

THE GENERAL STATUTES OF NORTH CAROLINA

1969 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF
D. W. PARRISH, JR., S. G. ALRICH, W. M. WILLSON
AND SYLVIA FAULKNER

Volume 1B

Place in Pocket of Corresponding 1953 Recompiled Volume of
Main Set and Discard Previous Supplement

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Preface

This Cumulative Supplement to Recompiled Volume 1B contains the general laws of a permanent nature enacted at the 1953, 1955, 1956, 1957, 1959, 1961, 1963, 1965, 1966, 1967 and 1969 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

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

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein prior to 1961 appears in Replacement Volumes 4B and 4C. The Cumulative Supplements to such volumes contain an index to statutes codified as a result of the 1961, 1963, 1965, 1966, 1967 and 1969 legislative sessions.

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

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

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



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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1953, 1955, 1956, 1957, 1959, 1961, 1963, 1965, 1967 and 1969 Sessions of the General Assembly affecting Chapters 2 through 14 of the General Statutes.

Annotations:

Sources of the annotations:

- North Carolina Reports volumes 233 (p. 313)-275 (p. 341).
- North Carolina Court of Appeals Reports volumes 1-5 (p. 227).
- Federal Reporter 2nd Series volumes 186 (p. 745)-410 (p. 448).
- Federal Supplement volumes 95 (p. 249)-298 (p. 1200).
- United States Reports volumes 340 (p. 367)-394 (p. 575).
- Supreme Court Reporter volumes 71 (p. 474)-89 (p. 2151).
- North Carolina Law Review volumes 29 (p. 227)-47 (p. 731).
- Wake Forest Intramural Law Review volumes 2-5.

The General Statutes of North Carolina 1969 Cumulative Supplement

VOLUME 1B

Chapter 2.

Clerk of Superior Court.

Article 3. Deputies.

Sec.
2-13. Appointment; powers.

Article 4. Powers and Duties.

Sec.
2-28. [Repealed.]
2-42. To keep books or microfilm; enumeration.

ARTICLE 1.

The Office.

§ 2-1. Judge of probate abolished; clerk acts as judge.

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.—

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).

§ 2-3. **Clerk's bond.**—At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it is the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than twenty-five thousand dollars, payable to the State of North Carolina, and with a condition to be void if he shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property which have come or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are or thereafter shall be prescribed by law: Provided that in counties having a population in excess of fifty thousand inhabitants, the penalty of the clerk's bond shall be not less than ten thousand dollars, and not more than fifty thousand dollars. This section is inapplicable in any county in which a district court has been established. (C. C. P., s. 137; Code, s. 72; 1889, c. 7; 1891, c. 385; 1895, cc. 270, 271; 1899, c. 54, s. 52; 1901, c. 32; 1903, c. 747; Rev., s. 295; C. S., s. 927; 1931, c. 170; 1943, c. 713; 1967, c. 691, s. 38.)

Local Modification. — By virtue of Session Laws 1957, c. 1196, the reference to Washington County should be deleted from the recompiled volume.

Editor's Note.—

The 1967 amendment, effective July 1, 1967, added the present last sentence in the section.

The duty to receive carries with it the duty to pay the sums collected to the parties entitled thereto. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964).

§ 2-4. Clerk's bond; approval, acknowledgments and custody.—The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe-keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds. This section is inapplicable in any county in which a district court has been established. (C. C. P., s. 138; Code, s. 73; Rev., s. 296; C. S., s. 928; 1967, c. 691, s. 38.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, added the present last sentence in the section.

§ 2-8. Office and equipment furnished.

Editor's Note.—The word "stationary" in line one of this section in the replacement volume should read "stationery."

ARTICLE 2.

Assistant Clerks.

§ 2-10. Appointment; oath; powers and jurisdiction; responsibility of clerks.—Each clerk of the superior court, by and with the written consent and approval of the superior court judge resident in his district, may appoint one or more assistant clerks of the superior court, who before entering upon their duties shall take and subscribe the oath prescribed for clerks: Provided, that in counties having a population of less than fifty thousand (50,000), not more than two such assistant clerks may hold office at the same time; that in counties having a population of fifty thousand (50,000) to eighty thousand (80,000), not more than four such assistant clerks may hold office at the same time; that in counties having a population of more than eighty thousand (80,000), not more than ten such assistant clerks may hold office at the same time. Upon compliance with the provisions of this article such assistant clerk or clerks shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the superior court as the clerk himself, and all the acts, orders, and judgments of such assistant clerk shall be entitled to the same faith and credit as those of such clerk. Such assistant clerks shall be subject in all respects to all laws which apply to the clerks. The several clerks of the superior court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover the acts of their assistant clerks. (1921, c. 32, s. 1; C. S., s. 934(a); 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1965, c. 264.)

Local Modification.—

By virtue of Session Laws 1953, c. 346, the reference to Guilford County in the recompiled volume should be deleted.

Orange: 1963, c. 249.

Editor's Note.—

The 1959 amendment rewrote the first sentence.

Session Laws 1953, c. 404, provided that from and after March 20, 1953, the provisions of this section shall apply to Wake County.

The 1965 amendment increased the maximum number of assistant clerks in counties having a population of more than 80,000 from six to ten.

An assistant clerk of the superior court has plenary authority to probate an instrument in common form. In re Will of Marks, 259 N.C. 326, 130 S.E.2d 673 (1963).

Cited in State v. Cooper, 275 N.C. 283, 167 S.E.2d 266 (1969).

ARTICLE 3.

Deputies.

§ 2-13. **Appointment; powers.** — Clerks of the superior court may appoint deputies, who shall take and subscribe the oaths prescribed for clerks, and who shall be as fully authorized and empowered as the clerk to certify the existence and correctness of any records in such clerks offices and to do and perform any other ministerial acts which the clerks may be authorized and empowered to do, in their own names and without reciting the names of their principals. The powers herein specified shall be in addition to such powers and authorities as are now or hereafter may be given deputy clerks by law. (1777, c. 115, s. 86, P. R.; R. C., c. 19, s. 15; Code, s. 75; Rev., s. 898; C. S., s. 935; 1963, c. 1187.)

Editor's Note.—The 1963 amendment substituted "oaths" for "oath" near the beginning of the section and added all the provisions as to powers.

Deputy Must Act in Clerk's Name.— This section and §§ 2-14 and 2-15 fix the status of a deputy as the agent or servant of the clerk of the superior court, rather than as an independent officer of the court. The decisions give emphasis to the idea that the legal power and authority incident

to the office of clerk is vested in the principal clerk as the responsible officer of the law, to be exercised by him, either in person or, within the orbit of ministerial powers, by deputy. Therefore, since a deputy's authority is derivative, the general rule is that he is required to do all things in his principal's name except where statute expressly provides otherwise. *Beck v. Voncannon*, 237 N.C. 707, 75 S.E.2d 895 (1953).

§ 2-14. **Record of appointment and discharge; copies.**

Applied in *Beck v. Voncannon*, 237 N.C. 707, 75 S.E.2d 895 (1953).

Cited in *Baker v. Murphrey*, 254 N.C. 506, 119 S.E.2d 398 (1961).

§ 2-15. **Responsibility of clerk for deputy's acts.**

Applied in *Beck v. Voncannon*, 237 N.C. 707, 75 S.E.2d 895 (1953).

ARTICLE 4.

Powers and Duties.

§ 2-16. **Powers enumerated.**

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).

(1961, c. 341, s. 2.)

Editor's Note.—

The 1961 amendment added to subsection 17 the reference to attorneys in fact. As only this subsection was affected by the amendment the rest of the section is not set out.

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).

Where discovery is counsel's objective, he must, before trial, avail himself of the remedies provided by §§ 8-89 and 8-90.

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.—

In accord with original See Morris v Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

§ 2-24. Location of and attendance at office.

Local Modification.—

Brunswick: 1955, c. 1259; Gates: 1959, c. 254; Wake: 1955, c. 1168.

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 plain-

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).

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).

tiff, 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).

§ 2-26. Fees of clerk of superior court.—The fees of the clerk of the superior court shall be the following, and no other, namely:

Advertising and selling under mortgage in lieu of bond, two dollars for sales of real estate and one dollar for sales of personal property.

Affidavit, including jurat and certificate, twenty-five cents.

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the Supreme Court, including certificate and seal, two dollars.

Appointing and qualifying justices of the peace, to be paid by the justice, twenty-five cents.

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

Auditing account of receiver, executor, administrator, guardian or other trustee, required to render accounts, if not over three hundred dollars, fifty cents; if over three hundred dollars and not exceeding one thousand dollars, eighty cents; if over one thousand dollars, one dollar.

Auditing final settlement of receiver, executor, administrator, guardian or other trustee, required to render accounts, one half of one percent of the amount on which commissions are allowed to such trustee, for all sums not exceeding one thousand dollars, and for all sums over one thousand dollars; one tenth of one percent on such excess; but such fees shall not exceed fifteen dollars, unless there be a contest, when the clerk shall have one percent on the said excess over one thousand dollars; but in no instance shall his fees exceed twenty-five dollars.

Auditing and recording the final account of commissioners appointed to sell real estate, one half of the fees allowed for auditing and recording final accounts of executors.

Bill of costs, preparing same, twenty-five cents.

Bond or undertaking, including justification, sixty cents.

Canceling notice of *lis pendens*, twenty-five cents.

Capias, each defendant, one dollar.

Capias, when the defendant is not arrested thereunder, shall be such sum as the commissioners of his county may allow.

Caveat to a will, entering and docketing same for trial, one dollar.

Certificate, except where it is a charge against the county, twenty-five cents; and where it is a charge against the county, the fee shall be such sum not exceeding twenty-five cents as the board of commissioners shall allow.

Commission, issuing, seventy-five cents.

- Continuance, thirty cents.
- Docketing *ex parte* proceedings, fifty cents.
- Docketing indictment, twenty-five cents.
- Docketing liens, twenty-five cents.
- Docketing judgment, twenty-five cents.
- Docketing summons, twenty-five cents.
- Execution and return thereon, including docketing, fifty cents; and certifying return to clerk of any county where judgment is docketed, twenty-five cents.
- Filing all papers, ten cents for each case.
- Guardian, appointment of, including taking bond and justification, one dollar.
- Impanelling jury, ten cents.
- Indexing judgment on cross-index book, ten cents for the judgment, regardless of number of parties.
- Indexing notice of *lis pendens*, twenty-five cents.
- Indexing liens on lien book, ten cents.
- Indictment, each defendant in the bill, sixty cents.
- Injunction, order for, including taking bond or undertaking and justification, one dollar.
- Judgment, final, in termtime, civil action, one dollar.
- Judgment, final, against each defendant, in criminal actions, one dollar.
- Judgment, final, before the clerk, fifty cents.
- Judgment by confession, without notice, all services, three dollars.
- Judgment in favor of widow for year's support, fifty cents.
- Judgment nisi, entering against a defaulting witness or juror, on bail bond or recognizance, twenty-five cents.
- Juror ticket, including jurat, ten cents.
- Justification of sureties on any bond or undertaking, except as otherwise provided, fifty cents.
- Letters of administration, including bond and justification of sureties, one dollar.
- Motions, entry and record of, twenty-five cents.
- Notices, twenty-five cents, and for each name over one in same paper, ten cents additional.
- Notifying solicitors of removal of guardian, one dollar.
- Order enlarging time for pleading, and all interlocutory orders, in special proceedings and civil actions, twenty-five cents.
- Order of arrest, one dollar.
- Order for appearance of apprentice, on complaint of master, one dollar; for appearance of master on complaint of apprentice, one dollar.
- Order for the registration of a deed or other writing, which has been proved or acknowledged in another county, or before a judge, justice, notary or other officer, except a chattel mortgage, twenty-five cents.
- Postage, actual amount necessarily expended.
- Presentment, each person presented, ten cents.
- Probate of a deed or other writing, proved by a witness, including the certificate, twenty-five cents.
- Probate of a deed or other writing, acknowledged by the signers or makers, including all except married women, who acknowledged at the same time, with the certificate thereof, twenty-five cents.
- Probate of a deed, or other writing, executed by a married woman, for her acknowledgment and private examination, with the certificate thereof, twenty-five cents.
- Probate of limited partnership, fifty cents.
- Probate of will in common form and letters testamentary, one dollar.
- Qualifying justice of the peace, to be paid by the justice, twenty-five cents.
- Qualifying members of the board of commissioners, to be paid by the commissioners, twenty-five cents.

- Recognizance, each party where no bond is taken, twenty-five cents.
 Recording and copying papers, per copy sheet, ten cents.
 Recording appointment of process agent for nonresident, fifty cents.
 Recording names, qualification, and expiration of term of office of justices of the peace, five cents for each name.
 Registering trained nurses, including certificate of registration, fifty cents.
 Recording names of jurors as required by law, five cents for each name.
 Resignation of guardian, relinquishment of right to administer, or to qualify as executor, receiving, filing and noting same, twenty-five cents.
 Seal of office, when necessary, twenty-five cents.
 Subpœna, each name, fifteen cents.
 Summons, in civil actions or special proceedings, including all the names therein, one dollar, and for every copy thereof, twenty-five cents.
 Transcript of judgment, twenty-five cents.
 Transcript of any matter of record or papers on file, per copy sheet, ten cents.
 Trial of any cause, or stating an account, as referee, pursuant to order of the judge, such allowance as the judge may make.
 Witness ticket, including jurat, ten cents.

Five percent commission shall be allowed the clerk on all fines, penalties, amercements and taxes paid the clerk by virtue of his office; and three percent on all sums of money not exceeding five hundred dollars placed in his hands by virtue of his office, except on judgments, decrees, executions, and deposits under article three of chapter forty-five; and upon the excess over five hundred dollars of such sums, one percent.

Provided, that in such counties of the State where the clerk of superior court is now or may hereafter be paid a salary in lieu of fees, that such clerk of superior court shall not charge and collect a fee for juror ticket, including jurat, or witness ticket, including jurat, as herein prescribed.

Provided, that when any services of the clerk of the superior court shall be for any court or person of any county other than his own county, the clerk of the superior court fees shall be as hereinafter set out:

Transcripts of judgments, including the certificate of filing and docketing . . . \$1.50 first page, 75¢ for each additional page thereafter.

Issuing certified copies of or recording certified copy of any other matter of record or papers on file in the office of the clerk of the superior court . . . \$1.50 first page, 75¢ for each additional page thereafter.

Issuing executions including docketing returns thereon and issuing certificates of satisfaction . . . \$1.50 first page, 75¢ for each additional page thereafter.

Execution against specific property or against the person, including docketing of returns thereon and issuing certificates of satisfaction . . . \$2.00. (Code, ss. 229, 1789, 3109, 3739; 1885, c. 199; 1893, c. 52, s. 4; 1897, c. 68; 1899, c. 17, s. 2; c. 247, s. 3; cc. 261, 578; 1901, c. 121; c. 614, s. 3; 1903, c. 359, s. 6; 1905, c. 360, s. 3; Rev., s. 2773; 1917, c. 198, s. 6; 1919, c. 329; C. S., s. 3903; 1927, c. 247; 1929, cc. 45, 214; 1933, c. 91; 1945, c. 635; 1955, c. 879; 1959, c. 1163, s. 4; 1967, c. 823, s. 1.)

Local Modification.—

Burke: 1959, c. 386; Catawba: 1963, c. 886; Craven: 1957, c. 124; Forsyth: 1961, c. 401; Gates: 1957, c. 327; Guilford: 1953, c. 1016; McDowell: 1953, c. 728; Macon: 1963, c. 465; Mitchell: 1959, c. 1270; Richmond: 1955, c. 1324; Surry: 1953, c. 851.

Cross References.—

See Editor's note to § 53-5.

Editor's Note.—The 1955 amendment, which added the above proviso at the end

of this section, defined a page as being "a regular legal size sheet of paper not greater than fourteen inches in length." The 1959 amendment inserted the sentence reading "Indexing notice of lis pendens, twenty-five cents."

The 1967 amendment, effective Jan. 1, 1968, deleted provisions as to fees for recording certificates of incorporation of corporations and recording corporation or amendment to corporate certificates.

§ 2-27. Local modifications as to clerk's fees.—For the probate of a short-form lien bond, or lien bond and chattel mortgage combined, the clerk shall receive ten cents in the following counties: Alamance, Alleghany, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Gaston, Gates, Granville, Greene, Harnett, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Polk, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Union, Vance, Warren, Washington, Watauga, Wayne, Wilson. (Rev., s. 2773; 1907, c. 717; 1909, c. 502; P. L. 1917, c. 182; C. S., s. 3904; 1933, c. 84; 1947, c. 235, s. 11; 1961, c. 401.)

In Anson, this fee is twenty cents. (P. L. 1913, c. 49; C. S., s. 3904.)

In Bertie County the clerk of the superior court shall collect the sum of fifteen cents for each crop lien or lien bond probated by him for registration in Bertie County, including all services connected therewith. (P. L. 1915, c. 163; C. S., s. 3904.)

In Jackson County, in addition to the fees now allowed by law, the clerk shall receive the sum of five dollars for writing up the minutes of each day's session of the superior court of the county, to be paid by the county. (P. L. 1913, c. 182; C. S., c. 3904.)

In Mitchell County the clerk of the superior court shall receive double the amount of fees and commissions as provided in § 2-26 of this chapter. (1931, c. 53, s. 1.)

In Robeson County the board of county commissioners may make an allowance to the clerk of the superior court for keeping the records of the court and transcribing the minutes, to be paid out of the general county fund. (Rev., s. 2773; C. S., s. 3904.)

From and after February 27, 1923, it shall be unlawful for the clerks of the superior courts of Bertie, Northampton, Vance, Warren and Wayne counties to charge fees for witness and juror tickets issued by them. (C. S., s. 3904; 1923, c. 92.)

Editor's Note.—

The 1961 amendment, effective July 1, 1961, deleted Forsyth from the first para-

graph and struck out the former fourth paragraph relating to Forsyth County.

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

§ 2-29. Advance court costs.

Local Modification.—

Forsyth: 1961, c. 401; Johnson: 1955, c. 1021.

§ 2-30. Advance costs on appeal from justice of the peace.

Local Modification.—Forsyth: 1961, c.

401.

§ 2-31. Fee for cross-indexing names of parties.

Local Modification.—Forsyth: 1961, c.

401.

§ 2-32. Fee for docketing judgment.

Local Modification.—Forsyth: 1961, c.

401.

§ 2-33. Fee for auditing annual accounts of receivers, executors, etc.

Local Modification.—Forsyth: 1961, c.

401.

§ 2-34. Fee for auditing final accounts of receivers, executors, etc.

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

§ 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.

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

§ 2-36. Certain counties not subject to §§ 2-29 to 2-35.—Sections 2-29 to 2-35 shall not apply to the counties of: Alleghany, Ashe, Avery, Bladen, Buncombe, Burke, Caldwell, Caswell, Catawba, Chowan, Cleveland, Columbus, Cumberland, Davidson, Davie, Duplin, Edgecombe, Franklin, Guilford, Haywood, Iredell, Jackson, Jones, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Onslow, Orange, Pamlico, Pitt, Richmond, Robeson, Rockingham, Rowan, Stokes, Swain, Tyrrell, Union, Washington, Wayne and Wilson: Provided, that § 2-29 shall apply to Iredell County. Provided, further, that §§ 2-33 and 2-34 shall apply to Bladen and Robeson counties. Provided, also that § 2-29 shall apply to Ashe County. (1935, c. 379, s. 8; c. 494; 1937, cc. 148, 149, 290; 1945, c. 296; 1947, c. 269; 1949, c. 386; 1953, c. 268; 1955, c. 759; 1959, c. 578; 1961, c. 72; 1965, c. 177.)

Editor's Note.—

The 1953 amendment deleted "Vance" from the list of counties.

The 1955 amendment added the proviso as to Bladen County.

The 1959 amendment deleted "Person" from the list of counties.

The 1961 amendment added Robeson to the second proviso.

The 1965 amendment added the proviso as to Ashe County.

§ 2-37. To keep fee bill posted.

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

§ 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:

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 number 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 judgments 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.

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.

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.

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

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.

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

(1) The name of the renouncer; or

(2) The name of the person who is waiving his right to renounce;

(3) The name of the estate affected by the renunciation or waiver;

(4) The date of the death of the intestate and the date of the renunciation.

35: Repealed.

(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.)

Cross Reference.—

See Editor's note to § 53-5.

Editor's Note.—This section was affected by two chapters of the 1953 Session Laws. Chapter 259 inserted the words "in civil actions" in line three of subsection 4, and inserted "civil" in line two of subsection 5. It also added the second sentence of subsection 7. Chapter 973 repealed former subsection 33.

Chapter 1073 of the 1959 Session Laws repealed subsection 35. The amendatory act, as amended by Session Laws 1963, c. 537, Session Laws 1967, cc. 6, 122, 470, 903, and Session Laws 1969, cc. 6, 109, 276, 396, 1305, provides that it shall not apply to the following counties: Ashe, Avery, Bertie, Bladen, Cherokee, Clay, Currituck, Davie, Duplin, Franklin, Greene, Halifax, Iredell, Jackson, Lincoln, Macon, Madison,

Mitchell, Moore, Pamlico, Pender, Perquimans, Person, Polk, Rockingham, Sampson, Stokes, Tyrrell, Union, Warren, Washington, Watauga and Yancey.

Chapter 1163 of the 1959 Session Laws rewrote subsection 6.

The first 1961 amendment inserted in subsection 12 the reference to attorneys in fact and added such reference to subsection 14.

The second 1961 amendment, effective July 1, 1961, added a new subsection 33.

The 1965 amendment added the proviso to the opening paragraph.

Chapter 470, Session Laws 1967, amends s. 4 of c. 1073, Session Laws 1959, by deleting Harnett and Lee from the list of counties to which the 1959 act shall not apply, but adds at the end of s. 4 the following: "The provisions of this act shall

not apply to Lee and Harnett counties, except section 2 which shall be applicable in said counties."

Session Laws 1967, c. 691, s. 39, effective July 1, 1967, struck out subsections 27, 28, 29 and 30.

Session Laws 1967, c. 823, s. 2, effective Jan. 1, 1968, deleted subsection 25.

Session Laws 1969, c. 658, provides: "The provisions of G.S. 2-42 (35) is hereby repealed as to Harnett and Lee counties."

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

Record of Permits to Purchase Weapons.—The 1959 act repealing subsection 35, which required the clerk to keep a record of permits to purchase weapons, did not apply to certain counties. See the 2nd paragraph of the Editor's Note above. In other counties the sheriff is required to keep such a record. See § 14-405.

Section 103-30.1 to Be Construed in Pari Materia with This Section.—The recording and indexing requirements of § 103-30.1 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 G. S. 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 § 108-30.1 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).

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).

ARTICLE 6.

Money in Hand; Investments.

§ 2-46. Public funds to be reported to county commissioners.

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

§ 2-50 Unclaimed fees of jurors and witnesses paid to school fund.

Local Modification.—

Scotland: 1953, c. 376

Cross Reference.—

For section providing for like disposi-

tion of such unclaimed fees after one year, see § 115-99.

§ 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.)

Editor's Note.—

The 1953 amendment added the provision limiting liability at the end of the first sentence

The 1961 amendment substituted "one thousand dollars (\$1,000.00)" for "five

hundred dollars (\$500.00)" in lines five and six. It also inserted after the words "may be paid to" in line six the words "and, if paid, shall be received by."

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.

Editor's Note.—

The 1959 amendment increased the amounts named in lines one and fifteen from five hundred to one thousand dollars.

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).

§ 2-55. Investments prescribed; use of funds in management of lands of infants or incompetents.

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

Chapter 3.

Commissioners of Affidavits and Deeds.

§ 3-8. Clerks and notaries to take affidavits.

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

Chapter 4.

Common Law.

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

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.—

In accord with 3rd paragraph in original. See State ex rel. Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968).

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

Extent of Common Law.—

In accord with 2nd paragraph in original. See 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. 117 (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).

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).

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 affirmation 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 in-

dependence of this State. *Woodard v. Clark*, 236 N.C. 190, 72 S.E.2d 433 (1952).

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).

Chapter 5.

Contempt.

§ 5-1. Contempts enumerated; common law repealed.

I. GENERAL CONSIDERATION.

Editor's Note.—

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

Construed Strictly.—

In accord with original. See *North Carolina v. Carr*, 264 F. Supp. 75 (W.D.N.C. 1967).

Nature and Purpose of Proceedings.—

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.—

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.—

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, etc.—

In accord with original. See *Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966).

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 Supreme Court in all cases arising under subdivisions one, two, three, and six of this section, and also in those cases arising under subdivisions four and five 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 Supreme Court 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 Supreme Court except in cases arising under subdivisions four and five 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).

IV. SUBDIVISION IV.

Failure to obey a court order, etc.—

In accord with 1st paragraph in original. See *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).

Temporary Restraining Orders.—

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).

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 regis-

ter 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 defendants in contempt for a willful disobedience of an order lawfully issued by clusions of law based thereon, adjudging the superior court having jurisdiction, exception on the ground that the court did not specifically denominate his conclusions of laws 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).

VI. SUBDIVISION VI.

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).

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, notwith-

standing he asserts that his refusal is a matter of religious conscience. In re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

§ 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 one, two, three, and six. Nor shall the right of appeal lie under subdivisions four and five 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 Reference.—

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 four and five 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).

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).

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).

§ 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.

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.—

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 sec-

tion. *Basnight v. Basnight*, 242 N.C. 645, 89 S.E.2d 259 (1955).

Applied in *Carolina Wood Turning Co.*

§ 5-5. Summary punishment for direct contempt.

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).

§ 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.

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

v. Wiggins, 247 N.C. 115, 100 S.E.2d 218 (1957).

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).

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

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.

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.—

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 violat-

ing 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).

§ 5-8. Acts punishable as for contempt.

Cross Reference.—As to distinctions between proceedings under this section and under § 5-1, see note to § 5-1.

Editor's Note.—

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).

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 Cloth-*

ing 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 neglects 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 Clause 1.—An act or default is not punishable by a court of record as for contempt under clause 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).

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.—

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, clause 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 § 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).

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 Supreme Court. 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 Supreme Court. *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).

§ 5-9. Trial of proceedings in contempt.

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 mat-

ter. *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.

Sec. 6-8. Clerk to itemize bills of criminal costs.

Article 2.

When State Liable for Costs.

6-17.1. Costs and expenses of State in connection with federal litigation arising out of State cases.

Article 3.

Civil Actions and Proceedings.

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

Sec.

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

Article 4.

Costs on Appeal.

6-34. Costs of transcript on appeal taxed in appellate division.

Article 5.

Liability of Counties in Criminal Actions.

6-38. Liability of county when defendant acquitted in appellate division.

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.)

Editor's Note.—The 1955 amendment added the second paragraph.

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).

§ 6-4. 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.

§ 6-5. Jurors' tax fees.

Local Modification.—Alamance: 1957, c. 1016.

§ 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.)

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

§ 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.)

Editor's Note.—The 1953 amendment struck out the words "and approved by

the solicitor" formerly appearing at the end of this section

ARTICLE 2.

When State Liable for Costs.

§ 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.

§ 6-19. When costs allowed as of course to defendant.

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.

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

Discretion Not Reviewable.—

In accord with original. See *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, etc.—

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 re-

quire the parties to share the costs. *Hoskins v. Hoskins*, 259 N.C. 704, 131 S.E.2d 326 (1963).

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 reallocation of homestead for increase in value, as provided in the chapter, Civil Procedure.
- (10) In proceedings regarding illegitimate children under article 3, chapter 49 of the General Statutes.

