. (1969, c. 869, s. 1.)

§ 14-288.19. Governor's power to order evacuation of public building.—(a) When it is determined by the Governor that a great public crisis, disaster, riot, catastrophe, or any other similar public emergency exists, or the occurrence of any such condition is imminent, and, in the Governor's opinion it is necessary to evacuate any building owned or controlled by any department, agency, institution, school, college, board, division, commission or subdivision of the State in order to maintain public order and safety or to afford adequate protection for lives or property, the Governor is hereby authorized to issue an order of evacuation directing all persons within the building to leave the building and its premises forthwith. The order shall be delivered to any law-enforcement officer or officer of the national guard, and such officer shall, by a suitable public address system, read the order to the occupants of the building and demand that the occupants forthwith evacuate said building within the time specified in the Governor's order.

(b) Any person who wilfully refuses to leave the building as directed in the Governor's order shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months, or both, in the discretion of the court. (1969, c. 1129.)

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-289. Advertising lotteries.—If anyone, by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (1887, c. 211; Rev., s. 3725; C. S., s. 4427.)

Editor's Note.—See the discussion in 5 N.C.L. Rev. 31.

§ 14-290. Dealing in lotteries.—If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods,

chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. (1834, c. 19, s. 1; R. C., c. 34, s. 69; 1874-5, c. 96; Code, s. 1047; Rev., s. 3726; C. S., s. 4428; 1933, c. 434; 1937, c. 157.)

In General.—A lottery may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. State v. Lipkin, 169 N.C. 265, 84 S.E. 340 (1915). Statutes, such as this section, regulating such schemes violate neither the State nor federal Constitution. They are remedial and should be liberally construed. And the fact that the device is an advertising scheme of an otherwise legitimately run business concern does not prevent the section from applying. Brevard Mfg. Co. v. Benjamin & Sons, 172 N.C. 53, 89 S.E. 797 (1916). See State v. Lumsden, 89 N.C. 572 (1883).

This section refers to persons who promote, make or draw, publicly or privately, a lottery, by whatever name, while § 14-291.1, deals only with those persons who shall "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order," etc. Thus it is apparent that the two statutes not only act upon different persons and serve purposes which are not the same but also they deal with different conditions. One inveighs against trafficking in lottery tickets and the other is designed to affect those persons engaged in promoting a particular kind of lottery. State v. Robinson, 224 N.C. 412, 30 S.E.2d 320 (1944).

Amendment of 1933 Valid. — The 1933 amendment to this section which makes the possession of tickets, etc., used in the operation of a lottery prima facie evidence of violation of the section, is constitutional and valid, the presumption being a rational one. State v. Fowler, 205 N.C. 608, 172 S.E. 191 (1934).

Actual Physical Possession Unnecessary. — The possession of lottery tickets sufficient to raise prima facie evidence of the violation of this section, need not be actual physical possession, and they need not be found on defendant's person, it being sufficient if they are found in his place of business under his control. State v. Jones, 213 N.C. 640, 197 S.E. 152 (1938).

Note for Lottery Contract.—Notes given in pursuance of a contract prohibited by this section are for an illegal consideration, and collection thereof is not enforcible in the courts of the State. Brevard Mfg. Co. v. Benjamin & Sons, 172 N.C. 53, 89 S.E. 797 (1916).

Surety to Lottery Contract. — A bond guaranteeing the performance of a "trade expansion contract" which is contrary to this section, is as unenforceable against the surety thereon as the contract upon which it is founded. Basnight v. American Mfg. Co., 174 N.C. 206, 93 S.E. 734 (1917).

Lottery Privilege Not a Contract. — A right, conferred in the charter of a corporation, to dispose of property by means of lottery tickets, is not a contract between the corporation and the State, but a mere privilege or license, and is revocable at will by the legislative power. State v. Morris, 77 N.C. 512 (1877).

Purchaser Not Included.—This section does not embrace persons who buy lottery tickets. State v. Bryant, 74 N.C. 207 (1876).

Admissibility of Evidence. — In establishing the promotion of the lottery by circumstantial evidence it was permissible for the State to show the association of the defendants together with their financial relation and transactions. The declaration of one defendant as to the other's participation in the enterprise and as to their protection if they were caught was also competent. State v. Ingram, 204 N.C. 557, 168 S.E. 837 (1933).

In a prosecution for possession of lottery tickets, testimony that on another ocsion a short time previously like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was

engaged in operating a lottery. State v. Bryant, 231 N.C. 106, 55 S.E.2d 922 (1949).

Sufficiency of Evidence.—Evidence that numerous lottery tickets and lottery ticket books were found in the store operated by defendant is sufficient to be submitted to the jury in a prosecution under this section, and defendant's contention that there was no evidence that he was in charge of the store is untenable when the record discloses that several witnesses referred to the locus in quo as defendant's place of business. State v. Jones, 213 N.C. 640, 197 S.E. 152 (1938).

Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same, is sufficient to be submitted to the jury in prosecution for operating a lottery and for illegal possession of lottery tickets, the evidence being sufficient to make out a prima facie case under the provisions of this section. State v. Powell, 219 N.C. 220, 13 S.E.2d 232 (1941).

Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

Circumstantial evidence of defendant's guilt of conspiracy or participation in lottery held insufficient. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953).

Applied in State v. Blanton, 207 N.C. 872, 180 S.E. 81 (1935); State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944).

Cited in State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

§ 14-291. Selling lottery tickets and acting as agent for lotteries.—If any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a misdemeanor, and shall be punished as provided for in § 14-290. (1834, c. 19, s. 2; R. C., c. 34, s. 70; Code, s. 1048; Rev., s. 3727; C. S., s. 4429.)

Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.—If any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the State, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section. (1943, c. 550.)

Cross Reference.—See note under § 14-290.

"Barter" and "sell" are not used as synonyms in this section. Barter is a contract by which parties exchange one commodity for another. It differs from a sale, in that the latter is a transfer of goods for a specified price, payable in money. This being so, an accused may violate this section in four distinct ways. He may sell the illegal articles, or he may barter them, or he may cause another to sell them, or he may cause another to barter them. State v. Albarty, 238 N.C. 130, 76 S.E.2d 381 (1953).

Admissibility of Evidence.—In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the Stae's view that defendant was engaged in operating a lottery. State v. Bryant, 231 N.C. 106, 55 S.E.2d 922 (1949).

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

Circumstantial evidence of defendant's guilt of conspiracy or participation in lottery held insufficient. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953).

Punishment. — A sentence and fine imposed upon conviction of violating this section are in personam; an order of confiscation entered under § 14-299 is in rem and is no part of the personal judgment against the accused. State v. Richardson, 228 N.C. 426, 45 S.E.2d 536 (1947). See note to § 14-299.

Applied in State v. Upchurch, 267 N.C. 417, 148 S.E.2d 259 (1966).

Cited in State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951); State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

§ 14-292. Gambling.—If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor. (1891, c. 29; Rev., s. 3715; C. S., s. 4430.)

Cross Reference. — As to gaming contracts, see § 16-1 et seq.

Editor's Note.—See 11 N.C.L. Rev. 248, for reference to acts legalizing pari-mutuel race track betting.

In General.—Betting is essential to the offense; playing without betting is not indictable. State v. Brannen, 53 N.C. 208 (1860). The section does not apply to prizes given for skill—here there is no betting. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895). Tenpins is not a game of chance. State v. King, 113 N.C. 631, 18 S.E. 169 (1903).

All who engage in gambling are principals. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895). A defendant may be indicted for keeping a gaming house and playing for money, without misjoinder. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Calling Transaction a Raffle. — Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895).

Horse racing is included in the category of "gaming" or "gambling." The word "game" is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid on the chance of a game, and it is gaming. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Betting on horse racing, or on any other sort of race, is an offense against the criminal law. The fact that the race itself is one of skill and endurance on the part of the jockey and his mount does not confer immunity upon those who wager on its result. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Betting on dog races under a pari-mutuel system having no other purpose than that of providing the facilities by means of tickets, machines, etc., for placing bets, calculating odds, determining winnings, if any, constitutes gambling within the meaning of this section. State ex rel. Taylor v. California Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Games of Chance and Games of Skill.—A game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

"The universal acceptation of 'a game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." State v. Gupton, 30 N.C. 271 (1848), quoted in State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

For illustrations of games of chance and games of skill, see State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Ordinances as to Gambling Void. — Gambling being an offense under the general law, a city ordinance covering the same subject is void. State v. McCoy, 116 N.C. 1059, 21 S.E. 690 (1895).

Sufficiency of Indictment. — An indictment charging defendant with keeping and maintaining a gaming house is sufficient, though it is not alleged that the games played there were games of chance, or that they were played at a place or tables where games of chance were played. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Evidence Sufficient for Submission to Jury. — Evidence as to rules and method of playing "Negro Pool" was held sufficient to be submitted to the jury on the question of whether the game is a game of chance within the purview of this section. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Evidence that all defendants wagered money on the results of a game of chance played by some of them was held sufficient to overrule their motions to nonsuit in a prosecution under this section. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Instruction. — An instruction that "the object of the gambling statute is to prevent people from getting something for nothing" without defining the term "game of chance" constituting an essential ele-

ment of the offense charged, was held reversible error. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Cited in State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

§ 14-293. Allowing gambling in houses of public entertainment; penalty.—If any keeper of an ordinary or other house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and shall be fined not less than five hundred dollars and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this State. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. (1799, c. 526, P. R.; 1801, c. 581, P. R.; 1831, c. 26; R. C., c. 34, s. 76; Code, s. 1043; 1901, c. 753; Rev., s. 3716; C. S., s. 4431; 1967, c. 101, s. 1.)

Editor's Note. — The 1967 amendment struck out the former fourth, fifth, sixth and seventh sentences, relating to the duties of police officers and of the mayor or other chief officer of the city, town or village, and the former eighth sentence, providing an additional penalty, recoverable in a civil suit. Section 2 of the amendatory act provides: "All actions, civil or criminal, arising under those former provisions of G.S. 14-293 repealed by s. 1 of this act, and which have not heretofore been instituted, shall be barred." The act was ratified March 28, 1967, and made effective on ratification.

Gambling in Leased Room of Tavern.— Where it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been leased and was not under the control of the landlord, it was held that the defendant landlord could not be convicted under this section. State v. Keisler, 51 N.C. 73 (1858).

Houses Where Liquor Was Retailed.— For case under this provision, see State v. Terry, 20 N.C. 325 (1839).

Sufficiency of Warrant. — A warrant charging that defendant did operate a house in which various types of gambling "is continuously carried on" and did permit named persons to engage in a game of cards in which money was bet, held sufficient to charge defendant with operating a gambling house. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963).

Excessive Punishment. — For the violation of this section a fine of two thousand dollars and imprisonment for thirty days, and thereafter until the fine and costs were paid, was held not excessive punishment. State v. Miller, 94 N.C. 904 (1886).

Cited in State v. McHone, 243 N.C. 235, 90 S.E.2d 539 (1955).

§ 14-294. Gambling with faro banks and tables.—If any person shall open, establish, use or keep a faro bank, or a faro table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property or other thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor, and shall be fined at least two hundred dollars and imprisoned not less than three months. (1848, c. 34; R. C., c. 71; 1856-7, c. 25; Code, s. 1044; Rev., s. 3717; C. S., s. 4432.)

Cross Reference. — As to compelling testimony in cases when this section and §§ 14-295 through 14-297 have been violated, see § 8-55.

Cited in State v. Norwood, 94 N.C. 935 (1886).

§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.—If any person shall establish, use or keep any gaming table (other than a faro bank), by whatever name such table may be

called, an illegal punchboard or an illegal slot machine, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars and shall be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars. (1791, c. 336, P. R.; 1798, c. 502, s. 2, P. R.; R. C., c. 34, s. 72; Code, s. 1045; Rev., s. 3718; C. S., s. 4433; 1931, c. 14, s. 2.)

Cross Reference. — See notes to §§ 14-292 and 14-296.

Indictment.—An indictment under this section is good, without any averment that the act was done "willfully and unlawfully" or that the games of chance were played at such table for money or other property. State v. Howe, 100 N.C. 449, 5 S.E. 671 (1888).

But a bill of indictment which does not charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed. State v. Norwood, 94 N.C. 935 (1886).

Evidence Admissible. — Where defendants admit keeping gaming tables, evidence may be admitted tending to show they were continuously present at the place and tending to show their large share in the receipts of these tables. State v. Galloway, 188 N.C. 416, 124 S.E. 745 (1924).

Cited in State v. McHone, 243 N.C. 235, 90 S.E.2d 539 (1955); State v. Bryant, 74 N.C. 207 (1876); State v. Humphries, 210 N.C. 406, 186 S.E. 473 (1936); State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

§ 14-296. Illegal slot machines and punchboards defined.—An illegal slot machine or punchboard within the contemplation of §§ 14-295 through 14-298 is defined as one that shall not produce for or give to the person who places coin or money or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. (1931, c. 14, s. 1.)

Editor's Note.—The act from which this section was taken amended §§ 14-295 through 14-298 to make them applicable to illegal slot machines and punchboards. The act expressively provided that it should not have the effect of modifying in any way §§ 14-301 through 14-303 and should be construed as supplemental thereto.

Cited in Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

§ 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.—If any person shall knowingly suffer to be opened, kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables prohibited by §§ 14-289 through 14-300 or any illegal punchboard or illegal slot machine, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned. (1798, c. 502, s. 3, P. R.; 1800, c. 5, s. 2, P. R.; R. C., c. 34, s. 73; Code, s. 1046; Rev., s. 3719; C. S., s. 4434; 1931, c. 14, s. 3.)

Cross Reference.—See note to § 14-296.

Where the agreed statement of facts in an action to recover the penalty under this section states that defendant kept a slot machine in his store, without a finding that the machine was illegal, the findings are insufficient to support a judgment against defendant. Nivens v. Justice, 210 N.C. 349, 186 S.E. 237 (1936).

Cited in State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

§ 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by justices and police officers. — All justices of the peace, sheriffs, constables and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by §§ 14-289 through 14-300, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (1791,

c. 336, P. R.; 1798, c. 502, s. 2, P. R.; R. C., c. 34, s. 74; Code, s. 1049; Rev., s. 3720; C. S., s. 4435; 1931, c. 14, s. 4.)

Cross Reference.—See note to § 14-296.

Enjoining Officers. — The court should have found whether the slot machines involved were illegal in determining the plaintiff's right to enjoin officers from interfering with his business. McCormick v. Proctor, 217 N.C. 23, 6 S.E.2d 870 (1940).

Cited in Daniels v. Homer, 139 N.C. 219, 51 S.E. 992 (1905).

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.—All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, including any motor vehicle used in the conduct of a lottery within the purview of G.S. 14-291.1, shall be liable to be seized by any justice of the peace or other court of competent jurisdiction or by any person acting under his or its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general fund of the county. Any property seized which is used for and is suitable only for gambling shall be destroyed, and all other property so seized shall be sold in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall (after deducting the expenses of keeping the property and the costs of the sale and after paying, according to their priorities all known prior, bona fide liens which were created without the lienor having knowledge or notice that the motor vehicle or other property was being used or to be used in connection with the conduct of such game or lottery) be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county. (1798, c. 502, s. 3, P. R.; R. C., c. 34, s. 77; Code, s. 1051; Rev., s. 3722; C. S., s. 4436; 1943, c. 84; 1957, c. 501.)

A confiscation order entered under this section is no part of the personal judgment imposed under § 14-29.1. Hence, a defendant may comply with the personal judgment entered against him upon conviction of violating § 14-291.1, and at the same time prosecute an appeal from an order of confiscation entered under this section, whether embraced in the same judgment or not; but the failure to appeal the personal judgment, while not estopping him for further contesting the order of confiscation, forever precludes him from contesting the fact of guilt. State v. Richardson, 228 N.C. 426, 45 S.E.2d 536 (1947).

Cited in North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

§ 14-300. Opposing destruction of gaming tables and seizure of property.—If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the State and the person so opposed, and shall, moreover, be guilty of a misdemeanor. (1798, c. 502, s. 4, P. R.; R. C., c. 34, s. 78; Code, s. 1052; Rev., s. 3723; C. S., s. 4437.)

Cited in North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

§ 14-301. Operation or possession of slot machine; separate offenses.—It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. Each time said machine is operated as aforesaid shall constitute a separate offense. (1923, c. 138, ss. 1, 2; C. S., s. 4437(a).)

Construed with § 14-304.—This section and §§ 14-302, 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed

by §§ 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Where an indictment charged defendant in one count with ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, §§ 14-304 through 14-309, and charged defendant in the second count with the operation and possession of certain illegal slot machines, under this section and §§ 14-302, 14-303, it was held that the different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon, and defendant's contention of duplicity is untenable. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Value Required to Be Given.—Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within the condemnation of the statute. State v. May, 188 N.C. 470, 125 S.E. 9 (1924).

License of Lawful Machines Only.—The State license issued for the operation of a slot machine is for one that is lawful and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. State v. May, 188 N.C. 470, 125 S.E. 9 (1924).

Sufficiency of Indictment. — An indictment charging that the defendant "unlawfully and wilfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute," etc., is insufficient because it fails to inform the accused of the specific offense or the necessary ingredients thereof, notwithstanding the statute is cited. State v. Ballangee, 191 N.C. 700, 132 S.E. 795 (1926).

Cited in Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.—It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, for the purpose of being operated, any punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another, by paying money or other thing of value for the privilege of operating, playing or patronizing same, whether through himself or another, the same return in market value, each and every time such punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played or patronized by paying of money or other thing of value for the privilege thereof. Each time said punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played, or patronized by the paying of money or other thing of value therefor, shall constitute a separate violation of this section as to operation thereunder. (1923, c. 138, ss. 3, 4; C. S., s. 4437(b).)

An essential element of the offense created by this section is the operation of the gambling device or the keeping in possession of such device for the purpose of being operated; the mere having in possession of gambling devices, and nothing more, is not made a criminal offense. State v. Sheppard, 4 N.C. App. 670, 167 S.E.2d 535 (1969).

An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being operated, is fatally defective. State v. Jones, 218 N.C. 734, 12 S.E.2d 292 (1940); State v. Sheppard, 4 N.C. App. 670, 167 S.E.2d 535 (1969).

Applied in State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945).

§ 14-303. Violation of two preceding sections a misdemeanor.—A violation of any of the provisions of §§ 14-301, 14-302 shall be a misdemeanor punishable by a fine or imprisonment, or, in the discretion of the court, by both. (1923, c. 138, s. 5; C. S., s. 4437(c).)

Applied in State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945).

§ 14-304. Manufacture, sale, etc., of slot machines and devices.—It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device. (1937, c. 196, s. 1.)

Editor's Note. — For comment on this and the following sections, see 15 N.C.L. Rev. 340.