The words "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: 1953, c. 737.

Editor's Note.—

The 1955 amendment added the provisions as to actions or proceedings requiring construction of wills or trusts or to fix the rights and duties of parties thereunder in subdivision (2).

The 1965 amendment added the proviso at the end of subdivision (2).

The first 1967 amendment, effective Oct. 1, 1967, added subdivision (10).

The second 1967 amendment, effective Oct. 1, 1967, 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 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).

Caveats to Wills.—

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).

Allowance to Referee.—

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).

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 (1963).

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).

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

§ 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 1963 amendment increased the limit on judgments from \$500.00 to \$1,000.00.

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.—Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. 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).

§ 6-28. Costs of laying off homestead and exemption.

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

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.

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).

§ 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.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" near the beginning and at the end of the section.

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.

ARTICLE 5.

Liability of Counties in Criminal Actions.

§ 6-36. County to pay costs in certain cases; if approved, audited and adjudged.

Quoted in *City of Henderson v. County of Vance*, 260 N.C. 529, 133 S.E.2d 201 (1963).

§ 6-38. Liability of county when defendant acquitted in appellate division.—If, on appeal to the appellate division in criminal actions, the defendant is successful, the county from which the appeal was taken shall pay one half the costs of the appeal and shall also pay all such sums as have been properly expended by the defendant for the transcript of the record and printing done under

the rules of the court. Provided, where the cause has been removed, said costs shall be paid by the county in which the offense was committed instead of the county from which the appeal is taken. (Rev., s. 1284; C. S., s. 1261; 1947, c. 781; 1969, c. 44, s. 21.)

Editor's Note.—

The 1969 amendment substituted "appel-

late division" for "Supreme Court" near the beginning of the section.

ARTICLE 6.

Liability of Defendant in Criminal Actions.

§ 6-45. Costs against defendant convicted, confessing, or submitting.

No Part of Punishment.—

In accord with original. See *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.

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.

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

§ 6-48. Arrest for nonpayment of fine and costs.

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 fines and costs should be paid. *State v. Bryant*, 251 N.C. 423, 111 S.E.2d 591 (1959).

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.

(1953, c. 675, s. 1.)

Editor's Note.—

The 1953 amendment substituted "or" for "of" immediately preceding the word "justice" in line seven of the first sen-

tence. As only this sentence was affected by the amendment the rest of the section is not set out.

ARTICLE 8.

Fees of Witnesses.

§ 6-52. **Fees and mileage of witnesses.**—The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be such amount per day as the board of commissioners of the respective counties may fix, to be not less than one dollar per day and not more than three dollars per day, except in the counties of Alexander, Alleghany, Anson, Ashe, Brunswick, Burke, Clay, Cleveland, Dare, Franklin, Graham, Greene, Harnett, Haywood, Henderson, Johnston, Mitchell, Nash, Polk, Stanly, Swain and Union, in which counties the fees shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses: Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of the justices of the peace, under subpoena, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpoenaed to prove any one material fact, but no prosecutor or complainant shall pay any costs except as provided by General Statutes, §§ 6-49 and 6-50: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the Utilities Commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route: Provided further, that any sheriff, deputy sheriff, chief of police, police, patrolman, State highway patrolman, and/or any other law enforcement officer who receives a salary or compensation for his services from any source or sources other than the collection of fees, shall prove no attendance, and shall receive no fee as a witness for attending at any superior or inferior criminal court sitting within the territorial boundaries in which such officer has authority to make an arrest: Provided, further, that in all criminal cases tried in the State where the crime charged is of the grade of a felony, all witnesses who have been held in jail incommunicado pending the trial of such case shall be paid witness fees for each such day which such witness is so held in jail, in addition to the witness fees provided by law in criminal actions. (Code, ss. 2860, 3756; 1891, c. 147; 1905, cc. 279, 522; Rev., s. 2803; P. L. 1911, c. 402; C. S., s. 3893; Ex. Sess. 1920, c. 61, ss. 2, 3; 1921, c. 62, s. 2; 1933, c. 40; 1941, c. 171; 1947, cc. 270, 781; 1949, c. 520; 1961, c. 676.)

Local Modification.—

Brunswick: 1953, c. 1309; Transylvania: 1961, c. 676; Transylvania and Union: 1953, c. 1317; Wayne: 1959, cc. 443, 920.

By virtue of Session Laws 1955, c. 952, the reference to Pitt County should be deleted from the recompiled volume.

Cross References.—

See § 1-553.

Editor's Note.—

The 1961 amendment deleted "Transylvania" from the list of excepted counties.

§ 6-55. **Fees of witnesses before jury of view, commissioner, etc.**

Cross Reference.—See § 1-553.

**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. Solicitors; compensation.
7-45. Travel and office expenses of solicitors.
7-46 to 7-49. [Repealed.]
7-50 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.]

Sec.

7-65. [Transferred.]
7-66, 7-67. [Repealed.]

Article 9.

Judicial and Solicitorial Districts and Terms of Court.

7-68. Number of solicitorial districts.
7-68.1 to 7-68.9. [Repealed.]
7-69 to 7-70.1. [Repealed.]
7-70.2. [Transferred.]
7-71 to 7-71.2. [Repealed.]
7-72, 7-73. [Transferred.]
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.]
7-90 to 7-92.4. [Repealed.]

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Article 13.

Domestic Relations Courts.

7-108.1. Docketing judgments forfeiting bonds.

SUBCHAPTER V. JUSTICES OF THE PEACE.

Article 14.

Election and Qualification.

7-114.1 Bond required.
7-115 Appointment and removal by resident judge.

Article 14A.

Appointment by Judge and Abolition of Fee System.

7-120.1 to 7-120.11. [Repealed.]

Article 17A.

Warrants and Receipts.

7-134.1. Clerk of superior court to furnish printed forms; requirements for warrants and receipts.

- Sec.
 7-134.2. Use of forms by justices; contents of warrants-issued register; reports to clerk of superior court; records open to inspection.
 7-134.3 Auditing of justices records.
 7-134.4. Enforcement officers to submit list of warrants for auditing; lists to be made available to accountant.
 7-134.5 Penalty.
 7-134.6 Counties to which article applies

Article 21.

Judgment and Execution.

- 7-166. Justice's judgment docketed; lien and execution, transcript.

SUBCHAPTER VI. RECORDERS' COURTS.

Article 24.

Municipal Recorders' Courts.

- 7-200.1. Deputy or assistant clerks of court.

Article 26.

Municipal-County Courts.

- 7-240 to 7-242. [Repealed.]

Article 28.

Civil Jurisdiction of Recorders' Courts.

- 7-247. Extent of jurisdiction; cross action or counterclaim in excess of jurisdiction.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Article 30.

Establishment, Organization and Jurisdiction.

- 7-285 Application of article.

Article 31.

Practice and Procedure.

Sec.

- 7-296. Enforcement of judgments; stay of execution, etc.; retention of jurisdiction in divorce, alimony, custody and support cases.

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.]

Article 32.

District County Courts.

- 7-297 to 7-307. [Repealed.]

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

Article 33.

With Jurisdiction Not to Exceed \$3000.

- 7-308 to 7-331. [Repealed.]

Article 34.

With Jurisdiction Not to Exceed \$5000.

- 7-332 to 7-350. [Repealed.]

Article 35.

With Jurisdiction Not to Exceed \$1500.

- 7-351 to 7-383. [Repealed.]

Article 35A.

Additional Method of Establishing County Court.

- 7-383.1 to 7-383.33. [Repealed.]

SUBCHAPTER I. SUPREME COURT.

ARTICLE 1.

Organization and Terms.

§§ 7-1 to 7-7: Repealed by Session Laws 1967, c. 108, s. 12.

Cross References.—As to Judicial Department of State government, see chapter 7A. As to appellate division of General Court of Justice, consisting of the Supreme Court, see § 7A-5.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chap-

ter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

ARTICLE 2.

Jurisdiction.

§§ 7-8 to 7-21: Repealed by Session Laws 1967, c. 108, s. 12.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

ARTICLE 3.

Officers of Court.

§§ 7-22 to 7-29: Repealed by Session Laws 1967, c. 108, s. 12.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

§ 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.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

ARTICLE 5.

Supreme Court Reports.

§§ 7-34, 7-35: Repealed by Session Laws 1967, c. 108, s. 12.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

ARTICLE 6.

Salaries of Supreme Court Employees.

§§ 7-36 to 7-39: Repealed by Session Laws 1967, c. 108, s. 12.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

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.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

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.**—Effective July 1, 1969, solicitors shall receive as full compensation for their services fourteen thousand five hundred dollars (\$14,500.00) per year, except that solicitors who qualified July 1, 1967, or who qualify July 1, 1969, as full-time solicitors under G.S. 7-46 (b) shall receive sixteen thousand five hundred dollars (\$16,500.00) per year. The salaries set forth in this section shall be in lieu of fees or other compensation, except the expenses allowed in G.S. 7-45. (1879, c. 240, s. 12; Code, s. 3736; Rev., s. 2767; C. S., s. 3890; 1923, c. 157, s. 1; 1933, c. 78, s. 1; 1935, c. 278; 1943, c. 134, s. 4; 1949, c. 189, s. 1; 1953, c. 1079, s. 1; 1957, c. 1389, s. 1; 1961, c. 984; 1963, c. 839, s. 3; 1965, c. 1009, s. 1; 1967, c. 1049, s. 2; 1969, c. 1186, s. 7; c. 1190, s. 37.)

Cross Reference.—As to amount of solicitors' fees, see § 6-12.

Editor's Note.—

The 1953 amendment increased the salary from \$6,500.00 to \$7,150.00.

The 1957 amendment increased the salary from \$7,150.00 to \$7,936.00.

The 1961 amendment, effective July 1, 1961, increased the salary from \$7,936.00 to \$9,000.00.

The 1963 amendment, effective July 1, 1963, increased the salary from \$9,000.00 to \$11,500.00.

The 1965 amendment, effective July 1, 1965, increased the salary from \$11,500.00 to \$12,000.00.

The 1967 amendment rewrote this section.

Session Laws 1969, c. 1186, effective July 1, 1969, rewrote the first sentence, increasing the salaries, changing the first two dates, inserting "or who qualify July 1, 1969," and making certain other minor changes. Session Laws 1969, c. 1190, effective July 1, 1969, inserted "or July 1, 1969," in the exception clause in the first sentence. The first sentence of the section is set out above as it appears in c. 1186.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7-45. **Travel and office expenses of solicitors.**—(a) In addition to the salary set forth in G.S. 7-44, each solicitor shall receive the sum of three thousand dollars (\$3,000.00) per year, as reimbursement for all of his travel and sub-

sistence expenses while engaged in duties connected with his office. This sum shall be paid in equal monthly installments out of the State treasury upon warrants duly drawn thereon.

(b) Solicitors in the following districts may elect to become full-time State employees on July 1, 1968 or July 1, 1969, provided they discontinue the private practice of law and so certify to the Administrative Officer of the Courts by that date: Districts one through twenty-one. Solicitors who qualify under this subsection are entitled to a State allowance of not to exceed four hundred dollars (\$400.00) per month per solicitor, to be used to reimburse the solicitor for actual expenditures for office rent, secretarial service, telephone bills, postage, and similar expenses of his office. Reimbursement shall be in accordance with regulations issued by the Administrative Office of the Courts. (1923, c. 157, s. 2; C. S., s. 3890(a); 1933, c. 78, s. 2; 1937, c. 348; 1949, c. 189, s. 2; 1953, ch. 1079, s. 2; 1957, ch. 1389, s. 2; 1965, c. 1009, s. 2; 1967, c. 1049, s. 3; 1969, c. 1190, s. 38; c. 1263.)

Editor's Note.—

The 1953 amendment substituted "one thousand five hundred dollars" for "fifteen hundred dollars." The 1957 amendment increased the amount for expenses from \$1,500.00 to \$2,000.00

The 1965 amendment, effective July 1, 1965, increased the amount for expenses from \$2,000.00 to \$3,000.00.

The 1967 amendment, effective July 1, 1967, rewrote this section.

The first 1969 amendment, effective

July 1, 1969, inserted "or July 1, 1969" near the beginning of subsection (b).

The second 1969 amendment substituted "Districts one through twenty-one" for an enumeration of certain districts following the colon in the first sentence of subsection (b).

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§§ 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. 12.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other

laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

§ 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 1955, 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.

Editor's Note.—Session Laws 1969, c. 513, struck "Iredell" from the list of counties in § 7-64.

§ 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 **Number of solicitorial districts.**—(a): Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

(b) Solicitorial districts.—In conformity with the Constitution, article IV, section 23, the solicitorial districts shall be constituted and numbered as follows:

The first solicitorial district shall be composed of the following counties: Beaufort, Camden, Chowan, Currituck, Dare, Gates, Hyde, Pasquotank, Perquimans, Tyrrell.

The second solicitorial district shall be composed of the following counties: Edgecombe, Martin, Nash, Washington, Wilson.

The third solicitorial district shall be composed of the following counties: Bertie, Granville, Halifax, Hertford, Northampton, Vance, Warren.

The fourth solicitorial district shall be composed of the following counties: Harnett, Johnston, Lee, Wayne.

The fifth solicitorial district shall be composed of the following counties: Carteret, Craven, Greene, Jones, Pamlico, Pitt.

The sixth solicitorial district shall be composed of the following counties: Duplin, Lenoir, Onslow, Sampson.

The seventh solicitorial district shall be composed of the following counties: Franklin, Wake.

The eighth solicitorial district shall be composed of the following counties: Brunswick, Columbus, New Hanover, Pender.

The ninth solicitorial district shall be composed of the following counties: Cumberland and Hoke.

The ninth-A solicitorial district shall be composed of the following counties: Bladen and Robeson.

The tenth solicitorial district shall be composed of the county of Durham.

The tenth-A solicitorial district shall be composed of the following counties: Alamance, Chatham, Orange, Person.

The eleventh solicitorial district shall be composed of the following counties: Alleghany, Ashe, Forsyth.

The twelfth solicitorial district shall be composed of the following counties: Davidson, Guilford.

The thirteenth solicitorial district shall be composed of the following counties: Anson, Moore, Richmond, Scotland, Stanly, Union.

The fourteenth solicitorial district shall be composed of the county of Gaston.

The fourteenth-A solicitorial district shall be composed of the county of Mecklenburg.

The fifteenth solicitorial district shall be composed of the following counties: Alexander, Cabarrus, Iredell, Montgomery, Randolph, Rowan.

The sixteenth solicitorial district shall be composed of the following counties: Burke, Caldwell, Catawba, Cleveland, Lincoln, Watauga.

The seventeenth solicitorial district shall be composed of the following counties: Avery, Davie, Mitchell, Wilkes, Yadkin.

The eighteenth solicitorial district shall be composed of the following counties: Henderson, McDowell, Polk, Rutherford, Transylvania, Yancey.

The nineteenth solicitorial district shall be composed of the following counties: Buncombe, Madison.

The twentieth solicitorial district shall be composed of the following counties: Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.

The twenty-first solicitorial district shall be composed of the following counties: Caswell, Rockingham, Stokes, Surry. (1913, cc. 63, 196; C. S., s. 1441; 1937, c. 413, s. 1; 1943, c. 134, s. 2; 1955, c. 129, ss. 2, 6; c. 708; 1959, c. 1168, s. 1; c. 1175, s. 1; 1961, c. 730, ss. 1-4½.)

Editor's Note.—

The first 1955 amendment, effective July 1, 1955, rewrote this section.

The first 1959 amendment rewrote the paragraph relating to the ninth solicitorial district and inserted the paragraph relating to the ninth-A solicitorial district. The second 1959 amendment rewrote the paragraph relating to the fourteenth solicitorial district and inserted the paragraph relating to the fourteenth-A solicitorial district.

Session Laws 1959, c. 1168, s. 2, and c. 1175, s. 2, provide that the Governor of North Carolina shall appoint solicitors for solicitorial districts 9A and 14A to serve until the general election of 1960. The solicitors of the present ninth and fourteenth solicitorial districts shall continue to serve as the new solicitors of such districts. In the primary and general elections to be held in the year 1960, candidates shall be nominated and elected to the office of solicitor of solicitorial districts 9A and 14A for the term ending on December 31, 1962. Thereafter the solicitor of said districts shall be nominated and elected at the same time as are the solicitors for the other

solicitorial districts of North Carolina for the term of four years.

The 1961 amendment, effective July 1, 1961, rewrote the first paragraph under subsection (b) and the paragraph relating to the tenth solicitorial district. It inserted the paragraph covering the tenth-A solicitorial district and transferred Chatham County thereto from the fourth solicitorial district. It also transferred Granville County from the tenth to the third solicitorial district. Section 6 of the 1961 amendatory act provides that the Governor shall appoint the solicitor for solicitorial district No. 10-A to serve until the general election of 1962.

The 1969 amendment, effective July 1, 1969, repealed former subsection (a), relating to judicial districts.

Repeal of Subsection (b).—Section 6, c. 1049, Session Laws 1967, provides that subsection (b) and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

Stated in Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

§§ 7-68.1 to 7-68.9: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

Editor's Note. — Repealed §§ 7-68.1 through 7-68.3 were codified from Session Laws 1955, c. 129. Repealed §§ 7-68.1 and 7-68.3 were amended by Session Laws

1965, c. 654. Repealed § 7-68.4 was codified from Session Laws 1965, c. 654. Repealed §§ 7-68.5 through 7-68.9 were codified from Session Laws 1967, c. 997.

§ 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.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chap-

ter 7, subchapter I, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other

laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

§ 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.

Cross Reference.—See Editor's note to § 7-70.

§§ 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.

Cross Reference.—See Editor's note to § 7-70.

§ 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.

Editor's Note.—Section 12, c. 108, Session Laws 1967, effective July 1, 1967, provides: "G.S. 7-1 through 7-39.15 (chapter 7, subchapter 1, articles 1-6A), 7-50, 7-51, 7-51.1, 7-51.2, 7-70, 7-70.1, 7-71, 7-71.1, 7-71.2, 7-75, 7-79, and all other laws and clauses of laws in conflict with this act, are hereby repealed, except to the extent temporarily necessary to effectuate the transitional provisions of § 7A-35 of s. 1 of this act."

§ 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.**—The resident judge of each judicial district is hereby authorized and empowered to appoint an official court reporter for one or more or all of the counties in his district who shall serve at the will of the

resident judge, and whose appointment may be terminated by 30 days' written notice thereof.

The appointment of such reporter or reporters shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same, or a certified copy thereof, shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe an oath in words substantially as follows: "I, , do solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the county of in the judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me, God." Said oath shall be filed in the office of each of the clerks of the superior courts of the counties in which said reporter is to officiate, and recorded and indexed on the minute dockets of said courts.

If on account of sickness, or for other cause, said reporter is unable to attend upon any of the regular courts of said districts, and for conflict and special terms, the resident judge may appoint a reporter pro tem for said court or courts, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above, which oath shall be filed with the clerk. In lieu of appointing a reporter pro tem for each of said courts, the resident judge may, in his discretion, appoint a reporter pro tem for a stated period whose duty it shall be to report any and all courts in the county or counties designated in the appointment, which the regular court reporter is for any cause unable to report.

The board of county commissioners of each county shall fix the compensation which such reporter and such reporter pro tem shall receive while engaged in the performance of his duties in said county.

The duties of the office of court reporter or reporter pro tem in each district shall be prescribed by the resident judge of said district.

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.

This section shall not apply to any county for which provision for the appointment of a court reporter is made by law elsewhere; provided however, that in the following named counties the county commissioners shall have the authority to appoint, terminate the appointment and reappoint a court reporter and a reporter pro tem, and fix the compensation therefor: Anson, Ashe, Bladen, Buncombe, Caldwell, Carteret, Cleveland, Craven, Davidson, Franklin, Gaston, Greene, Halifax, Haywood, Hertford, Hoke, Jackson, Lenoir, Lincoln, Mitchell, Moore, Nash, Northampton, Orange, Pender, Person, Rockingham, Sampson, Surry, Union, Vance, Warren, Yadkin. (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.)

Local Modification. — Brunswick, Duplin, Jones, New Hanover, Onslow, Rockingham, Sampson: 1955, c. 1317, s. 2½; Edgecombe: 1955, c. 950; Wilson: 1955, c. 1249; c. 1317, s. 2½.

Cross Reference. — As to reporting of trials, see § 7A-95.

Editor's Note. — The 1955 amendment effective July 1, 1955, rewrote this section.

The 1961 amendment deleted "McDowell" and "Polk" from the list of counties in the last paragraph.

The 1967 amendment inserted "Nash" in the list of counties in the last paragraph.

The purpose of this section is to preserve an accurate record of the trial. *Wagner v. Eudy*, 257 N.C. 199, 125 S.E.2d 598 (1962).

§§ 7-90 to 7-92: Repealed by Session Laws 1955, c. 1317, s. 1.

Editor's Note.—The repealing act became effective July 1, 1955. Repealed § 7-92 had been amended by c. 742 of the 1955 Session Laws.

§§ 7-92.1 to 7-92.3: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

Editor's Note. — Repealed § 7-92.1 was codified from Session Laws 1955, c. 1034, as amended by Session Laws 1967, c. 626. Repealed § 7-92.2 was codified from Session Laws 1961, cc. 13, 595, as amended by Session Laws 1965, c. 73; 1967, c. 635. Repealed § 7-92.3 was codified from Session Laws 1963, c. 128.

§ 7-92.4: Repealed by Session Laws 1967, c. 691, s. 59, effective July 1, 1967.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

ARTICLE 13.

Domestic Relations Courts.

§ 7-101. **Establishment by county or city or both.** — The board of county commissioners of any county or the governing body of any incorporated city shall have authority to establish a "domestic relations court", which court may be a joint county and city court, as provided in § 7-102 or a court for the county or city as may be determined by the governing authorities. In counties with two or more cities, any city may join any other city or cities in such county in establishing a domestic relations court, or any number of cities may join the county in which they are situate in establishing a domestic relations court.

The board of county commissioners of any of a group of counties, not exceeding five, with abutting boundaries, or the governing body of any incorporated city, within the boundaries of the cooperating counties, shall have authority to establish a joint domestic relations court as provided in § 7-102 or a court for the counties cooperating in the establishment of such court, or city or cities within such counties as may be determined by the governing bodies. Any number of cities may join the counties in which they are situate in establishing a domestic relations court.

As used in this section, "city" means any incorporated city or town with a population of at least five thousand as shown by the latest decennial census (1929, c. 343, s. 1; 1949, cc. 420, 957; 1951, c. 1111, s. 2; 1955, c. 1018, s. 1.)

Local Modification.—Forsyth: 1959, c. 1290, s. 1.

Cross References.—

As to continued existence and ultimate abolition of courts inferior to the superior courts, and their replacement by district courts, see § 7A-3. As to family court ser-

vices of district courts, see § 7A-134. As to domestic relations jurisdiction of district courts, see § 7A-244. As to jurisdiction of district courts over juveniles, see § 7A-277.

Editor's Note.—

The 1955 amendment inserted the second paragraph.

§ 7-102. **Vote on establishment of court; any other city in county with required population may have such court.** — In case the board of county commissioners and governing authorities of a particular city decide to establish a joint city and county domestic relations court, they, voting as separate bodies, shall determine whether or not such domestic relations court shall be established. If both bodies shall vote for its establishment, each of them shall record the resolutions in their minutes and upon such consent by both boards, the court shall be established. In counties in which the said joint court is thus established by the board of county commissioners and the governing authorities of the county and city such establishment of the court shall not prevent any other city within the territorial limits of the county and having more than twenty-five thousand inhabitants, establishing its own court under § 7-101.

If two or more counties, not exceeding five, cooperate in the joint establishment of such court, the boards of commissioners of such cooperating counties and the governing authorities of cities and towns therein shall follow the same procedure for the establishment of such court as is provided in the preceding paragraph. (1929, c. 343, s. 2; 1955, c. 1018, s. 2.)

Editor's Note.—The 1955 amendment added the second paragraph.

§ 7-103. Jurisdiction.

(c) All cases involving the custody of juveniles, including the authority to make orders concerning tuition and maintenance of said juveniles except where the case is tried in superior court as a part of any divorce proceeding.

(i) In an action for divorce where the pleadings show that there are minor children; if the pleadings also show that the custody of said children is controverted; or if any judge of the superior court having jurisdiction to try said action so direct, it shall be the duty of the clerk of the superior court to refer the case for investigation as to the child or children, to the domestic relations court, and the judge of the domestic relations court shall make his recommendations to the judge of the superior court as to the disposition of the child, or children, for the consideration of the judge of the superior court in disposing of the custody of the said child or children.

(j) All cases where an adult is charged with failure to support a parent;

(k) All cases where husband and wife are charged with an affray between each other. (1929, c. 343, s. 3; 1941, c. 308; 1943, c. 470, s. 1; 1955, c. 756; 1957, c. 366, ss. 1, 2.)

Local Modification.—Gaston: 1959, c. 59.

Editor's Note.—

The 1955 amendment rewrote the first part of subsection (i).

The 1957 amendment inserted in subsection (c) the phrase "including the authority to make orders concerning tuition and maintenance of said juveniles". It also added subsections (j) and (k).

As the rest of the section was not affected by the amendments only subsections (c), (i), (j) and (k) are set out.

Exclusive Original Jurisdiction of Child.

—The domestic relations courts have the exclusive original jurisdiction in all cases of a child coming within the purview of the Juvenile Court Act and the Domestic Relations Court Act, which, when once acquired, and the status of the child is fixed, continues during the minority of the child. In re Blalock, 233 N.C. 493, 64 S.E.2d 848, 25 A.L.R.2d 818 (1951).

The General Assembly has created both domestic relations courts and clerks of superior court as separate branches of the superior court. By this section the former is given exclusive original jurisdiction over all cases involving the custody of juveniles, and clerks of superior courts are given jurisdiction of proceedings for the

adoption of minor children with right, incidental to temporary approval of application for adoption, to "issue an order giving the care and custody of the child to the petitioner" by chapter 48 and §§ 1-7 and 1-13. In re Blalock, 233 N.C. 493, 64 S.E.2d 848, 25 A.L.R.2d 818 (1951).

Determining the custody of minor children is never the province of a jury; it is that of the judge of the court in which the proceeding is pending. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

With the enactment of § 17-39.1 the legislature did not give the judge presiding in the district the discretion to issue a writ of habeas corpus and to hear and determine the custody of all infants, without regard to previous decisions relating to their custody. To so hold would make a shambles of the statutes relating to custody, some of which are conflicting and inconsistent. In re Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Determining Paternity of Child.—The domestic relations court has jurisdiction to determine the paternity of a child in a proceeding under G. S. 49-2 et seq. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

§ 7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile court officers may be declared officers of new court.—It shall be the duty of the board of commissioners of any county and the governing board of any city, in which a joint court of do-

mestic relations is established, as provided in this article, or of the governing authorities of any city or county in which an independent domestic relations court shall be established, as provided in this article, acting jointly, in the first instance, or independently, in the second instance, to elect a judge of the domestic relations court and to fix his salary and provide for the payment of same, his term of office to run from the time of his election to the second Monday in July in each odd-numbered year and until his successor shall have been elected and qualified. The regular term of office shall be for a term of two years and until his successor is elected and qualified. If any vacancy should occur in said office during the two years' term, for any cause, it shall be filled for the unexpired term in the same manner and by the same bodies as provided for the election of said judge.