Constitutionality. — This and following sections, prohibiting coin slot machines in the operation of which a player may make varying scores or tallies upon which wages may be made, and differentiating between such machines and those returning a definite and unvarying service or things of value each time they are played, are in accord with the policy of the State to suppress gambling and have a reasonable relation to this objective, and this statute is constitutional as a reasonable regulation relating to the public morals and welfare, well within the police power of the State. Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938); State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940).

Construed with § 14-301.—See note to § 14-301.

Not Repealed by 1939 Licensing Act.—The provisions of the Flanagan Act, ch. 196, Public Laws of 1937, proscribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine were not repealed by § 105-65.1. State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940), followed in 218 N.C. 480, 11 S.E.2d 545 (1940).

Testimony as to Description and Operation of Machines.—In a prosecution under this section it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation. State v. Davis, 229 N.C. 552, 50 S.E.2d 668 (1948).

Cited in State v. Finch, 218 N.C. 511, 11 S.E.2d 547 (1940).

§ 14-305. Agreements with reference to slot machines or devices made unlawful.—It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machines or device, pursuant to which the user thereof may become entitled to receive any money, credit, allowance, or anything of value or additional chance or right to use such machines or devices, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1937, c. 196, s. 2.)

§ 14-306. Slot machine or device defined.—Any machine, apparatus or device is a slot machine or device within the provisions of §§ 14-304 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or any other machine or device designed and manufactured primarily for use in connection with gambling and which machine or device is classified by the United States as requiring a federal gaming device tax stamp under applicable provisions of the Internal Revenue Code. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be

deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies. This definition shall not include coin-operated machines or devices designed and manufactured to be played for amusement only and the operation of which depends in part upon the skill of the player. (1937, c. 196, s. 3; 1967, c. 1219.)

Editor's Note. — The 1967 amendment rewrote the portion of the first sentence that follows the semicolon therein and added the last sentence.

An indictment charging the ownership and distribution of slot machines adapted for use in such a way that as a result of the insertion of a coin the machine may be operated in such a manner that the user may secure additional chances or rights to use such machine and upon which the user has a chance to make various scores upon the outcome of which wagers may be made, follows the language of this section and is sufficient to charge the offense therein defined. State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940), followed in 218 N.C. 480, 11 S.E.2d 545 (1940).

Evidence.—Where it was admitted that the machines in question were owned by one defendant and rented by him to the other defendants, testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes was evidence sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine because of lack of soldering tools, did not amount to a failure of the State's evidence upon the critical issue. State v. Davis, 229 N.C. 552, 50 S.E.2d 668 (1948).

§ **14-307. Issuance of license prohibited.** — There shall be no State, county, or municipal tax levied for the privilege of operating the machines or devices the operation of which is prohibited by §§ 14-304 through 14-309. (1937, c. 196, s. 4.)

§ **14-308. Declared a public nuisance.**—An article or apparatus maintained or kept in violation of §§ 14-304 through 14-309 is a public nuisance. (1937, c. 196, s. 5.)

§ **14-309. Violation made misdemeanor.**—Any person who violates any provision of §§ 14-304 through 14-309 is guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 196, s. 6.)

Article 38.

Marathon Dances and Similar Endurance Contests.

§ **14-310. Dance marathons and walkathons prohibited.**—It shall be unlawful for any person, firm, association or corporation to promote, advertise or conduct any marathon dance contests, walkathon contests and/or similar endurance contests, by whatever name called, of walking or dancing, and it shall be unlawful for any person to participate in any marathon dance contest, walkathon contest, and/or similar physical endurance contests by walking and dancing continuing or intended to continue for a period of more than eight consecutive hours, whether or not an admission is charged and/or a prize awarded, and it shall be unlawful for any person to participate in more than one such contest or performance within any period of forty-eight hours. (1935, c. 13, s. 1.)

§ **14-311. Penalty for violation.**—Any persons violating the provisions of this article shall be guilty of a misdemeanor and shall be punishable by imprisonment in the county or municipal jail for not less than thirty days nor more than ninety days, or by a fine of not less than fifty dollars ($50.00) nor

more than five hundred dollars ($500.00), or by both such fine and imprisonment in the discretion of the court. (1935, c. 13, s. 2.)

§ 14-312. Each day made separate offense.—Each and every day that any person, firm or corporation shall continue such a contest or engage in any such activities and/or each day's participation in such contest or advertisement of the same or do any act in violation of the provisions of this article shall be and constitute a distinct and separate offense. (1935, c. 13, s. 3.)

ARTICLE 39.

Protection of Minors.

§ 14-313. Selling cigarettes to minors.—If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes, or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years, or if any person shall aid, assist or abet any other person in selling such articles to such minor, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1891, c. 276; Rev., s. 3804; C. S., s. 4438; 1969, c. 1224, s. 3.)

Cross Reference.—As to giving intoxicants to unmarried minors under 17 years of age, see §§ 14-331 and 14-332.

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

§ 14-314. Aiding minors in procuring cigarettes; duty of police officers.—If any person shall aid or assist any minor child under seventeen years old in obtaining the possession of cigarettes, or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

It shall be the duty of every police officer, upon knowledge or information that any minor under the age of seventeen years is or has been smoking any cigarette, to inquire of any such minor the name of the person who sold or gave him such cigarette, or the substance from which it was made, or who aided and abetted in effecting such gift or sale. Upon receiving this information from any such minor, the officer shall forthwith cause a warrant to be issued for the person giving or selling, or aiding and abetting in the giving or selling of such cigarette or the substance out of which it was made, and have such person dealt with as the law directs. Any such minor who shall fail or refuse to give to any officer, upon inquiry, the name of the person selling or giving him such cigarette, or the substance out of which it was made, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1891, c. 276, s. 2; Rev., s. 3805; 1913, c. 185; C. S., s. 4439; 1969, c. 1224, ss. 1, 7.)

Editor's Note. — The 1969 amendment substituted, at the end of the first paragraph, the present provisions as to punishment for provisions for punishment by fine or imprisonment in the discretion of the court. The amendment also added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ 14-315. Selling or giving weapons to minors.—If any person shall knowingly sell, offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie knife, dirk, loaded cane or slingshot, he shall be guilty of a misdemeanor. (1893, c. 514; Rev., s. 3832; C. S., s. 4440.)

§ 14-316. Permitting young children to use dangerous firearms.—(a) It shall be unlawful for any parent, guardian, or person standing in loco parentis, to knowingly permit his child under the age of twelve years to have the possession, custody or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such weapon be loaded or unloaded, except when such child is under the supervision of the parent, guardian or person standing in loco parentis. It shall be unlawful for any other person to knowingly furnish such child any weapon enumerated herein. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days.

(b) Air rifles, air pistols, and BB guns shall not be deemed "dangerous firearms" within the meaning of subsection (a) of this section except in the following counties: Anson, Caldwell, Caswell, Chowan, Cleveland, Durham, Forsyth, Gaston, Harnett, Haywood, Mecklenburg, Stanly, Stokes, Surry, Union, Vance. (1913, c. 32; C. S., s. 4441; 1965, c. 813.)

§ 14-316.1. Neglect by parents; encouraging delinquency by others; penalty.—(a) A parent, guardian, or other person having custody of a child, who omits to exercise reasonable diligence in the care, protection, or control of such child or who knowingly or wilfully permits such child to associate with vicious, immoral, or criminal persons, or to beg or solicit alms, or to be an habitual truant from school, or to enter any house of prostitution or assignation, or any place where gambling is carried on, or to enter any place which may be injurious to the morals, health, or general welfare of such child, and any such person or any other person who knowingly or wilfully is responsible for, or who encourages, aids, causes, or connives at, or who knowingly or wilfully does any act to produce, promote, or contribute to, any condition of delinquency or neglect of such child shall be guilty of a misdemeanor.

(b) It shall not be necessary that there shall have been a prior adjudication of delinquency or neglect of the child in order to proceed under this statute.

(c) A prior adjudication of delinquency or neglect shall not preclude a subsequent proceeding against any parent, guardian or other person who thereafter contributes to any condition of delinquency or neglect. (1919, c. 97, s. 19; C. S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4.)

Editor's Note. — This section formerly appeared as § 110-39. It was transferred to its present position by Session Laws 1969, c. 911, s. 4.

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

§ 14-317. Permitting minors to enter barrooms or billiard rooms.—If the manager or owner of any barroom, wherein beer, wine, or any alcoholic beverages are sold or consumed, or billiard room shall knowingly allow any minor under 18 years of age to enter or remain in such barroom or billiard room, where before such minor under 18 years of age enters or remains in such barroom or billiard room, the manager or owner thereof has been notified in writing by the parents or guardian of such minor under 18 years of age not to allow him to enter or remain in such barroom or billiard room, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (1897, c. 278; Rev., s. 3729; C. S., s. 4442; 1967, c. 1089.)

Editor's Note. — The 1967 amendment rewrote this section.

§ 14-318. Exposing children to fire. — If any person shall leave any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or

enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court. (1893, c. 12; Rev., s. 3795; C. S., s. 4443.)

§ 14-318.1. Discarding or abandoning iceboxes, etc.; precautions required.—It shall be unlawful for any person, firm or corporation to discard, abandon, leave or allow to remain in any place any icebox, refrigerator or other container, device or equipment of any kind with an interior storage area of more than one and one-half (1½) cubic feet of clear space which is airtight, without first removing the door or doors or hinges from such icebox, refrigerator, container, device or equipment. This section shall not apply to any icebox, refrigerator, container, device or equipment which is being used for the purpose for which it was originally designed, or is being used for display purposes by any retail or wholesale merchant, or is crated, strapped or locked to such an extent that it is impossible for a child to obtain access to any airtight compartment thereof. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court. (1955, c. 305.)

§ 14-318.2. Immunity of physicians and others who report abuse or neglect of children.—Any licensed physician or surgeon, any licensed nurse, any school teacher, principal, superintendent, or other administrative head of a school, or any employee of a county department of public welfare, who in the pursuit of his profession or occupation shall make an observation or acquire information causing him to believe that a child under the age of sixteen years suffers from any illness or has had any injury inflicted upon him as a result of abuse or neglect by a parent, stepparent, guardian, custodian, a person standing in loco parentis to such child, or an institution, or an agent or employee of an institution, having the authority of a parent or guardian over such child, may report to the county director of public welfare of the county where the child resides, the names and addresses of the child and his parents or other persons responsible for his care, the age of the child, the nature and extent of the child's injury or illness, including any evidence of previous injury or illness and any other information that the maker of the report shall believe might be helpful in establishing the cause of the injury or illness and the identity of the person causing or responsible for the abuse, neglect, injury or illness.

Anyone who makes a report pursuant to this statute and anyone who testifies in any judicial proceeding resulting from the report shall be immune from any civil or criminal liability that might otherwise be incurred or imposed for so doing, unless such person acted in bad faith or with malicious purpose. (1965, c. 472, s. 1.)

Editor's Note.—The act inserting this section was effective as of July 1, 1965.

§ 14-318.3. County directors of public welfare to investigate such reports.—The county director of public welfare upon receiving the report referred to in G.S. 14-318.2, shall investigate to attempt to determine who caused the abuse, neglect, injury or illness, and shall take such action in accordance with law necessary to prevent the child from being subjected to further abuse, neglect, injury or illness. (1965, c. 472, s. 1.)

§ 14-319. Marrying females under sixteen years old.—If any person shall marry a female under the age of sixteen years, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1820, c. 1041, ss. 1, 2, P. R.; R. C., c. 34, s. 46; Code, s. 1083; Rev., s. 3368; C. S., s. 4444; 1947, c. 383, s. 1; 1969, c. 1224, s. 1.)

Cross Reference. — As to capacity to marry in general, see § 51-2.

Editor's Note. — The 1969 amendment added, at the end of the section, "punish-

able by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Cited in Caroon v. Rogers, 51 N.C. 240 (1858).

§ 14-320. Separating child under six months old from mother.—It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the State for such purpose, without the written consent of either the county director of public welfare of the county in which the mother resides, or of the county in which the child was born, or of a private child-placing agency duly licensed by the State Board of Public Welfare; but the written consent of any of the officials named in this section shall not be necessary for a child when the mother places the child with relatives or in a boarding home or institution inspected and licensed by the State Board of Public Welfare. Such consent when required shall be filed in the records of the official or agency giving consent. Any person or agency violating the provisions of this section shall, upon conviction, be fined not exceeding five hundred dollars ($500.00) or imprisoned for not more than one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240; C. S., s. 4445; 1939, c. 56; 1945, c. 669; 1949, c. 491; 1965, c. 356.)

Cross Reference.—As to adoption generally, see chapter 48.

§ 14-320.1. Transporting child outside the State with intent to violate custody order.—When any court of competent jurisdiction in this State shall have awarded custody of a child under the age of sixteen years, it shall be a felony for any person with the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State. Such crime shall be punishable by a fine in the discretion of the court or by imprisonment in the State's prison for not more than three years, in the discretion of the court, or by both such fine and imprisonment. Provided that keeping a child outside the limits of the State in violation of a court order for a period in excess of seventy-two hours shall be prima facie evidence that the person charged intended to violate the order at the time of taking. (1969, c. 81.)

Opinions of Attorney General.—Mr. John Morton, Attorney at Law, 8/27/69.

§ 14-321. Failing to pay minors for doing certain work.—Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1893, c. 309; Rev., s. 3428a; C. S., s. 4446.)

Cross Reference.—As to child labor regulations, see § 110-1 et seq.

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment by husband or parent.—If any husband shall wilfully abandon his wife without providing her with adequate support or if any

father or mother shall wilfully neglect or refuse to provide adequate support for his or her child or children, whether natural or adopted, whether or not he or she abandons said child or children, he or she shall be guilty of a misdemeanor and upon conviction for the first offense shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court; upon conviction of a second or subsequent offense he or she shall be punished by fine or by imprisonment not exceeding two years, or both, in the discretion of the court; and such wilful neglect or refusal shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen (18) years. (1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; Code, s. 970; Rev., s. 3355; C. S., s. 4447; 1925, c. 290; 1949, c. 810; 1957, c. 369; 1969, c. 1045, s. 1.)

Cross References.—As to failure of husband to provide adequate support for family, see § 14-325. As to competency of wife's testimony upon trial of husband for abandonment, see § 8-57. As to abandonment of child under sixteen by mother, see § 14-326.

Editor's Note. — The 1969 amendment inserted the language beginning "and upon conviction" and ending "in the discretion of the court" near the middle of the section.

For discussion of statutory abandonment, see 38 N.C.L. Rev. 1 (1959).

The purpose of this section was to make unlawful a willful abandonment of a wife by a husband without providing adequate support for her. It is not made unlawful for a husband to simply willfully abandon his wife—a husband is not compelled to live with his wife if he provides her adequate support. Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939); State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947).

Section must be strictly construed. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941); State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947).

It has no application to illegitimate children, and therefore an indictment drawn under this section charging defendant with the abandoment of his illegitimate child fails to charge a crime. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941).

This section relates only to legitimate children. An illegitimate child is not protected thereby. Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949), citing State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941).

Elements of Offense. — To violate this section one must willfully abandon his wife or children without providing adequate support. Abandonment does not violate it unless followed by nonsupport; and nonsupport does not constitute the offense unless preceded by abandonment. Both essential elements must exist to constitute the crime. Fowler v. Ross, 196 F.2d 25 (D.C.C. 1952).

In a prosecution under this section, the State must establish (1) a wilful abandonment, and (2) a wilful failure to provide adequate support. Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957); Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

In a prosecution under this section, the failure by a defendant to provide adequate support for his child must be willful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved. State v. Hall, 251 N.C. 211, 110 S.E.2d 868 (1959).

Abandonment under § 50-7 (1) is not synonymous with the criminal offense defined in this section. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

The duty to support is primarily the obligation of the father. Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962).

And He Cannot Relieve Himself of It by Contract. — A father cannot, by contract, relieve himself of his obligation to support his child. Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962).

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its wilful neglect or abandonment. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

This section in express terms constitutes the abandonment of children by the father a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law. State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936).

Due to continuing nature of the crime under this section, a person, arrested in Georgia and sought to be extradited to North Carolina, who temporarily came into the State after the commission of the crime, although for an innocent purpose, was a fugitive from justice when he again departed from the State. Daugherty v. Hornsby, 151 F.2d 799 (5th Cir. 1945).

Abandonment of children by their father is a continuing offense, and therefore, termination of a prosecution in defendant's favor will not preclude a subsequent prosecution. State v. Smith, 241 N.C. 301, 84 S.E.2d 913 (1954).

If the mother is guilty of nonsupport, this section provides a remedy and this remedy is exclusive. Hensen v. Thomas, 231 N.C. 173, 56 S.E.2d 432, 12 A.L.R.2d 1171 (1949).

Two Offenses Created. — This section evinces the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the willful abandonment by the father of his children of the marriage; especially when construed in connection with § 14-325, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her." State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

This section as amended in 1949 defines clearly two separate and distinct offenses. If the State desires to prosecute for both offenses, each offense should be fully charged in a separate bill of indictment or as a seperate count in the bill of indictment. State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955); State v. Outlaw, 242 N.C. 220, 87 S.E.2d 303 (1955).

Where Offense Committed.—The crime defined in this section is not committed —is not begun—unless the husband willfully abandons his wife and children in North Carolina. So, abandonment in North Carolina must precede failure to provide adequate support before nonsupport can be said to be a day by day repetition of the offense. Both essential acts must take place in North Carolina. Fowler v. Ross, 196 F.2d 25 (D.C.C. 1952).

As to when offense of failure to support child deemed committed in State, see § 14-325.1.

Construed with § 14-325. — Where the husband has been convicted of wilfully abandoning his wife and minor children (under this section); and, secondly, of wilfully failing to support them (§ 14-325), an order suspending judgment upon the second count, to take effect, however, upon the defendant's failure to comply with the order for support under this first one, is not objectionable as being conditional or alternative. State v. Vickers, 196 N.C. 239, 145 S.E. 175 (1928).

Indictment. — An indictment against a husband for abandoning his wife must aver his failure to support her. State v. May, 132 N.C. 1020, 43 S.E. 819 (1903).

Abandonment Must Be Willful. — The willful abandonment of the wife is an essential element of the offense made criminal by this section, and this, the prosecutrix is required to show beyond a reasonable doubt. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913); State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921); State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947).

But there is no reversible error in the charge of the court for omitting the word "willful" in one part thereof when he has elsewhere repeatedly instructed the jury that in order to convict the abandonment must have been willful, which must be proved beyond a reasonable doubt. State v. Taylor, 175 N.C. 833, 96 S.E. 22 (1918).

Where the defendant is indicted under this section for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there is no presumption of wilfulness from the failure to provide adequate support under § 14-323, and an instruction that leaves out this essential element of the crime will be held for reversible error. State v. Roberts, 197 N.C. 662, 150 S.E. 199 (1929).