When two or more counties cooperate in the establishment of such court, it shall be the duty of the boards of commissioners of such counties and the governing authorities of cities and towns within such counties, acting jointly, to elect a judge of such court and to fix his salary and provide for the payment of same, and his term of office shall be as provided in the preceding paragraph. The boards of commissioners of the said counties and the governing bodies of cities and towns shall determine the proportionate share of the salary of such judge and the other expenses of such court to be paid by the governmental units cooperating. The judge of such court shall select a location for the court headquarters at a county seat where all the court records shall be kept and maintained, and such judge shall schedule hearings at the county seats of the cooperating counties as he shall determine the need to be, and file such schedule with the welfare department of each cooperating county.

It shall be the duty of the judge of the domestic relations court to appoint a clerk and such number of deputy clerks as are needed for said court, the salary of said clerk and deputy clerks to be fixed, provided for, and paid by the board of county commissioners of any of such counties and the governing board of any of such cities, acting jointly, or independently when a joint county and city court is not established.

And the officers of the juvenile court of any of such cities and of any such counties, as now constituted by law may be declared to be officers of the domestic relations court.

The probation officers of domestic relations court and their method of appointment shall be the same as now provided for in § 110-31, for probation officers of the juvenile court. The salaries of said probation officers, and the necessary equipment for the proper maintenance and functioning of said court, shall be a charge upon such county and such city jointly, or upon the county or city, if it is an independent court.

Wherever a domestic relations court is established a substitute judge of said court may be appointed in the same manner as the regular judge of said court. Such substitute judge shall serve during the absence, illness or other temporary disability of the regular judge, and while serving shall have the same power and authority as the regular judge. Such substitute judge shall receive such compensation, on a per diem basis, as shall be determined and provided by the governing body or bodies appointing him. (1929, c. 343, s. 4; 1931, c. 221, s. 1; 1943, c. 470, s. 2; 1955, c. 1018, s. 3; 1967, c. 962, ss. 1, 2.)

Local Modification. — Buncombe: 1957, c. 875; Guilford: 1957, c. 1397; Mecklenburg: 1961 c. 851.

Editor's Note. — The 1955 amendment directed that the second paragraph be inserted to follow the first paragraph of this section.

The 1967 amendment inserted "and such number of deputy clerks as are needed" preceding "for said court" in the present third paragraph and inserted "and deputy clerks" preceding "to be fixed" in that paragraph.

§ 7-106. **Procedure, practice and punishments.**—The procedure, practice, and punishments imposed in the domestic relations court as established in

this article shall be the same as now provided by law in courts now having original jurisdiction of the various offenses or causes enumerated in this article, and the judge of the said domestic relations court is hereby granted the power to prescribe such rules and fix such modes of procedure, as, in his discretion, will best effect the purposes for which said court is created.

Such court, when established, shall adopt an official seal, shall keep and preserve adequate dockets and other records of its proceedings, and shall be a court of record. The judge, and clerk and deputy clerks of said court shall have power to administer oaths and to issue warrants and other process in said court. (1929, c. 343, s. 6; 1943, c. 470, s. 3; 1967, c. 962, s. 3.)

Editor's Note.—

The 1967 amendment included deputy clerks in the last sentence.

§ 7-108. Offenses before court to be petty misdemeanors; demand for jury trial; appearance bonds.

Local Modification.—Forsyth: 1959, c. 1290, s. 2.

§ 7-108.1. Docketing judgments forfeiting bonds.—A transcript of any judgment of a domestic relations court rendering absolute a bond forfeiture may be docketed in the office of the clerk of superior court of the county in which said judgment was rendered, and, when so docketed, said judgments shall have the full force and effect of all judgments docketed in the superior court. (1965, c. 989.)

§ 7-111. Discontinuance of court.

Local Modification.—Guilford: 1959, c. 1071; Wake: 1953, c. 469.

SUBCHAPTER V. JUSTICES OF THE PEACE.

ARTICLE 14.

Election and Qualification.

§ 7-112. Constitution, article seven, abrogated; exceptions.

Cross References.—As to abolition of office of justice of the peace, see § 7A-176. As to magistrates, see §§ 7A-170 to 7A-175.

§ 7-113. Election and number of justices.

Local Modification. — Yancey: 1959, c. 228; City of Washington: 1957, c. 898. **Cited in** McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

§ 7-114. Oath of office; vacancies filled.

Cited in McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

§ 7-114.1. Bond required.—(a) Amount and Conditions; Premiums.—Every justice of the peace shall, before exercising any of the functions of his office, furnish a bond, either corporate or personal, with good and sufficient surety, approved by the clerk of the superior court, in the amount of one thousand dollars (\$1,000.00) payable to the State of North Carolina and conditioned upon the faithful performance of his duties and upon a correct and proper accounting for all funds coming into his hands by virtue or color of his office. Premiums on such bonds shall be paid by the justice of the peace concerned.

(b) Penalty for Violation.—Any person exercising any of the official functions of a justice of the peace without having first complied with the provisions of this section shall be subject to a penalty of one hundred dollars (\$100.00) for every

such violation, such penalty to be recoverable in a civil action by any taxpayer of the county in which such violation occurs.

(c) Counties Exempted.—This section shall not apply to Alleghany, Ashe, Bertie, Bladen, Cabarrus, Caldwell, Caswell, Chatham, Clay, Columbus, Dare, Davie, Duplin, Franklin, Granville, Guilford, Harnett, Haywood, Hertford, Hoke, Hyde, Jackson, Johnston, Lee, Lincoln, McDowell, Mitchell, Montgomery, Northampton, Onslow, Pamlico, Pender, Perquimans, Person, Randolph, Robeson, Rowan, Scotland, Transylvania, Tyrrell, Vance, Yadkin and Yancey counties.

(d) Police Officers Serving as Justices.—Police officers who also serve as justices of the peace are exempt from the provisions of this section so long as they exercise their powers and authorities as justices of the peace solely for the purpose of signing warrants and accepting bonds returnable to any court. (1957, c. 1380.)

The issuance of a warrant by a justice of the peace who had not given bond upon appointment to the office in compliance with this section, is the act of a justice of the peace de facto, and the warrant is not subject to collateral attack. *State v. Porter*, 272 N.C. 463, 158 S.E.2d 626 (1968).

§ 7-115. Appointment and removal by resident judge.—In addition to other methods provided by law for appointment or election of a justice of the peace, the resident judge of the superior court of the district in which a county is situated may, from time to time at his discretion, appoint one or more fit persons as justice of the peace in said county who shall hold office for two years from and after the date of appointment: Provided, that the appointing judge shall find to his satisfaction that there is then existing a need for such additional justice or justices of the peace. The appointing judge shall issue to each justice of the peace so appointed a certification in writing of such appointment, a copy of which shall be filed with the clerk of the court, before whom shall be taken and subscribed the oath of office, and the clerk shall note on his minutes the qualification of the justice of the peace. For such qualification the clerk shall collect a fee of seven dollars and fifty cents (\$7.50) which shall be remitted to the Department of Revenue at the time required for remitting the taxes collected pursuant to G. S. 105-93 for the use of the General Fund.

Any justice of the peace so appointed may, after due notice and hearing, be removed from office by the resident judge of the superior court of the district in which the county is situated, for misfeasance, malfeasance, nonfeasance or other good cause.

Any person holding himself out to the public as a justice of the peace, or any person attempting to act in such capacity after his appointment shall have been revoked, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (1917, c. 40; C. S., s. 1468; 1927, c. 116; 1955, c. 910, s. 2.)

Editor's Note. — The 1955 amendment, effective July 1, 1955, rewrote this section which formerly authorized the Governor to appoint justices of the peace.

Section Cumulative.—This section does not purport to repeal and abrogate the other general methods of electing and appointing justices of the peace. It specifically provides that it is in addition to all other methods of appointment. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).

The failure of a justice of the peace to collect fees for the service of civil process upon the issuance of the process at the instance of certain business firms, and his action in waiting until the end of the month to collect such fees, is insufficient to support a finding of malfeasance or bad faith on the part of such justice of the peace which would justify his removal from office, any monetary loss from such practice being recoverable by action against such justice of the peace personally and on his official bond. *Swain v. Creasman*, 255 N.C. 546, 122 S.E.2d 358 (1961).

This section and §§ 128-16 through 128-20 are not in *pari materia* *State ex rel. Swain v. Creasman*, 260 N.C. 163, 132 S.E.2d 304 (1963).

This section, relating to the removal of a justice of the peace by the resident judge

appointing him, is restricted in its scope and provides a procedure different from that specified in §§ 128-16 through 128-20. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Where a petition for removal from office of a justice of the peace was heard by the resident judge who appointed him, and the judgment recites that the petition was heard under the provisions of this section and the judge heard the proceeding in chambers after notice to the justice of the peace, instead of fixing the hearing at the next term after the petition was filed, it was held that the proceeding was under this section and not under §§ 128-16 through 128-20. State ex rel. Swain v.

Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Justice of the peace is not entitled to recover costs and attorney's fees upon final judgment in his favor in a proceeding under this section to remove him from office, since this section, unlike § 128-20, makes no provision for such recovery. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

The provisions of § 128-20, relating to the recovery of costs and attorney's fees, are not applicable to a proceeding under this section. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Stated in State v. Hockaday, 265 N.C. 688, 144 S.E.2d 867 (1965).

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. Jurisdiction in actions on contract.

I. ACTIONS EX CONTRACTU.

Jurisdiction of Superior Court.—

In accord with 2nd paragraph in original. See *Coble v. Reap*, 269 N.C. 229, 152 S.E.2d 219 (1967).

A justice of the peace has exclusive original jurisdiction of causes of action arising ex contractu when the sum demanded is not in excess of \$200, and the superior court has no original jurisdiction of such actions. *Jenkins v. Winecoff*, 267 N.C. 639, 148 S.E.2d 577 (1966).

Whether Action in Tort or on Contract.—

Where plaintiff's allegations were to the effect that he purchased specified

items of personalty from defendant and made a partial payment under agreement that he would pay the balance when he picked up the articles, and that defendant thereafter sold the personalty to a third party, to plaintiff's actual damage in the amount of \$70, the complaint was sufficient to allege a cause of action in tort for conversion, and defendant's demurrer to the jurisdiction on the ground that the action was ex contractu and within the exclusive original jurisdiction of a justice of the peace, should have been overruled. *Coble v. Reap*, 269 N.C. 229, 152 S.E.2d 219 (1967).

§ 7-122. **Jurisdiction in actions not on contract.** — Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars: Provided, however, that justices of the peace shall have concurrent jurisdiction in claim and delivery proceedings wherein the value of the property in controversy does not exceed two hundred dollars (\$200.00) and provided, further, that the plaintiff or petitioner in such action has a vendor-vendee relationship with the defendant with respect to the property in question. (Const., art. 4, s. 27; Code, s. 887; Rev., s. 1420; C. S., s. 1474; 1963, c. 383.)

Cross Reference.—

As to complaint alleging cause of action in tort for conversion, see note to § 7-121.

Editor's Note.—

The 1963 amendment added the two provisos.

Jurisdictional Amount for Counterclaims.—For note on problem arising from counterclaim exceeding jurisdictional limit of court, see 32 N.C.L. Rev. 231 (1954).

Applied in *Coble v. Reap*, 269 N.C. 229, 152 S.E.2d 219 (1967).

§ 7-124. Title to real estate in controversy as a defense.

Answer in Writing Necessary.—

Rohrabacher, 243 N.C. 255, 90 S.E.2d 499

In accord with original. See Harwell v. (1955).

§ 7-127. Justice may act anywhere in county.

Local Modification.—Harnett: 1959, c.

567; Sampson: 1957, c. 1354.

§ 7-129. Jurisdiction in criminal actions. — Justices of the peace have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law does not exceed a fine of fifty dollars or imprisonment for thirty days: Provided, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: Provided further, that nothing in this section shall prevent the superior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said courts from assuming jurisdiction of all offenses whereof exclusive original jurisdiction is given to justices of the peace if some justice of the peace, within twelve months after the commission of the offense, shall not have proceeded to take official cognizance of the same. (Const., art. 4, s. 27; Code, s. 892; 1889, c. 50+, s. 2; Rev., s. 1-27; C. S., s. 1481; 1955, c. 1345, s. 3.)

Editor's Note. — The 1955 amendment inserted the word "not" in line five.

Cited in State v. Wilkes, 233 N.C. 645, 66 S.E.2d 129 (1951).

Applied in State v. Doughtie, 238 N.C. 228, 77 S.E.2d 642 (1953).

ARTICLE 17.

Fees.

§ 7-134. Fees of justices of the peace.—Justices of the peace shall receive the following fees, and none other: For attachment with one defendant, twenty-five cents, and if more than one defendant, ten cents for each additional defendant; transcript of judgment, ten cents; summons, twenty cents; if more than one defendant in the same case, for each additional defendant, ten cents; subpoena for each witness, ten cents; trial when issues are joined, seventy-five cents, and if no issues are joined, then a fee of forty cents for trial and judgment; taking an affidavit, bond or undertaking, or for an order of publication, or an order to seize property, twenty-five cents; for jury trial and entering verdict, seventy-five cents; execution, twenty-five cents; renewal of execution, ten cents; return to an appeal, thirty cents; order of arrest in civil actions, twenty-five cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, fifty cents; warrant of commitment, twenty-five cents; taking depositions on order or commission, per one hundred words, ten cents; garnishment for taxes, and making necessary return and certificate of same, twenty-five cents; for hearing petition for widow's year's allowance, issuing notice to commissioners and allotting the same, one dollar; for filing and docketing laborers' liens, fifty cents; probate of a deed or other writing proved by a witness, including the certificate, twenty-five cents; probate of a deed or other writing executed by a married woman, proper acknowledgment and private examination, with the certificate thereof, twenty-five cents; probate of a deed or other writing acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof, twenty-five cents; probating chattel mortgage, including the certificate, ten cents; for issuing all papers and copies thereof in an action for claim and delivery, and the trial of the same, if issues are joined, when there is one defendant, one dollar

and fifty cents, and if more than one defendant in action, fifty cents for each additional defendant, and ten cents for each subpoena issued in said cause, and twenty-five cents for taking the replevy bond, when one is given: Provided, that when the trial of such a cause shall have been removed from before the justice of the peace issuing the said papers, the justice of the peace sitting in trial of such cause shall receive fifty cents of the above costs for such trial and judgment.

Justices of the peace in the counties of Alamance, Alexander, Anson, Bertie, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Chatham, Cherokee, Chowan, Clay, Columbus, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gates, Granville, Greene, Halifax, Haywood, Henderson, Hertford, Jackson, Johnston, Jones, Lee, Lenoir, Macon, Madison, Mitchell, Montgomery, Nash, Northampton, Onslow, Orange, Pender, Perquimans, Person, Polk, Richmond, Robeson, Rockingham, Rowan, Stanly, Stokes, Swain, Transylvania, Tyrrell, Vance, Wake, Washington, Watauga, Wayne, Wilkes and Yadkin shall receive the following fees, and none other: For attachment with one defendant, thirty-five cents, and if more than one defendant, fifteen cents for each additional defendant; transcript of judgment, fifteen cents; summons, thirty cents; if more than one defendant in the same case, for each additional defendant, fifteen cents; subpoena for each witness, fifteen cents; trial when issues are joined, one dollar; and if no issues are joined, then a fee of fifty cents for trial and judgment; taking an affidavit, bond, or undertaking, or for an order of publication, or an order to seize property, thirty-five cents; for jury trial and entering verdict, one dollar; execution, thirty-five cents; renewal of execution, fifteen cents; return to an appeal, forty cents; order of arrest in civil actions, thirty cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, seventy-five cents; warrant of commitment, fifty cents; taking depositions on order of commission, per one hundred words, fifteen cents; garnishment for taxes and making necessary return and certificate of same, thirty-five cents. (1870-1, c. 130, s. 9; 1883, c. 368; Code, ss. 2135, 3748; 1885, c. 86; 1903, c. 225; Rev., s. 2788; 1907, c. 967; 1917, c. 260; C. S., s. 3923; 1921, c. 113; Ex. Sess., 1921, cc. 38, 64, 67; 1923, cc. 28, 114, 238; 1929, cc. 13, 59; 1931, cc. 51, 303; 1945, c. 150; 1947, c. 337; 1953, c. 1173; 1955, c. 522, s. 3; 1957, c. 776; c. 933, s. 2; c. 1054; 1959, c. 691, s. 1; 1963, c. 1073, s. 1.)

Local Modification.—Alleghany: 1959, c. 1116; Avery: 1957, c. 922; Beaufort: 1957, c. 641; Caldwell: 1959, c. 691, s. 2; Chowan: 1959, c. 972; Currituck: 1957, c. 1116; Harnett: 1963, c. 1073, s. 2; Hyde: 1953, c. 872; 1957, c. 933, s. 1; McDowell: 1957, c. 776; 1959, c. 694; Washington: 1955, c. 522, s. 1; 1961, c. 774.

Editor's Note. — The 1953 and 1955

amendments made the second paragraph applicable to Washington County. The 1957 amendments deleted "Cumberland," "Hyde" and "McDowell" from the list of counties in the second paragraph. The 1959 amendment deleted "Caldwell" from the list of counties

The 1963 amendment deleted "Harnett" from the list of counties.

ARTICLE 17A.

Warrants and Receipts.

§ 7-134.1. **Clerk of superior court to furnish printed forms; requirements for warrants and receipts.**—The clerk of superior court of every county in the State shall have printed, at the expense of the county, warrants, warrants-issued register pages, and receipt books for the use of justices of the peace as hereinafter provided. The warrants shall be pre-numbered consecutively in duplicate and bound together in sets of twenty-five (25) or more. The receipt books shall contain receipts in triplicate, and the receipts shall be pre-numbered consecutively and bound together in sets of twenty-five (25) or more. The clerk shall distribute to each justice of the peace in his county one or more sets of pre-numbered warrants, one or more receipt books containing pre-numbered receipts, and a sufficient supply of warrants-issued register pages. The clerk

shall from time to time issue other prenumbered warrants and receipts and other warrants-issued register pages as demand is made for them. (1957, c. 1109, s. 1.)

Local Modification. — Union: 1959, c. 1195.

§ 7-134.2. Use of forms by justices; contents of warrants-issued register; reports to clerk of superior court; records open to inspection.

—Each justice of the peace shall in all criminal cases use the said pre-numbered warrants. The warrants shall be issued consecutively and upon issuance the warrant shall be entered on the warrants-issued register. Warrants which are voided or returned to the justice of the peace unserved shall be retained by the justice of the peace.

The warrants-issued register shall contain columns for each of the following:

- (1) The warrant number,
- (2) The date of issuance,
- (3) The offense for which issued,
- (4) The defendant's name,
- (5) The defendant's address,
- (6) The officer or office to which the warrant was issued,
- (7) The docket number,
- (8) The receipt number or numbers issued.

When a criminal case is docketed, the docket number shall be entered on the warrants-issued register opposite the appropriate warrant number. Each justice of the peace shall issue a receipt to every person paying a fine, fee, cost, or other item in a criminal case. The receipts shall be issued consecutively, and each receipt shall be made out in triplicate with the original going to the person paying the fine, fee, cost, or other item, one copy being retained by the justice of the peace, and one copy being retained in the receipt book for filing with the clerk of superior court. When the receipt is issued, the number thereof shall be entered on the warrants-issued register opposite the appropriate warrant number. When a justice of the peace fills his docket and files the same with the clerk of the superior court as provided in G. S. 7-132, he shall at the same time turn over all such receipt books as are filled and shall file with the clerk of the superior court a report indicating what warrants he has issued that are not in his possession and to whom such warrants were delivered. The failure of the justice of the peace to have such warrants in his possession shall not be deemed to constitute a violation of the criminal provisions of this article. All warrants, warrants-issued register pages, receipts and other records and reports filed with the clerk shall be public records and open to inspection by any person. (1957, c. 1109, s. 2.)

§ 7-134.3. Auditing of justices' records.—Each board of county commissioners shall cause the records of each justice of the peace to be audited annually and at such other time as the board may direct. The audit shall cover all criminal records, including the warrants, warrants-issued register, and receipts herein provided for, whether in the possession of the justice of the peace or in the possession of the clerk of superior court, and the audit may cover such other records as the board of county commissioners may direct. The cost of any such audit shall be borne by the county and may be performed either by the county accountant or by a certified public accountant, as the board may in its discretion determine. (1957, c. 1109, s. 3.)

Local Modification.—Swain: 1959, c. 236.

§ 7-134.4. Enforcement officers to submit list of warrants for auditing; lists to be made available to accountant.—Every law enforcement officer serving criminal process shall submit to the clerk of the superior court for auditing purposes a list of warrants in his possession as of June 30 of each year, or at such other time as the board of county commissioners may direct. The

clerk in turn shall make such lists available to the accountant selected by the board of county commissioners to perform audits of justices of the peace. (1957, c. 1109, s. 4.)

§ 7-134.5. **Penalty.**—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1957, c. 1109, s. 5.)

§ 7-134.6. **Counties to which article applies.**—The provisions of this article shall apply to the following counties only: Anson, Ashe, Avery, Cabarrus, Cherokee, Chowan, Columbus, Craven, Cumberland, Davidson, Guilford, Harnett, Haywood, Hertford, Hoke, Johnston, Macon, McDowell, Montgomery, Nash, Onslow, Richmond, Rowan, Rutherford, Swain, Union, Wayne and Wilkes. (1957, c. 1109, s. 5-1; 1959, cc. 184, 237, 300, 335, 345, 762, 958; 1961, cc. 389, 499, 578, 736.)

Editor's Note. — The 1959 amendments inserted Anson, Columbus, Craven, Harnett, Hertford and Wayne in the list of counties, and deleted therefrom Burke and Pitt.

The first 1961 amendment inserted Av-

ery in the list of counties, and the second 1961 amendment inserted Macon in the list. The third 1961 amendment deleted Polk from the list of counties. The fourth 1961 amendment added Wilkes to the list of counties.

ARTICLE 18.

Process.

§ 7-138. **Process issued to another county.**

Cited in *Waters v. McBee*, 244 N.C. 540, 94 S.E.2d 640 (1956).

ARTICLE 19.

Pleading and Practice.

§ 7-149. **Rules of practice.**

Rule 3, Answer.

Jurisdictional Amount for Counterclaims.—For note on problem arising from

counterclaim exceeding jurisdictional limit of court, see 32 N.C.L. Rev. 231 (1954).

Rule 12, No process quashed for want of form.

Editor's Note.—For note as to power of superior court to amend warrant, see 36 N.C.L. Rev. 80 (1957).

Power of superior court to allow amendments to warrants is very comprehensive. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Amendment of Warrants.—

In accord with 1st paragraph in original. See *State v. Thompson*, 233 N.C. 345, 64 S.E.2d 157 (1951); *State v. McHone*, 243 N.C. 231, 90 S.E.2d 536 (1955); *State v. Moore*, 247 N.C. 368, 101 S.E.2d 26 (1957); *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

In accord with 2nd paragraph in original. See *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

The amendment of a warrant is a procedural matter. *State v. Fenner*, 263 N.C. 694, 140 S.E.2d 349 (1965).

As a general proposition the superior

court, on an appeal from a recorder's court or other inferior court upon a conviction of a misdemeanor, has power to allow an amendment to the warrant, provided the charge as amended does not change the offense with which defendant was originally charged. *State v. Fenner*, 263 N.C. 694, 140 S.E.2d 349 (1965).

Notwithstanding these broad powers with respect to amendments, a warrant as well as the amendments thereto must relate to the charge and the facts supporting it as they existed at the time it was formally laid in the court. Therefore, a conviction upon an amended warrant, unsupported by the facts as they existed at the time the warrant was issued, will not be upheld. Neither will a conviction for the willful failure to support an illegitimate child be upheld on such warrant, where the State, in order to sustain the conviction, must rely altogether on evi-

dence of willful failure to support the child subsequent to the time the charge was laid in court. *State v. Thompson*, 233 N.C. 345, 64 S.E.2d 157 (1951).

A warrant cannot be amended so as to charge a different offense. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

North Carolina courts have authority to amend warrants defective in form, and even in substance, provided the amendment

does not change the nature of the offense charged in the original warrant. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Fatal Defect Cannot Be Cured by Amendment.—Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

ARTICLE 20.

Jury Trial.

§ 7-150. Parties entitled to a jury trial.

This Section and N. C. Const., art. 4, § 27, Determinative of Number of Jury in Criminal Prosecution in Municipal Recorder's Court.—See note to § 7-204.

§ 7-153. Jury list furnished.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-154. Names kept in jury box.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-156. Jury drawn and trial postponed.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-157. Summoning the jury.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-158. Selection of jury.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-160. Names returned to the jury box.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-161. Names of jurors serving.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-162. Tales jurors summoned.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-163. No juror to serve out of township.

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

ARTICLE 21.

Judgment and Execution.

§ 7-166. Justice's judgment docketed; lien and execution; transcript.—A justice of the peace on the demand of a party in whose favor he has rendered a judgment shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judg-

ment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney a transcript of any stay of execution issued, or which may thereafter be issued by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket, and from that time the judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county and shall have the same effect, and be executed in the same manner as other executions of the superior court, but in case a stay of execution upon such judgment shall be granted as provided by law, execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with like effect, in every respect as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript. A justice of the peace may issue a transcript of a judgment under the provisions of this section which was rendered by said justice of the peace during his prior term of office, provided said judgment was rendered within one year of the issuance of said transcript. If, within one year after rendering a judgment, any justice of the peace dies, vacates his office, fails to re-qualify or becomes insane or otherwise becomes incapable of performing the duties of his office, without issuing a transcript of a judgment rendered by him during his term, any other justice of the peace in the same county may issue a transcript of said judgment from the docket or a judgment found among the papers of the justice of the peace who rendered said judgment upon request of a party in whose favor said judgment was rendered and the payment of the necessary fees. (Code, s. 839; Rev., s. 1479, C. S., s. 1517, 1953, c. 846.)

Editor's Note.—The 1953 amendment added the last two sentences.

Generally.—

When a transcript of a judgment of a justice of the peace is filed and docketed in accordance with this section, this section expressly provides that such judgment shall be a judgment of the superior

court in all respects for the purposes of lien and execution. *Bryant v. Poole*, 261 N.C. 553, 135 S.E.2d 629 (1964).

Quoted in *Rehm v. Rehm*, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

Cited in *Clements v. Booth*, 244 N.C. 474, 94 S.E.2d 365 (1956).

§ 7-170. Issue and return of execution.

Execution, etc.—

Under prescribed circumstances, execution may be issued by a justice of the

peace on a judgment rendered in his court. *Bryant v. Poole*, 261 N.C. 553, 135 S.E.2d 629 (1964).

ARTICLE 22.

Appeal.

§ 7-178. Appeal does not stay execution.

Applied in *Massenburg v. Fogg*, 256 N.C. 703, 124 S.E.2d 868 (1962).

§ 7-181. Justice's return on appeal.

Motion to Dismiss Appeal Where Record Not Filed in Superior Court.—Where appeal from a judgment of a justice of the peace is not filed in the superior court within ten days as required by this section, but is filed during the term at which the appeal would have stood regularly for trial had the record been timely filed, ap-

pellee's motion at the next succeeding term to dismiss the appeal presents, in like manner as a petition for recordari under Superior Court Rule 14, the question of fact whether the failure of the justice of the peace to comply with this section was caused by defendant's default, and when there is no evidence or finding in regard

thereto, judgment denying the motion is not supported by the record, and the cause must be remanded. *Freeman v. Bennett*, 249 N.C. 180, 105 S.E.2d 809 (1958).

Appeal from Order of Superior Court Granting Writ of Recordari.—For a review and discussion of the decisions rela-

tive to the right of an immediate appeal to the Supreme Court from an order of the superior court granting a motion for a writ of recordari to a justice's court where the justice has failed to comply with this section, see *Freeman v. Bennett*, 249 N.C. 180, 105 S.E.2d 809 (1958).

SUBCHAPTER VI. RECORDERS' COURTS.

ARTICLE 24.

Municipal Recorders' Courts.

§ 7-185. In what cities and towns established; court of record.

Cross References.—

As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Editor's Note.—Session Laws 1953, c. 998, made the provisions of this article applicable to municipalities in Johnston County.

Validity of Act Making Article Applicable to Municipalities in Johnston County.—The 1953 act making the provisions of

this article applicable to municipalities in Johnston County, etc., was not a local, private or special act violative of N. C. Const., art. 2, § 29, but was tantamount to a re-enactment of the general law relating to establishment of recorders' courts, making it applicable to Johnston County. *State v. Ballenger*, 247 N.C. 216, 100 S.E.2d 351 (1957).

Cited in *State v. Morgan*, 246 N.C. 596, 99 S.E.2d 764 (1957); *State v. Johnson*, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-186. Recorder's election and qualification; term of office and salary.

Local Modification.— Johnston: 1957, c. 619, s. 2; city of Belmont: 1957, c. 385 s. 1; 1965, c. 35; town of Graham: 1959, c. 960; town of Kernersville: 1955, c. 282, s. 1; town of Liberty: 1965, c. 478, amending

1959, c. 731; town of Mount Holly: 1959, c. 223; town of Siler City: 1953, c. 607, s. 2; town of Southern Pines: 1959, c. 74, s. 1; town of Wendell: 1955, c. 1007.

§ 7-190. Criminal jurisdiction.

Local Modification.— Johnston: 1957, c. 619, s. 1; city of Belmont: 1957, c. 385, s. 2.

Jurisdiction Given over Crimes below Grade of Felony.—

By virtue of this section a municipality is vested with power and authority to create a recorder's court with jurisdiction to try cases which involve criminal acts below the grade of felony, committed within a radius of five miles outside its corporate limits. *State v. Ballenger*, 247 N.C. 216, 100 S.E.2d 351 (1957).

Such Offenses Designated Petty Misdemeanors.—The legislature has declared in this section that criminal offenses below the grade of felony committed within the corporate limits of the municipality or within five miles thereof are petty mis-

demeanors, and for such offenses N. C. Const., art. 1, § 13, authorizes the legislature to provide means of trial other than by (common-law) jury. *Roebuck v. City of New Bern*, 249 N.C. 41, 105 S.E.2d 194 (1958).

Concurrent Jurisdiction of County Recorder's Court.—County recorder's court and a municipal recorder's court in the county were held to possess concurrent jurisdiction of general misdemeanors committed within the territorial limits of municipal recorder's court. *State v. Sloan*, 238 N.C. 547, 78 S.E.2d 312 (1953).

Applied in *State v. Dove*, 261 N.C. 366, 134 S.E.2d 683 (1964).

Cited in *State v. Johnson*, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-191. Jurisdiction to recover penalties.

Local Modification.—City of Belmont: 1957, c. 385, s. 3.

§ 7-195. Appeal to superior court.

Local Modification.—Town of Southern Pines: 1959, c. 74, s. 2.

Quoted in *State v. Johnson*, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-196. Costs paid to the municipality.

Local Modification. — Johnston: 1957, c. 619, s. 3.

§ 7-197. Seal of court.

Local Modification. — Town of Siler City: 1953, c. 607, s. 3.

§ 7-198. Issuance and service of process.

This section does not confer upon police sergeants the power to issue warrants. State v. Blackwell, 246 N.C. 642, 99 S.E.2d 867 (1957).

Under this section in conjunction with § 13-13, the deputy clerk of a municipal court had authority to issue a search warrant for illegal liquor. State v. Mock, 259 N.C. 501, 130 S.E.2d 863 (1963).

Search Warrant for Illegal Liquor. —**§ 7-200. Clerk of court; election and duties; removal; fees.**

Local Modification. — City of Wilson: 1955, c. 529; town of Southern Pines: 1959, c. 74, s. 3.

§ 7-200.1. Deputy or assistant clerks of court.—The governing body of the municipality may, at any time it deems necessary and in the same manner as is provided in this article for the election of the clerk of court, elect a deputy or assistant clerk of court, who before entering upon his duties shall enter into a bond, in the same manner and amount as is now required for the clerk of court. Upon compliance with the provisions of this article, such assistant or deputy clerk shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of municipal recorder's court as the clerk himself and shall be fully empowered to issue all process of the court, administer oaths, receive moneys and do all other things necessary to the operation of his office. The compensation of such office shall be fixed by the governing body of the municipality, shall consist of a salary only, which salary shall not be subject to be diminished during such deputy's or assistant's term of office. Provided, the clerk of the municipal recorder's court shall be held responsible for the official acts of such deputy or assistant clerk. Provided, further, that the election of a deputy or assistant clerk under this article shall be in the discretion of the governing body of the municipality subject to their finding that a deputy or assistant clerk is necessary to the operation of the court. (1959, c. 858.)

§ 7-201. Clerk to keep records.

Clerk's certificate is accepted as true in the absence of positive proof to the contrary. State v. Dawkins, 262 N.C. 298, 136 S.E.2d 632 (1964).

the court or the judgment in criminal cases, except capital, does not affect the validity of the judgment. State v. Dawkins, 262 N.C. 298, 136 S.E.2d 632 (1964).

Failure of judge to sign the minutes of**§ 7-203 Prosecuting attorney; duties and salary.**

Local Modification.—Town of Kernersville: 1955, c. 282, s. 2; town of Siler City:

1953, c. 607, s. 4; town of Southern Pines: 1959, c. 74, s. 4.

§ 7-204. Jury trial, as in justice's court.

Local Modification.—Chowan: 1957, c. 701; Wake: 1963, c. 343; Bessemer City: 1959, c. 224; city of Wilson: 1955, c. 573; town of Garner: 1955, c. 459; town of Liberty: 1965, c. 477; town of Mooresville: 1969, c. 38; town of Siler City: 1953, c. 607, s. 5; town of Southern Pines: 1959, c. 74, s. 5.

a reference to N. C. Const., art. 4, § 27 and § 7-150, with as much certainty as if actually set out in this section. Roebuck v. City of New Bern, 249 N.C. 41, 105 S.E.2d 194 (1958).

Provisions of §§ 7-250 and 7-252 Inapplicable.—See note to § 7-250.

The number of which the jury shall consist under this section is determined by

Quoted in State v. Johnson, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-206. Officers' fees; fines and penalties paid.

Where a municipal recorder's court is established or may be established in a municipality wherein the territorial jurisdiction of said municipal recorder's court is composed of portions of two or more counties the fines and forfeitures collected by or paid into said municipal recorder's court shall be paid to the county treasurer for distribution according to law of the county in which the crime was committed which resulted in the indictment and conviction and because of which said fines or penalties were collected and paid: except that the provisions of this sentence shall not apply to the following counties: Alamance Cabarrus. Catawba. Edgecombe, Guilford and Nash. (1919, c. 277, s. 14; C. S., s. 1557; 1955, c. 707.)

Editor's Note. — The 1955 amendment added the above sentence at the end of this section. As the rest of the section was not changed it is not set out

ARTICLE 25.

County Recorders' Courts.

§ 7-218. Established by county commissioners.

Cross Reference.—As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

The County Recorder's Court in Pamlico County is a duly constituted court under this section. State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

Cited in State v. Morgan, 246 N.C. 596, 99 S.E.2d 764 (1957); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959); State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961); State v. Cook, 273 N.C. 377, 160 S.E.2d 49 (1968).

§ 7-219. Recorder's election, qualification, and term of office.

Local Modification.—Caldwell: 1965, c. 481; Hertford: 1957, c. 660; Randolph: 1953, c. 444.

§ 7-220. Time and place for holding court.

The Recorder's Court of Pamlico County has jurisdiction to try a defendant on a charge of operating a motor vehicle on a public highway while his license was revoked, and when the judge of that court testified that he held a session of court on

a certain day, such court was a court of competent jurisdiction to try the defendant for such offense on that day. State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

§ 7-222. Criminal jurisdiction.

Concurrent Jurisdiction of Municipal Recorder's Court. — County recorder's court and a municipal recorder's court in the county were held to possess concurrent jurisdiction of general misdemeanors committed within the territorial limits of municipal recorder's court. State v. Sloan, 238 N.C. 547, 78 S.E.2d 312 (1953).

Jurisdiction of Municipal-County Courts. Municipal-county courts created pursuant to § 7-240 have exclusive jurisdiction of all

misdemeanors except minor misdemeanors, with respect to which they have concurrent jurisdiction with justices of the peace under this section. State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960).

Applied in State v. Morgan, 246 N.C. 596, 99 S.E.2d 764 (1957).

Cited in State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953); State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961).

§ 7-223. Jurisdiction and powers as in municipal court.

Cited in State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959).

§ 7-228. Jury trial as in municipal court.

Local Modification. — Chowan: 1957, c. 701; Randolph: 1959, c. 1077, repealing Session Laws 1951, c. 414, and providing for election as to jury trials.

Effect of Demand for Jury Trial in Craven County Recorder's Court.—Where the defendant demanded a jury trial in the Craven County recorder's court, the jurisdiction of the recorder's court was ousted and the Superior Court of Craven County was vested with exclusive original jurisdiction of the charges laid in the warrants,

and the jurisdiction of the superior court was not derivative but original, and it was necessary for defendant to be tried on bills of indictment and not upon the original warrants. *State v. Peede*, 256 N.C. 460, 124 S.E.2d 134 (1962).

Cited in *State v. Norman*, 237 N.C. 205, 74 S.E.2d 602 (1953).

§ 7-231. Clerk of superior court ex officio clerk of county recorder's court.—The clerk of the superior court of any county in which a county recorder's court shall be established shall be ex officio clerk of such court. He shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable upon his official bond as clerk of the superior court for all of his official acts and conduct in reference thereto. Whenever the clerk of the superior court acts ex officio as clerk of the recorder's court or general county court, any assistant clerk or deputy clerk of the superior court in his office shall have power and authority to take affidavits, issue warrants and other process, administer oaths to witnesses and to perform any other duty in connection with said court under the direction of the clerk of the superior court, and for the acts of said assistant or deputy clerk, the clerk of the superior court shall be liable on his official bond to the same extent that he would have been liable if he had done the act himself. The preceding sentence shall not apply to recorder's courts in Brunswick, Camden, Forsyth, Gates, Halifax, Martin Moore, Perquimans and Vance counties. (1919, c. 277 s. 36; C. S., s. 1576; 1935, c. 346; 1947, c. 214, s. 5; 1957, c. 305.)

Editor's Note.—

The 1957 amendment deleted "Bladen"

from the list of counties in the last sentence.

§ 7-235. Prosecuting attorney may be elected.

Local Modification. — Franklin: 1955.

c. 4.

§ 7-238. Fees taxed when county officer on salary; recorder's court fund.

Local Modification.—Cherokee: 1955, c.

105.

ARTICLE 26.

Municipal-County Courts.

§§ 7-240 to 7-242: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

ARTICLE 28.

Civil Jurisdiction of Recorders' Courts.

§ 7-247. Extent of jurisdiction; cross action or counterclaim in excess of jurisdiction.—The jurisdiction of such municipal and county recorders' courts in civil actions shall be as follows:

- (1) Jurisdiction concurrent with that of the justices of the peace within the county;
- (2) Jurisdiction concurrent with the superior court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars;
- (3) Jurisdiction concurrent with the superior court in actions not founded upon contract wherein the amount involved exclusive of interest and cost does not exceed the sum of five hundred dollars.

When any action either on contract or in tort has been or hereafter is instituted in any court inferior to the superior court having jurisdiction of civil actions, and a cross action or counterclaim is filed for an amount in excess of the jurisdiction of the court in which the action was instituted, both the original action and the cross action or counterclaim may, upon motion of either plaintiff or defendant, in the discretion of the court, be transferred for trial, on all issues presented, to the superior court of the county where the action originated; provided, however, that if the court in which the action is pending fails to transfer such action to the superior court upon motion of either plaintiff or defendant, the defendant may elect to take voluntary nonsuit as to the cross action or counterclaim, and in such event, the determination of the issues on the plaintiff's action in the inferior court, shall not constitute *res judicata* as to defendant's counterclaim or cross action in a subsequent action, instituted in the superior court of any county by the defendant, nor shall the pendency of such action in the inferior court be ground for abatement of a subsequent action instituted by the defendant in the superior court of any county; provided further however that the defendant may elect to prosecute his cross action or counterclaim in the inferior court in which the action was commenced but, in that event, the recovery shall be limited to the jurisdiction of such court, and the determination of the issues raised by the pleadings, shall constitute *res judicata* in any subsequent action. (1919, c. 277, s. 48; C. S., s. 1590; 1921, c. 110, s. 8; 1963, c. 487.)

Local Modification.—Franklin: 1953, c. 218, s. 1.

Editor's Note. — The 1963 amendment added the last paragraph.

§ 7-248. Procedure in civil actions.

Local Modification.—Franklin: 1953, c. 218, s. 3.

§ 7-250. Jurors drawn and summoned.

This Section and § 7-252 Inapplicable to Criminal Prosecution Contemplated by § 7-204.—Statutory provisions for a jury of twelve under this section and § 7-252, applicable solely to civil actions in a municipal recorder's court, cannot be invoked by a defendant in a criminal prosecution

in such court as the basis for demand under § 7-204, for a jury of twelve, in the face of statutes establishing a jury of six in criminal prosecution in such court *Roebuck v. City of New Bern*, 249 N.C. 41, 105 S.E.2d 194 (1958).

§ 7-252. Jury as in superior court.

Section Inapplicable to Criminal Prosecution Contemplated by § 7-204. — See note to § 7-250.

§ 7-253. Appeals to superior court.

The reason for a jury of twelve in a civil action before a municipal recorder's court is made apparent by examination of this section, which provides for appeals in civil cases from recorder's court to the superior court in term. Upon such appeal the superior court may either affirm or modify the judgment of the recorder's

court, or may remand the cause for a new trial. A jury trial is not available in the superior court in a civil case. Therefore, a jury trial in the constitutional or common-law sense (in a civil case) must be provided in the municipal recorder's court *Roebuck v. City of New Bern*, 249 N.C. 41, 105 S.E.2d 194 (1958).

ARTICLE 29.

Elections to Establish Recorders' Courts.

§ 7-264. **Certain districts and counties not included.**—This subchapter shall not apply to the following judicial districts: the tenth, except as to Alamance, Granville and Orange counties; the eleventh; the seventeenth, the eighteenth, except as to Rutherford and Transylvania counties; the nineteenth; and the

twentieth, except as to Cherokee, Haywood, Jackson and Swain counties; nor shall it apply to the counties of Chatham, New Hanover and Robeson. (1919, c. 277, s. 64; C. S., s. 1608; 1921, c. 110, s. 16; Ex. Sess 1921, cc. 59, 80; 1923, cc. 19, 40, 1925, c. 162; Pub. Loc. 1927, cc. 214, 545 1929, cc. 17, 111, 114, 130, 340; 1931 cc. 3, 19; 1933, c. 142; 1935, c. 396; 1939, c. 204; 1941, c. 338; 1947, c. 1021 s. 2; 1953, cc. 850, 998.)

Editor's Note.—

The first 1953 amendment deleted Columbus from the list of counties at the end of the section. And the second 1953 amendment deleted Johnston from the list.

The 1953 act eliminating Johnston

County from the list of excepted counties was not a local, private or special act in violation of N.C. Const., art. 2, § 29. State v. Ballenger, 247 N.C. 216, 100 S.E.2d 351 (1957).

ARTICLE 29A.

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

§ 7-264.1. **Establishment of municipal recorders' courts without election.**

Cited in State v. Johnson, 251 N.C. 339, 111 S.E.2d 297 (1959).

SUBCHAPTER VII. GENERAL COUNTY COURTS.

ARTICLE 30.

Establishment, Organization and Jurisdiction.

§ 7-265. **Establishment authorized; official entitlement; jurisdiction.**—In each county of this State, there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this subchapter and which court shall be called the general county court and shall have jurisdiction over the entire county in which said court may be established. In any county in the State in which there is situated a city which has or may have in the future a population, according to any enumeration by the United States census bureau, of more than fifteen thousand inhabitants, the commissioners of such county or counties are authorized hereby to establish general county courts as hereinafter provided without first submitting the question of establishing such court to a vote of the people: Provided, that the said enumeration need not be made at a regular decennial census. In the event that the second sentence of this section is acted upon by the commissioners of any county in establishing a general county court, as is herein provided, the said commissioners may make such provisions for holding such courts in such city. (1923, c. 216, s. 1; C. S., s. 1608(f); 1925, c. 242; 1927, c. 74; 1955, c. 1081.)

Local Modification.—Beaufort: 1959, c. 848, s. 1.

By virtue of Session Laws 1963, c. 102. Transylvania should be stricken from the recompiled volume.

Cross Reference.—As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Editor's Note.—The 1955 amendment substituted "fifteen thousand" for "twenty thousand" in line seven.

History.—For history of this section,

see Waters v. McBee, 244 N.C. 540, 94 S.E.2d 640 (1956).

The phrase "shall have jurisdiction over the entire county in which said court may be established" does not have reference to the kind or character of action of which the general county court may take jurisdiction nor of the parties who may be subject to its jurisdiction. It merely fixes the territorial limits within which the court may act. The quoted words give such court jurisdiction within the boundaries of its county notwithstanding that other courts

may have been created with jurisdiction covering the same matters in other parts of the county, and do not limit such court to causes of action arising within the

county. *Waters v. McBee*, 244 N.C. 540, 94 S.E.2d 640 (1956).

Cited in *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-266. Creation by board of commissioners without election.

Local Modification.—Beaufort: 1959, c. 848, s. 1.

Cited in *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-268. Transfer of criminal cases.

Local Modification.—Beaufort: 1959, c. 848, s. 3.

§ 7-270. Costs

Local Modification. — Buncombe: 1953, c. 1021.

Cited in *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.

Local Modification.—Beaufort: 1953, c. 1247, s. 2; 1959, c. 848, s. 3; Buncombe: 1955, c. 425; 1969, c. 630; Henderson: 1957, c. 362, s. 6.

Cited in *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-272. Terms of court.

Local Modification. — Duplin: 1959, c. 650.

§ 7-273. Prosecuting officer; duties, election, salary, etc.

Local Modification. — Buncombe: 1969, c. 630; Henderson: 1957, c. 362, s. 7.

§ 7-274. Superior court clerk as clerk ex officio; salary, bond, etc.

—The clerk of the superior court of the county shall be ex officio clerk of the general county court, herein provided for, and in addition to the salary and fees paid him as clerk of the superior court, he shall be paid such additional compensation as the county commissioners of the county may fix, to be paid monthly out of the county funds. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him to the same extent as he is bound as clerk of the superior court. The clerk of said court or any deputy thereof, upon application and the making of proper affidavit as provided by law, shall have power and authority to issue any criminal warrant or warrants in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases. The last sentence shall not apply to the following counties: Alexander, Alleghany, Ashe, Caldwell, Camden, Clay, Dare, Davidson, Duplin, Durham, Edgecombe, Forsyth, Haywood, Hertford, Hoke, Hyde, Jackson, Johnston, Lincoln, Mecklenburg, Nash, New Hanover, Person, Pitt, Robeson, Rockingham, Scotland, Tyrrell, Union, Vance, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1923, c. 216, s. 4; C. S., s. 1608(j); 1931, c. 233; 1955, c. 8; c. 1080, s. 1; 1957, c. 362, s. 3; c. 811.)

Local Modification.—Buncombe: 1967, c. 517.

deleted "Alamance" and "Henderson" therefrom.

Editor's Note. — The 1955 amendments deleted "Halifax" and "Craven" from the list of counties, and the 1957 amendments

Cited in *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-278. Criminal jurisdiction, extent.

Local Modification.—Beaufort: 1959, c. 848, s. 3; Buncombe: 1969, c. 630.

Cited in *Waters v. McBee*, 244 N.C. 540, 94 S.E.2d 640 (1956).

§ 7-279. Civil jurisdiction, extent.

Local Modification.—Beaufort: 1953, c. 1247, s. 4; 1959, c. 848, s. 3.

The jurisdiction of the superior court upon appeal from a general county court is limited to rulings on exceptions duly noted and brought forward, and the superior court is without authority to make additional findings of fact. *Becker v. Becker*, 273 N.C. 65, 159 S.E.2d 569 (1968).

Jurisdiction Not Limited to Causes of Action Arising in the County.—Had it been the intention of the legislature to limit the jurisdiction of the general county court to causes of action arising in the county, it would have been simple and appropriate for it to have inserted such a provision in this section. No such limitation appears. To the contrary the General

Assembly has made express provisions for change of venue in appropriate cases in § 7-286. *Nelms v. Nelms*, 250 N.C. 237, 108 S.E.2d 529 (1959).

Where plaintiff institutes an action in the general county court for alimony without divorce and for custody and support of the children, that court acquires original jurisdiction of the parties and the children, and the superior court thereafter has appellate jurisdiction only and is without authority to modify custody or contempt orders entered in the court below. *Becker v. Becker*, 273 N.C. 65, 159 S.E.2d 569 (1968).

Cited in *Waters v. McBee*, 244 N.C. 540, 94 S.E.2d 640 (1956); *In re Holt*, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

§ 7-280. Election, requirement of.

Local Modification.—Beaufort: 1959, c. 848, s. 2.

§ 7-284. Count and return of votes; canvass of returns; effect; expense.

Cited in *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-285. Application of article.—This article shall not apply to any county in which there has been established a court, inferior to the superior court, by whatever name called by a special act, nor shall this article apply to the following counties: Granville, Iredell, New Hanover, Pasquotank and Wake; nor shall it apply to the counties in the seventeenth and nineteenth judicial districts, except Buncombe county: Provided, the provisions of this article shall apply to Surry County, notwithstanding that there has been established a court inferior to the superior court. (Ex. Sess. 1924, c. 85 s. 2; 1925, c. 9; 1927, c. 103, ss. 1, 2; 1929, c. 159, s. 1; 1931, c. 19; 1937, c. 439; 1949, c. 896; 1953, c. 845; 1953, c. 1241, s. 1; 1957, c. 362, s. 4.)

Local Modification.—Watauga: 1937, c. 439.

Editor's Note.—The 1925 amendment added Randolph to the list of counties in this section, and the 1927 amendment added Henderson to the list. The 1931 amendment struck out the former exemption of the counties in the sixteenth judicial district. The first 1953 amendment deleted Randolph from the list of counties, and the second 1953 amendment added the proviso to this section.

The 1957 amendment deleted "Henderson" from the list of counties. Section 2 of the amendatory act provided that this article is applicable to Henderson County, except as otherwise provided in the act. See Local Modification under G. S. 7-271 and 7-273.

Repealed Only as to Surry County.—

Chapter 896 of the 1949 Session Laws is held to repeal this section only insofar as it relates to Surry County. When the act is considered in its entirety, it seems clear that the purpose of the legislature was to take Surry County out of those counties to which the general county court act did not apply, and place it under the provisions of the act, and to make special provisions in respect of the general county court of the county. *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

And Wilkes County is still excluded from the general county court act. Therefore, its board of commissioners is without authority to establish a general county court. *In re Hickerson*, 235 N.C. 716, 71 S.E.2d 129 (1952).

ARTICLE 31.

*Practice and Procedure.***§ 7-286. Procedure; issuance and return of process.**

Cross Reference.—See note to § 7-279.

§ 7-287. Trial by jury; waiver; deposit for jury fee.

Local Modification.—Beaufort: 1953, c. 1247, s. 3; Henderson: 1965, c. 480, s. 1. Cited in *Gasperson v. Rice*, 240 N.C. 660, 83 S.E.2d 665 (1954).

§ 7-288. Continuance if jury demanded; drawing of jury; list.—If a jury trial is demanded, the judge shall continue the case until a day to be set, and the judge, together with the attorneys for all parties, shall proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen men, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. It shall be the duty of the register of deeds to prepare a list of jurors for this the general county court identical with the list prepared for the superior court, and the jury shall be drawn out of the box containing such list. Provided, that the judge of said court may in his discretion, if and when a sufficient number of cases are at issue in which jury trial has been demanded to warrant such action, cause a jury of not less than eighteen, not more than twenty-four men to be drawn for a certain week of a term, setting such cases for trial during such time, and in such cases the juries shall be drawn in the same manner as now provided for the drawing of juries for the superior court. The proviso shall not apply to the following counties: Alamance, Alexander, Alleghany, Ashe, Caldwell, Camden, Clay, Dare, Davidson Duplin Durham, Edgecombe, Forsyth, Halifax, Haywood Hertford Hoke, Hyde Jackson, Johnston, Lincoln, Mecklenburg, Nash, New Hanover, Person Pitt, Robeson, Rockingham, Scotland, Tyrrell, Union, Vance, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1923 c. 216, s. 9; C. S., s. 1608(v); 1931, c. 233, s. 2; 1955 c. 1080, s. 2; 1957, c. 362, s. 5.)

Local Modification. — Henderson: 1963 c. 660; 1965, c. 480, s. 2.

Editor's Note.—The 1955 amendment

deleted "Craven" from the list of counties in the last sentence and the 1957 amendment deleted "Henderson" therefrom.

§ 7-290. Process; authentication; service; return

Local Modification. — Duplin: 1959, c. 649.

§ 7-291. Pleadings; time for filing.

Local Modification. — Duplin: 1959, c. 649.

§ 7-295. Appeals to superior court in civil actions; time; record; judgment; appeal to Supreme Court.

Section Governs Appeals. — Appeals in civil actions from the general county courts to the superior court are governed by this section. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 157 S.E.2d 131 (1967).

Section makes no provision for filing of case on appeal or docketing of record in superior court until settlement of the case. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 157 S.E.2d 131 (1967).

Delay in Filing Case as Settled.—When appellant timely serves his case on appeal and appellee files exceptions thereto with

request that the judge settle the case, appellee is not entitled to dismissal for any delay of the judge of the general court in filing the case as settled by him. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 157 S.E.2d 131 (1967).

Superior Court Sits as Appellate Court.—

In accord with 1st paragraph in original. See *Pelaez v. Carland*, 268 N.C. 192, 150 S.E.2d 201 (1966).

Upon the entering of an appeal the trial court is functus officio and has no further jurisdiction except to enter orders affect-

ing the judgment during the term when the judgment is in fieri, to adjudge an appeal abandoned after notice and on a proper showing, and to settle the case on appeal, which the court may do only in the event of timely service of exceptions or counter-case to appellant's statement of case on appeal. *Pelaez v. Carland*, 268 N.C. 192, 150 S.E.2d 201 (1966).

Extensions of Time. — In this case the defendants' attorneys, following a series of other extensions, consented to an order extending the time to serve the case on appeal through August 19, 1965, a time of approximately eight months. Plaintiff then obtained an additional order from the judge of the general county court which purported to grant a further extension of time to August 30, 1965. The court, however, was without authority to grant this additional extension. *Pelaez v. Carland*, 268 N.C. 192, 150 S.E.2d 201 (1966).

§ 7-296. **Enforcement of judgments; stay of execution, etc.; retention of jurisdiction in divorce, alimony, custody and support cases.** — (Orders to stay execution on judgments entered in the general county court shall be the same as in appeals from the superior court to the Supreme Court. Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to same extent as if rendered by the superior court, and shall be subject to the same statutes of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. Notwithstanding the foregoing, the general county court shall retain jurisdiction to hear and determine all motions with respect to divorce, divorce a mensa et thoro, alimony without divorce, child custody and support in all cases wherein the said general county court had rendered the initial order or judgment. (1923, c. 216, s. 19; C. S., s. 1608(dd); 1965, c. 1198.)