The word "willfully" as used in § 49-2 is used with the same import as in this section. State v. Cook, 207 N.C. 261, 176 S.E. 757 (1934).

Providing for Support.—It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of willfully abandoning them (§§ 14-322, 14-324), and an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of one thousand dollars comes within the provisions of the statute. State v. Vickers, 196 N.C. 239, 145 S.E. 175 (1928).

Where the husband has been convicted of abandoning his wife and minor children,

the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the superior court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court. State v. Vickers, 196 N.C. 239, 145 S.E. 175 (1928).

Both Abandonment and Nonsupport Must Be Proved.—Both the fact of willful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his willful abandonment and failure to provide constitutes the statutory offense. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

"In State v. Johnson, 194 N.C. 378, 139 S.E. 697 (1927), it was said: 'An offending husband may be convicted of abandonment and nonsupport when—and only when—two things are established: First, a wilful abandonment of the wife; and, second, a failure to provide "adequate support for such wife, and the children which he may have begotten upon her." State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902); State v. Toney, 162 N.C. 635, 78 S.E. 156 (1913). The abandonment must be wilful, that is, without just cause, excuse or justification. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913). And both ingredients of the crime must be alleged and proved. State v. May, 132 N.C. 1020, 43 S.E. 819 (1903).'" State v. Yelverton, 196 N.C. 64, 144 S.E. 534 (1928).

The husband's act becomes criminal when and only when he, having willfully or wrongfully separated himself from his wife, intentionally and without just cause or excuse, ceases to provide adequate support for her according to his means and station in life. State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947); State v. Lucas, 242 N.C. 84, 86 S.E.2d 77 (1955).

Abandonment and Failure to Support Must Be Willful. — By express language the abandonment and failure to support must be willful to create criminal offenses. State v. Westmoreland, 255 N.C. 725, 122 S.E.2d 702 (1961).

Willful Abandonment May Signify Whether Failure to Support Was Willful.—Under certain circumstances the willful abandonment of the wife by the husband may be a significant factor in determining whether his failure to provide adequate support was willful, as when he leaves and goes to a new community where there is no prospect of equally satisfactory employment. State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955).

Good Faith of Abandonment Question for Jury.—In a prosecution of a husband for abandonment the question whether such abandonment was in good faith for the causes assigned is for the jury. State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902).

Separation by Consent.—Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of this section. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913).

An offer of a home when not made in good faith, and when refused, is equivalent to abandonment by the husband. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913).

Divorce after First Conviction No Defense on New Trial.—Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife, under this section, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. State v. Faulkner, 185 N.C. 635, 116 S.E. 168 (1923).

Abandonment of Children after Divorce.—The father's duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

Denial of Paternity. — Where the husband in an action for nonsupport for a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. State v. Ray, 195 N.C. 628, 143 S.E. 216 (1928).

Wife Guilty of Adultery.—Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment. State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902).

Upon the trial of the husband for abandonment, under this section, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to

show his guilt beyond a reasonable doubt. State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921).

While ordinarily the husband may not withdraw his support from his wife and children, and compel her to leave him without violating this section, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error. State v. Johnson, 194 N.C. 378, 139 S.E. 697 (1927).

Competency of Wife's Testimony.—Under § 8-57 the wife is a competent witness against her husband "as to the fact of abandonment, or neglect to provide adequate support." She is not, however, a competent witness to prove the fact of marriage. State v. Brown, 67 N.C. 470 (1872). See § 8-57 and note thereunder.

Condonation by Wife Does Not Bar Prosecution.—Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. State v. Manon, 204 N.C. 52, 167 S.E. 493 (1933).

Jurisdiction.—The constructive domicile of the wife is that of her husband, and where he has resided in another state and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of the State statute making it a misdemeanor. State v. Sneed, 197 N.C. 668, 150 S.E. 197 (1929).

Venue.—When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of this section is in that county. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Same — Where Husband Nonresident.—Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another state, he cannot direct her choice of residence and is indictable under this section in the county of her residence. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

Statute of Limitations. — Where the abandonment consisted in the failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date, and was not a bar under the facts of this case. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Same—Renewal of Cohabitation.—Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh abandonment and failure to support, and an indictment found within two years therefrom is not barred by the statute of limitations. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

Same—Promise and Gifts.—The promise of the father to support his children and his making gifts to them is sufficient to repel the bar of the two-year statute of limitations, whether he was living in the home with them or otherwise, in proceedings under this section for his willfully abandoning them. State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

Instruction — Plaintiff's contention that the court should have charged that the failure to provide support under this section must have been willful in order to constitute an abandonment is untenable. Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939).

Plea in Abatement after Plea of Not Guilty.—Where the defendant has been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section, his plea in abatement comes too late after his plea of not guilty. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

An instruction which omits the element of willful abandonment as a necessary predicate for a verdict of guilty is reversible error. State v. Gilbert, 230 N.C. 64, 51 S.E.2d 887 (1949).

Sufficient Evidence to Show Willful Abandonment and Failure to Support Minor Child. — Evidence that defendant refused to support his minor child although repeated demands were made on him after the parties had returned to this State, is held to show that the offense of willful abandonment and failure to support said minor child was committed by the defendant in this State, since this section provides that the abandonment by the father of a minor child shall constitute a continuing offense. State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936).

Institution of bastardy proceedings prior to birth of child is insufficient to establish such abandonment as is contemplated by this section. In re Adoption of Doe, 231 N.C. 1, 56 S.E.2d 8 (1949).

Presence in State When Crime Committed. — In habeas corpus proceedings, in which petitioner, charged with a violation of this section was held under warrant of governor of Georgia, evidence did not carry petitioner's burden of showing that he was not in North Carolina when the crime was committed. Daugherty v. Hornsby, 151 F.2d 799 (5th Cir. 1945).

Punishment for Violation.—North Carolina Constitution, Art. II, § 4, making a person guilty of a misdemeanor punishable by commitment to houses of correction, leaves the matter of establishing a house of correction to the discretion of the legislature, and a husband convicted of abandonment under this section, may be imprisoned or assigned to work on the roads during his term. State v. Faulkner, 185 N.C. 635, 116 S.E. 168 (1923).

Husband Cannot Be Twice Convicted.— A husband once convicted of an abandonment of his wife cannot be again tried for the same offense, he not having lived with her since the original abandonment. State v. Dunston, 78 N.C. 418 (1878).

Autrefois Acquit and Convict. — In a prosecution for the violation of this section a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto. State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).

Wife Not Deprived of Civil Remedies.— Requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, under this section, does not deprive the wife of her civil remedies under the provisions of § 50-16. 1 et seq. State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921).

Crucial Questions for Jury — Defective Instruction.—Where, in a prosecution for abandonment and willful failure to support, the evidence tends to show that the husband was employed and had earnings, and had in some measure made provision for the support of the wife, the adequacy of such support and the willfulness of the defendant's failure to do more, are the crucial questions to be submitted to the jury, and an instruction to the effect that defendant's earning capacity made no difference is erroneous, and an instruction that the failure to provide support would be excusable only if the husband had no income or earning capacity whatsoever, is inexact. State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955).

Sufficient Warrant.—A warrant charging defendant with wilful refusal and neglect to provide adequate support for his minor children, naming them, is sufficient, abandonment not being an element of the offense since the 1957 amendment rewriting this section. State v. Goodmen, 266 N.C. 659, 147 S.E.2d 44 (1966).

Insufficient Warrant. — A warrant charging that defendant willfully failed to provide adequate support for his wife and children, but failing to charge that he willfully abandoned either the wife or the children, is insufficient under this section, and motion in arrest of judgment is allowed. State v. Outlaw, 242 N.C. 220, 87 S.E.2d 303 (1955).

Applied in State v. Evans, 262 N.C. 492, 137 S.E.2d 811 (1964); State v. Woodland, 119 N.C. 779, 25 S.E. 719 (1896); National Council, Junior Order of United American Mechanics v. Tate, 212 N.C. 305, 193 S.E. 397, 113 A.L.R. 1514 (1937).

Quoted in Jeffreys v. Hocutt, 195 N.C. 339, 142 S.E. 226 (1928).

Stated in State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Cited in State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951); Lee v. Coffield, 245 N.C. 570, 96 S.E.2d 726 (1957); State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961); In re Custody of Hughes, 254 N.C. 434, 119 S.E.2d 189 (1961); Steel v. Steel, 104 N.C. 631, 10 S.E. 707 (1889); State v. Henderson, 207 N.C. 258, 761 S.E. 758 (1934); State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950); State v. Campo, 233 N.C. 79, 62 S.E.2d 500 (1950); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941).

§ 14-322.1. Abandonment of child or children for six months. — Any man or woman who, without just cause or provocation, wilfully abandons his or her child or children for six (6) months and who wilfully fails or refuses to provide adequate means of support for his or her child or children during the six months' period, and who attempts to conceal his or her whereabouts from his or her child or children with the intent of escaping his lawful obligation for the support of said child or children, shall, upon conviction there-

of, be guilty of a felony and punished in the discretion of the court. (1963, c. 1227.)

§ 14-322.2. Failure to support handicapped dependent.—If any father or mother shall wilfully fail and refuse to provide support for a physically handicapped child or a mentally retarded child who becomes eighteen years of age and who is unable to be self-supporting, then the parent shall be guilty of a misdemeanor; failure to provide such support shall be a continuing offense after the eighteenth birthday and after the child reaches his majority until such time as the physically handicapped or mentally retarded dependent is able to become self-supporting. (1969, c. 889, s. 1.)

Editor's Note.—Session Laws 1969, c. 889, s. 3, makes the act effective July 1, 1969.

§ 14-323. Evidence that abandonment was willful. — If the fact of abandonment of and failure to provide adequate support for the wife and children shall be proved, or, while being with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is willful. (1868-9, c. 209, s. 3; Code, s. 971; Rev., s. 3356; C. S., s. 4448.)

When Evidence for Defendant Necessary. — Where the nonsupport and abandonment of the husband are both established or admitted, under this section, it may be necessary for the defendant to come forward with his evidence and proof that the abandonment was not willful to avoid the risk of an adverse verdict. State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921).

Cited in Steel v. Steel, 104 N.C. 631, 10 S.E. 707 (1889).

§ 14-324. Order to support from husband's property or earnings. —Upon any conviction for abandonment, any judge or any recorder having jurisdiction thereof may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant. (1917, c. 259; C. S., s. 4449.)

Local Modification. — Person: 1967, c. 848, s. 3.

This section is in addition to the powers conferred by § 14-322, and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor. State v. Faulkner, 185 N.C. 635, 116 S.E. 168 (1923).

"Husband".—This section uses the word "husband" as descriptio personae in his relation to the child of the marriage to whom his duty of support continues after a decree of divorcement has been entered, and does not confine the offense to the abandonment of the wife. State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

A judgment under this section is not conditional because of an order that capias issue at any time on motion of the solicitor, for such order is void and not a part of judgment and capias may issue upon an order of the court. State v. Manon, 204 N.C. 52, 167 S.E. 493 (1933).

The practice of suspending judgments or staying executions in criminal prosecutions upon reasonable and just terms, with the consent of defendant, is established by custom and judicial decision, and in prosecutions for abandonment has received express legislative sanction under this section. State v. Henderson, 207 N.C. 258, 176 S.E. 758 (1934).

Judgment Entered without Notice after Default in Payment Is Void.—In State v. Brooks, 211 N.C. 702, 191 S.E. 749 (1937), an order was entered requiring the defendant to pay into the clerk's office for the support and maintenance of his children certain monthly stipulated amounts, after indictment under § 14-322. Default having been made in said payments, judgment was entered upon the defendant's original plea without his knowledge or presence,

and the defendant was sentenced to two years on the road. It was held that the judgment was void because entered without the knowledge or presence of the accused.

Judgment Held Sufficiently Certain and Definite.—A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms. State v. Vickers, 197 N.C. 62, 147 S.E. 673 (1929). See note to § 14-322.

Suspension of Judgment.—Upon conviction of abandonment, the suspension of judgment upon conditions for the support and maintenance of the minor child is expressly authorized by this section. State v. Johnson, 230 N.C. 743, 55 S.E.2d 690 (1949).

§ 14-325. Failure of husband to provide adequate support for family. —If any husband, while living with his wife, shall willfully neglect to provide adequate support of such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor and upon conviction for the first offense shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court; upon a conviction of a second or subsequent offense he shall be punished by fine or by imprisonment not exceeding two years, or both, in the discretion of the court. Upon conviction of any husband as herein provided, the court having jurisdiction thereof may in his discretion make such order as in his judgment will best provide for the support of such wife or children, and may commit the said husband to the common jail of the county, to be hired out by the county commissioners for such length of time as the court may deem proper, which said wage or salary shall be paid to the said wife or children, to be used toward their support. (1868-9, c. 209, s. 2; 1873-4, c. 176, s. 11; 1879, c. 92; Code, s. 972; Rev., s. 3357; C. S., s. 4450; 1921, c. 103; 1969, c. 1045, s. 2.)

Local Modification. — Person: 1967, c. 848, s. 3.

Cross Reference.—As to abandonment of wife and children, see § 14-322.

Editor's Note. — The 1969 amendment added the provisions as to punishment at the end of the first sentence.

A husband is under the legal duty of supporting his wife by furnishing her with such necessaries as the law deems essential to her health and comfort, including suitable food, clothing, lodging and medical attendance. State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951).

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its wilful neglect or abandonment. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

"Adequate" and "Support" Defined. — "Adequate" is defined as meaning sufficient to meet specific requirements. "Support," as the word is used in this section, means personal support, maintenance, the supplying of food, clothing and housing suitable to their condition in life and commensurate with the defendant's ability; together with medical assistance reasonably required for the preservation of health. State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951).

This being a criminal statute, it may not be extended to include cases not clearly within its terms. State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951).

Neglect Must Be Willful, Unjustifiable and Wrongful.—To constitute a criminal offense under this section the neglect on the part of the husband to provide adequate support for his wife must have been willful. The support which the law deems adequate must have been purposely omitted without just cause or excuse in violation of law. The neglect must have been unjustifiable and wrongful. State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951).

The failure of a husband to give his wife the affectionate consideration a husband should manifest for his wife is not sufficient to constitute the criminal offense defined by this section. State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951).

Sufficiency of Warrant. — A warrant charging defendant with willfully neglecting to provide adequate support for his wife and two children is sufficient to express the charge against defendant and to apprise him of its nature, and defendant's

motion in arrest of judgment on the ground that it omitted to charge that he had begotten the children, is properly denied, the question of paternity having been raised and submitted to the jury upon the conflicting evidence. State v. Stone, 231 N.C. 324, 56 S.E.2d 675 (1949).

A warrant charging that defendant willfully neglected and refused to provide adequate support for his wife and children, without alleging that defendant committed the offense "while living with his wife," is insufficient under this section, and motion in arrest of judgment is allowed. State v. Outlaw, 242 N.C. 220, 87 S.E.2d 303 (1955).

Amendment of Warrant. — The trial court has authority to permit the solicitor to amend a warrant charging the defendant with wilful neglect to support his wife and two children by inserting the words "while living with his wife" to conform to the language of this section. State v. Stone, 231 N.C. 324, 56 S.E.2d 675 (1949).

Sufficiency of Indictment. — An indictment charging violation and following the words of the statute is sufficient. State v. Kerby, 110 N.C. 558, 14 S.E. 856 (1892).

Submission of Issues. — Where, in a prosecution for willfully neglecting to provide adequate support for wife and children, defendant sets up the defense of the adultery of the wife and nonpaternity of the youngest child, the submission of written issues by the court as to the paternity of the child, the adultery of the wife, and the guilt or innocence of defendant of offense charged, will not be held for error on defendant's appeal, the jury being instructed that the burden is on the State to prove defendant's guilt beyond a reasonable doubt as to each of the essential elements of the offense. State v. Stone, 231 N.C. 324, 56 S.E.2d 675 (1949).

Applied in State v. Bynum, 265 N.C. 732, 145 S.E.2d 5 (1965).

Cited in State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961); State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

§ 14-325.1. When offense of failure to support child deemed committed in State.—The offense of wilful neglect or refusal of a father to support and maintain his child or children, and the offense of wilful neglect or refusal to support and maintain one's illegitimate child, shall be deemed to have been committed in the State of North Carolina whenever the child is living in North Carolina at the time of such wilful neglect or refusal to support and maintain such child. (1953, c. 677.)

Editor's Note.— For brief comment on this section, see 31 N.C.L. Rev. 404 (1953).

§ 14-326. Abandonment of child by mother.—If any mother shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor. (1931, c. 57, s. 1.)

Cross Reference.—As to statute affecting this section, see § 14-322.

Cited in In re Adoption of Doe, 231 N.C. 1, 56 S.E.2d 8 (1949).

§ 14-326.1. Parents; failure to support.—If any person being of full age, and having sufficient income after reasonably providing for his or her own immediate family shall, without reasonable cause, neglect to maintain and support his or her parent or parents, if such parent or parents be sick or not able to work and have not sufficient means or ability to maintain or support themselves, such person shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court; upon conviction of a second or subsequent offense he or she shall be punished by fine or by imprisonment not exceeding two years, or both, in the discretion of the court.

If there be more than one person bound under the provisions of the next preceding paragraph to support the same parent or parents, they shall share equitably in the discharge of such duty. (1955, c. 1099; 1969, c. 1045, s. 3.)

Local Modification. — Person: 1967, c. 848, s. 3.

Editor's Note. — The 1969 amendment substituted the language beginning "punished by a fine" at the end of the first sentence for "fined or imprisoned in the discretion of the court."

Cited in Shealy v. Associated Transp., Inc., 252 N.C. 738, 114 S.E.2d 702 (1960).

Article 41.

Intoxicating Liquors.

§ 14-327. Adulteration of liquors.—If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as provided in the following section [§ 14-328], or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this State any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1858-9, c. 57, ss. 1, 4; Code, s. 982; Rev., s. 3512; C. S., s. 4451; 1969, c. 1224, s. 6.)

Cross Reference. — As to regulation of intoxicating liquors, see chapter 18.

Editor's Note. — The 1969 amendment substituted, at the end of the section, the present provisions as to punishment for provisions for punishment by fine or imprisonment, or both, at the discretion of the court.

§ 14-328. Selling recipe for adulterating liquors.—If any person shall sell or offer for sale any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is herein provided, he shall be guilty of a felony, and shall be fined or imprisoned as is provided in the preceding section [§ 14-327]: Provided, that this section and §§ 14-327 and 14-329 respectively shall not be so construed as to prevent druggists, physicians and persons engaged in the mechanical arts from adulterating liquors for medical and mechanical purposes. (1858-9, c. 57, ss. 2, 3; Code, s. 984; Rev., s. 3513; C. S., s. 4452.)

§ 14-329. Manufacturing, trafficking in, transporting, or possessing poisonous liquors.—(a) Any person who, either individually or as an agent for any person, firm or corporation, shall manufacture for use as a beverage, any spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a felony and shall be punished by imprisonment in the State's prison not less than five years, and may be fined in the discretion of the court.

(b) Any person who, either individually or as agent for any person, firm or corporation, shall, knowing or having reasonable grounds to know of the poisonous qualities thereof, transport for other than personal use, sell or possess for purpose of sale, for use as a beverage, any spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of the felony and shall be punished by imprisonment in the State's prison for not less than twelve months, and may be fined in the discretion of the court.

(c) Any person who, either individually or as agent for any person, firm or corporation, shall transport for other than personal use, sell or possess for purpose of sale, any spirituous liquor to be used as a beverage which is found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a misdemeanor and shall be punished by imprisonment for not less than six months, and may be fined in the discretion of the court. In prosecutions under this subsection and under subsection (b) above, proof of transportation of more than one gallon of spirituous liquor will be prima facie evidence of transportation for other than personal use, and proof of possession of more than one gallon of spirituous liquor will be prima facie evidence of possession for purpose of sale.

(d) Any person who, either individually or as agent for any person, firm or corporation, shall transport or possess, for use as a beverage, any illicit spirituous liquor which is found to contain any foreign properties or ingredients poison-

ous to the human system, shall be guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200.00), and may be imprisoned in the discretion of the court: Provided, anyone charged under this subsection may show as a complete defense that the spirituous liquor in question was legally obtained and possessed and that he had no knowledge of the poisonous nature of the beverage. (1873-4, c. 180, ss. 1, 2; Code, s. 983; Rev., s. 3522; C. S., s. 4453; 1961, c. 897.)

What Must Be Shown to Sustain Conviction.—In order for the State to sustain a conviction upon an indictment based on the provisions of this section, the State must show that the defendant did manufacture, sell, or deal out spirituous liquors, to be used as a drink or beverage, containing poisonous foreign properties or ingredients in such quantity as to be injurious or dangerous to the human system. State v. Barefoot, 254 N.C. 308, 118 S.E.2d 758 (1961), decided prior to the 1961 amendment.

§ 14-330. Selling or giving away liquor near political speaking.—If any person shall sell or give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, during the day on which such speaking shall take place, he shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days. (1879, c. 212; Code, s. 1079; Rev., s. 3528; C. S., s. 4454.)

§ 14-331. Giving intoxicants to unmarried minors under seventeen years old.—If any person shall give intoxicating drinks or liquors to any unmarried minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in giving such drinks or liquors to such minor, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both; but nothing in this section shall prevent any parent or other person standing in loco parentis from giving or administering any such drinks or liquors to his minor child for medicinal purposes, nor any physician from giving or administering such drinks or liquors to any minor patient under his care; nor shall this section apply to the giving or using of wine in the administration of the sacrament. (1915, c. 82; C. S., s. 4455; 1969, c. 1224, s. 17.)

Cross Reference. — As to giving cigarettes to minors, see §§ 14-313 and 14-314.

Editor's Note. — The 1969 amendment substituted "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both" for "and upon conviction shall be punished by fine or imprisonment in the discretion of the court" near the middle of the section.

§ 14-332. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.—If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing such person to be under the age of twenty-one years he shall be guilty of a misdemeanor; and such sale or giving away shall be prima facie evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section.

The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of this section, shall have a right of action in a civil suit against the person so offending by such sale or gift, and upon proof of such illicit sale or gift shall recover from the party so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1873-4,

c. 68; 1881, c. 242; Code, ss. 1077, 1078; Rev., ss. 3524, 3525; C. S., s. 4456; 1969, c. 1224, s. 9.)

Editor's Note. — The 1969 amendment added the last sentence.

For cases under this law, see State v. Lawrence, 97 N.C. 492, 2 S.E. 367 (1887); State v. Walker, 103 N.C. 413, 4 S.E. 582 (1889); State v. Kittelle, 110 N.C. 560, 15 S.E. 103 (1892); Spencer v. Fisher, 158 N.C. 264, 73 S.E. 810 (1912); Spencer v. Fisher, 161 N.C. 116, 76 S.E. 731 (1912).

ARTICLE 42.

Public Drunkenness.

§ 14-333. Public drinking on railway passenger cars; copy of section to be posted.—Any person who shall publicly engage in the drinking of intoxicating liquors in the presence of passengers on any passenger car shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not to exceed thirty days. This section shall not apply to any smoking compartment or to any closet, dining or buffet car. It shall be the duty of all railway companies to have posted a copy of this section in all passenger coaches used for transporting passengers within the State. (1907, c. 455; C. S., s. 4457.)

§ 14-334. Public drunkenness and disorderliness.—It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in North Carolina; person or persons convicted of a violation hereof shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days in the discretion of the court. (1921, c. 211; C. S., s. 4457(a).)

Section Not General Law Respecting Public Drunkenness. — See note to § 14-335.

Verdict of guilty of disorderly conduct but not of drunkenness will not support conviction for drunken and disorderly conduct under this section. State v. Myrick, 203 N.C. 8, 164 S.E. 328 (1932).

Stated in State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

§ 14-335. Public drunkenness.—(a) If any person shall be found drunk or intoxicated in any public place, he shall be guilty of a misdemeanor and upon conviction or plea of guilty shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not more than 20 days in the county jail. Upon conviction for any subsequent offense under this section within a 12-month period he shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not more than 20 days in the county jail or by commitment to the custody of the Commissioner of Correction for an indeterminate sentence of not less than 30 days and not more than six months.

(b) The Commissioner of Correction or his agent shall designate the place of confinement within the State prison system where a person committed to the Commissioner's custody under the provisions of this section shall begin service of the sentence. At any time during the period such person is committed to the custody of the Commissioner, the Commissioner or his agent may authorize his release under such conditions as the Commissioner or his agent may prescribe, in order to receive care and treatment from a specified hospital, outpatient clinic, or other appropriate facility or program outside the State prison system. The conditions of release may be modified or the conditional release may be revoked by the Commissioner or his agent at any time during the period such person is committed to the Commissioner's custody, provided that the total time served in confinement and on conditional release shall not exceed a term of six months from the date of entry into the State prison system. If a conditional release is revoked, the revocation order shall constitute authority for any prison, parole or peace officer to arrest such person without a warrant and return him to a facility of the

State prison system. The Commissioner of Correction shall require any person committed to his custody under the provisions of this section to serve at least 30 days of the sentence, but this minimum term can be served in part on conditional release after a period of confinement. The Commissioner or his agent may discharge the person from custody at any time after service of the minimum term.

(c) Chronic alcoholism shall be an affirmative defense to the charge of public drunkenness. For the purpose of this section, chronic alcoholism shall be as defined in article 7A of chapter 122. When the defense of chronic alcoholism is shown to the satisfaction of the trier of fact, and a judgment of not guilty by reason of chronic alcoholism is entered, the court may follow the treatment procedures outlined in article 7A of chapter 122. (1897, c. 57; 1899, cc. 87, 208, 608, 638; 1901, c. 445; 1903, cc. 116, 124, 523, 758; Rev., s. 3733; 1907, cc. 305, 785, 900, 908, 976; 1908, c. 113; 1909, c. 46, s. 2; cc. 256, 271, 815; Pub. Loc. 1915, c. 790; Pub. Loc. 1917, cc. 447, 475; Pub. Loc. 1919, cc. 148, 190, 200; C. S., s. 4458; Ex. Sess. 1924, c. 5; Pub. Loc. 1927, c. 17; 1929, c. 135; Pub. Loc. 1929, c. 1; 1931, c. 219; Pub. Loc. 1931, cc. 32, 413; 1933, cc. 10, 287; 1935, c. 49, ss. 1, 4; cc. 207, 208, 284, 350; 1937, cc. 46, 95, 96, 203, 286, 329, 443; 1939, c. 55; 1941, cc. 82, 150, 334, 336; 1943, c. 268, ss. 1-3; c. 506; 1945, cc. 215, 254; 1947, c. 12, ss. 1, 2; cc. 109, 445; 1949, cc. 215, 217, 246, 891, 1154, 1193; 1951, cc. 20, 255, 731; 1953, cc. 18, 163, 276, 363, 655, 971; 1955, cc. 30, 47, 856; 1957, cc. 47, 88, 145, 325, 474, 512, 520, 576, 606, 721, 736, 804, 936; 1959, cc. 13, 96, 217, 267, 403, 575, 757, 823, 907; 1961, cc. 464, 543, 545, 546, 632, 927; 1963, cc. 38, 282, 331, 341, 410, 626, 724; 1965, cc. 39, 44, 265, 595; 1967, cc. 144, 256, 420; c. 661, s. 2; c. 733; c. 1256, s. 1.)

Editor's Note.—Chapter 1256, s. 1, Session Laws 1967, rewrote this section.

Chapter 996, s. 15, Session Laws 1967 substituted "Commissioner of Correction" for "Director of Prisons" and "Commissioner" for "Director" throughout the section.

Chapters 144, 256, 420, 661, 733, Session Laws 1967, had inserted or deleted the names of various counties in the former section.

Session Laws 1967, c. 1256, s. 4, provides: "All local public drunkenness statutes and all other laws and clauses of laws in conflict with this act are hereby repealed."

Many of the cases cited in the note below construe this section as it appeared prior to the 1967 amendment.

For comment on punishment for alcoholism, see 44 N.C.L. Rev. 818 (1966).

History of Section.—See State v. Dew, 248 N.C. 188, 102 S.E.2d 774 (1958).

And Application.—This section was intended for general application in the localities affected. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

Jurisdiction. — The offense of public drunkenness is within the jurisdiction of a justice of the peace. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Effect of 1967 Amendment. — Chapter 1256, Session Laws of 1967, rewriting this section, did not repeal the public drunkenness statute, but had the effect of reducing and making uniform throughout the State the maximum punishment for the offense of public drunkenness, and of establishing chronic alcoholism as an affirmative defense to the offense. State v. Pardon, 272 N.C. 72, 157 S.E.2d 698 (1967).

Section Punishes Public Demonstration of Drunkenness. — The North Carolina statute does not punish solely for drunkenness, but rather for its public demonstration. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966), commented on in 46 N.C.L. Rev. 909 (1968).

Under this section drunkenness becomes a crime when, and only when, it is in a public place. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

"Drunk" and "intoxicated" are synonymous terms. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

But Not "Drunk" and "under the Influence of Intoxicating Liquor." — "Drunk" within the meaning of this section is not synonymous with "under the influence of intoxicating liquor" within the intent of §§ 20-138 and 20-139. State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964).

Hence, in a prosecution for public drunkenness under this section, an instruction applying the definition of "under the influence of intoxicating liquor" must be held for prejudicial error. State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964).

Being Drunk Distinguished from Being under the Influence of Intoxicating Beverages.—See State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964).

"Drunk" or "Intoxicated". — A person is "drunk" or "intoxicated" within the intent and meaning of this section when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment materially impaired, or when his brain is so far affected by potations of intoxicating liquor that his intelligence, sense-perceptions, judgment, continuity of thought or of ideas, speech and coordination of volition with muscular action, or some of these faculties or processes are materially impaired. This is the definition of "drunk" or "intoxicated" recognized in common speech, in ordinary experience, and in judicial decisions. State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964).

Where the judge defined "public place," "drunk," and "intoxicated or intoxication" in strict accord with the definitions appearing in Black's Law Dictionary, and applied these definitions to the facts in the case, there was no error. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

"Public Place".—As used in statutes relating to drunkenness, "public place" means a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have resort, a place which is accessible to the public and visited by many persons. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

A mercantile establishment and the premises thereof is a public place during business hours when customers are coming and going. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

Arrest without Warrant. — Where an officer sees a person intoxicated at a public bar, the officer may arrest such person without a warrant for violation of this section, and such person's assault upon the officer cannot be excused on the ground that the arrest was unlawful and that he had the right to defend himself against such arrest. State v. Shirlen, 269 N.C. 695, 153 S.E.2d 364 (1967).

Sufficiency of Warrant. — A warrant charging that defendant did "unlawfully and wilfully appear off of his premises in a drunken condition" is insufficient to charge the offense of public drunkenness proscribed by this section, since it fails to charge that defendant was in a public place. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Chronic Alcoholism.—See Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966), commented on in 46 N.C.L. Rev. 909 (1968).

Burden.—Before the State is entitled to a conviction within the intent and meaning of this section, it must satisfy the jury beyond a reasonable doubt from the evidence that defendant was drunk or intoxicated in a public place. State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964).

Sufficiency of Warrant. — See State v. Raynor, 235 N.C. 184, 69 S.E.2d 155 (1952).

Punishment.—See State v. Stephenson, 247 N.C. 231, 100 S.E.2d 327 (1957); State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).

Applied in Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953); In re Bentley, 240 N.C. 112, 81 S.E.2d 206 (1954); State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Best, 267 N.C. 435, 148 S.E.2d 261 (1966); State v. Sutton, 3 N.C. App. 221, 164 S.E.2d 405 (1968); State v. Sutton, 3 N.C. App. 230, 164 S.E.2d 392 (1968).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

ARTICLE 43.

Vagrants and Tramps.

§ 14-336. Persons classed as vagrants. — If any person shall come within any of the following classes, he shall be deemed a vagrant, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, however, that this limitation of punishment shall not be binding except in cases of a first offense, and in all other cases such person shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. The classes are:

(1) Persons wandering or strolling about in idleness who are able to work and have no property to support them.

(2) Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.

(3) All persons able to work having no property to support them and who

have not some visible and known means of a fair, honest and reputable livelihood.

(4) Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.

(5) Professional gamblers living in idleness.

(6) All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor children, except of male children over eighteen years old.

(7) Keepers and inmates of bawdy houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: Provided, that nothing here is intended or shall be construed as abolishing the crime of keeping a bawdy house, or lessening the punishment by law for such crime. (1905, c. 391; Rev., s. 3740; 1907, c. 1012, s. 1; 1913, c. 75; 1915, c. 1; C. S., s. 4459; 1969, c. 1224, s. 21.)

Cross Reference. — As to prostitution, see § 14-203.

Editor's Note. — The 1969 amendment substituted, in the opening paragraph, the language beginning "shall be guilty of a misdemeanor" for "may be fined or imprisoned, or both, in the discretion of the court."

Constitutionality.—See Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969).

Injunctive Relief Against Provisions of This Section.—See Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969).

Insufficient Warrant.—A warrant charging defendant with living in the county without visible means of support and without working is insufficient to charge defendant with vagrancy. State v. Harris, 229 N.C. 413, 50 S.E.2d 1 (1948).

Amendment to Warrant.—Where a warrant in a criminal action charges the defendant with "being a vagrant," it is within the discretion of the judge to allow an amendment specifying the particular act under which it has been issued; and while it is the better practice to reduce the amendment to writing at the time, the order is self-executing, and failure to do so does not destroy its legal effect. State v. Walker, 179 N.C. 730, 102 S.E. 404 (1920). See State v. Price, 175 N.C. 804, 95 S.E. 478 (1918).

Admissibility of Evidence.—By express statutory provision (§ 14-188), the reputation that a house is kept as a bawdy house may be received in evidence on the trial of a person for keeping one, under an indictment for vagrancy, etc., and the statute is constitutional and valid. State v. Price, 175 N.C. 804, 95 S.E. 478 (1918).

Sufficiency of Evidence.—Evidence in a prosecution under this section held insufficient to support a conviction. State v. Oldham, 224 N.C. 415, 30 S.E.2d 318 (1944).

Testimony by officers that defendant, a cripple, had no known occupation was not sufficient to support a finding that the defendant was a vagrant where there was positive evidence that defendant had a home and possessed ready cash State v. Millner, 240 N.C. 602, 83 S.E.2d 546 (1954).

Imposition of Wrong Sentence.—Where a conviction for vagrancy has been legally had under this section, and the sentence has been imposed of imprisonment for twelve months allowed under § 14-208, the case will be remanded for the imposition of the proper sentence. State v. Walker, 179 N.C. 730, 102 S.E. 404 (1920).

§ 14-337. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.—It shall be the duty of the chief of police, marshal, constable or other chief ministerial officer of each city and town in this State to furnish every thirty days to the police justice, recorder, mayor or other trial officer of such city or town a list of the bawdy, assignation, lewd and disorderly houses and other places where illegal sexual intercourse is carried on, together with the names of the keepers and inmates of such houses and places, in such city or town; and it shall be the duty of such police justice, recorder, mayor or other trial officer, upon the filing of such list, to issue his warrant for the persons declared in subdivision seven of § 14-336 to be vagrants, and to punish in accordance with the provisions of that section such of them

as may be found guilty. In all trials under said subdivision seven of § 14-336 any keeper or inmate of any of the houses or places named, or his employees, shall be competent and compellable to give evidence of the character and nature of such house or place and of the character and acts of the keepers and inmates thereof; but the person so testifying shall not be prosecuted or punished for the commission of any crime about which he shall have been required to testify.

If any chief of police, marshal, constable or other chief ministerial officer of any city or town shall fail to furnish the list of houses and places provided for in this section, or shall suppress the name of any person whom he is required herein to report, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (1907, c. 1012, ss. 2, 3; C. S., s. 4460.)

§ 14-338. Tramp defined and punishment provided; certain persons excepted.—If any person shall go about from place to place begging or subsisting on charity, he shall be denominated a tramp, and shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days: Provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman, to any minor under the age of fourteen years, or to any blind person. (1879, c. 198, ss. 1, 4, 6; Code, ss. 3828, 3829, 3831, 3833; 1897, c. 268; Rev., s. 3735; C. S., s. 4461.)

Cross Reference.—As to release for good behavior of one committed to house of correction, see § 153-221.

§ 14-339. Trespassing and the carrying of dangerous weapons by tramps.—If any tramp shall enter any dwelling house or kindle any fire on the land of another without the consent of the owner or occupant thereof, or shall kindle a fire on any highway, or shall be found carrying any firearm or other dangerous weapon, or shall threaten to do any injury to the person, or to the real or personal estate, of another, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1879, c. 198, s. 2; Code, s. 3829; Rev., s. 3736; C. S., s. 4462; 1969, c. 1224, s. 18.)

Editor's Note. — The 1969 amendment substituted the language beginning "guilty of a misdemeanor" at the end of the section for "punished by imprisonment, at the discretion of the court, not to exceed twelve months."

§ 14-340. Malicious injuries by tramps to persons and property.—If any tramp shall willfully and maliciously do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed three years. (1879, c. 198, s. 3; Code, s. 3830; Rev., s. 3737; C. S., s. 4463.)