Editor's Note. — The 1965 amendment added the last sentence.

Alternate Route for Collection of Money Judgment. — By this section, the legislature is providing the holder of a money judgment obtained in a general county court an alternate route for collection. He may have execution issue from the general county court, or he may have his judgment transcribed to superior court as is provided for judgments of justices of the peace. When this is done, it shall be a judgment of the superior court in all respects for the purposes of lien and execution, subject to the same statutes of limitations and the statutes relating to the revival of judgments and executions thereon. *Rehm v. Rehm*, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

After appeal and the fixing of time for service of case on appeal from a general county court to the superior court, the trial court granted successive extensions of time, one with the consent of appellee, and then granted further extension of time without appellee's consent. It was held that no case on appeal having been served within the time fixed or within the extension agreed upon by counsel, the superior court could review only the record proper, and, no error appearing on the face thereof, should have dismissed the purported appeal, and objection that the motion to dismiss was broadside is untenable, the matter being a question of jurisdiction. *Pelaez v. Carland*, 268 N.C. 192, 150 S.E.2d 201 (1966).

Applied in *Rowland v. Beauchamp*, 253 N.C. 231, 116 S.E.2d 720 (1960).

Cited in *Johnson v. Wayne Thompson, Inc.*, 250 N.C. 665, 110 S.E.2d 306 (1959).

Jurisdiction in Custody and Child Support Matters. — By this section the legislature did not intend to oust the jurisdiction of the general county court in custody and child support matters where the judgment settling custody and support was docketed in the superior court as a matter of custom and convenience. *Rehm v. Rehm*, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

In suits for alimony without divorce and for the custody of children, the general county court acquires jurisdiction of the children as well as the parents, and that jurisdiction remains in the court wherein the action is brought. *Rehm v. Rehm*, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

Cited in *Becker v. Becker*, 273 N.C. 65, 159 S.E.2d 569 (1968).

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.

Editor's Note. — The repealed sections were codified from Session Laws 1957, c. 1441.

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. **Counties authorized to establish county criminal courts.**

Cross Reference.—As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Cited in *Bassinov v. Finkle*, 261 N.C. 109, 134 S.E.2d 130 (1964).

§ 7-388. **Appointment of judge; associate judge.**

Local Modification.—McDowell: 1957 c 486, s 1

§ 7-389. **Appointment of prosecuting attorney.**

Local Modification. — Gates: 1957. c 1166, McDowell: 1957. c. 486, s 2

§ 7-390. Clerk of court; term of office; fees; bond; sheriff.

Local Modification. — Burke: 1957, c. 284.

§ 7-393. Jurisdiction; appeal; judgment docket.

Local Modification. — Anson: 1959, c. 933, s. 1; Burke, as to subsection (d): 1955, c. 637; Yadkin, as to subsection (a): 1959, c. 411.

Section Modified by § 7-64.—The exclusive original jurisdiction given county criminal courts by this section must now be considered as modified by § 7-64, except as to those counties excluded from its provisions. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

County court does not have final jurisdiction of felonies. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

But clerk may issue warrants in felony cases. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

And county court may determine whether probable cause exists in felony cases. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

§ 7-394. Jury trials.

Local Modification. — Anson: 1959, c. 933, s. 2; Davie: 1961, c. 797; 1963, c. 407;

McDowell: 1959, c. 530; Person: 1955, c. 118; Yadkin: 1957, c. 378, s. 1.

§ 7-395. Process.

Cross Reference.—See note to § 7-393. Applied in State v. Brady, 238 N.C. 407, 78 S.E.2d 129 (1953).

§ 7-396. Duties of judge; bond on appeal or on being bound over.

Cross Reference.—See note to § 7-393.

§ 7-399. Warrants returnable to court.

Local Modification. — Yadkin: 1957, c. 378, s. 2.

§ 7-400. Service fees to officers except where they are on salary.

Local Modification.—Davie: 1963, c. 742.

§ 7-401. Regular and special terms; place of sessions.

Local Modification. — Yadkin: 1957, c. 378, s. 3.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

ARTICLE 37.

Special County Courts.

§ 7-405. Establishment upon resolution of county commissioners.

Cross Reference.—As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

§ 7-410. Compensation of judge and solicitor.

Local Modification. — Richmond: 1953, c. 285

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 1953 amendment inserted the words "or some member of his staff designated by him, two solicitors of the superior court designated by the Chief Justice" in the first sentence of this section. The 1969 amendment rewrote the first sentence.

§ 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 1953 amendment added the words "If he designates no member of his staff" at the beginning of present subdivision (3), and rewrote present subdivision (4). The 1969 amendment added present subdivision (2) and renumbered former subdivisions (2) and (3) as (3) and (4).

§ 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.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote this section. The 1957 amendment deleted the former limitation on the salary of the executive secretary and the former requirement that he act as law clerk and research assistant to the Chief Justice.

Chapter 7A. Judicial Department.

- Sec.
7A-1. Short title.
7A-2. Purpose of chapter.

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

Article 1.

Judicial Power and Organization.

- 7A-3. Judicial power; transition provisions.
7A-4. Composition and organization.

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

Article 2.

Appellate Division Organization.

- 7A-5. Organization.
7A-6. Appellate division reporters; reports.
7A-7. Law clerks; secretaries and stenographers.
7A-8, 7A-9. [Reserved.]

Article 3.

The Supreme Court.

- 7A-10. Organization; compensation of justices.
7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.
7A-12. Supreme Court marshal.
7A-13. Supreme Court library; functions; librarian; library committee; seal of office.
7A-14, 7A-15. [Reserved.]

Article 4.

Court of Appeals.

- 7A-16. Creation and organization.
7A-17. [Repealed.]
7A-18. Compensation of judges.
7A-19. Seats and sessions of court
7A-20. Clerk; oath; bond; salary; assistants; fees.
7A-21 to 7A-24. [Reserved.]

Article 5.

Jurisdiction.

- 7A-25. Original jurisdiction of the Supreme Court.
7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.
7A-27. Appeals of right from the courts of the trial divisions.

- Sec.
7A-28. Decisions of Court of Appeals in post-conviction proceedings final.
7A-29. Appeals of right from certain administrative agencies.
7A-30. Appeals of right from certain decisions of the Court of Appeals.
7A-31. Discretionary review by the Supreme Court.
7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.
7A-33. Supreme Court to prescribe appellate division rules of practice and procedure.
7A-34. Rules of practice and procedure in trial courts.
7A-35. Disposition of appeals during transitional period.
7A-36. [Repealed.]
7A-37 to 7A-39. [Reserved.]

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.
7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.
7A-39.3. Retired justices and judges constituted emergency justices and judges subject to recall to active service; compensation.
7A-39.4. Retirement creates vacancy.
7A-39.5. Recall of emergency justice or emergency judge upon temporary incapacity of a justice or judge.
7A-39.6. Notice to Governor of intention to retire; commission as emergency justice or emergency judge.
7A-39.7. Jurisdiction and authority of emergency justices and emergency judges.
7A-39.8. Court authorized to adopt rules.
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.
7A-39.10. Article applicable to previously retired justices.

GENERAL STATUTES OF NORTH CAROLINA

Sec.

7A-39.11. Retirement on account of total and permanent disability.

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

Article 7.

Organization.

- 7A-40. Composition; judicial powers of clerk; statutes applicable.
- 7A-41. Superior court divisions and districts; judges; assistant solicitors.
- 7A-42. Sessions of superior court in cities other than county seats.
- 7A-43. [Reserved.]
- 7A-43.1. Temporary incapacity of solicitor; acting solicitor.
- 7A-43.2. Assistant solicitors.
- 7A-43.3. County may authorize appointment of additional assistant solicitors.
- 7A-44. Salary and expenses of superior court judge.
- 7A-45. Special judges; appointment; removal; vacancies; authority.
- 7A-46. Special sessions.
- 7A-47. Powers of regular judges holding courts by assignment or exchange.
- 7A-47.1. Jurisdiction in vacation or in session.
- 7A-48. Jurisdiction of emergency judges.
- 7A-49. Orders returnable to another judge; notice.
- 7A-49.1. Disposition of motions when judge disqualified.
- 7A-49.2. Civil business at criminal sessions; criminal business at civil sessions.
- 7A-49.3. Calendar for criminal trial sessions.

Article 8.

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

- 7A-50. Emergency judge defined.
- 7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.
- 7A-52. Retired judges constituted emergency judges subject to recall to active service; compensation for emergency judges on recall.
- 7A-53. Notice to Governor of intention to retire; commission as emergency judge.

Sec.

7A-54. Article applicable to judges retired under prior law.

7A-55. Retirement on account of total and permanent disability.

7A-56 to 7A-59. [Reserved.]

Article 9.

Solicitors and Solicitorial Districts.

- 7A-60. Solicitors and solicitorial districts.
- 7A-61. Duties of solicitor.
- 7A-62. Acting solicitor.
- 7A-63. Assistant solicitors.
- 7A-64. Temporary assistance when dockets overcrowded.
- 7A-65. Compensation and allowances of solicitors and assistant solicitors.
- 7A-66. Removal of solicitors and assistant solicitors.
- 7A-67. Effective date.

Article 10.

7A-68 to 7A-94. [Reserved.]

Article 11.

Special Regulations.

- 7A-95. Reporting of trials.
- 7A-96. Court adjourned by sheriff when judge not present.
- 7A-97 to 7A-100. [Reserved.]

Article 12.

Clerk of Superior Court.

- 7A-101. Compensation.
- 7A-102. Number, salaries, appointment, etc., of assistants, deputies and employees.
- 7A-102.1. Transfer of sick leave earned as county or municipal employees by certain employees in offices of clerks of superior court.
- 7A-103. Accounting for fees and other receipts; annual audit.
- 7A-104. Suspension, removal and reinstatement of clerk.
- 7A-105. Bonds of clerks, assistant and deputy clerks, and employees of office.
- 7A-106. Application of article.
- 7A-107 to 7A-129. [Reserved.]

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

Article 13.

Creation and Organization of the District Court Division.

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

- Sec.
 7A-131. Establishment of district courts.
 7A-132. Judges, prosecutors, full-time assistant prosecutors and magistrates for district court districts.
 7A-133. Numbers of judges and full-time assistant prosecutors, by districts; numbers of magistrates and additional seats of court, by counties.
 7A-134. Family court services.
 7A-135. Transfer of pending cases when present inferior courts replaced by district courts.
 7A-136 to 7A-139. [Reserved.]

Article 14.

District Judges.

- 7A-140. Number; election; term; qualification; oath.
 7A-141. Designation of chief judge; assignment of judge to another district for temporary or specialized duty.
 7A-142. Vacancies in office.
 7A-143. Suspension; removal; reinstatement.
 7A-144. Compensation.
 7A-145. Holdover judges; judges taking office after ratification of chapter.
 7A-146. Administrative authority and duties of chief district judge.
 7A-147. Specialized judgeships.
 7A-148. Annual conference of chief district judges.
 7A-149 to 7A-159. [Reserved.]

Article 15.

District Prosecutors.

- 7A-160. Appointment; term; duties; oath; practice of law forbidden.
 7A-161. Compensation; expenses.
 7A-162. Suspension; removal; reinstatement.
 7A-163. Vacancies in office; temporary incapacity; acting prosecutor.
 7A-164. Assistant prosecutors; appointment; compensation; duties; oath; practice of law forbidden.
 7A-165. Attorneys appointed to assist in prosecution.
 7A-166 to 7A-169. [Reserved.]

Article 16.

Magistrates.

- 7A-170. Nature of office; oath; office and court hours.
 7A-171. Numbers; fixing of salaries; appointment and terms; vacancies
 7A-172. Minimum and maximum salaries.

- Sec.
 7A-173. Suspension; removal; reinstatement.
 7A-174. Bonds.
 7A-175. Records to be kept.
 7A-176. Office of justice of the peace abolished.
 7A-177 to 7A-179. [Reserved.]

Article 17.

Clerical Functions in the District Court.

- 7A-180. Functions of clerk of superior court in district court matters.
 7A-181. Functions of assistant and deputy clerks of superior court in district court matters.
 7A-182. Clerical functions at additional seats of court.
 7A-183 to 7A-189. [Reserved.]

Article 18.

District Court Practice and Procedure Generally.

- 7A-190. District courts always open.
 7A-191. Trials; hearings and orders in chambers.
 7A-192. By whom power of district court to enter interlocutory orders exercised.
 7A-193. Civil procedure generally.
 7A-194. Criminal procedure generally.
 7A-195. [Repealed.]
 7A-196. Jury trials.
 7A-197. Petit jurors.
 7A-198. Reporting of civil trials.
 7A-199. Special venue rule when district court sits without jury in seat of court lying in more than one county; where judgments recorded.
 7A-200 to 7A-209. [Reserved.]

Article 19.

Small Claim Actions in District Court.

- 7A-210. Small claim action defined.
 7A-211. Small claim actions assignable to magistrates.
 7A-212. Judgment of magistrate in civil action improperly assigned or not assigned.
 7A-213. Procedure for commencement of action; request for and notice of assignment.
 7A-214. Time within which trial is set.
 7A-215. Procedure upon nonassignment of small claim action.
 7A-216. Form of complaint.
 7A-217. Methods of subjecting person of defendant to jurisdiction.
 7A-218. Answer of defendant.

Sec.

- 7A-219. **Certain counterclaims; cross-claims; third party claims not permissible.**
- 7A-220. **No pleadings other than complaint and answer.**
- 7A-221. **Objections to venue and jurisdiction over person.**
- 7A-222. **General trial practice and procedure.**
- 7A-223. **Practice and procedure in small claim actions for summary ejectment.**
- 7A-224. **Rendition and entry of judgment.**
- 7A-225. **Lien and execution of judgment.**
- 7A-226. **Priority of judgment when appeal taken.**
- 7A-227. **Stay of execution on appeal.**
- 7A-228. **No new trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice.**
- 7A-229. **Trial de novo on appeal.**
- 7A-230. **Jury trial on appeal.**
- 7A-231. **Provisional and incidental remedies.**
- 7A-232. **Forms.**
- 7A-233 to 7A-239. [Reserved.]

**SUBCHAPTER V. JURISDICTION
AND POWERS OF THE TRIAL
DIVISIONS OF THE GEN-
ERAL COURT OF
JUSTICE.**

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Original Civil Jurisdiction of the Trial Divisions.

- 7A-240. **Original civil jurisdiction generally.**
- 7A-241. **Original jurisdiction in probate and administration of decedents' estates.**
- 7A-242. **Concurrently held original jurisdiction allocated between trial divisions.**
- 7A-243. **Proper division for trial of civil actions generally determined by amount in controversy.**
- 7A-244. **Domestic relations.**
- 7A-245. **Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.**
- 7A-246. **Special proceedings; guardianship and trust administration.**
- 7A-247. **Mandamus; quo warranto.**
- 7A-248. **Condemnation actions and proceedings.**
- 7A-249. **Corporate receiverships.**
- 7A-250. **Review of decisions of administrative agencies.**
- 7A-251. **Appeal from clerk to judge.**
- 7A-252. **Application of article.**
- 7A-253, 7A-254. [Reserved.]

Article 21.

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

Sec.

- 7A-255. **Clerk of superior court processes all actions and proceedings.**
- 7A-256. **Causes docketed and retained in originally designated trial division until transferred.**
- 7A-257. **Waiver of proper division.**
- 7A-258. **Motion to transfer.**
- 7A-259. **Transfer on judge's own motion.**
- 7A-260. **Review of transfer matters.**
- 7A-261. **Application of article.**
- 7A-262 to 7A-269. [Reserved.]

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

- 7A-270. **Generally.**
- 7A-271. **Jurisdiction of superior court.**
- 7A-272. **Jurisdiction of district court.**
- 7A-273. **Powers of magistrates in criminal actions.**
- 7A-274. **Power of mayors, law enforcement officers, etc., to issue warrants and set bail restricted.**
- 7A-275. **Application of article.**
- 7A-276. [Reserved.]

Article 23.

Jurisdiction and Procedure Applicable to Children.

- 7A-277. **Purpose.**
- 7A-278. **Definitions.**
- 7A-279. **Juvenile jurisdiction.**
- 7A-280. **Felony cases.**
- 7A-281. **Petition.**
- 7A-282. **Issuance of summons.**
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- 7A-284. **Immediate custody of a child.**
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- 7A-287. **Juvenile records.**
- 7A-288. **Termination of parental rights.**
- 7A-289. **Appeals.**

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.**

Article 26.

Additional Powers of District Court Judges and Magistrates.

- 7A-291. **Additional powers of district court judges.**

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- 7A-292. Additional powers of magistrates
- 7A-293. Special authority of a magistrate assigned to a municipality located in more than one county of a district court district.
- 7A-294 to 7A-299. [Reserved.]

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 27.

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- 7A-300. Expenses paid from State funds.
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- 7A-315. Liability of State for witness fees in criminal cases when defendant not liable.
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- 7A-318. Determination and disbursement of costs on and after date district court established.
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SUBCHAPTER VII. ADMINISTRATIVE OFFICE OF THE COURTS.

Article 29.

Administrative Office of the Courts.

- 7A-340. Administrative Office of the Courts; establishment; officers.
- 7A-341. Appointment and compensation of Director.

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- 7A-342. Appointment and compensation of assistant director and other employees.
- 7A-343. Duties of Director.
- 7A-344. Special duties of Director concerning representation of indigent persons.
- 7A-345. Duties of assistant director.
- 7A-346. Information to be furnished to Administrative Officer.
- 7A-347 to 7A-399. [Reserved.]

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Article 30.

Transitional Matters.

- 7A-400. Venue transfers into counties having no district court.
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SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

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- 7A-451. Scope of entitlement.
- 7A-452. Source of counsel; fees; appellate records.
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- 7A-454. Supporting services.
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- 7A-456. False statements; penalty.
- 7A-457. Waiver of counsel; pleas of guilty.
- 7A-458. Counsel fees.
- 7A-459. Implementing regulations by State Bar Council.
- 7A-460 to 7A-464. [Reserved.]

Article 37.

The Public Defender.

- 7A-465. Public defender; defender districts; qualifications; compensation.
- 7A-466. Selection of defender; term; removal.
- 7A-467. Assistant defenders; assigned counsel.
- 7A-468. Investigative services.
- 7A-469. Support for office of defender.
- 7A-470. Reports.

Articles 38, 39.

- 7A-471 to 7A-499. [Reserved.]

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40.

North Carolina Courts Commission.

Sec.
7A-500. Creation; members; terms; qualifications; vacancies.

Sec.
7A-501. Ex officio members.
7A-502. Commission supersedes temporary commission of same name.
7A-503. Duties.
7A-504. Chairman; meetings; compensation of members.
7A-505. Supporting services.

§ 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.)

Editor’s Note.—The subchapter and article numbers and location and the section numbers appear herein exactly as they do in c. 310, Session Laws 1965.

provides: “Except as otherwise provided in this act, this act shall become effective on July 1, 1965.”

Cited in Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

Section 5 of the act inserting this chapter

§ 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, effective July 1, 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, effective July 1, 1967, added the present second and third sentences in subsection (b).

The 1969 amendment, effective July 1, 1969, 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.)

Editor's Note.—The act inserting this article is effective July 1, 1967.

§ 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, former subsection (b), setting out the effective July 1, 1969, added the present form of the oath to be taken by the clerk. last sentence of the section and deleted

§ 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 act inserting this article is effective July 1, 1967.

The 1969 amendment, effective July 1, 1969, 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.)

Cross Reference.—As to effective date of article, see § 7A-36.

§ 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 con-

stitutional 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

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-time Asst. Solicitors	
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
		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
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 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 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, effective July 1, 1969.

§ 7A-43: Reserved for future codification purposes.

§ 7A-43.1. **Temporary incapacity of solicitor; acting solicitor.** — When a superior court solicitor becomes for any reason unable to perform his duties, the Attorney General 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 receive fifty-five dollars (\$55.00) per diem for each day in which he performs the duties of solicitor. (1965, c. 310, s. 1; 1967, c. 691, s. 2; 1969, c. 1186, s. 1.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, struck out the former last sentence, making the section effective on the first Monday in December, 1966.

The 1969 amendment, effective July 1, 1969, increased the per diem from forty-five dollars to fifty-five dollars.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-43.2. **Assistant solicitors.**—(a) With the approval of the Administrative Officer of the Courts, the solicitor may appoint one or more full-time assistant solicitors, each to serve at the pleasure of the solicitor. The salary for a full-time assistant solicitor shall be fixed by the Administrative Officer of the Courts, but shall not exceed that of a district court prosecutor.

(b) With the approval of the Administrative Officer of the Courts, a solicitor may appoint for part-time service one or more qualified attorneys to assist in the prosecution of the criminal dockets of his district when:

- (1) Criminal cases accumulate on the dockets of the district beyond the capacity of the solicitor and his full-time assistants, if any, to keep the dockets reasonably current; or

- (2) The prosecution of criminal cases in a specific location in the district would be better served.

Attorneys appointed under the authority of this subsection shall receive forty-five dollars (\$45.00) per diem for each day, not in excess of five days per week, they serve as assistant prosecutors, and they shall serve for such time as may be authorized by the Administrative Officer of the Courts.

(c) An assistant solicitor appointed under this section is entitled to reimbursement for travel and subsistence expenses when engaged on official business outside his county of residence at the rate applicable to State employees generally. (1965, c. 310, s. 1; 1967, c. 691, s. 3; 1969, c. 1186, s. 2.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, rewrote the section.

The 1969 amendment, effective July 1, 1969, increased the per diem in subsection (b) from thirty-five dollars to forty-five dollars.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-43.3. County may authorize appointment of additional assistant solicitors.—Notwithstanding the provisions of G.S. 7A-43.2, the board of commissioners of any county may, in its discretion, authorize the solicitor to appoint a competent attorney to assist him in the prosecution of the criminal docket of the superior court of the county. The assistant solicitor so appointed serves at the pleasure of the solicitor, who assigns his duties. The compensation of the assistant solicitor shall be fixed by the board of commissioners after consultation with the solicitor, and it shall be paid from the general fund of the county. The board may terminate the compensation at any time upon 30 days' notice. (1965, c. 310, s. 1; 1967, c. 691, s. 4.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "Notwithstanding the provisions of G.S. 7A-43.2" for "In addition to the assistant solicitors otherwise provided for in this article" at the beginning of the section and struck out the former last sentence, mak-

ing the section effective on the first Monday in December, 1966.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-44. Salary and expenses of superior court judge.—A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be allowed five thousand 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, effective July 1, 1969.

§ 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 appoint-

ments 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 re-written, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 41, effective July 1, 1969.

§ 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, effective July 1, 1969.

§ 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, effective July 1, 1969.

§ 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 mat-

ters 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, effective July 1, 1969.

§ 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, effective July 1, 1969.

§ 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, effective July 1, 1969.

§ 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, effective July 1, 1969.

§ 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, effective July 1, 1969.

§ 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, effective July 1, 1969.

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.)

Editor's Note.—The act inserting this article is effective July 1, 1967.

§ 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 con-

tinuously 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 1967, c. 1049, s. 1, this section will become added the second sentence. By the terms effective on Jan. 1, 1971. of § 7A-67, as enacted by Session Laws

§ 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, effective July 1, 1969, 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, effective July 1, 1969.

§§ 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:

<i>Population</i>	<i>Salary</i>
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, effective July 1, 1967, 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, effective July 1, 1969, 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, effective July 1, 1969, 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, "Courts" near the beginning of the first sentence. effective July 1, 1969, deleted "and the Department of Administration" following

§ 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, effective July 1, 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, effective July 1, 1967, 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 sen-

tence, 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		Additional Seats of Court
				Min.	Max.	
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	Belhaven
			Beaufort	4	5	
			Tyrrell	1	2	
			Hyde	2	3	
			Washington	3	4	
3	4	1	Craven	5	7	Farmville Ayden
			Pitt	9	11	
			Pamlico	2	3	
			Carteret	4	5	

District	Judges	Full-Time Asst. Pros.	County	Magistrates		Additional Seats of Court
				Min.	Max.	
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	Roanoke Rapids
			Halifax	7	9	
			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 Benson and Selma
			Johnston	10	12	
			Lee	3	5	
12	4	2	Cumberland	10	15	
			Hoke	2	3	
13	2	0	Bladen	4	6	Shalotte Tabor City
			Brunswick	4	6	
			Columbus	6	8	
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		Additional Seats of Court
				Min.	Max.	
17	4		Caswell	2	3	Reidsville Eden Madison
			Rockingham	4	8	
			Stokes	2	3	
			Surry	4	6	
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	Hamlet Southern Pines
			Union	4	6	
			Anson	4	5	
			Richmond	5	6	
			Moore	5	6	
21	5	2	Forsyth	10	15	Kernersville
22	4		Alexander	2	3	Thomasville Mooresville
			Davidson	5	7	
			Davie	2	3	
			Iredell	4	6	
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		Additional Seats of Court
				Min.	Max.	
30	2	0	Cherokee	2	3	Canton
			Clay	1	2	
			Graham	2	3	
			Haywood	4	6	
			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, effective July 1, 1967, struck out the former table and inserted the present table in lieu thereof.

Session Laws 1969, c. 527, designated Beulah 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, nine-

teenth, 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, effective July 1, 1967, 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, effective July 1, 1969, 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 "appellate division" for "Supreme Court" in the third sentence of the last paragraph, and substituted "Court of Appeals" for "Supreme Court" in the first sentence of the last paragraph, and effective Oct. 1, 1967, substituted "Court of Appeals" for "Supreme Court" in 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, effective July 1, 1967, 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 operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following :

- (1) Arranging schedules and assigning district judges for sessions of district courts ;
- (2) Arranging or supervising the calendaring of 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, mer provisions of the section as subsec- effective July 1, 1967, designated the for- tion (a) and added subsection (b).

§§ 7A-149 to 7A-159: Reserved for future codification purposes.

ARTICLE 15.

District Prosecutors.

§ 7A-160. **Appointment; term; duties; oath; practice of law forbidden.**—The senior regular resident superior court judge shall appoint, for a term of four years, a district court prosecutor for his district, except that the term of office of a prosecutor appointed in a district activated in December, 1968, or December, 1970, is terminated December 31, 1970. The prosecutor shall be a resident of the district. The prosecutor's term of office shall commence on the same day as that of the district judges in his district. It shall be the duty of the prosecutor to prosecute on behalf of the State all criminal actions in the district courts of his district, to advise the officers of justice in his district, and to cooperate with the superior court solicitor in criminal actions arising in the district court. The prosecutor shall also represent the State in juvenile cases in which the juvenile is represented by an attorney. The district prosecutor shall take the oath of office prescribed for the superior court solicitor.

The office of district prosecutor is full time, and he shall not practice law during his term of office, nor shall he during such term be the partner or associate of any person engaged in the practice of law. (1965, c. 310, s. 1; 1967, c. 1049, s. 4; 1969, c. 1190, s. 12.)

Editor's Note.—The 1967 amendment added the exception at the end of the first sentence.

The 1969 amendment, effective July 1, 1969, added the fifth sentence of the first paragraph.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-161. **Compensation; expenses.**—Each district court prosecutor 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. 12.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, rewrote the section, which formerly consisted of two sentences and specified the amount of compensation.

Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

Repeal of Section.—Section 6, c. 1049,

§ 7A-162. **Suspension; removal; reinstatement.**—A district prosecutor 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. (1965, c. 310, s. 1.)