§ 14-341. Arrest of tramps by persons who are not officers.—Any person, upon a view of any offense described in §§ 14-338 through 14-340, shall cause the offender to be arrested upon a warrant and taken before some justice of the peace, or he may apprehend the offender and take him before a justice of the peace, for examination, and, on his conviction, he shall be entitled to the same fee as a sheriff. (1879, c. 198, s. 5; Code, s. 3832; Rev., s. 3738; C. S., s. 4464.)

Article 44

Regulation of Sales.

§ 14-342. Selling or offering to sell meat of diseased animals.—If any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (1905, c. 303; Rev., s. 3442; C. S., s. 4465.)

§ 14-343. Unauthorized dealing in railroad tickets.—If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1895, c. 83, s. 1; Rev., s. 3764; C. S., s. 4466; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ 14-344. Sale of athletic contest tickets in excess of printed price.—It shall be unlawful for any person, firm or corporation to sell or offer for sale any ticket of admission to any baseball, basketball, football game or other athletic contest of any kind in excess of the sale price written or printed on such ticket or tickets. Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1941, c. 180; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ 14-345. Sale of cotton at night under certain conditions.—If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1873-4, c. 62; 1874-5, c. 70; Code, s. 1006; 1905, c. 417; Rev., s. 3813; C. S., s. 4467; 1969, c. 1224, s. 1.)

Local Modification.—Mecklenburg, Nash: C.S. 4467.

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Cited in State v. Moore, 104 N.C. 714, 10 S.E. 143 (1889); State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927).

§ 14-346. Sale of convict-made goods prohibited. — (a) It shall be unlawful to sell or to offer for sale anywhere within the State of North Carolina any articles or commodities manufactured or produced, wholly or in part, in this State or elsewhere by convicts or prisoners, except

(1) Articles or commodities manufactured or produced by convicts on probation or parole or prisoners released part time for regular employment in the free community, and

(2) Products of agricultural or forestry enterprises or quarrying or mining

operations in which inmates of any penal or correctional institution of this State are employed, and

(3) Articles and commodities manufactured or produced in any penal or correctional institution of this State for sale to departments, institutions, and agencies supported in whole or in part by the State, or to any political subdivision of this State, for the use of these departments, institutions, agencies, and political subdivisions of the State and not for resale, and

(4) Articles of handicraft made by the inmates of any penal or correctional institution of this State during their leisure hours and with their own materials.

(b) Any person, firm or corporation selling, undertaking to sell, or offering for sale any prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this section, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Each sale or offer to sell, in violation of the provisions of this section, shall constitute a separate offense. (1933, c. 146, ss. 1-4; 1959, c. 170, s. 1; 1969, c. 1224, s. 4.)

Editor's Note. — The 1969 amendment rewrote the provisions as to punishment in the first sentence of subsection (b).

§ **14-346.1. Sale of bay rum.**—It shall be unlawful for any person, firm or corporation to sell or offer for sale any bay rum in the State of North Carolina, or to cause any delivery of bay rum to be made in the State of North Carolina pursuant to any sale thereof, except:

(1) When such sale is made to a pharmacy or drugstore, supervised by a person licensed as a pharmacist or assistant pharmacist as described in G.S. 90-71;

(2) When such sale is made pursuant to a prescription of some duly licensed physician, or

(3) When such sale is made to a duly licensed barber for use in the course of treatments given or services performed in a barbershop, and not for resale.

Any person who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine not exceeding five hundred dollars ($500.00), imprisonment for not more than six months, or both.

The provisions of this section shall not apply to the following counties: Anson, Beaufort, Bertie, Brunswick, Burke, Camden, Caswell, Columbus, Craven, Currituck, Dare, Duplin, Edgecombe, Forsyth, Franklin, Gates, Greene, Halifax, Harnett, Hertford, Hoke, Hyde, Johnston, Lenoir, Lincoln, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Randolph, Robeson, Stanly, Tyrrell and Wilson. (1951, c. 1096; 1953, cc. 179, 181, 411; 1955, c. 947; 1959, c. 1300; 1963, c. 260; 1967, c. 746; 1969, c. 1224, s. 19.)

Editor's Note. — The 1967 amendment deleted "Rutherford" from the list of counties. The 1969 amendment rewrote the next-to-last paragraph.

§ **14-346.2. Sale of certain articles on Sunday prohibited; counties excepted.**—Any person, firm or corporation who engages on Sunday in the business of selling, or sells or offers for sale on such day, clothing and wearing apparel, clothing accessories, furniture, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments or recordings, shall be guilty of a misdemeanor punishable by a fine

not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

Each separate sale or offer to sell shall constitute a separate offense: Provided this section shall not be applicable to Avery, Brunswick, Camden, Carteret, Cherokee, Clay, Currituck, Dare, Graham, Haywood, Henderson, Hyde, Jackson, Macon, Madison, Mitchell, New Hanover, Pamlico, Pender, Polk, Swain, Transylvania, Watauga, Wilkes and Yancey counties. (1961, c. 1156; 1963, c. 488; 1969, c. 1224, s. 4.)

Editor's Note. — The 1963 amendatory act provides that it shall not apply to Chimney Rock township of Rutherford County, Colly township of Bladen County or Edneyville township of Henderson County, or to facilities within the right-of-way of the Blue Ridge Parkway in Ashe, Alleghany and Watauga counties, or to Blowing Rock township of Watauga County. The act further provides that:

"The areas that are exempted from this act by the foregoing provisions are so exempted upon the classification of such areas as resort or tourist areas, the General Assembly recognizing that different considerations apply to such areas. By exempting from this act the General Assembly hereby classifies such areas as resort or tourist areas."

The 1969 amendment rewrote the provisions of the first sentence relating to punishment.

For case law survey on blue laws, see 41 N.C.L. Rev. 431 (1963).

For an article on local legislation in the General Assembly discussing this section, see 45 N.C.L. Rev. 340 (1967).

Constitutionality.—The 1963 amendment is not general because it does not apply to and operate uniformly on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law. On the contrary, it applies to and operates only on merchants in designated counties or portions thereof and not on similarly situated merchants in other counties or portions thereof and no reasonable basis exists for the attempted classification of the exempted counties or portions thereof as resort areas or tourist areas; hence, the 1963 amendment must be considered a local and special act in violation of N.C. Const., Art. II, § 29, and therefore void. Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964).

For constitutionality of section prior to the 1963 amendment, see G.I. Surplus Store, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962).

Cited in High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

ARTICLE 45.

Regulation of Employer and Employee.

§ **14-347. Enticing servant to leave master.**—If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to leave unlawfully the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer, then, in either case, such person and servant shall be guilty of a misdemeanor and shall be fined not exceeding one hundrd dollars or imprisoned not exceeding six months. (1866, c. 58; 1866-7, c. 124; 1881, c. 303; Code, ss. 3119, 3120; Rev., s. 3365; C. S., s. 4469.)

Cross Reference.—As to a similar provision in the case of landlord and tenant or cropper, see § 14-359.

In General. — The offense was not known to the common law, State v. Rice, 76 N.C. 194 (1877). The section applies only where there has been an enticement, and not where a servant merely leaves his employer, even though such leaving is in violation of a contract between the parties. State v. Daniel, 89 N.C. 553 (1883). Nor does the section apply to the parent of a minor child who commands such child to quit employment. State v. Anderson, 104 N.C. 771, 10 S.E. 47 (1889). But if a minor is induced to leave his employment by a stranger, not in loco parentis, such stranger is amenable to action under this section. State v. Harwood, 104 N.C. 724, 10 S.E 171 (1889). The section does not

apply where a mere contract to serve, not entered into, has been made. Sears v. Whitaker, 136 N.C. 37, 48 S.E. 517 (1904); State v. Holly, 152 N.C. 839, 67 S.E. 53 (1910).

A tenant or cropper of another is not his servant, within the meaning of this section. State v. Etheridge, 169 N.C. 263, 84 S.E. 264 (1915).

Sufficiency of Indictment. — It is not necessary to specify whether the contract is oral or written, nor the means by which the enticing was accomplished. State v. Harwood, 104 N.C. 724, 10 S.E. 171 (1889).

Cited in Haskins v. Royster, 70 N.C. 601 (1874).

§ 14-348. Local: Hiring servant who has unlawfully left employer. —If any person shall knowingly hire, employ, harbor or detain in his own service any servant, employee, tenant, or wage hand of any other person, who shall have contracted in writing, or orally, for a fixed period of time to serve his employer, and who shall have left the service of his employer in violation of his contract, he shall be guilty of a misdemeanor, and shall be civilly liable in damages to the party so aggrieved. This section shall apply to the following counties: Beaufort, Caswell, Edgecombe, Granville, Guilford, Halifax, Hertford, Pender, Person, Pitt, Richmond, Vance, Wake, Warren, Washington and Wayne. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1901, c. 682; 1903, c. 365; Rev., s. 3374; 1907, c. 238, s. 2; c. 402; 1919, c. 274; C. S., s. 4470; 1969, c. 1224, s. 9.)

Cross Reference. — As to employing tenant or cropper who has unlawfully violated a contract with his landlord, see § 14-358.

Editor's Note. — The 1969 amendment added the last sentence.

§ 14-349. Enticing seamen from vessel.—If any person shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1879, c. 219, s. 1; 1881, c. 256, s. 1; Code, s. 1108; Rev., s. 3555; C. S., s. 4471.)

§ 14-350. Secreting or harboring deserting seamen.—If any person shall secrete or harbor any seaman who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his premises, such concealment and secretion shall be deemed prima facie evidence that such person knew that such seaman was a deserter. (1879, c. 219, s. 2; 1881, c. 256, s. 2; Code, s. 1109; Rev., s. 3556; C. S., s. 4472.)

Cited in State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905).

§ 14-351. Search warrants for deserting seamen.—If any credible witness shall complain, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found; and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of the search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint. (1881, c. 256, s. 3; Code, s. 1110; Rev., s. 3557; C. S., s. 4473.)

§ 14-352. Appeal in cases of deserting seamen regulated.—In all cases arising under §§ 14-349 through 14-351, if any appeal is prayed by either

party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case. In case an appeal is prayed at the trial, it shall be the duty of the justice to proceed immediately to reduce to writing the testimony of any witness whose testimony is material (if such witness shall be master, officer or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by the justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions. (1881, c. 256, ss. 4, 5; Code, s. 1111; Rev., s. 3558; C. S., s. 4474.)

§ 14-353. Influencing agents and servants in violating duties owed employers.—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1913, c. 190, s. 1; C. S., s. 4475; 1969, c. 1224, s. 6.)

Editor's Note. — The 1969 amendment substituted, at the end of the section, the present provisions as to punishment for a provision for punishment in the discretion of the court.

For list of articles respecting acts prohibited by this section and similar statutes, and "commercial bribery" and influencing of employees, see State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

The first two parts of this section are divisible and separable from the remainder of the statute. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

And Are Constitutional.—The first two parts of this section are not repugnant to the "due process of law" clause of the Fourteenth Amendment to the United States Constitution, and to "the law of the land" clause of Const., Art. I, § 17, and are a reasonable and proper exercise of the police power of the State. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

And Sufficiently Clear.—The acts prohibited in the first clause of this section are stated in words sufficiently explicit, clear and definite to inform any man of ordinary intelligence what conduct on his part will render him liable to its penalties. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Although the second clause of this section employs general terms, the words used are sufficiently explicit and definite to convey to any man of ordinary intelligence and understanding an adequate description of the prohibited act or acts, and to inform him of what conduct on his part will render him liable to its penalties. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

A violation of this section is not a malicious misdemeanor. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

A violation of the first clause of this section is related to unfair trade practices, and is an unfair method of competition. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

And Is Commonly Called "Commercial Bribery."—If a person does the prohibited act or acts specified in the first clause of this section with the intent explicitly stated

therein, he is guilty of what is commonly called "commercial bribery." State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Such Practices Are Generally Prohibited.—There is general agreement that where an agent or employee receives money or other considerations from a person in return for the agent's or employee's efforts to further that person's interest in business dealings between him and the principal or employer, such an act or acts on the part of the agent or employee and on the part of the person who gives the money or other consideration is an essential element of the offense. prohibited. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

The intent specified in the first clause of this section is an essential element of the offense. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

As Is Agreement or Understanding in Second Clause.—The agreement or understanding in the second clause of this section is an essential element of the offense State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

First Clause Does Not Prohibit Customary Tipping.—A contention that the language of the first clause of this section is so broad as to prohibit the customary habit of tipping is untenable. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Since Tipping Lacks Intent to Influence.—Customary tipping is in obedience to custom or in appreciation of service, and is done with no intent to influence the action of the person receiving the tip in relation to his or her employer's business, and as to tipping done in such a manner the statute is not applicable. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

But If Such Intent Is Present, Tipping May Be Violation.—It is possible that a person by tipping an agent, servant or employee with the intent specified in the first clause of this section could bring himself within its penalties, e.g., by giving substantial amounts or considerations and calling them tips. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Second Clause Is Intended to Prohibit Disloyalty by Employees.—The plain intent and purpose of the second clause of this section is to prohibit any agent, employee or servant from being disloyal and unfaithful to his principal, employer or master. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

The third and fourth parts of this section refer to a commission, discount or bonus received by any agent, employee or servant under the circumstances therein specified, and to any person who gives or offers such an agent, employee, or servant such commission, discount or bonus. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Parties to Prohibited Acts Generally Only Witnesses.—The activities necessary to accomplish the offenses prohibited by this section and similar statutes, require no violence, embody no traces in lasting form, and frequently, if not almost entirely, have no witnesses other than persons implicated or potentially implicated. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

Failure to Prove Conspiracy Does Not Bar Conviction of Substantive Offense.—Although the State failed to prove that one of the defendants was one of the conspirators and was guilty of the conspiracy alleged against him in one count in the indictment, he could still be convicted of the substantive offenses committed by him in violation of this section, as charged against him in other counts. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-354. Witness required to give self-criminating evidence; no suit or prosecution to be founded thereon.—No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and other documents before any court, or in obedience to the subpoena of any court, having jurisdiction of the crime denounced in § 14-353, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or in obedience to its subpoena or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or other

documents shall be exempted from prosecution and punishment for perjury committed in so testifying. (1913, c. 190, s. 2; C. S., s. 4476.)

Cross References.—As to constitutional provisions against self-criminating evidence, see N.C. Const., Art. I, § 11, and note thereto, and the United States Constitution, Amendment V.

Editor's Note.—For an article discussing the limits to self-incrimination, see 15 N.C.L. Rev. 229.

Stated in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ **14-355. Blacklisting employees.**—If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars; and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge. (1909, c. 858, s. 1; C. S., s. 4477.)

Intent of Section.—This section was intended to correct the abuse under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement; and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously. Seward v. Receivers of Seaboard Air Line Ry., 159 N.C. 241, 75 S.E. 34 (1912).

Remedial Provisions. — The provisions of this section and § 14-356 are remedial and do not put the burden upon the plaintiff of showing either malice or actual damages. Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1929).

What Constitutes a Violation. — Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the services of such employee that he would not sell his product to them should they employ him, and thus has prevented the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc., the employee is entitled to recover damages in his civil action against his former employer, and a demurrer ore tenus to a complaint setting forth this cause of action is bad. Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1929).

Cited in Scott v. Burlington Mills Corp., 245 N.C. 100, 95 S.E.2d 273 (1956).

§ **14-356. Conspiring to blacklist employees.**—It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1909, c. 858, s. 2; C. S., s. 4478.)

Editor's Note.—See note to § 14-355.

For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1962).

Cited in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941).

§ **14-357. Issuing nontransferable script to laborers.**—If any person who employs laborers by the day, week or month shall issue in payment for the services of such laborers any ticket, certificate or other script bearing upon its face the word "nontransferable," or shall issue such ticket, certificate or other script in any form that would render it void by transfer from the person to whom issued, or shall refuse to pay to the person holding the same its face value, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined not

less than ten dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days. (1889, c. 280; 1891, cc. 46, 78, 167, 370, 456; 1895, c. 127; Rev., s. 3730; C. S., s. 4479.)

"Face Value" Defined. — The "face value" is the value expressed on the face of the writing in the commodity in which it is payable. W.C. Marriner & Bro. v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906 (1893).

Rights of Assignee. — This section does not authorize the assignee of a ticket or script payable in merchandise to demand and receive payment in money instead of in merchandise. W.C. Marriner & Bro. v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906 (1893).

§ 14-357.1. Requiring payment for medical examination, etc., as condition of employment.—(a) It shall be unlawful for any employer, as defined in subsection (b) of this section, to require any applicant for employment, as defined in subsection (c), to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of the initial act of hiring.

(b) The term "employer" as used in this section shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company, doing business in or operating within the State.

Provided that this section shall not apply to any employer as defined in this subsection who employs less than twenty-five (25) employees.

(c) The term "applicant for employment" shall mean and include any person who seeks to be permitted, required or directed by any employer, as defined in subsection (b) hereof, in consideration of direct or indirect gain or profit, to engage in employment.

(d) Any employer who violates the provisions of this section shall be liable to a fine of not more than one hundred dollars ($100.00) for each and every violation. It shall be the duty of the Commissioner of Labor to enforce this section. (1951, c. 1094.)

ARTICLE 46.

Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement with intent to defraud the tenant, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Alamance, Alexander, Beaufort, Bertie, Bladen, Cabarrus, Camden, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne, Wilson and Yadkin. (1905, cc. 297, 383, 445, 820; Rev., s. 3366; 1907, c. 8; c. 84, s. 1; c. 595, s. 1; cc. 639, 719, 869; Pub. Loc. 1915, c. 18; C. S., s.

4480; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; 1945, c. 635; 1953, c. 474.)

Cross References.—As to similar provisions for master and servants, see § 14-347 et seq. As to ejectment of tenant, see § 42-26 and note thereto.

Constitutionality of Section.—The provisions of this section contravene N.C. Const., Art. I, § 16, prohibiting imprisonment for debt, except in cases of fraud; and an indictment thereunder, without averment of fraud, will be quashed. State v. Williams, 150 N.C. 802, 63 S.E. 949 (1909); Minton v. Early, 183 N.C. 199, 111 S.E. 347 (1922).

Jurisdiction.—A court of a justice of the peace has final jurisdiction of a willful abandonment of crop in violation of this section. State v. Wilkes, 149 N.C. 453, 62 S.E. 430 (1908).

Indictment Insufficient. — An indictment under the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. State v. Williams, 150 N.C. 802, 63 S.E. 949 (1909).

§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement with intent to defraud the tenant, or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land with intent to defraud the landlord, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances, for the amount thereof. This section shall apply only to the following counties: Alamance, Anson, Cabarrus, Caswell, Davidson, Franklin, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Lee, Lincoln, Moore, Person, Randolph, Richmond, Rockingham, Rowan, Rutherford, Sampson, Stanly, Stokes, Union, Vance, Wake and Washington. (1905, c. 299, ss. 1-7; Rev., s. 3367; 1907, c. 84, s. 2; c. 238, s. 1; c. 543; c. 595, s. 2; c. 810; C. S., s. 4481; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; Pub. Loc. 1927, c. 614; 1929, c. 5, s. 1; 1931, c. 44; c. 136, s. 2; 1939, c. 95; 1945, c. 635; 1949, c. 83; 1951, c. 615.)

Cross Reference.—As to willful destruction of landlord's property by the tenant, see § 42-11.

ARTICLE 47.

Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.—If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. In this section, and in every law which may be enacted relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature;

the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food. (1881, c. 34, s. 1; c. 368, ss. 1, 15; Code, ss. 2482, 2490; 1891, c. 65; Rev., s. 3299; 1907, c. 42; C. S., s. 4483; 1969, c. 1224, s. 2.)

Cross Reference.—As to livestock, see also § 14-366.

Editor's Note. — The 1969 amendment added, at the end of the first sentence, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

In General.—Anger does not excuse the killing when it was wilful and needless. And under such circumstances the intent is immaterial. State v. Neal, 120 N.C. 613, 27 S.E. 81 (1897). In order to convict, however, there must be a finding that the act was "wilfully and unlawfully" done. State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894). Unnecessary suffering knowingly and willfully permitted constitutes the offense. State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893).

This section is for the protection of animals. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

It is not for the protection of trespassers or mere licensees. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

Hence, Unlawful Shooting at Dog Is Not Negligence Per Se.—Where plaintiff, who was struck by a bullet fired by defendant, was at best a mere licensee, the fact defendant was unlawfully shooting at a dog did not render the act negligence per se, nor impose on defendant absolute liability. Since this section is not for the protection of the class to which plaintiff belonged, its violation did not impose liability in the absence of a showing that defendant knew, or in the exercise of reasonable care should have known, of plaintiff's presence in the vicinity. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

Indictment. — The facts constituting torturing, tormenting or cruel conduct must be set out when such conduct is charged. State v. Watkins, 101 N.C. 702, 8 S.E. 346 (1888). A charge that defendant "did unlawfully and wilfully beat" was held sufficient in State v. Alleson, 90 N.C. 733 (1884).

Injury to Prevent Depredations. — The fact that cows (State v. Butts, 92 N.C. 784 (1885)) or chickens (State v. Neal, 120 N.C. 613, 27 S.E. 81 (1897)) were trespassing on defendant's property is not a defense to an action under this section, where the killing or wounding was unnecessary. See also State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

Illustrations. — Shooting pigeons for sport (State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893)) and poisoning chickens (State v. Bossee, 145 N.C. 579, 59 S.E. 879 (1907)) have been held violations of the section.

Hitting a runaway horse with a rock, however, has been held insufficient to sustain a direct verdict—the question of the wilful purpose to injure being for the jury. State v. Isley, 119 N.C. 862, 26 S.E. 35 (1896).

A dog is a useful animal within the meaning of this section. State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939).

Unnecessary to Show Dog Has Pecuniary Value. — It is unnecessary to show that a dog is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the section. State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

The word "willful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939).

Justification. — In a prosecution for needlessly killing a useful dog, evidence that a dog, not identified as the dog killed, had frequented the place where defendant was employed, resulting in unpleasant odors around the place, and that the dog had barked at night, is properly excluded from the evidence upon the State's objection, since the evidence does not tend to establish justification, the presence of the dog on the premises giving the defendant only the right to drive him away but not to injure him unnecessarily, and previous offenses committed by the dog not being justification for killing him, the right to kill being founded on the immediate necessity of protecting property, a person, or another animal. State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939).

Applied in State v. Holt, 90 N.C. 749 (1884).

Quoted in State ex rel. Bruton v. American Legion Post No. 113, 256 N.C. 691, 124 S.E.2d 885 (1962).

§ 14-361. Instigating or promoting cruelty to animals.—If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or

engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1881, c. 368, s. 6; Code, s. 2487; 1891, c. 65; Rev., s. 3300; C. S., s. 4484; 1953, c. 857, s. 1; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment as previously amended in 1953.

Cited in State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893).

§ 14-362. Bearbaiting, cockfighting and similar amusements. — If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1881, c. 368, s. 2; Code, s. 2483; 1891, c. 65; Rev., s. 3301; C. S., s. 4485; 1953, c. 857, s. 2; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment as previously amended in 1953.

§ 14-363. Conveying animals in a cruel manner.—If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Whenever an offender shall be taken into custody therefor by any officer, the officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody. The necessary expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of such animal in an action therefor. (1881, c. 368, s. 5; Code, s. 2486; 1891, c. 65; Rev., s. 3302; C. S., s. 4486; 1953, c. 857, s. 3; 1969, c. 1224, s. 4.)

Editor's Note. — The 1969 amendment rewrote the provisions of the first sentence relating to punishment as previously amended in 1953.

ARTICLE 48.

Animal Diseases.

§ 14-364: Repealed by Session Laws 1945, c. 635.

ARTICLE 49.

Protection of Livestock Running at Large.

§ 14-365. Failing to show hide and ears of livestock killed while running at large.—If any person shall kill any neat cattle, sheep or hogs in the woods or range, and shall for two days fail to show the hide and ears to the nearest justice or to two freeholders, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (R. C., c. 17, s. 2; Code, s. 2318; 1901, c. 546; Rev., s. 3315; 1907, c. 821; C. S., s. 4493; 1969, c. 1224, s. 1.)

Local Modification.—Tyrrell: C.S. 4493.

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ 14-366. Molesting or injuring livestock. — If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of the owner, whether done with actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a misdemeanor: Provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1850, c. 94, ss. 1, 2; R. C., c. 34, s. 104; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; Rev., s. 3314; C. S., s. 4494; 1969, c. 1224, s. 9.)

Local Modification. — Graham, Haywood, Jackson, Swain, Transylvania: C.S. 4494.

Cross Reference.—As to cruelty to animals, see § 14-360.

Editor's Note. — The 1969 amendment added the last sentence.

Applied in State v. Pollard, 83 N.C. 598 (1880); State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

§ 14-367. Altering the brands of and misbranding another's livestock.—If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and shall be punished as if convicted of larceny. (1797, c. 485, s. 2, P. R.; R. C., c. 34, s. 57; Code, s. 1001; Rev., s. 3317; C. S., s. 4495.)

Cross Reference.—As to cattle brands, their registration, defacement, etc., see § 80-45 et seq.

§ 14-368. Placing poisonous shrubs and vegetables in public places. —If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mock orange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1887, c. 338; Rev., s. 3318; C. S., s. 4496; 1969, c. 1224, s. 3.)

Cross Reference. — As to putting out poisonous foodstuffs, see § 14-401.

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

§ 14-369. Wounding, capturing or killing of homing pigeons prohibited.—It shall be unlawful for any person or persons at any time or in any manner to hurt, pursue, take, capture, wound, maim, disfigure or kill any homing pigeon then and there owned by another person, or to trap the same by use of any pit, pitfall, scaffold, cage, snare, trap, net, baited hook or similar trapping device, or make use of any drug, poison, explosive or chemical for the purpose of injuring, capturing or killing any such homing pigeon. Any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1941, c. 10; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

Article 50.

Protection of Letters, Telegrams, and Telephone Messages.

§ 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.—If any person wrongfully obtains, or attempts to obtain, any knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulges to any but the person for whom it was intended, the contents of a telephonic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (1903, c. 599; Rev., s. 3848; C. S., s. 4497.)

§ 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.—If any person wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulges to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a misdemeanor. (1889, c. 41, s. 1; Rev., s. 3846; C. S., s. 4498.)

§ 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.—If any person shall willfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor. (1889, c. 41, s. 2; Rev., s. 3728; C. S., s. 4499.)

Cross Reference.—See note to § 14-155.

Indictment. — It is necessary to charge, in an indictment for a violation of this section and to prove upon the trial, that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority. State v. Bagwell, 107 N.C. 859, 12 S.E. 254 (1890).

Article 51.

Protection of Athletic Contests.

§ 14-373. Bribery of players, managers, coaches, referees, umpires or officials.—If any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any player or participant in any athletic contest with intent to influence his play, action, or conduct and for the purpose of inducing the player or participant to lose or try to lose or cause to be lost any athletic contest or to limit or try to limit the margin of victory or defeat in such contest; or if any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any referee, umpire, manager, coach, or any other official of an athletic club or team, league, association, institution or conference, by whatever name called connected with said athletic contest with intent to influence his decision or bias his opinion or judgment for the purpose of losing or trying to lose or causing to be lost said athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be guilty of a felony, and, upon conviction shall be imprisoned in the State's prison not less than one nor more than ten years, and shall be fined not less than three thousand dollars ($3,000.00), nor more than ten thousand dollars ($10,000.00). (1921, c. 23, s. 1; C. S., s. 4499(a); 1951, c. 364, s. 1; 1961, c. 1054, s. 1.)

Editor's Note. — Session Laws 1961, c. 1504, s. 7, provides that notwithstanding any other provisions of the act, it shall not be construed as repealing any provision of

article 51 of chapter 14 of the General Statutes as said article reads or provided immediately preceding June 19, 1961, with respect to any act done or offense committed in violation of said article prior to the said date, and the provisions of said article 51 in effect immediately preceding said date shall continue in full force and effect with respect to all acts done or offenses committed prior to said date.

Essential Element. — An essential element of the offense is bribery or offer to bribe with intent to influence the play, action or conduct of a player in any athletic contest. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964).

It is necessary for the State to prove specific intent to influence the play, action or conduct of a player in any athletic contest. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964).

Competency of Evidence. — Testimony admitted over objections and exceptions as to the bribery of a number of basketball players in other states and rigging of basketball games in other states, was held competent as proof of intent to influence the play, action or conduct of a player in an athletic contest in State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964).

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-374. Acceptance of bribes by players, managers, coaches, referees, umpires or officials.—If any player or participant in any athletic contest shall accept, or agree to accept, a bribe given for the purpose of inducing the player or participant to lose or try to lose or cause to be lost or to limit or try to limit the margin of victory or defeat in such contest; or if any referee, umpire, manager, coach, or any other official of an athletic club, team, league, association, institution, or conference connected with an athletic contest shall accept or agree to accept a bribe given with the intent to influence his decision or bias his opinion or judgment and for the purpose of losing or trying to lose or causing to be lost said athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison not less than one nor more than ten years, or fined in the discretion of the court. (1921, c. 23, s. 2; C. S., s. 4499(b); 1951, c. 364, s. 2; 1961, c. 1054, s. 2.)

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-375. Completion of offenses set out in §§ 14-373 and 14-374. —To complete the offenses mentioned in §§ 14-373 and 14-374, it shall not be necessary that the player, manager, coach, referee, umpire, or official shall, at the time, have been actually employed, selected, or appointed to perform his respective duties; it shall be sufficient if the bribe be offered, accepted, or agreed to with the view of probable employment, selection, or appointment of the person to whom the bribe is offered or by whom it is accepted. It shall not be necessary that such player, referee, umpire, manager, coach, or other official actually play or participate in an athletic contest, concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3; C. S., s. 4499(c); 1951, c. 364, s. 3; 1961, c. 1054, s. 3.)

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-376. Bribe defined.—By a "bribe," as used in this article, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or in the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any player, referee, manager, coach, umpire, club or league official, to see which game an admission fee may be charged, or in which athletic contest any player, manager, coach, umpire, referee, or other official is paid any compensation for his services. Said bribe as defined in this article need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other man-

ner defined to cover the true intention of the parties. (1921, c. 23, s. 4; C. S., s. 4499(d); 1951, c. 364, s. 4; 1961, c. 1054, s. 4.)

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ **14-377. Intentional losing of athletic contest or limiting margin of victory or defeat.**—If any player or participant shall commit any willful act of omission or commission, in playing of an athletic contest, with intent to lose or try to lose or to cause to be lost or to limit or try to limit the margin of victory or defeat in such contest for the purpose of material gain to himself, or if any referees, umpire, manager, coach, or other official of an athletic club, team, league, association, institution or conference connected with an athletic contest shall commit any willful act of omission or commission connected with his official duties with intent to try to lose or to cause to be lost or to limit or try to limit the margin of victory or defeat in such contest for the purpose of material gain to himself, such person shall be guilty of a felony and upon conviction shall be imprisoned in the State's prison, not less than one nor more than ten years, or fined in the discretion of the court. (1921, c. 23, s. 5; C. S., s. 4499(e); 1951, c. 364, s. 5; 1961, c. 1054, s. 5.)

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ **14-378. Venue.**—In all prosecutions under this article, the venue may be laid in any county where the bribe herein referred to was given, offered, or accepted, or in which the athletic contest was carried on in relation to which the bribe was offered, given, or accepted, or the acts referred to in § 14-377 were committed. (1921, c. 23, s. 6; C. S., s. 4606(c); 1951, c. 364, s. 6.)

§ **14-379. Bonus or extra compensation not forbidden.**—Nothing in this article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager, coach, or professional player, or to any league, association, or conference for the purpose of encouraging such manager, coach, or player to a higher degree of skill, ability, or diligence in the performance of his duties. (1921, c. 23, s. 7; C. S., s. 4499(f); 1951, c. 364, s. 7; 1961, c. 1054, s. 6.)

§ **14-380:** Repealed by Session Laws 1951, c. 364, s. 8.

ARTICLE 51A.

Protection of Horse Shows.

§ **14-380.1. Bribery of horse show judges or officials.**—Any person who bribes, or offers to bribe, any judge or other official in any horse show, with intent to influence his decision or judgment concerning said horse show, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1963, c. 1100, s. 1; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ **14-380.2. Bribery attempts to be reported.**—Any judge or other official of any horse show shall report to the resident superior court solicitor any attempt to bribe him with respect to his decisions in any horse show, and a failure to so report shall constitute a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1963, c. 1100, s. 2; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

§ **14-380.3. Bribe defined.**—The word "bribe," as used in this article, shall have the same meaning as set forth in G.S. 14-376, in relation to athletic contests. (1963, c. 1100, s. 3.)

§ **14-380.4. Printing article in horse show schedules.**—The provisions of this article shall be printed on all schedules for any horse show held prior to January 1, 1965. (1963, c. 1100, s. 4.)

Article 52.

Miscellaneous Police Regulations.

§ **14-381. Desecration of State and National flag.**—Any person who in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color or ensign of the United States or State flag or ensign of this State, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or substance of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance upon which it is so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. Any person violating this section shall also forfeit a penalty of fifty dollars for each offense to be recovered with costs in a civil action or suit in any court having jurisdiction. Such action or suit may be brought by and in the name of any citizen of this State, and such penalty, when collected, less the costs and expenses of the action or suit, shall be paid one half to the person suing and one half to the school fund of the county in which suit was brought; and two or more penalties may be sued for and recovered in the same action or suit.

The words, flag, standard, color or ensign, as used in this section, shall include any flag, standard, color, ensign, or any picture or representation of any of them, made of any substance or represented on any substance, and of any size, evidently purporting to be a flag, standard, color or ensign of the United States of America, or a picture or a representation of any of them, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe it to represent the flag, colors, standard or ensign of the United States of America.

The possession by any person other than a public officer, as such, of a flag, standard, color, ensign, article, substance, or thing, on which there is anything made unlawful by this section, shall be presumptive evidence that the same is in violation of this section. (1917, c. 271; C. S., s. 4500.)

§ **14-382. Pollution of water on lands used for dairy purposes.**—It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such way as to pollute the water on the lands so used or which may be used for dairy

purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned for not more than thirty days, or both, and each day that such pollution is committed or exists shall constitute a separate offense. (1919, c. 222; C. S., s. 4501.)

§ 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.—Any person, firm or corporation owning lands or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within four hundred feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all treetops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of four hundred feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such treetops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1913, c. 56; C. S., s. 4502; 1969, c. 1224, s. 1.)

Editor's Note. — The 1969 amendment added, at the end of the section, "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Constitutionality. — The section constitutes a valid exercise of the police power and is constitutional. State v. Perley, 173 N.C. 783, 92 S.E. 504 (1917).

The motive is immaterial and where the intent to violate the section is shown the defendant is punishable. State v. Perley, 173 N.C. 783, 92 S.E. 504 (1917).

§ 14-384. Injuring notices and advertisements. — If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a lawful purpose, before the object for which such notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office. (1885, c. 302; Rev., s. 3709; C. S., s. 4503.)

Cross Reference. — As to the unlawful posting of advertisements, see § 14-145.

§ 14-385. Defacing or destroying public notices and advertisements.—If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be

guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1876-7, c. 215; Code, s. 981; Rev., s. 3710; C. S., s. 4504.)

§ 14-386. Erecting signals and notices in imitation of those of railroads.—No person, firm or corporation other than a railroad or street railway company shall, for advertisement or other purposes, erect and maintain on or near any highway any cross-arm post or other post or standard containing the words "Stop! Look! Listen!" or other such words or combinations of words in imitation of railroad signals or notices. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1917, c. 230; C. S., s. 4505; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ 14-387: Repealed by Session Laws 1945, c. 635.

§ 14-388: Repealed by Session Laws 1943, c. 543.

§ 14-389. Sale of Jamaica ginger.—It shall be unlawful for any person, firm, or corporation to sell the compound known as Jamaica ginger except upon the prescription of a duly licensed and regularly practicing physician; the person, firm, or corporation selling Jamaica ginger upon prescription shall keep a list of said prescriptions, and shall allow said list to be examined by any officer of the law, and no prescription shall ever be filled but once; it shall be unlawful for any physician to give a prescription for Jamaica ginger except to a person directly under his care, and then only in good faith for medicinal purposes only. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not for more than six months, or both. (Pub. Loc. 1913, c. 761; 1919, c. 288; C. S., s. 4507; 1969, c. 1224, s. 9.)

Editor's Note. — The 1969 amendment added the last sentence.

§§ 14-390, 14-390.1: Repealed by Session Laws 1969, c. 970, s. 11.

Cross References. — For present provisions as to furnishing intoxicants, barbiturates or stimulant drugs to inmates of charitable or penal institutions, see § 90-113.12. For present provisions as to furnishing poison, narcotics, deadly weapons, cartridges or ammunition to inmates of charitable or penal institutions, see § 90-113.13.

§ 14-391. Usurious loans on household and kitchen furniture or assignment of wages.—Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale, or purported conditional sale or otherwise, upon any article of household or kitchen furniture, or any assignment of wages, earned or to be earned, and shall willfully:

(1) Take, receive, reserve or charge a greater rate of interest than six percent (6%), either before or after the interest may accrue; or

(2) Refuse to give receipts for payments on interest or principal of such loan; or

(3) Fail or refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security;

shall be guilty of a misdemeanor and in addition thereto shall be subject to the provisions of G.S. 24-2. (1907, c. 110; C. S., s. 4509; 1927, c. 72; 1959, c. 195.)