Cross Reference.—As to suspension, removal and reinstatement of district judge, see § 7A-143.

Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

Repeal of Section.—Section 6, c. 1049,

§ 7A-163. **Vacancies in office; temporary incapacity; acting prosecutor.**—A vacancy in the office of district prosecutor shall be filled for the unexpired term in the same manner as the original appointment.

If the prosecutor in a district which has no full-time assistant prosecutor becomes for any reason unable to perform his duties, the senior regular resident

superior court judge for that district may appoint an acting prosecutor to serve during the period of disability. An acting prosecutor has all the power, authority and duties of the regular prosecutor. He shall take the oath of office prescribed for the regular prosecutor, and receive from the State fifty dollars (\$50.00) per diem for each day in which he performs the duties of prosecutor. (1965, c. 310, s. 1; 1969, c. 1186, s. 4.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, increased the per diem in the last sentence from forty-five dollars to fifty dollars.

Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

Repeal of Section.—Section 6, c. 1049,

§ 7A-164. Assistant prosecutors; appointment; compensation; duties; oath; practice of law forbidden.—A district prosecutor may appoint full-time assistant prosecutors in the number authorized by the General Assembly. The number of full-time assistant prosecutors for each district shall be determined with due regard to the population, geography and criminal case load of each district. An assistant prosecutor serves at the pleasure of the prosecutor. He 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. The duties of an assistant prosecutor are assigned by the district prosecutor, and he takes the same oath of office as the prosecutor.

An assistant prosecutor shall not practice law during his term of office, nor shall he during such term be the partner or associate of any person engaged in the practice of law. (1965, c. 310, s. 1; 1967, c. 691, s. 13.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, rewrote the fourth sentence.

Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

Repeal of Section.—Section 6, c. 1049,

§ 7A-165. Attorneys appointed to assist in prosecution.—A district prosecutor, with the approval of the Administrative Officer of the Courts, may designate one or more qualified attorneys to assist in the prosecution of the criminal dockets of the district when:

- (1) The criminal cases accumulate on the dockets of the district court beyond the capacity of the prosecutor and his assistants to keep the dockets reasonably current; or
- (2) A full-time assistant prosecutor becomes for any reason unable to perform his duties; or
- (3) The prosecution of criminal cases in a specific location would be better served.

Attorneys designated under the authority of this section shall receive forty-five dollars (\$45.00) per diem for each day, not in excess of five days per week, they serve as assistant prosecutors, and they shall serve for such time as may be authorized by the Administrative Officer of the Courts. Assistant prosecutors shall also receive reimbursement for travel and subsistence expenses on the same basis as State employees generally. (1965, c. 310, s. 1; 1967, c. 691, s. 14; 1969, c. 1186, s. 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "not in excess of five days per week, they serve as assistant prosecutors, and they" for "they prosecute in court and" in the first sentence in the last paragraph and added the second sentence in that paragraph.

1969, increased the per diem in the last paragraph from thirty-five dollars to forty-five dollars.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

The 1969 amendment, effective July 1,

§§ 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, effective July 1, 1969, 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, effective July 1, 1967, 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, effective July 1, 1969, increased the max-

imum 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, effective Oct. 1, 1967, 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, effective July 1, 1969, 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, effective July 1, 1967, 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, effective July 1, 1967, designated the former provisions of the section as subsection (a) and added subsection (b).

The 1969 amendment, effective July 1, 1969, 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, effective July 1, 1969, 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, effective July 1, 1969, 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).

§ 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 juris-

diction 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, effective July 1, 1969, 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, effective July 1, 1969, 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.)

Editor's Note.—The act inserting this section is effective July 1, 1967.

§§ 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 ejection, 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, effective July 1, 1969, 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, effective July 1, 1969, 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, effective July 1, 1967, 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, effective July 1, 1967, 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, effective July 1, 1969, 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, originally effective Oct. 1, 1967, corrected an error by substituting "or" for "of" near the middle of the second sentence. Session Laws 1967, c. 1078, amends the 1967 amen-

datory 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, effective July 1, 1969, 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 Car-

olina, 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

General Court of Justice
District Court Division
Before the Magistrate

..... COUNTY

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

General Court of Justice
District Court Division

..... County

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

General Court of Justice
District Court Division
Before the Magistrate

..... County

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

General Court of Justice
District Court Division
SMALL CLAIM

..... COUNTY

A. B., Plaintiff
v.
C. D., Defendant } COMPLAINT

1. Plaintiff is a resident of County; defendant is a resident of County.

2. Defendant on or about January 1, 1964, executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); (a copy of which is annexed as Exhibit); (whereby defendant promised to pay to plaintiff or order on June 1, 1964, the sum of two hundred and fifty dollars (\$250.00) with interest thereon at the rate of six 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, effective July 1, 1967, 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 interference, 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, eral process of the State" for "throughout effective July 1, 1967, substituted "as gen- 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 docketes 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 docketes 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, effective Jan. 1, 1970, 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, effective July 1,

1969, 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, mer provisions of the section as subsection effective July 1, 1967, designated the for- (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, late division" for "Supreme Court" in the effective July 1, 1967, substituted "appel- 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, effective July 1, 1967, designated the former provisions of the section as subsection (a) and added present subsection (c).

The 1969 amendment, effective July 1, 1969, 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, sub-

§ 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

sections (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).

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, effective July 1, 1969, 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 ap-

pearing 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-

ceded 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 estab-

lished, 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.]

Editor's Note. — Former §§ 7A-280 c. 310, s. 1, and were repealed by Session through 7A-287, which constituted article Laws 1967, c. 108, s. 8. 24, were codified from Session Laws 1965,

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, c. 911, s. 5, effective Jan. 1, 1970.

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, effective July 1, 1969, inserted "in writing" in the third sentence and deleted a sentence inserted by a 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, effective July 1, 1969, 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, effective July 1, 1967, inserted present subdivisions (5) to (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.)

Editor's Note.—The act inserting this section is effective July 1, 1967.

§§ 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, effective July 1, 1967, substituted "appellate division" for "Supreme Court" in subdivision (1) of subsection (a).

The 1969 amendment, effective July 1, 1969, 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 municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: Adequate space and furniture for judges, 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.

tion. (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, effective July 1, 1967, inserted 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, effective July 1, 1969, inserted "public defenders"

in the third sentence of subdivision (2) of subsection (a).

Session Laws 1969, c. 1190, effective July 1, 1969, 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, effective July 1, 1967, inserted "or to the appellate division, as the case may be" in subdivision (5) of subsection (d).

The second 1967 amendment, effective July 1, 1967, 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).

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).

Appealing Party Not Prejudiced by

§ 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, originally effective Oct. 1, 1967, 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, effective July 1, 1967, substituted "section" for "article" near the beginning of subsection (c).

The 1969 amendment, effective July 1, 1969, 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, effective July 1, 1967, 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, effective July 1, 1969, 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 instrument50
(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, effective July 1, 1967, rewrote the second sentence in subdivision (1) of subsection (a).

The 1969 amendment, effective July 1, 1969, inserted "by the sheriff" near the be-

ginning 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 pro-

ceeding, 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 1969, rewrote the first sentence and deleted the present third sentence. Deleted "in lieu of daily mileage" at the end of the second sentence.
The 1969 amendment, effective July 1,

§ 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, effective July 1, 1969, 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, effective July 1, 1969, 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, effective July 1, 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.)

Editor's Note. — Session Laws 1969, c. 1190, s. 59, makes this section effective July 1, 1969.

§ 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, effective July 1, 1967, 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, effective July 1, 1967, 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.— Jan. 1, 1971, will delete “prosecutors” following Session Laws 1967, c. 1049, s. 5, effective 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 numbered § 7A-344 was renumbered § 7A-345 by the 1969 act. inserted by Session Laws 1969, c. 1013, effective July 1, 1969. The section formerly

§ 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, effective July 1, 1969, the above section was numbered § 7A-344. The 1969 act added a new section numbered 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, effective July 1, 1969, 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 hereby 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.)

Editor's Note. — Session Laws 1969, c. 1013, s. 14, makes the act effective July 1, 1969.

§ 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.)

Editor's Note. — Session Laws 1969, c. 1013, s. 14, makes the act effective July 1, 1969.

§ 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.)

Editor's Note. — Session Laws 1969, c. 910, s. 3, makes the act effective July 1, 1969.

§ **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 2.

Grants, Deeds and Wills.

Sec.

8-6. Copies certified by Secretary of State or State Archivist.

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.

Article 7.

Competency of Witnesses.

8-53.01. When evidence of physician not privileged notwithstanding § 8-53.

8-53.1. Communications between clergymen and communicants.

8-53.2. Communications between psychologist and client.

Article 8.

Attendance of Witness.

Sec.

8-60. [Repealed.]

8-61. Subpoena for the production of documentary evidence.

8-62. [Repealed.]

Article 10.

Depositions

8-71 to 8-73. [Repealed.]

Article 11.

Perpetuation of Testimony.

8-85 to 8-88. [Repealed.]

Article 12.

Inspection and Production of Writings.

8-89. [Repealed.]

8-89.1. Right of injured plaintiff to a copy of his statement.

8-90, 8-91. [Repealed.]

ARTICLE 1.

Statutes.

§ 8-1. Printed statutes and certified copies evidence.

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).

Applied in C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

§ 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, effective July 1, 1967, designated the first three sentences

of this section as subsection (a), deleted the former fourth sentence of the section, and added subsection (b).

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

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).

§ 8-5. Town ordinances certified.

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.)

Editor's Note. — The 1961 amendment made this section applicable to the Department of Archives and History and to the State Archivist.

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.)

Editor's Note. — The 1961 amendment inserted in line five the words "or in the Department of Archives and History."

§ 8-18. **Certified copies of registered instruments evidence.**

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).

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.)

Editor's Note. — The 1961 amendment inserted after "Adjutant General" in line four the words "or the State Department of Archives and History."

Cited in *State v. Beamon*, 2 N.C. App. 583, 163 S.E.2d 544 (1968).

§ 8-35. **Authenticated copies of public records.**

Authentication Essential. —

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).

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).

§ 8-37. **Certificate of Commissioner of Motor Vehicles as to ownership of automobile.**

Applied in *Woodruff v. Holbrook*, 255 N.C. 740, 122 S.E.2d 709 (1961).

ARTICLE 4.

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

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, etc.—

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).

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 vendor's 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).

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).

§ 8-40. Proof of handwriting by comparison.

Editor's Note.—For article on the taking of handwriting exemplars, see 4 *Wake Forest Intra. L. Rev.* 1 (1968).

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. —

In accord with original. See *In re McGowan*, 235 N.C. 404, 70 S.E.2d 189 (1952).

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 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).

Comparison by Jury.—

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 accord with original. See *In re Will of Gatling*, 234 N.C. 561, 68 S.E.2d 301 (1951).

Cited in *In re Will of Bartlett*, 235 N.C. 489, 70 S.E.2d 482 (1952).

§ 8-45. Itemized and verified accounts.

Applied in *United States Leasing Corp. v. Hall*, 264 N.C. 110, 141 S.E.2d 30 (1965).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

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

Reproductions Are Primary Evidence.— As proof of payment they constitute not Reproductions are made and kept among secondary but primary evidence *State v. the records of many banks in due course of Shumaker, 251 N.C. 678, 111 S.E.2d 878 business. Their accuracy is not questioned. (1960).*

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

Completed Age	Expectation
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
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

Completed Age	Expectation
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
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.)

Editor's Note.— The 1955 amendment rewrote this section to provide a modern mortuary table. In *Cronenberg v United States*, 123 F. Supp. 693 (E.D.N.C. 1954), the former table was referred to as "anti-quoted."

Need Not Be, etc.—

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 permit-

ting 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).

Table Not Conclusive.—

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 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).

§ 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
61	16.190

No. of Years Annuity is to Run	Cash Value of the Annuity of \$1
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 per cent, 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 per cent (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.)

Editor's Note.—

The 1957 amendment revised and extended the table

The 1959 amendment, effective July 1, 1960, struck out the word "dower" in the proviso at the end of the second paragraph and inserted in lieu thereof "a life interest in lieu of an intestate share taken under the provisions of G.S. 29-30," which provision was subsequently changed by the 1965 amendment.

The 1965 amendment substituted "land" for "lieu of an intestate share taken under the provisions of G.S. 29-30" in the proviso to the last sentence of the second paragraph, and added the last paragraph.

The proviso in this section is not appli-

cable 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).

ARTICLE 7.

Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.

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).

§ 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 1953 amendment inserted "(a)" at the beginning of the section, and added former subsections (b) and (c). For comment on amendment, see 31 N.C.L. Rev. 411 (1953).

The 1967 amendment repealed subsections (b) and (c).

Repeal of 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.

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.—

The 1965 amendment added "regardless of any presumptions with respect to paternity" near the beginning of the first

paragraph and added the last sentence in that paragraph.

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.

Editor's Note.—

The 1967 amendment added the last sen-

tence. 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).

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. *Brown v. Green*, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Purpose of Section.—

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. 340, 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, etc.—

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).

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 inter-

ested 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 with the administrators of the alleged tortfeasor, 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).

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*, 235 N.C. 737, 122 S.E.2d 725 (1961).

Provisions of This Section May Be Waived, etc.—

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 §§ 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).

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).

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

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 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.—

In accord with 1st paragraph in original See *Sanderson v. Paul*, 235 N.C. 56, 69 S.E.2d 156 (1952).

In accord with 1st sentence of 2nd paragraph in original See *Sanderson v. Paul*, 235 N.C. 56, 69 S.E.2d 156 (1952).

Present Interest —

In accord with 1st paragraph in original.

See *Sanderson v. Paul*, 235 N.C. 56, 69 S.E.2d 156 (1952).

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.

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).

C. Persons Deriving Title or Interest Through Two Preceding Classes.

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).

III. WHEN THE DISQUALIFICATION EXISTS.

Party Testifying against Interest. —

In accord with 1st paragraph in original. See *Sanderson v. Paul*, 235 N.C. 56, 69 S.E.2d 156 (1952).

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).

Testifying in Favor of Representative.—

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).

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.—

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, etc.—

In accord with 2nd paragraph in original. See *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," etc.—

When it appears that a car occupied by two persons is involved in a wreck, and in their associations preceding the wreck each occupant has operated the car, testimony of the survivor as to what occurred between them, bearing upon the identity of the driver immediately preceding the wreck, involves their relations inter se and constitutes a personal transaction between them within the meaning of this section. Under these circumstances, the surviving occupant, in an action against the estate of the deceased occupant, is 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), decided prior to 1967 amendment to this section.

Proof of Handwriting.—

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).

Will Cases.—

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 safe-keeping. *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).

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).

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).

V. EXCEPTIONS.

Similar Evidence Previously Introduced.—

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).

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).

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).

§ 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, effective July 1, 1969, substituted "court, either at the trial

or prior thereto" for "presiding judge of a superior court" in the proviso.

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).

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).

This section contemplates a superior court in term. 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 words "the presiding judge of a superior court" refer to the superior court judge who presides 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).

The provisions of this section authorizing "the presiding judge of a superior court" to compel a physician to disclose confidential matters is limited to a judge presiding at the trial and 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 Presiding Judge of Superior 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 "the presiding judge of a superior 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.—

In accord with original See 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, etc.—

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 phy-

sician 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.—

In accord with original. See *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 physi-

cian 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 Supreme Court Cannot Exercise Trial Judge's Authority.—The Supreme 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 Supreme 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, etc.—

In accord with original. See *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).

§ 8-53.01. 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.)

Editor's Note. — The act from which this section was codified was effective as of July 1, 1965.

§ 8-53.1. 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 1963 amendment made this section applicable to an accredited Christian Science practitioner.

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).

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).

Judge May Not Enter Order in Chambers for Pretrial Examination of Physician.—The judge of the superior court has 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).

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.

§ 8-53.2. 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 compellingable to testify

Editor's Note.—

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).

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 compellingable to testify, and his testimony thus given is received under the sanction of oath. State v. Sheffield, 251 N.C. 309, 111 S.E.2d 195 (1959).

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).

Extent of Cross-Examination Permitted.—

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).

Failure to Take Stand — How Far Subject to Comment.—

In accord with 2nd paragraph in original. See 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).

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).

Character Not in Issue unless So Placed.—

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).

Cross-Examination as to Conviction Subsequently Set Aside.—While it was im-

proper 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).

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.—

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).

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).

§ 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 subpoena, *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 gam-

ing 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.)

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.

§ 8-56. Husband and wife as witnesses in civil actions.

Editor's Note.—

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).

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.—

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 of 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.

§ 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.)

Editor's Note.—

The 1957 amendment rewrote the fourth sentence.

The 1967 amendment so rewrote the

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 accord with original. See *Becker v. Becker*, 262 N.C. 685, 138 S.E.2d 507 (1964), citing *Perkins v. Perkins*, 88 N.C. 41 (1883).

Contradiction by Wife.—

In accord with original. See *Biggs v. Biggs*, 253 N.C. 10, 116 S.E.2d 178 (1960).

last sentence as to make a detailed comparison impractical.

Common Law.—At common law the husband or wife of the defendant in a crim-

inal 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).

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).

Effect of Marriage Subsequent to Assault.—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).

Same—Bigamy.—

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.—

In accord with original. See *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).

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).

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.

Editor's Note.—The 1959 amendment added a paragraph which was subsequently deleted by the 1967 amendment.

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 con-

tained 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.)

Editor's Note.—The 1965 amendment added "subject to the provisions of G.S. 6-51" near the beginning of the section.

ARTICLE 9.

Attendance of Witnesses from without State.

§ 8-68. **Exemption from arrest and service of process.**

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).

ARTICLE 10.

Depositions.

§§ 8-71 to 8-73: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 8-81. Objection to deposition before trial.

Purpose of Section.—

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.—

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).

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).

§ 8-82. Deposition not quashed after trial begun.

Opportunity to Object before Trial.—

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

cut 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).

§ 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.)

Editor's Note.—The 1965 amendment added subdivision (11).

The 1969 amendment inserted "judge of the Court of Appeals" in subdivision (7).

Applied in *Glenn v. Smith*, 264 N.C. 706, 142 S.E.2d 596 (1965).

Cited in *Norburn v. Mackie*, 264 N.C. 479, 141 S.E.2d 877 (1965).

§ 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 in the first sentence in subsection (b) and inserted "judge of the Court of Appeals" 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.)

Editor's Note. — Session Laws 1969, c. 692, s. 5, makes the act effective June 1, 1969.

§§ 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.

- Sec.
- 9-1. Jury commission in each county; membership; selection; oath; terms.
- 9-2. Preparation of jury list; sources of names.
- 9-3. Qualifications of prospective jurors.
- 9-4. Preparation and custody of list.
- 9-5. Procedure for drawing panel of jurors; numbers drawn.
- 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.
- 9-7. Removal of names of jurors who have served from jury list; retention.
- 9-8. Fees of jurors; provisions in effect until January 1, 1971.
- 9-9. [Repealed.]

Article 2.

Petit Jurors.

- 9-10. Summons to jurors.
- 9-11. Supplemental jurors; special venire.
- 9-12. Supplemental jurors from other counties.
- 9-13. Penalty for disobeying summons.
- 9-14. Jury sworn; judge decides competency.

Sec.

- 9-15. Questioning jurors without challenge; challenges for cause.
- 9-16. Exemption from civil arrest.
- 9-17. Jurors impeaneled to try case furnished with accommodations; separation of jurors.
- 9-18. Alternate jurors.

Article 3.

Peremptory Challenges.

- 9-19. Peremptory challenges in civil cases.
- 9-20. Civil cases having several defendants; challenges apportioned; discretion of judge.
- 9-21. Peremptory challenges in criminal cases.

Article 4.

Grand Jurors.

- 9-22. How grand jury drawn.
- 9-23. Exceptions to qualifications of grand jurors.
- 9-24. Judge to appoint foreman; acting foreman.
- 9-25. Foreman may administer oaths to witnesses.
- 9-26. Grand jury to visit county home and jail.
- 9-27 to 9-31. [Repealed.]

Revision of Chapter. — Session Laws 1967, c. 218, s. 1, rewrote all the provisions of this chapter of the General Statutes as contained in Recompiled Volume 1B and the 1965 Supplement thereto, 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 Assess-*

ment, 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, effective July 1, 1969, 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, effective July 1, 1969, 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 quali-

fied 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, effective July 1, 1969, 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, effective July 1, 1969, 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, in ten days" near the middle of subsection effective July 1, 1969, added the last sentence in subsection (c) and inserted "with- (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 dates 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. Fees of jurors; provisions in effect until January 1, 1971.—All jurors in the superior court shall receive such compensation as the board of county commissioners shall fix, not less than three dollars (\$3.00) and not more than eight dollars (\$8.00) per day; provided, that the board of county commissioners may establish different rates of compensation for different classes of superior court jurors within the limitations set out above. A board of county commissioners may fix the compensation of jurors to pass upon the competency of any person, under the provisions of chapter 35, article 2, of the General Statutes, at not less than one dollar (\$1.00) per day and not more than six dollars (\$6.00) per day.

In addition to the compensation provided for above, all jurors shall receive a travel allowance of five cents (5¢) per mile for travel to the seat of court and return home, the distance to be computed by the usual route of public travel; provided, that this allowance shall be paid once per calendar week for each calendar week in which attendance is required.

This section shall cease to be effective in each county on the date that a district court is established therein, and thereupon G.S. 7A-312 shall govern the compensation of jurors. Until that time all local modifications of the general law as to jury fees shall remain in effect. This section is repealed effective January 1, 1971. (Rev., s. 2798; 1919, c. 85, ss. 1, 2; C. S., s. 3892; Ex. Sess. 1920, c. 61, ss. 1, 3; 1921, c. 62, s. 1; 1947, c. 1015; 1949, c. 915; 1951, c. 98; 1955, c. 1360; 1967, c. 218, s. 1.)

Local Modifications to Former § 9-5.— Bertie: 1949, c. 802; c. 914, s. 2; 1965, c. 319; Bladen: 1961, c. 285; 1967, c. 68; Chatham: 1947, c. 47; Chowan: 1965, c. 460; Cumberland: 1945, c. 316; 1961, c. 495, s. 2; Currituck: 1945, c. 269; 1947, c. 228; Davidson: 1949, c. 521; Duplin: 1949, c. 680; Durham: 1943, c. 323; Gaston: 1947, c. 206; Graham: 1959, c. 1147; Harnett: 1933, c. 75; 1955, c. 460; Hertford: 1947, c. 59; 1965, c. 40; Johnston: 1963, c. 730, repealing 1961, c. 448; 1965, c. 322, repealing 1945, c. 993; Jones: 1949, c. 1002; Macon: 1951, c. 34; 1959, c. 194; Martin: 1943, c. 173; 1961, c. 349; Montgomery: 1951, c. 62; Moore: 1959, c. 997; New Hanover: 1947, c. 619; Onslow: 1961, c. 175, repealing 1947, c. 205; Pender: 1967, c. 714;

Randolph: 1949, c. 854; Richmond: 1947, c. 1965, c. 179; Vance: 1959, c. 149; Washing-
 235, s. 1; 1955, c. 421; Rowan: 1945, c. 233; ton: 1945, c. 103; 1959, c. 146; 1961, c. 178;
 1959, c. 147; Swain: 1949, c. 234; Tyrrell: Yadkin: 1955, c. 612.

§ 9-9: Repealed by Session Laws 1967, c. 218, s. 1.

Editor's Note.—Section 9-9, which de- was repealed effective Jan. 1, 1968, by its
 rived from Session Laws 1967, c. 218, s. 1, 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, effective July 1, 1969, 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).

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 determin-

ing the qualifications of a juror, 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 Vio-

lated. — 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. Liles, 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 also 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 cannot 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. 1, § 13, are the number of jurors their impartiality and a unanimous verdict and this section does not infringe upon same,

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).

§ 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

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 general 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 Acceptance.—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).

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, effective July 1, 1969, 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 commenced. *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 de-

termine 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 it 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 juror 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 Fed. 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 mem-

bers 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 judg-

ment 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 catch-line in note following analysis to chapter 9.

Chapter 10.

Notaries.

Sec.	Sec.
10-2. To qualify before register of deeds; record of qualification.	10-14. Validation of instruments which do not contain readable impression of notary's name.
10-3.1. Register of deeds notary ex officio with respect to certain instruments; to use seal of office.	10-15. Acts of notaries with seal containing name of another state validated.
10-9. Official acts of notaries public; signatures; appearance of names; notarial stamps or seals.	10-16. Validation of certain instruments acknowledged prior to January 1, 1945.
10-13. Validation of acknowledgment wherein expiration of notary's commission erroneously stated.	

§ 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 punish-

able 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.)

Editor's Note.—

The 1959 amendment rewrote the first paragraph.

The first 1969 amendment, effective Sept. 1, 1969, substituted "five" for "two" in the second and third sentences.

The second 1969 amendment, effective Sept. 1, 1969, 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 sentence of the second paragraph.

Opinions of Attorney General. — Mrs. Susan Lobinger, Governor's Office, 9/3/69.

§ 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.)

Editor's Note. — The 1969 amendment, effective Sept. 1, 1969, rewrote this section.

Opinions of Attorney General. — Mrs. Susan Lobinger, Governor's Office, 9/3/69.

§ 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.)

Editor's Note.—Session Laws 1969, c. 664, s. 5, makes the act effective July 1, 1969.

§ 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.

(1967, c. 24, s. 22.)

Cross Reference.—

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, originally effective Oct. 1, 1967, substituted "52-6" for "52-12" at the end of subdivision (1) of sub-

section (a). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

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

§ 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

The 1967 amendment, effective July 1, 1968, inserted "in the State of North Carolina" near the beginning of the section, rewrote subdivision (3) and added the last proviso in the section.

Editor's Note.—The 1953 amendment, effective June 30, 1953, rewrote this section.

The 1961 amendment again rewrote this section.

§ 10-10. Acts of minor notaries validated.

Cross Reference.—

For similar provision, see § 47-108.

§ 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.—

The 1965 amendment reenacted this section without change.

this section without change. Section 2 of the 1969 act provides that it shall not apply to pending litigation.

Session Laws 1969, c. 716, s. 1, reenacted

§ 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.)

Editor's Note. — The 1961 amendment substituted the words "an official act of a notary public in which the date of the notary's commission is erroneously stated" for the former words in lines five and six.

It also struck from the proviso the words "time of such acknowledgment" and substituted therefor the words "date of such official act."

§ 10-14. Validation of instruments which do not contain readable impression of notary's name.—All deeds, deeds of trusts, 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.

Sec.

11-7.1. Who may administer oaths of office.

ARTICLE 1.

General Provisions.

§ 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 act inserting this section became effective July 1, 1953

The first 1969 amendment rewrote this section. The second 1969 amendment, effective July 1, 1969, 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.

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.)

Editor's Note.—The 1959 amendment, effective July 1, 1960, struck out “in laying off widows' dower” which formerly ap-

peared after the words “real estate” in the third line.

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 any one unrepresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the

court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Oath for Petit Juror

You do solemnly swear (affirm) that you will truthfully and without prejudice or partiality try all issues in civil or criminal actions that come before you and give true verdicts according to the evidence, so help you, God.

Justice, Judge, or Magistrate of the General Court of Justice

I,, do solemnly swear (affirm) that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of of the Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God.

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 ameracements 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.)

Editor's Note.—

The 1959 amendment, effective July 1, 1960, repealed the oath for "Jury, Laying Off Dower." The 1967 amendment substituted the "Oath for Petit Juror" for the oaths for juries in capital cases, in criminal actions not capital and in civil actions.

The 1969 amendment, effective July 1, 1969, 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.

Sec.

12-1. [Repealed.]

§ 12-1: Repealed by Session Laws 1957, c. 783, s. 3.

§ 12-3. Rules for construction of statutes.

III SIMILAR AND RELATED ACTS

A. In General.

Permissible to Look at Other Statutes.—

In accord with 1st paragraph in original. See In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

VI. DEFINITIONS.

The Words "Twelve Months." etc.—

In accord with original See 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.—

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).

§ 12-4. Construction of amended statute.

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

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," etc.—

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).

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).

they had before the amendment. *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963).

Cited in *State v. Pardon*, 272 N.C. 72, 157 S.E.2d 698 (1967).

Chapter 13.

Citizenship Restored.

§ 13-1. Petition filed.

Cited in *Young v. Southern Mica Co.*, 237 N.C. 644, 75 S.E.2d 795 (1953).

§ 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 Train-

ing 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.

**Chapter 14.
Criminal Law.**

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

Felonies and Misdemeanors.

Sec.

14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

14-4. Violation of local ordinances misdemeanor.

Article 2A.

Habitual Felons.

14-7.1. Persons defined as habitual felons.

14-7.2. Punishment.

14-7.3. Charge of habitual felon.

14-7.4. Evidence of prior convictions of felony offenses.

14-7.5. Verdict and judgment.

14-7.6. Sentencing of habitual felons.

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Article 4A.

Prohibited Secret Societies and Activities.

14-12.2. Definitions.

14-12.3. Certain secret societies prohibited.

14-12.4. Use of signs, grips, passwords or disguises or taking or administering oath for illegal purposes

14-12.5. Permitting, etc., meetings or demonstrations of prohibited secret societies

14-12.6. Meeting places and meetings of secret societies regulated

14-12.7. Wearing of masks, hoods, etc., on public ways

14-12.8. Wearing of masks, hoods, etc., on public property.

14-12.9. Entry, etc., upon premises of another while wearing mask, hood or other disguise.

14-12.10. Holding meetings or demonstrations while wearing masks, hoods, etc.

14-12.11. Exemptions from provisions of article.

14-12.12. Placing burning or flaming cross on property of another or on public street or highway.

14-12.13. Placing exhibit with intention of intimidating, etc., another

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14-12.14. Placing exhibit while wearing mask, hood, or other disguise.

14-12.15. Punishment for violation of article.

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14-30.1. Malicious throwing of corrosive acid or alkali.

14-32. Assault with a firearm or other deadly weapon with intent to kill or inflicting serious injury; punishments.

14-33. Misdemeanor assaults, batteries, and affrays; simple and aggravated; punishments.

14-33.1. Evidence of former threats upon plea of self-defense.

14-34.1. Discharging firearm into occupied property.

14-34.2. Assault with a firearm upon law-enforcement officer or fireman.

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14-45.1. When abortion not unlawful.

Article 13.

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14-49. Malicious use of explosive or incendiary; attempt; punishment.

14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.

14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.

14-50.1. Explosive or incendiary device or material defined.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

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14-54. Breaking or entering buildings generally.

14-56. Breaking or entering into railroad cars, motor vehicles, or trailers; breaking out.

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14-56.1. Breaking into or forcibly opening coin operated machines.

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Arson and Other Burnings.

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14-62.1 Burning of building or structure in process of construction

14-67. Attempting to burn dwelling houses and certain other buildings

14-69.1 Making a false report concerning destructive device.

14-69.2. Perpetrating hoax by use of false bomb or other device.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

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Larceny.

14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

14-72. Larceny of property; receiving stolen goods not exceeding two hundred dollars in value.

14-72.1. Concealment of merchandise in mercantile establishments.

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14-89.1. Safecracking and safe robbery.

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False Pretenses and Cheats.

14-110. Defrauding innkeeper.

14-111.1. Obtaining ambulance services without intending to pay therefor—Buncombe, Haywood and Madison counties.

14-111.2. Obtaining ambulance services without intending to pay therefor — Alamance and other named counties.

14-111.3. Making false ambulance request in Buncombe, Haywood and Madison counties.

14-112.1. [Repealed.]

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

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another's credit device; use after notice of revocation

14-113.2. Notice defined; prima facie evidence of receipt of notice.

14-113.3 Use of credit device as prima facie evidence of knowledge.

14-113.4. Avoiding or attempting to avoid payment for telecommunication services.

14-113.5. Making, possessing or transferring device for theft of telecommunication service; concealment of existence, origin or destination of any telecommunication.

14-113.6. Violation made misdemeanor.

14-113.7. Article not construed as repealing § 14-100.

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14-113.9. Credit card theft.

14-113.10. Prima facie evidence of theft.

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14-113.12. Prima facie evidence of forgery.

14-113.13. Credit card fraud.

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14-113.15. Criminal receipt of goods and services fraudulently obtained.

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14-118.2. Assisting, etc., in obtaining academic credit by fraudulent means.

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14-128.1. Unauthorized cutting, digging, removal or transportation of certain ornamental plants and trees.
14-132. Disorderly conduct in and injuries to public buildings and facilities.
14-132.1. Demonstrations or assemblies of persons kneeling or lying down in public buildings.
14-134.1. Depositing trash, garbage, etc., on lands of another or in river or stream.
14-150.1. Desecration of public and private cemeteries.

Article 23.

Trespasses to Personal Property.

- 14-160. Wilful and wanton injury to personal property; punishments.

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- 14-168.1. Conversion by bailee, lessee, tenant or attorney in fact.
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14-168.3. Prima facie evidence of intent to convert property.

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- 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.
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- 14-227.1. Secret listening to conference between prisoner and his attorney.
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AGAINST THE PUBLIC
PEACE.**

Article 35.

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- 14-269.1. Confiscation and disposition of deadly weapons.

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SAFETY.**

Article 36.

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- 14-278. Wilful injury to property of railroads.
14-279. Unlawful injury to property of railroads.
14-281. Operating trains and streetcars while intoxicated.
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Riots and Civil Disorders.

- 14-288.1. Definitions.

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14-288.4. Disorderly conduct.
14-288.5. Failure to disperse when commanded, misdemeanor; prima facie evidence.
14-288.6. Looting; trespass during emergency.
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14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.
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14-288.13. Powers of counties to enact ordinances to deal with states of emergency.
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- 14-293. Allowing gambling in houses of public entertainment; penalty.

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- 14-322.1. Abandonment of child or children for six months.
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- 14-329. Manufacturing, trafficking in, transporting, or possessing poisonous liquors.

Article 42.

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- 14-335. Public drunkenness.

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 14-401.7. Persons, firms, banks and corporations dealing in securities on commission taxed as a private banker.
 14-401.8. Refusing to relinquish party telephone line in emergency; false statement of emergency.
 14-401.9. Parking vehicle in private parking space without permission.
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Article 53.**Sale of Weapons.**

- Sec.
 14-403. Permit issued by sheriff; form of permit.
 14-404. Applicant must be of good moral character; weapon for defense of home; sheriff's fee.
 14-405. Record of permits kept by sheriff.
 14-407.1. Sale of blank cartridge pistols.
 14-408. Violation of § 14-406 or 14-407 a misdemeanor.

Article 53A.**Other Firearms.**

- 14-409.1. Purchase of rifles and shotguns out of State.
 14-409.2. "Antique firearm" defined.

Article 56.**Debt Adjusting.**

- 14-423. Definitions.
 14-424. Engaging, etc., in business of debt adjusting a misdemeanor.
 14-425. Enjoining practice of debt adjusting; appointment of receiver for money and property employed.
 14-426. Certain persons and transactions not deemed debt adjusters or debt adjustment.

Article 57.**Use, Sale, etc., of Glues Releasing Toxic Vapors.**

- 14-427 to 14-431. [Repealed.]

SUBCHAPTER I. GENERAL PROVISIONS.**ARTICLE I.***Felomes 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.)

Editor's Note.—Prior to the 1967 amendment, effective July 1, 1967, 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).

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 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).

§ 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, effective July 1, 1967, 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).

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 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).

Applied in State v. Miller, 237 N.C. 427, 75 S.E.2d 242 (1953).

Cited in State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

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).

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

§ 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.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, 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).

When Section Applies.—

In accord with 1st paragraph in original. See *State v. Blackmon*, 260 N.C. 352, 132 S.E.2d 880 (1963).

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 misde-

meanors 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).

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. Eford*, 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).

meanors 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.—

In accord with original. See *State v. Brown*, 253 N.C. 195, 116 S.E.2d 349 (1960).

Conspiracy to violate the liquor law is a

misdeemeanor 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 354 (1961).

Attempt to Commit Crime against Nature.—

In accord with original. See *State v. Mintz*, 242 N.C. 761, 89 S.E.2d 463 (1955).

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

§ 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.)

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.—

In accord with original. See *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).

Violation of Invalid Ordinance No Offense.—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

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).

Applied in *State v. Thompson*, 3 N.C. App. 231, 164 S.E.2d 391 (1968).

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).

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).

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.

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. Rev. 285.

"Accessory before Fact," etc.—

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).

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).

Who Are Principals.—

Without regard to any previous confederation or design, when two or more persons aid and bet 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).

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).

§ 14-7. Accessories after the fact; trial and punishment.

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, etc.—

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).

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.§ 14-9. **Conspiring to rebel against the State.**

Editor's Note.—For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

§ 14-10. **Secret political and military organizations forbidden.**

Cross reference.—For subsequent statute relating to prohibited secret societies and activities, see §§ 14-12.2 to 14-12.15.

ARTICLE 4.

Subversive Activities.§ 14-12.1. **Certain subversive activities made unlawful.**

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.

(1953, c. 675, s. 2.)

Editor's Note.—

The 1953 amendment substituted "investigation" for "investigation" in line five of the third paragraph of subsection 3.

As only such paragraph was affected by the amendment the rest of the section is not set out.

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 persons 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: (a) any person or persons wearing traditional holiday costumes in season, (b) 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; (c) any person or persons using masks in theatrical productions including use in Mardi Gras celebrations and masquerade balls, (d) persons wearing gas masks prescribed in civil defense drills and exercises or emergencies, and (e) 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 make-up, 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 section as subsection (a) and added sub-designated the former provisions of this section (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.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

I. IN GENERAL.

Editor's Note.—

For case law survey as to homicide, see 45 N.C.L. Rev. 918 (1967).

For comment on homicide by fright, see 41 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. 505, 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.

Malice—Definition.—

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—Express.—

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 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).

Intent—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.—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).

III. MURDER IN THE FIRST DEGREE.

Definition.—

In accord with 1st paragraph in original. See *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).

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.—

In accord with first sentence in original. See *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—Deliberation.—

In accord with original. See *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—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 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.—

In accord with 3rd paragraph in original. See *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).

Killing in Perpetration of Robbery.—

In accord with 6th paragraph in original. See *State v. Maynard*, 247 N.C. 462, 101 S.E.2d 340 (1958).

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 aforesaid. *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.—

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.—

In accord with original. See *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).

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 in-

cumbent 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 he 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.—

In accord with 1st paragraph in original. See 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).

An unlawful killing with malice is murder in the second degree. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

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, etc.—

In accord with original. See 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 de-

ceased. *State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337 (1965).

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) un-

lawful 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).

Evidence Sufficient for Jury.—See *State v. Casper*, 256 N.C. 99, 122 S.E.2d 805 (1961).

V. PLEADING AND PRACTICE.

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 in-

tent, 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, etc.—

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 elements 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 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.—

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 sustained. *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.—*State v. Outing*, 255 N.C. 468, 121 S.E.2d 847 (1961), cert. denied, 369 U.S. 807, 82 S. Ct. 652, 7 L. Ed. 2d 555 (1962).

Charge—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).

Charge—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).

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).

Where Jury May Be Instructed, etc.—

In accord with 2nd paragraph of original. See *State v. Scales*, 242 N.C. 400, 87 S.E.2d 916 (1955).

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, etc.—

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

be 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).

§ 14-18. Punishment for manslaughter.

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. Bengé*, 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

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).

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, etc.—

The last 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. Efrid*, 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, etc.—

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), cited under this catchline in the original.

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).

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).

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).

§ 14-20. 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.)

Editor's Note.—The 1955 amendment inserted a proviso at the end of the first sentence, authorizing life imprisonment on recommendation of the jury, and added the second paragraph.

The 1965 amendment rewrote the first sentence, eliminating the death penalty formerly provided for therein.

ARTICLE 7.

Rape and Kindred Offenses.

§ 14-21. Punishment for rape.

Cross References.—

As to prosecution for rape not barring subsequent prosecution for carnal knowledge see note to § 14-26.

Editor's Note.—

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 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). See *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967); *State v. Peele*, 274 N.C. 106, 161 S.E.2d 568 (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).

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).

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. Sneed-*

en, 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).

“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).

Age of Consent.—

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 inter-

course by the man is rape. *State v. Primes*, 275 N.C. 61, 165 S.E.2d 225 (1969).

Penetration, etc.—

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. Sneed*, 274 N.C. 498, 164 S.E.2d 190 (1968).

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).

Who May Be Guilty of Rape—Two or More Persons.—

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).

Necessary Allegations—"By Force and against Her Will."—

In accord with 2nd paragraph or original. See *State v. Strickland*, 254 N.C. 658, 119 S.E.2d 781 (1961).

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 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 kid-

napping, 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).

Sufficiency of Evidence.—

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).

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).

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).

§ 14-22. Punishment for assault with intent to commit rape.

Editor's Note.—

In addition to case cited in original, see State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

In General.—

In accord with 3rd paragraph in original. See 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).

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. 301, 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).

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 de-

fendant 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).

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).

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).

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.

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).

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.

Cross Reference.—See note to § 14-22.

Essentials of Crime.—

In accord with original. See *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961).

“Carnal knowledge,” etc.—

In accord with original. See *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).

Evidence Sufficient for Jury.—See *State v. Barefoot*, 241 N.C. 650, 86 S.E.2d 424 (1955).

Punishment.—

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).

ARTICLE 8.

Assaults.

§ 14-28. Malicious castration.

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).

Cited in *State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961).

§ 14-29. Castration or other maiming without malice aforethought.

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 (prepenes) 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).

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.

History of Section.—See *State v. Bass*, 255 N.C. 42, 120 S.E. (2d) 580 (1961).

Indictment — 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.)

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).

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).

§ 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.)

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.—

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 inflicting of serious injury, charges a mis-

demeanor. *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 essential 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).

An indictment which follows, etc.—

In accord with original. See *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).

"A certain knife" is, etc.—

In accord with original. See *State v. Wiggs*, 269 N.C. 507, 153 S.E.2d 84 (1967).

Indictment Held Sufficient.—An indict-

ment 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).

Burden of Proof.—

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).

Admissibility, etc.—

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).

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).

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).

§ 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.)

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, etc.—

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.—

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).

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. Sheron*, 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.—

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).

Burden to Prove Age below Eighteen.—

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 ex-

cess 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).

§ 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).

§ 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.

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 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).

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).

Cited in *State v. Newton*, 251 N.C. 151, 110 S.E.2d 810 (1959).

§ 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, effective Oct. 1, 1969, 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 10.

Kidnapping and Abduction

§ 14-39. Kidnapping.

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.—

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).

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).

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).

§ 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, effective Oct. 1, 1969, rewrote the provisions of the first sentence relating to punishment.

§ 14-42. Conspiring to abduct children.

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.

Effect of Prior Adultery.—

In accord with original. See *State v. Temple*, 240 N.C. 738, 83 S.E.2d 792 (1954)

Evidence.—

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 se-

quence led to the elopement. *State v. Temple*, 240 N.C. 738, 83 S.E.2d 792 (1954).

Burden of Proof of First Proviso.—

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).

Instruction.—

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).

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).

This section and § 14-45 create separate and distinct offenses, etc.—

In accord with original See *State v. Hoover*, 252 N.C. 133, 113 S.E.2d 281 (1960)

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

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

Joinder of Offenses. -

In accord with 1st paragraph in original. See *State v. Hoover*, 252 N.C. 133, 113 S.E.2d 281 (1960).

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).

Stated in *Perkins v. North Carolina*, 234 F. Supp. 333 (W.D.N.C. 1964).

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 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. Philip*, 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).

§ 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.

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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, added, at the end of the section, "punishable by a fine not to exceed five hundred dollars (\$500.00), im-

prisonment for not more than six months, or both."

Cited in Gillikin v. Bell, 254, N.C. 244, 118 S.E.2d 609 (1961).

§ 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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 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.)

Editor's Note.—The 1969 amendment, effective May 23, 1969, added the last sentence.

For note on burglary in North Carolina, see 35 N.C.L. Rev. 98 (1956).

In General.—

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).

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 in-

truder 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. Tippet*, 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).

§ 14-52. Punishment for burglary.

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

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).

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. Tippet*, 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. Tippet*, 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).

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).

Judgment of Death Held Proper.—Where the indictment and the evidence relate to burglary in the first degree and the court instructs the jury that defendant is on trial for the capital crime of first degree burglary, clearly defines burglary in the first degree, and correctly charges the jury as to the permissible verdicts upon the evidence, a verdict of guilty returned by the jury, with no recommendation of mercy, necessarily imports a finding of guilty of burglary in the first degree, and supports

judgment of death. *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967), commented on in 45 N.C.L. Rev. 1070 (1967). But see *Alford v. North Carolina*, 405 F.2d 340 (4th Cir. 1968).

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).

Stated in *State v. Perry*, 265 N.C. 517, 144 S.E.2d 591 (1965).

§ 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, effective May 23, 1969, substituted "lar-

ceny" for "other infamous crime" in two places.

§ 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, effective May 23, 1969, rewrote this section as amended in 1955.

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 infam-

ous 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 accord with 2nd paragraph in origi-

nal. See *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).

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, as amended by S. L. 1959, c. 1285.

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).

Entry without Breaking.—

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).

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, 163 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, 16 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).

Erroneous Instruction.—

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).

Evidence held sufficient, etc.—

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).

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. 14, 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).

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).

§ 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, effective May 23, 1969, substituted "any felony or larceny" for "a felony or other infamous crime" in two places.

Separate Offenses.—

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 sec-

tion. 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 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 pick lock, 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).

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, this section; and (2) that such possession was without lawful excuse. *State v. Styles*, 3 N.C. App. 204, 164 S.E.2d 412 (1968).

Proof of “Intent” or “Unlawful Use” Not Required.—

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).

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, etc.—

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).

§ 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, effective May 23, 1969, rewrote this section.

§ 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, effective May 23, 1969, substituted "any felony or larceny therein" for "crime" near the beginning of the section.

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 conten-

tions 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).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

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).

§ 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.)

Editor's Note. — The 1965 amendment added "or any building owned by the State or any of its agencies, institutions, or sub-

divisions," near the beginning of the section.

§ 14-60. Burning of schoolhouses or buildings of educational institu-

tions. —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.)

Editor's Note. — The 1965 amendment rewrote this section.

Cited in *State v. Kelly*, 5 N.C. App. 209, 167 S.E.2d 881 (1969).

§ 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.

Editor's Note.—

The 1953 amendment, effective July 1, 1953, inserted "structure" and "or intended to be used" in line five.

The 1959 amendment inserted "any uninhabited house" in line three.

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).

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 a 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).

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 feloniously 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 of-

fense 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).

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).

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 identity under this section. *State v. Banks*, 247 N.C. 745, 102 S.E.2d 245 (1958).

IV. QUESTIONS FOR JURY.

Must Be Sufficient, etc.—

For circumstantial evidence sufficient for jury, see *State v. Moore*, 262 N.C. 431, 137 S.E.2d 812 (1964).

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).

§ 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.)

§ 14-65. Fraudulently setting fire to dwelling houses.

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).

§ 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 Reference. — As to offense of burning an uninhabited house as distinguished from an attempt to do so, see § 14-144

Editor's Note. — The 1957 amendment inserted the words "burn or wilfully" af-

ter the words "shall wilfully" in line one. The 1959 amendment rewrote this section.

Applied in State v. Lawhorn, 250 N.C. 598, 108 S.E.2d 863 (1959).

§ 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. "Commissioner of Insurance" has been substituted for "Insurance Commissioner"

By virtue of Session Laws 1943, c. 170, near the middle of the section.

§ 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.)

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, etc.—

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).

Accessories Abolished.—

In accord with original. See *State v. Bennett*, 237 N.C. 749, 76 S.E.2d 42 (1953).

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 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).

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

§ 14-71. Receiving stolen goods.

Included in Indictment for Larceny Charge.—

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

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 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).

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).

The Inference or Presumption Arising from the Recent Possession, etc.—

In accord with 1st paragraph in original. See *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).

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. —

In accord with original. See *State v. Hill*, 237 N.C. 764, 75 S.E.2d 915 (1953).

Defective Verdict.—

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).

Evidence Held Sufficient for Jury.—

State v. Chambers, 239 N.C. 114, 79 S.E.2d 262 (1953).

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, 15 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).

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).

Cited in State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Wilson, 231 N.C. 174, 119 S.E.2d 813 (1959).

§ 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 as previously amended in 1959, 1961 and 1965.

The cases cited in the note below were decided prior to the 1969 amendment.

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 limi-

tation 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. Masey*, 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).

"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. Bookèr*, 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. Bower*, 273 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, etc.—

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).

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 of-

fense, 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 posses-

sion 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).

Evidence.—

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 im-

prisonment 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. 149, 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).

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).

§ 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 shoplifting, see 41 N.C.L. Rev. 446 (1963), a 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 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

§ 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.)

Editor's Note.—

The 1961 amendment, effective July 1, 1961, substituted "two hundred dollars" for "one hundred dollars."

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 conceals" 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).

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).

§ 14-74. **Larceny by servants and other employees.**

Applied in *State v. Hauser*, 257 N.C. 158, 125 S.E.2d 389 (1962).

§ 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.)

§ 14-77. **Larceny, concealment or destruction of wills.**

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).

§ 14-78.1. **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 misde-

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 1955 amendment made this section applicable to the following counties: Craven, Greene, Martin, Perquimans, Sampson, Wayne and Wilson.

The 1957 amendment made this section applicable to Robeson County.

The 1969 amendment, effective Oct. 1, 1969, rewrote the provisions of the first sentence relating to punishment.

§ 14-80. Larceny of wood and other property from land.

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 Insufficient to Go to Jury. — Testimony that defendant was paid for dogwood delivered to a woodyard, with-

out 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.)

Editor's Note. — Prior to the 1965 amendment the section fixed the punishment at imprisonment at hard labor for not less than 1 nor more than 20 years and con-

tained a second sentence permitting a count under this section to be joined in an indictment with a count under § 14-82.

§ 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

§ 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.)

Editor's Note. — Prior to the 1955 amendment only dogs upon which tax had been paid were the subject of larceny.

§ 14-86. Destruction or taking of soft drink bottles. — It shall be unlawful for any person, firm or corporation, or any employee thereof, to mali-

ciously 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

The Primary Purpose and Intent, etc.—

In accord with original. See *State v. Hare*, 243 N.C. 262, 90 S.E.2d 550 (1955).

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 in-

tent 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).

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, etc.—

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 threat-

ened, 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).

An Indictment for Robbery with Firearms, etc.—

In accord with original. See *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 defen-

dant'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).

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.—

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).

Quoted in *Broyhill v. Morris*, 408 F.2d 820 (4th Cir. 1969).

Stated in *Perkins v. North Carolina*, 234

§ 14-88. Train robbery.

Stated in *Perkins v. North Carolina*, 234 F. Supp. 333 (W.D.N.C. 1964).

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).

Cited in *State v. Lawrence*, 262 N.C. 162, 136 S.E.2d 595 (1964).

§ 14-89. Attempted train robbery.

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 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.)

Editor's Note.—

The 1967 amendment inserted "unincorporated association or organization" near the end of the section.

Origin and Purpose.—

In accord with original. See *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, etc.—

In accord with original. See *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 felon-

ious 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).

To Whom Section Applies.—

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).

Allegations and Proof.—

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 Sufficient to Go to Jury.—

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).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false tokens and other false pretenses.

Cross Reference.—

As to obtaining property or services by false or fraudulent use of credit cards or other means, see §§ 14-113.1 to 14-113.6.

Elements of the Crime.—

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.—

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).

The Indictment.—

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).

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).

§ 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, effective Oct. 1, 1969, added the last sentence.

§ 14-106. Obtaining property in return for worthless check, draft or order.

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).

§ 14-107. Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

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.

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).

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).

It Is Not the Attempted Payment, etc.— In accord with original See *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).

Sentence.—

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).

§ 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, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, 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.)

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

The second 1969 amendment, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

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).

§ 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 misdemeanor 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, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, 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, Guildford, 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, effective Oct. 1, 1969, 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 punishable 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, effective Oct. 1, 1969, 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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 1965 amendment re-enacted this section without change. 1967, deleted references to credit cards throughout this section.

The 1967 amendment, effective July 1,

§ 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 deposit in the mail. (1961, c. 223, s. 3; 1965, c. 1147; 1967, c. 1244, s. 1.)

Editor's Note. — Prior to the 1965 amendment, this section was designated as § 14-113.3. The 1967 amendment, effective July 1, 1967, 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. — Prior to the 1965 amendment, this section was designated as § 14-113.4. The 1967 amendment, effective July 1, 1967, 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.)

Editor's Note. — Prior to the 1965 amendment, this section was designated as § 14-113.2 and made it unlawful to obtain telephone or telegraph service with intent to avoid payment.

§ 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. — Prior to the 1965 amendment, this section was designated as § 14-113.5. 1969, substituted the present provisions as to punishment for a provision for fine or imprisonment, or both at the discretion of the court.

The 1969 amendment, effective Oct. 1,

§ 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.)

Editor's Note. — Prior to the 1965 amendment, this section was designated as § 14-113.6.

§ 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.)

Editor's Note.—Section 4, c. 1244, Session Laws 1967, provides that this section is effective July 1, 1967.

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.)

Editor's Note.—Section 4, c. 1244, Session Laws 1967, provides that this article is effective July 1, 1967.

§ 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 punishable 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.)

Editor's Note. — The first 1969 amendment, effective Oct. 1, 1969, rewrote this section.

The second 1969 amendment, effective Oct. 1, 1969, rewrote the provisions of the first sentence relating to punishment.

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).

Applied in *State v. Dunn*, 264 N.C. 391, 141 S.E.2d 630 (1965).

§ 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.)

Editor's Note. — The first 1969 amendment, effective Oct. 1, 1969, inserted "or security interest" in two places in the section.

The second 1969 amendment, effective

Oct. 1, 1969, 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."

§ 14-118.1. 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, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, rewrote the provi-

sions relating to punishment in the last sentence.

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

Elements of Offense.—

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).

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).

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.—

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).

§ 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, 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.)

Editor's Note. — The 1961 amendment added the second sentence.

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).

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 im-

posed 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).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-126. **Forcible entry and detainer.**

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

§ 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*,

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.—

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).

Actual Possession Necessary.—

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).

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).

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.—

Session Laws 1957, c. 754, rewrote this section, and by virtue of Session Laws 1957, c. 65, § 11, "State Highway Commission" was substituted for "State Highway and Public Works Commission."

The 1965 amendment eliminated "or who, not being on his own lands, and without the consent of the owner, shall wilfully

deposit any trash, debris, garbage, or litter thereon."

The 1969 amendment, effective Oct. 1, 1969, 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."

§ 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 thereof, 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: 1967, c. 355.

The 1961 amendment deleted "Avery" from the list of counties.

Editor's Note.—The 1955 amendments deleted "Durham" and "Warren" from the list of counties in the last sentence.