Cross Reference.—As to interest in general, see § 24-1 et seq.

Editor's Note. — Section 3 of c. 1053, Session Laws 1961, which chapter enacted the North Carolina Consumer Finance Act, provides that this section shall not be applicable to persons licensed under the Consumer Finance Act, that is, §§ 53-164 to 53-191. See Editor's note to § 53-164.

This section is constitutional. State v. Davis, 157 N.C. 648, 73 S.E. 130 (1911).

Interest Need Not Be Received. — The charge of the usurious interest constitutes the offense without the necessity of having received it. State v. Davis, 157 N.C. 648, 73 S.E. 130 (1911).

§ 14-392. Digging ginseng on another's land during certain months.—All persons shall be allowed to dig ginseng at any time of the year for the purpose of replanting the same. If any person dig ginseng, except on his own premises, or for the purpose of replanting the same, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars for each day's or part of a day's digging, and shall also be guilty of a misdemeanor. (1866-7, c. 60; Code, s. 1053; 1905, c. 211; Rev., ss. 3502, 3714; C. S., s. 4510.)

Cross Reference.—As to the larceny of ginseng, see § 14-79.

§ 14-393. Purchase of ginseng; register to be kept; details.—Every person, firm or corporation buying ginseng in any quantity shall keep a register, and shall keep therein a true and accurate record of each purchase, showing the amount of the ginseng, the name and residence of the person from whom purchased, the source from which obtained, and amount paid for the same and the date of the purchase. A failure to comply with the above requirements, or the making of a false entry in regard to the purchasing of such ginseng, shall be a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1923, c. 199; C. S., s. 4510(a); 1969, c. 1224, s. 5.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ 14-394. Anonymous or threatening letters, mailing or transmitting.—It shall be unlawful for any person, firm, or corporation, or any association of persons in this State, under whatever name styled, to write and transmit any letter, note, or writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence or destruction of property of such individuals, firms, or corporations, or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such persons, firms or corporations, or officers thereof, as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person, firm, or corporation violating the provisions of this section shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 112; C.S., s. 4511(a).)

Transmission an Essential Element.—For a conviction under the statute, there must be a transmission of the anonymous letter which contains at least one of the categories of prohibited language. Unless and until there is a transmission, no crime has been committed. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

What Constitutes Transmission. — There can be no transmission within the meaning of the statute without an intended recipient and a delivery of the prohibited writing or a communication of its contents to the intended recipient. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

Circumstantial evidence of defendant's guilt of transmitting a threatening letter held sufficient to sustain conviction and

overrule defendant's motion for judgment as of nonsuit. State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

Cited in State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

§ 14-395. Commercialization of American Legion emblem; wearing by nonmembers.—It shall be unlawful for anyone not a member of the American Legion, an organization consisting of ex-members of the army, navy and marine corps, who served as members of such organizations in the recent world war, to wear upon his or her person the recognized emblem of the Amercian Legion, or to use the said emblem for advertising purposes, or to commercialize the same in any way whatsoever; or to use the said emblem in display upon his or her property or place of business, or at any place whatsoever. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars ($50.00) or imprisoned not more than thirty days. (1923, c. 89; C. S., s. 4511(b).)

§ 14-396. Dogs on "Capitol Square" worrying squirrels. — It shall be unlawful for any owner or keeper of a dog to permit the same to run at large on the Capitol grounds known as "Capitol Square" or to be thereon unless on leash or otherwise in the immediate physical control of said owner or keeper, or to pursue, worry or harass any squirrel or other wild animal kept on said grounds. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (1925, c. 289.)

§ 14-397. Use of name of denominational college in connection with dance hall.—It shall be unlawful for any person, firm, corporation, club or society, by whatsoever name called, to use in connection with any dance, or dance hall, by advertisement, announcement, or otherwise, the name of any college, or any class or organization of any college operated and conducted by a religious denomination, unless the written permission of the dean of such college is given, permitting and allowing the use of the name of such denominational college, or a class or organization of the same in connection with such dance, or dance hall. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 6; 1969, c. 1224, s. 5.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ 14-398. Theft or destruction of property of public libraries, museums, etc.—Any person who shall steal or unlawfully take or detain, or wilfully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, apparatus, specimen, or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of State or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, breaking or destroying any such property, shall not exceed fifty dollars ($50.00), be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of fifty dollars ($50.00), the person committing

same shall be guilty of a felony, and shall upon conviction be punished in accordance with the laws applicable thereto. (1935, c. 300; 1943, c. 543.)

§ 14-399. Placing of trash, refuse, etc., on the right-of-way of any public road.—It is unlawful for any person, firm, organization or private corporation, or for the governing body, agents or employees of any municipal corporation, to place or leave or cause to be placed or left temporarily or permanently, any trash, refuse, garbage, scrapped automobile, scrapped truck or part thereof on the right-of-way of any State highway or public road where said highway or public road is outside of an incorporated town.

The placing or leaving of the articles or matter forbidden by this section shall, for each day or portion thereof that said articles or matter are placed or left, constitute a separate offense.

A violation of this section is punishable by a fine of not less than ten dollars ($10.00) and not more than fifty dollars ($50.00) for each offense. (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1; 1953, cc. 387, 1011; 1955, c. 437; 1957, cc. 73, 175; 1959, c. 1173.)

Opinions of Attorney General.—Mr. F. L. Hutchinson, Division Engineer, State Highway Commission, 7/24/69.

Former Section Unconstitutional. — Before its amendment in 1959, this section made it unlawful to place, temporarily or permanently, any trash, refuse, garbage, or scrapped motor vehicles within 150 yards of a hard-surfaced highway unless such materials were concealed from the view of persons on the highway. The section further provided that it should not apply to junk yards which were properly screened from the view of persons on the highway. The section was held unconstitutional on the ground that its requirements had no substantial relationship to the public health, safety, morals or general welfare, since the mere screening of the proscribed materials from the public view could relate only to aesthetic considerations, which alone are an insufficient predicate for the exercise of the police power. State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1969).

§ 14-400. Tattooing prohibited.—It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under twenty-one years of age. Anyone violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1937, c. 112, ss. 1, 2; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ 14-401. Putting poisonous foodstuffs, etc., in certain public places, prohibited.—It shall be unlawful for any person, firm or corporation to put or place any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field, woods or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops or trees nor to poisons used in rat extermination. (1941, c. 181; 1953, c. 1239.)

Editor's Note. — For comment on this enactment, see 19 N.C.L. Rev. 479.

§ 14-401.1. Misdemeanor to tamper with examination questions.—Any person who purloins, steals, buys, receives, or sells, gives or offers to buy, give, or sell any examination questions or copies thereof of any examination provided and prepared by law before the date of the examination for which they shall

have been prepared, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1917, c. 146, s. 10; C. S., s. 5658; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

Section Limited to Examinations "Provided and Prepared by Law". — The portion of this section reading "any examination provided and prepared by law" expressly limits the application of the statute to examinations "provided and prepared by law," i.e., examinations given by the State Board of Medical Examiners, the State Board of Law Examiners, and other examining boards of this class. The statute has no application to college examination papers. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957).

§ 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.—It shall be unlawful for any person, firm, or corporation, who or which is engaged in business as a detective, detective agency, or what is ordinarily known as "secret service work," or conducts such business, to engage in the business of collecting claims, accounts, bills, notes, or other money obligations for others, or to engage in the business known as a collection agency. Violation of the provisions hereof shall be a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1943, c. 383; 1969, c. 1224, s. 5.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ 14-401.3. Inscription on gravestone or monument charging commission of crime.—It shall be illegal for any person to erect or cause to be erected any gravestone or monument bearing any inscription charging any person with the commission of a crime, and it shall be illegal for any person owning, controlling or operating any cemetery to permit such gravestone to be erected and maintained therein. If such gravestone has been erected in any graveyard, cemetery or burial plot, it shall shall be the duty of the person having charge thereof to remove and obliterate such inscription. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1949, c. 1075; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

§ 14-401.4. Identifying marks on machines and apparatus; application to Department of Motor Vehicles for numbers. — (a) No person, firm or corporation shall willfully remove, deface, destroy, alter or cover over the manufacturer's serial or engine number or any other manufacturer's number or other distinguishing number or indentification mark upon any machine or other apparatus, including but not limited to farm equipment, machinery and apparatus, but excluding electric storage batteries, nor shall any person, firm or corporation place or stamp any serial, engine, or other number or mark upon such machinery, apparatus or equipment except as provided for in this section, nor shall any person, firm or corporation purchase or take into possession or sell, trade, transfer, devise, give away or in any manner dispose of such machinery, apparatus, or equipment except by intestate succession or as junk or scrap after the manufacturer's serial or engine number or mark has been willfully removed, defaced, destroyed, altered or covered up unless a new number or mark has been added as provided in this section: Provided, however, that this section shall not prohibit or prevent the owner or holder of a mortgage, conditional sales contract, title retaining contract, or a trustee under a deed of trust from taking possession for the purpose of foreclosure under a power of sale or by court order, of such machinery, apparatus, or equipment, or from selling the same by foreclosure sale under a power

contained in a mortgage, conditional sales contract, title retaining contract, deed of trust, or court order; or from taking possession thereof in satisfaction of the indebtedness secured by the mortgage, deed of trust, conditional sales contract, or title retaining contract pursuant to an agreement with the owner.

(b) Each seller of farm machinery, farm equipment or farm apparatus covered by this section shall give the purchaser a bill of sale for such machinery, equipment or apparatus and shall include in the bill of sale the manufacturer's serial number or distinguishing number or identification mark, which the seller warrants to be true and correct according to his invoice or bill of sale as received from his manufacturer, supplier, or distributor or dealer.

(c) Each user of farm machinery, farm equipment or farm apparatus whose manufacturer's serial number, distinguishing number or identification mark has been obliterated or is now unrecognizable, may obtain a valid identification number for any such machinery, equipment or apparatus upon application for such number to the Department of Motor Vehicles accompanied by satisfactory proof of ownership and a subsequent certification to the Department by a member of the North Carolina Highway Patrol that said applicant has placed the number on the proper machinery, equipment or apparatus. The Department of Motor Vehicles is hereby authorized and empowered to issue appropriate identification marks or distinguishing numbers for machinery, equipment or apparatus upon application as provided in this section and the Department is further authorized and empowered to designate the place or places on the machinery, equipment or apparatus at which the identification marks or distinguishing numbers shall be placed. The Department is also authorized to designate the method to be used in placing the identification marks or distinguishing numbers on the machinery, equipment or apparatus: Provided, however, that the owner or holder of the mortgage conditional sales contract, title retaining contract, or trustee under a deed of trust in possession of such encumbered machinery, equipment, or apparatus from which the manufacturer's serial or engine number or other manufacturer's number or distinguishing mark has been obliterated or has become unrecognizable or the purchaser at the foreclosure sale thereof, may at any time obtain a valid identification number for any such machinery, equipment or apparatus upon application therefor to the Department of Motor Vehicles.

(d) Any person, firm or corporation who shall violate any part of this section shall be guilty of a misdemeanor and upon plea of guilty or conviction shall be punished in the discretion of the court. (1949, c. 928; 1951, c. 1110, s. 1; 1953, c. 257.)

§ 14-401.5. Practice of phrenology, palmistry, fortune-telling or clairvoyance prohibited.—It shall be unlawful for any person to practice the arts of phrenology, palmistry, clairvoyance, fortune-telling and other crafts of a similar kind in the counties named herein. Any person violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than six months or both such fine and imprisonment in the discretion of the court.

This section shall not prohibit the amateur practice of phrenology, palmistry, fortune-telling or clairvoyance in connection with school or church socials, provided such socials are held in school or church buildings.

Provided that the provisions of this section shall apply only to the counties of Alexander, Ashe, Avery, Bertie, Bladen, Brunswick, Buncombe, Burke, Caldwell, Camden, Carteret, Caswell, Chatham, Chowan, Clay, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Franklin, Gates, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Hertford, Hoke, Iredell, Johnston, Lee, Madison, Martin, McDowell, Mecklenburg, Moore, Nash, Northampton, Onslow, Orange, Pasquotank, Pender, Perquimans, Person, Polk,

Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Surry, Transylvania, Union, Vance, Wake and Warren. (1951, c. 314; 1953, cc. 138, 227, 328; 1955, cc. 55, 454; 1957, cc. 151, 166, 309, 355, 915; 1959, cc. 428, 1018; 1961, c. 271; 1969, c. 1224, s. 20.)

Local Modification.—Chatham: 1961, c. 544; Durham: 1951, c. 1189; Harnett: 1955, c. 1326; Lee: 1955, c. 766; Orange: 1961, c. 544.

Editor's Note. — The 1969 amendment substituted "six months" for "one year" near the end of the first paragraph.

§ 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.—It shall be unlawful for any person, firm, corporation or association to possess, use, store, sell or transport within the State of North Carolina, any form of that type of gas generally known as "tear gas," or any container or device for holding or releasing the same; provided, the provisions of this section shall not apply to the possession, use, storage, sale or transportation of such gas by or for any of the armed services of the United States or of this State, or by or for any governmental agency, or municipal and State peace officers of this State or for bona fide scientific, educational or industrial purposes, or for use in safes, vaults and depositories as a means of protection against robbery.

Any person, firm, corporation or association violating any provision of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1951, c. 592; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

§ 14-401.7. Persons, firms, banks and corporations dealing in securities on commission taxed as a private banker. — No person, bank, or corporation, without a license authorized by law, shall act as a stockbroker or private banker. Any person, bank, or corporation that deals in foreign or domestic exchange certificates of debt, shares in any corporation or charter companies, bank or other notes, for the purpose of selling the same or any other thing for commission or other compensation, or who negotiates loans upon real estate securities, shall be deemed a security broker. Any person, bank, or corporation engaged in the business of negotiating loans on any class of security or in discounting, buying or selling negotiable or other papers or credits, whether in an office for the purpose or elsewhere shall be deemed to be a private banker. Any person, firm, or corporation violating this section shall pay a fine of not less than one hundred nor more than five hundred dollars for each offense. (1939, c. 310, s. 1004; 1953, c. 970, s. 9.)

Cited in State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

§ 14-401.8. Refusing to relinquish party telephone line in emergency; false statement of emergency.—Any person who shall wilfully refuse to immediately relinquish a party telephone line when informed that such line is needed for an emergency call to a fire department or police department, or for medical aid or ambulance service, or any person who shall secure the use of a party telephone line by falsely stating that such line is needed for an emergency call, shall be guilty of a misdemeanor, and, upon conviction shall be fined or imprisoned in the discretion of the court.

The term "party line" as used in this section is defined as a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number. The term "emergency" as used in this section is defined as a situation in which property

or human life are in jeopardy and the prompt summoning of aid is essential. (1955, c. 958.)

Cited in Citizens Tel. Co. v. Telephone Serv. Co., 214 F. Supp. 627 (W.D.N.C. 1963).

§ 14-401.9. Parking vehicle in private parking space without permission.—It shall be unlawful for any person other than the owner or lessee of a privately owned or leased parking space to park a motor or other vehicle in such private parking space without the express permission of the owner or lessee of such space; provided, that such private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto, and provided further, that the parking spaces within the lot be clearly marked by signs setting forth the name of each individual lessee or owner.

The provisions of this section shall only apply to parking spaces located within the corporate limits of municipalities.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than ten dollars ($10.00) in the discretion of the court. (1955, c. 1019.)

§ 14-401.10. Soliciting advertisements for official publications of law-enforcement officers' associations.—Every person, firm or corporation who solicits any advertisement to be published in any law-enforcement officers' association's official magazine, yearbook, or other official publication, shall disclose to the person so solicited, whether so requested or not, the name of the law-enforcement association for which such advertisement is solicited, together with written authority from the president or secretary of such association to solicit such advertising on its behalf.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1961, c. 518; 1969, c. 1224, s. 8.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment in the last sentence.

ARTICLE 52A.

Sale of Weapons in Certain Counties.

§ 14-402. Sale of certain weapons without permit forbidden. — It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or dispose of, or to purchase or receive, at any place within the State from any other place within or without the State, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the sheriff of the county in which such purchase, sale, or transfer is intended to be made, any pistol, so-called pump-gun, bowie knife, dirk, dagger, slung-shot, blackjack or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the State of North Carolina any pistol, so-called pump-gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the sheriff as provided in § 14-403. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be

fined not less than fifty dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than six months, or both, in the discretion of the court. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781; 1959, c. 1073, s. 2.)

Editor's Note.—Session Laws 1959, c. 1073, s. 2, amended this and other sections of this article by striking out the word "clerk" and the words "clerk of the superior court" wherever they appeared and substituting therefor the word "sheriff," it being the intent and purpose of the amendatory act to transfer to the sheriffs the duties theretofore performed by the clerks of the superior court in issuing permits for the purchase of weapons and keeping the records of issuance of such permits and all other duties incident to the purchase, sale and ownership of weapons.

Session Laws 1959, c. 1073, s. 4, as amended from time to time, excepts the following counties from the application of the 1959 amendments to this article: Ashe, Avery, Bertie, Bladen, Cherokee, Clay (inserted in the list by Session Laws 1969, c. 276), Currituck, Davie, Duplin, Franklin, Greene, Halifax, Iredell, Jackson, Lincoln, Macon, Madison, Mitchell, Moore, Pender, Perquimans, Person, Polk, Rockingham, Sampson, Stokes, Tyrrell, Union, Warren, Washington, Watauga and Yancey.

Harnett was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Haywood was deleted by Session Laws 1969, c. 6; Hertford was deleted by Session Laws 1967, c. 903; Johnston was deleted by Session Laws 1967, c. 122; Jones was deleted by Session Laws 1969, c. 109; Lee was deleted by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Mecklenburg was deleted by Session Laws 1969, c. 1305; Pamlico was deleted by Session Laws 1967, c. 6; Vance was deleted by Session Laws 1969, c. 396; Wilson was deleted by Session Laws 1963, c. 537.

The article as it applies to the counties excepted from the 1959 act has been codified as article 53, §§ 14-409.1 through 14-409.9.

Opinions of Attorney General.—Mr. J.B. Roberts, Sheriff, Cabarrus County, 7/8/69; Mr. Jay F. Frank, Iredell County Attorney, 10/17/69.

§ 14-403. Permit issued by sheriff; form of permit. — The sheriffs of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,

..... County.

I, ..., sheriff of said county, do hereby certify that ..... whose place of residence is ..... Street, in ..... (or) in ..... Township ..... County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, and that the possession of one of the weapons described is necessary for self-defense or the protection of the home, a license or permit is therefore hereby given said ..... to purchase one pistol, (or if any other weapon is named strike out the word pistol) ..... from any person, firm or corporation authorized to dispose of the same.

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

.....

Sheriff.

(1919, c. 197, s. 2; C. S., s. 5107; 1959, c. 1073, s. 2.)

§ 14-404. Applicant must be of good moral character; weapon for defense of home; sheriff's fee.—Before the sheriff shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said sheriff shall not be so fully satisfied, he shall refuse to issue said license or permit: Provided, that nothing in this article shall

apply to officers authorized by law to carry firearms if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms. The sheriff shall charge for his services upon issuing such license or permit a fee of fifty cents. (1919, c. 197, s. 3; C. S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73.)

Editor's Note. — The 1969 amendment added "if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms" at the end of the second sentence.

Opinions of Attorney General.—Mr. Jay F. Frank, Iredell County Attorney, 10/17/69.

§ 14-405. Record of permits kept by sheriff.—The sheriff shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C. S., s. 5109; 1959, c. 1073, s. 2.)

§ 14-406. Dealer to keep record of sales. — Every dealer in pistols, pistol cartridges and other weapons mentioned in this article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted State, county or police officer, within this State. (1919, c. 197, s. 5; C.S., s. 5110.)

§ 14-407. Weapons to be listed for taxes.—During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapon for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6; C. S., s. 5111.)

§ 14-407.1. Sale of blank cartridge pistols.—The provisions of G.S. 14-402 and G.S. 14-405 to 14-407 shall apply to the sale of pistols suitable for firing blank cartridges. The clerks of the superior courts of all the counties of this State are authorized and may in their discretion issue to any person, firm or corporation, in any such county, a license or permit to purchase or receive any pistol suitable for firing blank cartridges from any person, firm or corporation offering to sell or dispose of the same, which said permit shall be in substantially the following form:

"North Carolina
..... County

I, ..., Clerk of the Superior Court of said county, do hereby certify that ....., whose place of residence is ..... Street in .....(or) in ..... Township in ..... County, North Carolina, having this day satisfied me that the possession of a pistol suitable for firing blank cartridges will be used only for lawful purposes, a permit is therefore given said ..... to purchase said pistol from any person, firm or corporation authorized to dispose of the same, this ..... day of ....., 19 .....

.....
Clerk of Superior Court"

The clerk shall charge for his services, upon issuing such permit, a fee of fifty cents (50¢). (1959, c. 1068.)

§ 14-408. Violation of § 14-406 or 14-407 a misdemeanor.—Any person, firm, or corporation violating any of the provisions of § 14-406 or 14-407 shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred

dollars ($500.00), imprisonment for not more than six months, or both. (1919, c. 197, s. 7; C. S., s. 5112; 1969, c. 1224, s. 6.)

Editor's Note. — The 1969 amendment substituted the present provisions as to punishment for a provision for fine or imprisonment in the discretion of the court.

§ **14-409. Machine guns and other like weapons.**—It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of, use or possess machine guns, submachine guns, or other like weapons: Provided, however, that this section shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the sheriff of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the said business; officers and soldiers of the United States army, when in discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties; the manufacture, use or possession of such weapons for scientific or experimental purposes when such manufacture, use or possession is lawful under federal laws and the weapon is registered with a federal agency, and when a permit to manufacture, use or possess the weapon is issued by the sheriff of the county in which the weapon is located. Provided, further, that automatic shotguns and pistols or other automatic weapons that shoot less than thirty-one shots shall not be construed to be or mean a machine gun or submachine gun under this section; and that any bona fide resident of this State who now owns a machine gun used in former wars, as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section upon his reporting said ownership to the sheriff of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than five hundred ($500.00) dollars, or imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1; 1959, c. 1073, s. 2; 1965, c. 1200.)

Article 53.

Sale of Weapons in Certain Other Counties.

§ **14-409.1. Sale of certain weapons without permit forbidden.** — It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or dispose of, or to purchase or receive, at any place within the State from any other place within or without the State, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such purchase, sale or transfer is intended to be made, any pistol, so-called pump gun, bowie knife, dirk, dagger, slung-shot, blackjack or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the State of North Carolina any pistol, so-called pump gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the clerk of the superior court as provided in § 14-409.2. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than six months, or

both, in the discretion of the court. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781.)

Editor's Note.—Counties excepted from article 52A, §§ 14-402 through 14-409, as amended by Session Laws 1959, c. 1073, are governed by this article. The list of counties, as amended from time to time, is as follows: Ashe, Avery, Bertie, Bladen, Cherokee, Clay (inserted in the list by Session Laws 1969, c. 276), Currituck, Davie, Duplin, Franklin, Greene, Halifax, Iredell, Jackson, Lincoln, Macon, Madison, Mitchell, Moore, Pender, Perquimans, Person, Polk, Rockingham, Sampson, Stokes, Tyrrell, Union, Warren, Washington, Watauga and Yancey.

Harnett was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Haywood was deleted by Session Laws 1969, c. 6; Hertford was deleted by Session Laws 1967, c. 903; Johnston was deleted by Session Laws 1967, c. 122; Jones was deleted by Session Laws 1969, c. 109; Lee was deleted by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Mecklenburg was deleted by Session Laws 1969, c. 1305; Pamlico was deleted by Session Laws 1967, c. 6; Vance was deleted by Session Laws 1969, c. 396; Wilson was deleted by Session Laws 1963 c. 537.

See Editor's Note under § 14-402.

Opinions of Attorney General.—Mr. Jay F. Frank, Iredell County Attorney 10/17/69.

§ 14-409.2. Permit issued by clerk of court; form of permit.—The clerks of the superior courts of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,
..... County.

I, ..., clerk of the Superior Court of said county, do hereby certify that ..... whose place of residence is ..... Street, in ..... (or) in ..... Township ..... County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, and that the possession of one of the weapons described is necessary for self-defense or the protection of the home, a license or permit is therefore hereby given said ..... to purchase one pistol, (or if any other weapon is named strike out the word pistol) ..... from any person, firm or corporation authorized to dispose of the same.

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

.....
Clerk Superior Court.

(1919, c. 197, s. 2; C. S., s. 5107.)

§ 14-409.3. Applicant must be of good moral character; weapon for defense of home; clerk's fee.—Before the clerk of the superior court shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said clerk shall not be so fully satisfied, he shall refuse to issue said license or permit: Provided, that nothing in this article shall apply to officers authorized by law to carry firearms if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms. The clerk shall charge for his services upon issuing such license or permit a fee of fifty cents. (1919, c. 197, s. 3; C. S., s. 5108; 1969, c. 73.)

Editor's Note. — The 1969 amendment added "if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms" at the end of the second sentence.

Opinions of Attorney General. — Mr. Jay F. Frank, Iredell County Attorney, 10/17/69.

§ **14-409.4. Record of permits kept by clerk.**—The clerk of the superior court shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C. S., s. 5109.)

§ **14-409.5. Dealer to keep record of sales.** — Every dealer in pistols, pistol cartridges and other weapons mentioned in this article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted State, county or police officer, within this State. (1919, c. 197, s. 5; C. S., s. 5110.)

§ **14-409.6. Weapons to be listed for taxes.**—During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapons for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6; C. S., s. 5111.)

§ **14-409.7. Sale of blank cartridge pistols.**—The provisions of G. S. 14-409.1 and G. S. 14-409.4 to 14-409.6 shall apply to the sale of pistols suitable for firing blank cartridges. The clerks of the superior courts of all the counties of this State are authorized and may in their discretion issue to any person, firm or corporation, in any such county, a license or permit to purchase or receive any pistol suitable for firing blank cartridges from any person, firm or corporation offering to sell or dispose of the same, which said permit shall be in substantially the following form:

"North Carolina,
..... County.

I, ..., Clerk of the Superior Court of said county, do hereby certify that ....., whose place of residence is ..... Street in ..... (or) in ..... Township in ..... County, North Carolina, having this day satisfied me that the possession of a pistol suitable for firing blank cartridges will be used only for lawful purposes, a permit is therefore given said ..... to purchase said pistol from any person, firm or corporation authorized to dispose of the same, this ..... day of ....., 19.....

.....
Clerk of Superior Court"

The clerk shall charge for his services, upon issuing such permit, a fee of fifty cents (50¢). (1959, c. 1068.)

Editor's Note.—The above section is § 14-407.1 as enacted by Session Laws 1959, c. 1068. Being applicable throughout the State, it has been codified in this article as well as in article 52A. See Editor's notes under §§ 14-402 and 14-409.1.

§ **14-409.8. Violation of § 14-409.5 or 14-409.6 a misdemeanor.**—Any person, firm, or corporation violating any of the provisions of § 14-409.5 or 14-409.6 shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1919, c. 197, s. 7; C. S., s. 5112; 1969, c. 1224, s. 6.)

Editor's Note. — The 1969 amendment substituted the present provisions as to punishment for a provision for fine or imprisonment in the discretion of the court.

§ **14-409.9. Machine guns and other like weapons.**—It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of,

use or possess machine guns, submachine guns, or other like weapons: Provided, however, that this section shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the clerk of the superior court of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the said business; officers and soldiers of the United States army, when in discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties; the manufacture, use or possession of such weapons for scientific or experimental purposes when such manufacture, use or possession is lawful under federal laws and the weapon is registered with a federal agency, and when a permit to manufacture, use or possess the weapon is issued by the sheriff of the county in which the weapon is located. Provided, further, that automatic shotguns and pistols or other automatic weapons that shoot less than thirty-one shots shall not be construed to be or mean a machine gun or submachine gun under this section; and that any bona fide resident of this State who now owns a machine gun used in former wars, as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section upon his reporting said ownership to the clerk of the superior court of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than five hundred ($500.00) dollars, or imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1; 1965, c. 1200.)

Editor's Note. — The 1965 amendment added the provisions pertaining to weapons for scientific or experimental purposes in the second paragraph and in the proviso of the same paragraph substituted "thirty-one shots" for "sixteen shots."

Article 53A.

Other Firearms.

§ **14-409.10. Purchase of rifles and shotguns out of State.**—It shall be lawful for citizens of this State to purchase rifles and shotguns and ammunition therefor in states contiguous to this State. (1969, c. 101, s. 1.)

§ **14-409.11. "Antique firearm" defined.**—The term "antique firearm" means any firearm manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1898; and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade. (1969, c. 101, s. 2.)

Article 54.

Sale, etc., of Pyrotechnics.

§ **14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.**—It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the State of North Carolina: Provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: Provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under super-

vision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or discharged: Provided, further, that it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business. (1947, c. 210, s. 1.)

Local Modification. — Durham: 1963, c. 745; Pender: 1957, c. 113.

§ **14-411. Sale deemed made at site of delivery.**—In case of sale or purchase of pyrotechnics, where the delivery thereof was made by a common or other carrier, the sale shall be deemed to be made in the county wherein the delivery was made by such carrier to the consignee. (1947, c. 210, s. 2.)

§ **14-412. Possession prima facie evidence of violation.**—Possession of pyrotechnics by any person, for any purpose other than those permitted under this article, shall be prima facie evidence that such pyrotechnics are kept for the purpose of being manufactured, sold, bartered, exchanged, given away, received, furnished, otherwise disposed of, or used in violation of the provisions of this article. (1947, c. 210, s. 3.)

§ **14-413. Permits for use at public exhibitions.**—For the purpose of enforcing the provisions of this article, the board of county commissioners of any county are hereby empowered and authorized to issue permits for use in connection with the conduct of public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. (1947, c. 210, s. 4.)

§ **14-414. Pyrotechnics defined; exceptions.**—For the proper construction of the provisions of this article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: Provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. This article shall not apply to the sale, use, or possession of explosive caps designed to be fired in toy cap pistols, provided that the explosive mixture of such explosive caps shall not exceed twenty-five hundredths (.25) of a gram for each cap. (1947, c. 210, s. 5; 1955, c. 674, s. 1.)

§ **14-415. Violation made misdemeanor.**—Any person violating any of the provisions of this article, except as otherwise specified in said article, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1947, c. 210, s. 6; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

Article 55.

Handling of Poisonous Reptiles.

§ **14-416. Handling of poisonous reptiles declared public nuisance and criminal offense.**—The intentional exposure of human beings to contact with reptiles of a venomous nature being essentially dangerous and injurious and detrimental to public health, safety and welfare, the indulgence in and inducement to such exposure is hereby declared to be a public nuisance and a criminal offense, to be abated and punished as provided in this article. (1949, c. 1084, s. 1.)

§ 14-417. Regulation of ownership or use of poisonous reptiles.—It shall be unlawful for any person to own, possess, use, or traffic in any reptile of a poisonous nature whose venom is not removed, unless such reptile is at all times kept securely in a box, cage, or other safe container in which there are no openings of sufficient size to permit the escape of such reptile, or through which such reptile can bite or inject its venom into any human being. (1949, c. 1084, s. 2.)

§ 14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.—It shall be unlawful for any person to intentionally handle any reptile of a poisonous nature whose venom is not removed, by taking or holding such reptile in bare hands or by placing or holding such reptile against any exposed part of the human anatomy, or by placing their own or another's hand or any other part of the human anatomy in or near any box, cage, or other container wherein such reptile is known or suspected to be. It shall also be unlawful for any person to intentionally suggest, entice, invite, challenge, intimidate, exhort or otherwise induce or aid any person to handle or expose himself to any such poisonous reptile in any manner defined in this article. (1949, c. 1084, s. 3.)

§ 14-419. Investigation of suspected violations; seizure and examination of reptiles; destruction or return of reptiles.—In any case in which any law-enforcement officer has reasonable grounds to believe that any of the provisions of this article have been or are about to be violated, it shall be the duty of such officer and he is hereby authorized, empowered, and directed to immediately investigate such violation or impending violation and to forthwith seize the reptile or reptiles involved, and all such officers are hereby authorized and directed to deliver such reptiles to the respective county health authorities for examination and tests of such reptiles by such authorities or other qualified authorities to which the county health authorities may refer the same, for the purpose of ascertaining whether said reptiles contain venom and are poisonous. If such health authorities, or other qualified authorities designated by them to make such examinations and tests, find that said reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, and they are hereby authorized and directed to forthwith destroy such reptiles; but if said health authorities, or other qualified authorities by them designated to make such examination and tests, find that the reptiles are not dangerously poisonous, and are not and cannot be harmful to human life, safety, health or welfare, then it shall be the duty of such officers to return the said reptiles to the person from whom they were seized. (1949, c. 1084, s. 4.)

§ 14-420. Arrest of persons violating provisions of article.—If the examination and tests made by the county health or other qualified authorities as provided herein show that such reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, in addition to destroying such reptiles, also to arrest all persons violating any of the provisions of this article. (1949, c. 1084, s. 5.)

§ 14-421. Exemptions from provisions of article.—This article shall not apply to the possession, exhibition, or handling of reptiles by employees or agents of duly constituted museums, laboratories, educational or scientific institutions in the course of their educational or scientific work. (1949, c. 1084, s. 6.)

§ 14-422. Violation made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor punishable by a fine

not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1949, c. 1084, s. 7; 1969, c. 1224, s. 3.)

Editor's Note. — The 1969 amendment rewrote the provisions relating to punishment.

Article 56.

Debt Adjusting.

§ 14-423. Definitions.—As used in this article certain terms or words are hereby defined as follows:

(1) The term "debt adjuster" means a person who engages in, attempts to engage in, or offers to engage in the practice or business of debt adjusting as said term is defined in this article.

(2) The term "debt adjusting" shall mean the entering into or making of a contract, express or implied, with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business and who shall for a consideration, agree to distribute, or distribute the same among certain specified creditors in accordance with a plan agreed upon. The term "debt adjusting" is further defined and shall also mean the business or practice of any person who holds himself out as acting or offering or attempting to act for a consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding, or in anywise altering the terms of payment of any debt of a debtor, and to that end receives money or other property from the debtor, or on behalf of the debtor, for the payment to, or distribution among, the creditors of the debtor.

(3) The term or word "debtor" means an individual, and includes two or more individuals who are jointly and severally or jointly or severally indebted to a creditor or creditors.

(4) The word "person" means an individual, firm, partnership, limited partnership, corporation or association. (1963, c. 394, s. 1.)

§ 14-424. Engaging, etc., in business of debt adjusting a misdemeanor.—If any person shall engage in, or offer to or attempt to, engage in the business or practice of debt adjusting, or if any person shall hereafter act, offer to act, or attempt to act as a debt adjuster, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1963, c. 394, s. 2; 1969, c. 1224, s. 6.)

Editor's Note. — The 1969 amendment substituted the present provisions as to punishment for a provision for punishment by fine or imprisonment, or both, in the discretion of the court.

§ 14-425. Enjoining practice of debt adjusting; appointment of receiver for money and property employed.—The superior court shall have jurisdiction, in an action brought in the name of the State by the solicitor of the solicitorial district, to enjoin any person from acting, offering to act, or attempting to act, as a debt adjuster, or engaging in the business of debt adjusting; and, in such action, may appoint a receiver for the property and money employed in the transaction of business by such person as a debt adjuster, to insure, so far as may be possible, the return to debtors of so much of their money and property as has been received by the debt adjuster, and has not been paid to the creditors of the debtors. (1963, c. 394, s. 3.)

§ 14-426. Certain persons and transactions not deemed debt adjusters or debt adjustment.—The following individuals or transactions shall not be deemed debt adjusters or as being engaged in the business or practice of debt adjusting:

(1) Any person or individual who is a regular full-time employee of a debtor, and who acts as an adjuster of his employer's debts;

(2) Any person or individual acting pursuant to any order or judgment of a court, or pursuant to authority conferred by any law of this State or of the United States;

(3) Any person who is a creditor of the debtor, or an agent of one or more creditors of the debtor, and whose services in adjusting the debtor's debts are rendered without cost to the debtor;

(4) Any person who at the request of a debtor, arranges for or makes a loan to the debtor, and who, at the authorization of the debtor, acts as an adjuster of the debtor's debts in the disbursement of the proceeds of the loan, without compensation for the services rendered in adjusting such debts;

(5) An intermittent or casual adjustment of a debtor's debts, for compensation, by an individual or person who is not a debt adjuster or who is not engaged in the business or practice of debt adjusting, and who does not hold himself out as being regularly engaged in debt adjusting. (1963, c. 394, s. 4.)

ARTICLE 57.

Use, Sale, etc., of Glues Releasing Toxic Vapors.

§§ 14-427 to 14-431: Repealed by Session Laws 1969, c. 970, s. 11.

Cross Reference. — For present provisions as to use, sale, etc., of glues releasing toxic vapors, see §§ 90-113.9 through 90-113.11.

Editor's Note.—Former § 14-431, which provided the penalty for violation of this article, was amended by Session Laws 1969, c. 1224, s. 1.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 3, 1969

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the general Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

ROBERT MORGAN
Attorney General of North Carolina