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 1957 amendment to punishment in the second sentence for added the last proviso. a provision for fine or imprisonment in the discretion of the court.

The 1969 amendment, effective Oct. 1, 1969, substituted the present provisions as

§ 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 (the fine not to exceed \$500, imprisonment for not more than six months, or both) as rewrote this section. is provided in subsection (d) of the section as rewritten by the first 1969 amendment.

The second 1969 amendment, effective Oct. 1, 1969, provided the same punishment

§ 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, effective Oct. 1, 1969, added, at the end of the section, "punishable by a fine not to exceed five hundred dollars (\$500.00), im-

prisonment for not more than six months, or both."

Quoted in part 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 Reference.—

See note to § 14-126.

Editor's Note.—The 1963 amendment rewrote the penalty provision near the beginning of the section.

1969, 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.

The 1969 amendment, effective Oct. 1,

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 on 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, 85 Sup. 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 Sup. 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.—

In accord with original See *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).

Entry under Claim of Right.—

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).

License to Enter, etc.—

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).

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 to 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).

Cited in *State v. Francis*, 261 N.C. 358, 134 S.E.2d 681 (1964).

§ 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, effective Oct. 1, 1969, inserted "or county" 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.—Granville: 1965, c. 570.

Editor's Note.—The 1957 amendment substituted the words "or imprisonment, or both, in the discretion of the court" for the words "of not more than fifty dollars or by imprisonment for not more than

thirty days." Section 2 of the amendatory act provides that G.S. 14-135 as worded immediately prior to June 12, 1957 shall continue in full force and effect with respect to all offenses committed before that date.

§ 14-136. Setting fire to grass and brush lands and woodlands.

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).

Care No Defense.—

In accord with original. See *Benton v. Montague*, 253 N.C. 695, 117 S.E.2d 771 (1961).

§ 14-137. Wilfully or negligently setting fire to woods and fields.

Cited in *Pickard v. Burlington Belt Corp.*, 2 N.C. App. 97, 162 S.E.2d 601 (1968).

§ 14-138. Setting fire to woodlands and grasslands with campfires.

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).

Editor's Note.—

The 1953 amendment rewrote this section.

§ 14-140. Certain fires to be guarded by watchman.

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).

§ 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, effective Oct. 1, 1969, substituted the present provisions for punishment for provisions authorizing punishment by fine or imprisonment, or both, at the discretion of the court.

§ 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.)

Cross Reference.—See also § 14-159
Editor's Note.—“punishable by a fine not to exceed five hundred dollars (\$500.00), imprisonment for not more than six months, or both.”

The 1969 amendment, effective Oct. 1, 1969, added, at the end of the section,

§ 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

Editor's Note. — The 1957 amendment inserted after the words “or shall” the words “by any other means than burning or attempting to burn.” It also deleted the word “burn” formerly appearing immediately before “demolish, pull down.”

The 1969 amendment, effective Oct. 1, 1969, 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.”

An “uninhabited house” within the purview of this section is a house fit for hu-

man 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 con-

viction 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).

§ 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.)

Editor's Note. — The 1969 amendment added the second sentence.

Cited in *Mills v. Carolina Cem. Park Corp.*, 242 N.C. 20, 86 S.E.2d 893 (1955).

§ 14-150. Disturbing graves.

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.)

§ 14-155. Making unauthorized connections with telephone and telegraph wires.

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 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).

§ 14-157. 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, effective Oct. 1, 1969, 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 messages 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

§ 14-159. Injuring buildings or fences; taking possession of house without consent.

Cross References.—

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 Reference — 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, effective Oct. 1, 1969, rewrote this section.

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).

Not Accessories.—

In accord with original. See State v. Parrish, 251 N.C. 274, 111 S.E.2d 314 (1959).

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).

§ 14-163. 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

§ 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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.)

Editor's Note. — The 1965 amendment inserted "aircraft, motor, trailer, appliance, equipment, tool, or other thing of value" following "vehicle" and deleted "for temporary use" formerly following "vehicle."

§ 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 1965 amendment deleted "for temporary use" following "hire" near the beginning of the section and inserted "aircraft, motor, trailer, appliance, equipment, tool, or other thing of value." 1969, 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.

The 1969 amendment, effective Oct. 1,

§ 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 1965 amendment deleted "for temporary use" following "hire" near the beginning of the section and inserted "aircraft, motor, trailer, appliance, equipment, tool, or other thing of value."

The 1969 amendment, effective Oct. 1,

1969, 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 1965 amendment deleted "for temporary use" following "rent" and inserted "aircraft, motor, trailer, appliance, equipment, tool, or other thing of value."

The 1969 amendment, effective Oct. 1,

1969, 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, effective Oct. 1,

1969, added "Except as otherwise provided" at the beginning of this section.

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.—Prior to the 1965 amendment the section fixed the punishment at imprisonment in the State's prison for not less than 5 nor more than 60 years.

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 a bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

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 in-

decent 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.—

In accord with original. See 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 accu-

sation 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 300 (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).

§ 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.)

Editor's Note.—Prior to the 1965 amendment, this section contained no reference to stepchild or legally adopted child.

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).

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).

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).

§ 14-180. Seduction.

Applied in *State v. Leggett*, 255 N.C. 358, 121 S.E.2d 533 (1961).

§ 14-181. Miscegenation.

Virginia antimiscegenation statutes held unconstitutional.—See *Loving v. Virginia*,

388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

§ 14-183. Bigamy.

Editor's Note.—For note as to consequences of a voidable divorce decree, see 35 N.C.L. Rev. 409 (1957).

Testimony of First Wife.—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).

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, effective Oct. 1, 1969, added the last sentence.

"Lewdly and lasciviously cohabit," etc.—

In accord with original. See *State v. Kleiman*, 241 N.C. 277, 85 S.E.2d 148 (1954).

Circumstantial Evidence.—

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).

Instruction Held without Error.—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).

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).

§ 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 boarding-house 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

§ 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, effective Oct. 1, 1969, designated the former provisions of this section as subsection (a) and added subsection (b).

§ 14-189. Obscene literature; crime comic publications.

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 of 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)

Editor's Note.—The 1955 amendment, effective July 1, 1955, added the second paragraph. As the first paragraph was not changed it is not set out.

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).

City Ordinance Not Forbidden.—It cannot 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 nei-

ther 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 contents 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.—The 1965 amendment added subdivision (4) in subsection (a).

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 interest 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, effective Oct. 1, 1969, 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 resort, 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.

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 Guil-

ford 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).

§ 14-193. 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 neces-

sary 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, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, 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."

§ 14-196. 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 1957 amendment deleted 'Washing-ton' from the list of exempt counties

The 1959 amendment deleted "Cleveland" from the list

The first 1963 amendment deleted 'Pas-quotank' from the list of exempt counties.

The second 1963 amendment deleted "Mar-tin" from the list.

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).

§ 14-199. 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.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, added the last sentence.

§ 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.—

The 1957 amendment substituted "female person" for "woman" near the beginning of the section.

"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 230 (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 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 delicti*, 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.

§ 14-204. Prostitution and various acts abetting prostitution unlawful.

Warrant Must State Wherein Defendant Aided and Abetted.—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 subsection 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 what-

soever" 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).

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).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. Punishment for perjury.

Definition of Perjury.—

In accord with original. See *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.—

In accord with 1st paragraph in original. See *State v. Lucas*, 247 N.C. 208, 100 S.E.2d 366 (1957).

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.—

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).

Evidence Must Relate to Statement upon Which Indictment Predicated.—Testimony of two or more witnesses as to con-

flicting 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.—

In a prosecution for perjury it is re-

§ 14-210. Subornation of perjury.

Cross Reference.—

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.

§ 14-214. False statement to procure benefit of insurance policy or certificate.—Any person who shall wilfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon any contract of insurance or certificate of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other documents or writing, with intent that the same may be presented or used in support of such claim, shall be guilty of a felony punishable by imprisonment for not more than five years or by a fine of not more than five thousand dollars (\$5,000.00), 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 substituted "guilty of a felony," substituted inserted "or certificate of insurance," in-

quired 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).

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).

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 G. S. 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.—

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 for 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).

ARTICLE 29.

Bribery.

§ 14-217. Bribery of officials.

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).

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).

§ 14-218. Offering bribes.

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

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).

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 patrol man fails to allege the official act the ac-

cused intended to influence, defendant's motion to quash should be allowed *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953).

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).

ARTICLE 30.

Obstructing Justice.

§ 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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) identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute; (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 (1963); *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 offi-

cer 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).

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).

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).

§ 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, effective Oct. 1, 1969, 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).

§ 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, effective Oct. 1,

1969, rewrote the provisions relating to punishment.

§ 14-226. **Intimidating or interfering with jurors and witnesses.**

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 statute. 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).

§ 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.)

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, effective Oct. 1, 1969, 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.

§ 14-230. Willfully failing to discharge duties.

History of Section.—See State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

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).

Applied in State v. Hucks, 264 N.C. 160, 141 S.E.2d 299 (1965).

§ 14-233. Making of false report by bank examiners; accepting bribes.

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.)

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)

Officers of City or Corporation.—

In accord with original See *Lexington*

Insulation Co v Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

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 Supreme Court 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.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, substituted the present provisions as

to punishment for provisions for fine, imprisonment and removal from office at the discretion of the court.

§ 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, effective Oct. 1, 1969, 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.

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).*

§ 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.

§ 14-247. Private use of publicly owned vehicle.

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 subdivisions 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).*

§ 14-249. 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.)

Editor's Note.—The first 1957 amendment added the last proviso. The second 1957 amendment increased the amount referred to in the section from \$1,500 to \$2,000; and the 1959 amendment increased the amount from \$2,000 to \$2,500.

§ 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.)

Editor's Note.—

The 1957 amendment added the last proviso.

The 1961 amendment rewrote the second proviso.

The 1965 amendment deleted former

provisions pertaining to the size of the lettering on the motor vehicle or license tags and plate and a requirement for the inclusion of "For Official Use Only" on the car or the front plate.

§ 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, effective Oct. 1, 1969, rewrote the provi-

sions as to punishment in the first sentence.

§ 14-252 Five preceding sections applicable to cities and towns.

Cross Reference. — See note to § 14-247

ARTICLE 33.

Prison Breach and Prisoners.

§ 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.)

Editor's Note.— The 1955 amendment rewrote this section.

The 1955 amendatory act provided in section 4: "The provisions of this act shall

be construed to be mandatory rather than directive.”

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).

§ 14-259. Harboring or aiding escaped prisoners.

Sufficiency of Indictment. — An indictment charging that the defendant unlawfully, 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.

Cited in *Threatt v. North Carolina*, 221 F. Supp. 858 (W.D.N.C. 1963).

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. — Edgecombe: 1953, c. 864; 1955, c. 945; Forsyth, as to former paragraph (b): 1965, c. 228; Granville: 1953, c. 864; Halifax: 1955, c. 1241, amending 1953, c. 1213; 1961, c. 526, amending 1953, c. 1213; Nash: 1953, c. 864; Pitt, as to former paragraph (b): 1965, c. 228; Rockingham: 1957, c. 939; Scotland, as to former paragraph (b): 1955, c. 569; Wake: 1957, c. 637; Wilson, as to former paragraph (b): 1955, c. 530.

Editor's Note.—

The 1959 amendatory act, as amended by Session Laws 1963, c. 537, Session Laws 1967, cc. 6, 122, 470, 903, and Session Laws 1969, cc. 6, 109, 276, provides that it shall not apply to the following counties: Ashe, Avery, Bertie, Bladen, Cherokee, Clay, Currituck, Davie, Duplin, Franklin, Greene, Halifax, Iredell, Jackson, Lincoln, Macon, Madison, Mecklenburg, Mitchell, Moore, Pamlico, Pender, Perquimans, Person,

Polk, Rockingham, Sampson, Stokes, Tyrrell, Union, Vance, Warren, Washington, Watauga and Yancey.

Chapter 470, Session Laws 1967, amends s. 4 of c. 1073, Session Laws 1959, by deleting Harnett and Lee from the list of counties to which the 1959 act shall not apply, but adds at the end of s. 4 the following: “The provisions of this act shall not apply to Lee and Harnett counties, except section 2 which shall be applicable in said counties.”

The 1965 amendment rewrote this section, deleting former paragraphs (a) and (b), the subject matter of which is now covered by § 14-269.1. Section 2 1/2 of the act provides that § 14-269.1 shall not apply to the following counties: Cumberland, Dare, Halifax, Harnett, Pamlico, Perquimans, Rockingham, Scotland and Warren.

The 1969 amendment, effective Oct. 1, 1969, 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.

Session Laws 1969, c. 1117, amends Session Laws 1965, c. 954, s. 2½, as amended, by adding at the end thereof: "The provisions of G.S. 14-269 (b) prior to amendment by this Act shall be effective as to these counties."

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).

"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).

§ 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

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.—

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).

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).

The maximum imprisonment that may be imposed upon a defendant convicted of carrying a concealed weapon in violation of this section is two years. *State v. Barber*, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

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).

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 advertisement 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.—Section 2 1/2 of the act inserting this section provides that this section shall not apply to the following counties: Cumberland, Dare, Halifax, Harnett, Pamlico, Perquimans, Rockingham, Scotland and Warren.

The 1967 amendment, originally effective Oct. 1, 1967, 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.

Session Laws 1969, c. 301, deleted Dare County from the list of counties exempt from the provisions of this section.

Session Laws 1969, c. 1117, amends Session Laws 1965, c. 954, s. 2 1/2, as amended, by adding at the end thereof: "The provisions of G.S. 14-269 (b) prior to amendment by this act shall be effective as to these counties."

§ 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.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, added the last sentence.

§ 14 271. Engaging in and betting on prize fights.

Local Modification. — Durham: 1953 c 1287

§ 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

§ 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment as previously amended in 1959.

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).

Applied in *State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891 (1965).

§ 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

Section Not General Law Respecting

Public Drunkenness.—See note to § 14-335.

Stated in *State v. Fenner*, 263 N.C. 694, 140 S.E.2d 349 (1965).

§ 14-277. Impersonation of peace officers.

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).

§ 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.

§ 14-281. **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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

§ 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, effective Oct. 1, 1969, 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).

§ 14-286. 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 1961 amendment deleted words confining the former section to "municipal" fire alarm systems.

The 1969 amendment, effective Oct. 1, 1969, 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 punishable 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.1. **Definitions.**—Unless the context clearly requires otherwise, the definitions in this section apply throughout this article:

- (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 re-enactment.

(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 nec-

essary 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 directions 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 rescision 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) Notwithstanding 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 au-

thorized 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.

§ 14-290. Dealing in lotteries.

Sufficiency of Evidence. —

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).

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).

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation

"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)

Sufficiency of Evidence. —

Circumstantial evidence of defendant's guilt of conspiracy or participation in lot

tery held insufficient. *State v. Smith*, 236 N.C. 748, 73 S.E.2d 901 (1953).

Applied in *State v. Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966).

Cited in *State v. Gibson*, 233 N.C. 691,

§ 14-292. Gambling.

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 acceptance 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).

§ 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

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).

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 element 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).

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.

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).

Cited in *State v. McHone*, 243 N.C. 235, 90 S.E.2d 539 (1955).

§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.

Cited in *State v. McHone*, 243 N.C. 235, 90 S.E.2d 539 (1955).

§ 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.)

Editor's Note.—

The 1957 amendment inserted in the first sentence "including any motor vehicle

used in the conduct of a lottery within the purview of G. S. 14-291.1," and inserted in the last sentence the words in parentheses.

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.

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, etc.—

In accord with original. See *State v. Sheppard*, 4 N.C. App. 670, 167 S.E.2d 535 (1969).

§ 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 that follows the semicolon therein and rewrote the portion of the first sentence added the last sentence.

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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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), im-

prisonment 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, effective Oct. 1, 1969, 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."

§ 14-316. 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.)

Editor's Note. — The 1965 amendment rewrote this section.

§ 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 willfully 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 willfully is responsible for, or who encourages, aids, causes, or connives at, or who knowingly or willfully 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.

§ 14-318.1. 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.)

Editor's Note.—The act inserting this section was effective as of July 1, 1965.

§ 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), im-

prisonment 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.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, 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.”

§ 14-320. 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.)

Editor's Note.—

The 1965 amendment substituted “di-

rector” for “superintendent” in the title of the county officer in the first sentence.

§ 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.

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 special county attorneys and their duties in connection with the preparation and prosecution of criminal cases under this article, see §§ 108-14.01 to 108-14.03.

Editor's Note.—

The 1957 amendment rewrote this section.

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).

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).

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).

Two Offenses Created.—

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 separate 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

Both Abandonment and Nonsupport Must Be Proved.—

In accord with 3rd paragraph in original. See *State v. Lucas*, 242 N.C. 84, 86 S.E.2d 770 (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).

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. Goodman*, 266 N.C. 659, 147 S.E.2d 44 (1966).

Insufficient Warrant.—A warrant charging that defendant willfully failed to pro-

vide 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).

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).

§ 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 thereof, 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.

§ 14-324. Order to support from husband's property or earnings.

Local Modification. — Person: 1967, c. 848, s. 3.

§ 14-325. Failure of husband to provide adequate support for family.

—If any husband, while living with his wife, shall wilfully 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.

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 necessities 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).

"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

§ 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).

§ 14-326.1. 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.

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 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).

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).

Editor's Note. — The 1969 amendment substituted the language beginning "pun-

ished 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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.

§ 14-329. **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 a 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 poisonous 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.)

Editor's Note.—The 1961 amendment rewrote this section.

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.

§ 14-331. 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, added the last sentence.

ARTICLE 42.

Public Drunkenness.

§ 14-334. Public drunkenness and disorderliness.

Section Not General Law Respecting Public Drunkenness. — See note to § 14-335.

140 S.E.2d 349 (1965); *Perkins v. North Carolina*, 231 F. Supp. 333 (W.D.N.C. 1964).

Stated in *State v. Fenner*, 263 N.C. 694,

§ 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, c. 1.)

Editor's Note.—

Chapter 1256, s. 1, Session Laws 1967, rewrote this section.

Chapter 996, s. 15, Session Laws 1967, effective Aug. 1, 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 be-

low 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 in-

telligence, 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.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, 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).

Sufficiency of Evidence.—

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)

§ 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, effective Oct. 1, 1969, 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."

ARTICLE 44.

Regulation of Sales.

§ 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, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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."

§ 14-346. **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 1959 amendment re-wrote this section 1969, rewrote the provisions as to punishment in the first sentence of subsection (b).
The 1969 amendment, effective Oct. 1, (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 first 1953 amendment inserted "Dare" in the list of counties in the last paragraph, and the second 1953 amendment inserted Bertie and Hertford therein. The third 1953 amendment, effective July 1, 1953, deleted "Cleveland" from the list of counties and provided that the sale of bay rum in Cleveland County shall hereafter be prohibited according to the provisions of this section.

The 1955 amendment deleted "Wayne" from the list of counties.

The 1959 amendment deleted "Alamance" from the list of counties.

The 1963 amendment inserted "Northampton" in the list of counties.

The 1967 amendment deleted "Rutherford" from the list of counties.

The 1969 amendment, effective Oct. 1, 1969, 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 act inserting this section was effective as of Oct. 1, 1961.

The 1963 amendment, effective July 1, 1963, rewrote this section. The 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, effective Oct. 1, 1969, 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.

§ 14-348. 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.)

Editor's Note.— The 1969 amendment, effective Oct. 1, 1969, added the last sentence.

§ 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, effective Oct. 1, 1969, 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. 1, § 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 to the agent or employee should be 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).

§ 14-354. Witness required to give self-criminating evidence; no suit or prosecution to be founded thereon.

Stated in *State v. Brewer*, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-355. Blacklisting employees.

Cited in *Scott v Burlington Mills Corp.*, 245 N.C. 100, 95 S.E.2d 273 (1956).

§ 14-356. Conspiring to blacklist employees.

Editor's Note.—

For comment on criminal conspiracy in

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).

North Carolina, see 39 N.C.L. Rev. 422 (1962).

ARTICLE 46.

Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.—It 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 willtully 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 willtully 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, 1907, c. 84, s. 1, 1907, c. 595, s. 1; 1907, 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.)

Editor's Note.—

The 1953 amendment inserted "Person" in the list of counties in the last sentence,

and made the provisions of this section applicable to Person County.

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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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."

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 defen-

dant, 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).

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, effective Oct. 1, 1969, rewrote the provisions relating to punishment as previously amended in 1953.

§ 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, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, rewrote the provisions of the first sentence relating to punishment as previously amended in 1953.

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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, added the last sentence.

§ 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 mockorange 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.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

ARTICLE 50.

Protection of Letters, Telegrams, and Telephone Messages.

§ 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.

Cross Reference.—See note to § 14-155.

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.—

The 1961 amendment rewrote this section, making it also applicable to managers imprisonment from five to ten years and and coaches. It increased the maximum added the provision for fines.

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 ele-

§ 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.)

Editor's Note.—The 1961 amendment rewrote this section, making it also applicable to managers and coaches. It increased the maximum imprisonment from five to ten years and added the provision for a fine.

§ 14-375. **Completion of offenses set out in sections 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 ac-

ment 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).

Cited in *State v. Brewer*, 258 N.C. 533, 129 S.E.2d 262 (1963).

cepted 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.)

Editor's Note.—The 1961 amendment inserted the word “coach” in lines two and seven. **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 manner 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.)

Editor's Note.—The 1961 amendment inserted “coach” in lines five and six. **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.)

Editor's Note.—The 1961 amendment rewrote this section. **Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).**

§ 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.)

Editor's Note.—The 1961 amendment rewrote this section.

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, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, 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

§ 14-382. **Pollution of water on lands used for dairy purposes.**

Editor's Note. — The catchline to this section is set out above to correct an error in the recompiled volume.

§ 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, effective Oct. 1, 1969, 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."

§ 14-386. **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, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

§ 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, effective Oct. 1, 1969, 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 per cent (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.)

Editor's Note.— The 1959 amendment rewrote this section.

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.

§ 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

§ 14-394. Anonymous or threatening letters, mailing or transmitting.

Transmission an Essential Element.—For a conviction under this 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).

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).

Cited in *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

What Constitutes Transmission.—There

§ 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

§ 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.)

Editor's Note.—

The 1959 amendment rewrote this section, which had been declared unconstitutional in its earlier form.

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 hardsurfaced 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, sions relating to punishment in the last effective Oct. 1, 1969, rewrote the provi- 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.—

The 1953 amendment inserted "woods" in line four.

§ 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, effective Oct. 1, 1969, 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, sions relating to punishment in the last effective Oct. 1, 1969, rewrote the provi- 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, ceme-

tery or burial plot, it 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, sions relating to punishment in the last effective Oct. 1, 1969, rewrote the provi- 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 identification 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 willtully 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

(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.

(1953, c. 257.)

Editor's Note.—

The 1953 amendment added the provisos

at the end of subsections (a) and (c). It also deleted "on or before July 1, 1951"

formerly appearing after the word "Vehicles" in line five of subsection (c). As the rest of the section was not affected by the amendment only subsections (a) and (c) are set out.

§ 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 and Orange: 1961, c. 544; Harnett: 1955, c. 1326; Lee: 1955, c. 766.

Editor's Note. — The first 1953 amendment inserted "Caswell" and "Franklin" in the third paragraph. The second and third 1953 amendments, effective July 1, 1953, inserted "Robeson" and "Nash" therein. The first 1955 amendment inserted "Buncombe" and "Perquimans" in the third paragraph, and the second 1955 amendment inserted "Burke" therein.

The third paragraph was amended several times by the 1957 Session Laws. Chapter 151 inserted the counties of Brunswick, Chowan, Gates, Johnston,

Mecklenburg, Pasquotank, Pender, Sampson, Transylvania and Union. Chapter 166 inserted "Chatham," and chapter 309 inserted "Alexander" and "Caldwell" Chapter 355, effective January 1, 1958, inserted "Moore", and chapter 915 inserted "Greene."

The 1959 amendments inserted Avery, Currituck, Davie, McDowell and Surry counties in the third paragraph.

The 1961 amendment inserted "Iredell" and "Rutherford" in the list of counties in the third paragraph.

The 1969 amendment, effective Oct. 1, 1969, 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, effective Oct. 1, 1969, 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.)

Editor's Note.—

Prior to the 1953 amendment this section appeared as G. S. 105-319.

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, effective Oct. 1, 1969, rewrote the provisions relating to punishment in the last sentence.

ARTICLE 53.

Sale of Weapons.

§ 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.—

The 1959 amendment changed this and other sections of this article by striking out the word "clerk" and the words "clerk of the superior court" wherever they appear and substituting therefor the word "sheriff," it being the intent and purpose of the amendatory act to transfer to the sheriffs the duties now 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.

The 1959 amendatory act, as amended by Session Laws 1963, c. 537, Session Laws 1967, cc. 6, 122, 470, 903, and Session Laws 1969, cc. 6, 109, 276, 396, 1305, provides that it shall not apply to the following counties: Ashe, Avery, Bertie, Bladen,

Cherokee, Clay, 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.

Chapter 470, Session Laws 1967, amends s. 4 of c. 1073, Session Laws 1959, by deleting Harnett and Lee from the list of counties to which the 1959 act shall not apply, but adds at the end of s. 4 the following: "The provisions of this act shall not apply to Lee and Harnett counties, except section 2 which shall be applicable in said counties."

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.)

Cross Reference.—See note to § 14-402.

§ 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.)

Cross Reference.—See note to § 14-402.

Opinions of Attorney General.—Mr. Jay F. Frank, Iredell County Attorney, 10/17/69.

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.

§ 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.)

Cross Reference.—See note to § 14-402.

§ 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, effective Oct. 1, 1969, substituted the provisions for fine or imprisonment in the discretion of the court. vision for fine or imprisonment in the discretion of the court.
 effective Oct. 1, 1969, substituted the provisions as to punishment for a pro-

§ 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, sub-machine 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 shot-guns 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 sub-machine 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.)

Editor’s Note.—See note to § 14-402. paragraph and in the proviso of the same paragraph substituted “thirty-one shots” for “sixteen shots.”
 The 1965 amendment added the provisions pertaining to weapons for scientific or experimental purposes in the second

ARTICLE 53A.

Other Firearms.

§ 14-409.1. **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.)

§ 14-409.2. **“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.**

Local Modification.—Durham: 1963, c. 745; Pender: 1957, c. 113

§ 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 grain for each cap (1947, c. 210, s. 5; 1955 c. 674, s. 1.)

Editor’s Note.—The 1955 amendment added the last sentence. Section 2 of the amendatory act provides that it shall not apply to the following counties: Alleghany, Burke, Caswell, Chatham, Cleveland, Durham, Edgecombe, Gaston, Guilford, Haywood, Hoke, Mecklenburg, Moore, Nash, Pender, Person and Stokes.

Prior to 1959 Session Laws, cc. 310 and

1151, the above list of counties contained “Randolph” and “Buncombe.”

Prior to 1961 Session Laws, c. 815, the above list also contained “New Hanover.” And prior to c. 1031, the list also contained “Alamance” and “Union.”

Prior to 1963, Session Laws c. 629, the list of counties contained “Iredell.”

§ 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, effective Oct. 1, 1969, rewrote the provisions relating to punishment.

ARTICLE 55.

Handling of Poisonous Reptiles.

§ 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, effective Oct. 1, 1969, 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 word "person" means an individual, firm, partnership, limited partnership, corporation or association.
- (2) 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.
- (3) 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.
- (4) 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. (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, effective Oct. 1, 1969, 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

October 24, 1969

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1969 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

ROBERT MORGAN
Attorney General of North Carolina





