GENERAL STATUTES OF NORTH CAROLINA

1982 INTERIM SUPPLEMENT

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1982 INTERIM SUPPLEMENT

Prepared under the Supervision of the Department of Justice
by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
D.P. HARRIMAN, S.C. WILLARD, SYLVIA FAULKNER,
D.E. SELBY, JR., AND K.S. MAWYER

SEP 27 1982

To Be Used With the 1981 Cumulative Supplement

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1982

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This package contains:

THE 1982 INTERIM SUPPLEMENT

TO THE

NORTH CAROLINA GENERAL STATUTES

This 1982 Interim Supplement contains: Chapter 1130 of the Session Laws of 1981, which was enacted too late for inclusion in the 1981 Cumulative Supplement; the general and permanent legislation enacted at the 1982 Extra Session, held in February, 1982; the Second 1982 Extra Session, held in April, 1982; and the 1981 (Regular Session, 1982) Session, held in June, 1982; and annotations from cases decided since the preparation of the 1981 Cumulative Supplement. The 1982 Interim Supplement is to be used in conjunction with the 1981 Cumulative Supplement.

Attention is directed to the fact that General Statutes section numbers appearing in the Session Laws are frequently changed by the State Codifier of Statutes pursuant to G.S. 164-10(3). The location of any act codified in the General Statutes since 1919 can be found by consulting the Table of Laws Codified Subsequent to 1919 in Volume 4A and its 1981 supplement, and preceding the index in this 1982 Interim Supplement.

DO NOT DISCARD YOUR 1981 SUPPLEMENT

THE MICHIE COMPANY
Law Publishers
Charlottesville, Virginia

September, 1982

Preface

This 1982 Interim Supplement to the General Statutes of North Carolina contains Chapter 1130 of the 1981 Regular Session of the General Assembly, which was enacted too late for inclusion in the 1981 Cumulative Supplement, and the general and permanent laws enacted at the First and Second 1982 Extra Sessions, which were held in February and April of 1982, respectively, and the 1981 (Regular Session, 1982) Session, which was held in June of 1982. In addition, this Supplement contains annotations from cases decided since the preparation of the 1981 Cumulative Supplement and available in advance sheets on July 1, 1982, references to opinions of the Attorney General, recent amendments to the rules in the Appendices in Volume 4A, and certain sections and parts of sections set out to correct errors in the 1981 Cumulative Supplement or the replacement volumes.

Scope of Volume

Statutes:

Chapter 1130 of the 1981 Regular Session and permanent portions of the general laws enacted at the First and Second 1982 Extra Sessions and the 1981 (Regular Session, 1982) Session of the General Assembly affecting Chapters 1 through 168 of the General Statutes.

Annotations:

Sources of the annotations:

South Eastern Reporter 2nd Series through Volume 291, p. 488.
Federal Reporter 2nd Series through Volume 677, p. 882.
Bankruptcy Reports through Volume 19, p. 123.
Federal Supplement through Volume 537, p. 323.
Federal Rules Decisions through Volume 93, p. 253.
United States Reports through Volume 453, p. 691.
Supreme Court Reporter through Volume 102, p. 2048.
North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

The General Statutes of North Carolina
1982 Interim Supplement
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CASE NOTES

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Party Must Be Ordered to Appear. — No statute, rule of court or decision mandates the presence of a party to a civil action or proceeding at the trial of, or a hearing in connection with, the action or proceeding unless the party is specifically ordered to appear. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Cannot Appear in Person, etc.

The right to appear in actions either in person or by attorney is alternative, but a party has no right to "appear" both by himself and by counsel. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

A party has the right to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ 1-15. Statute runs from accrual of action.

CASE NOTES

Constitutionality of Subsection (c). — Even if subsection (c) may be vague as to certain classes of occupations because it fails to define "malpractice" or "professional services," it was not vague as to defendant doctor and hospital. Where a term such as "malpractice" or "professional service" has been used over such a lengthy period of time that its usage has given the term well-defined contours, such a term will not be found inadequate. Roberts v. Durham County Hosp. Corp., — N.C. App. —, 289 S.E.2d 875 (1982).

Subsection (c) of this section does not violate the federal constitutional guarantees of equal protection and the North Carolina Constitution's equal protection provision prohibiting exclusive emoluments contained in Article 1, § 32, because it is rationally related to maintaining sufficient medical treatment in this State. Roberts v. Durham County Hosp. Corp., — N.C. App. —, 289 S.E.2d 875 (1982).

Purpose of Subsection (c). — Subsection (c) was passed by the General Assembly in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims. Roberts v. Durham County Hosp. Corp., — N.C. App. —, 289 S.E.2d 875 (1982).

In general a cause of action accrues, etc. —

In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981).

Action on Promissory Note Payable on Demand. — The statute of limitations on an action on a promissory note payable on demand begins to run from the date of the execution of the note. Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

Effect of Partial Payment on Promissory Note. — The limitations period on an action on a promissory note will begin anew when a partial payment, nothing else appearing, is made by the debtor before the limitations period has expired. Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

Applied in Haislip v. Riggs, 534 F. Supp. 95 (W.D.N.C. 1981).

Cited in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981); Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981).

§ 1-17. Disabilities.

Legal Periodicals. —

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

CASE NOTES

Imprisonment Not Included. — This section, which enumerates the disabilities which delay the running of a limitations period, does not include imprisonment. Evans v. Chipps, — N.C. App. —, 287 S.E.2d 426 (1982).

§ 1-22. Death before limitation expires; action by or against personal representative or collector.

CASE NOTES

I. GENERAL CONSIDERATION.

Quoted in Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981).

Cited in Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981).

§ 1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.

CASE NOTES

Quoted in Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

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Limitations, Real Property.

§ 1-38. Seven years' possession under color of title.

Legal Periodicals. —
For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Effect of Holding Portion of Land, etc. — In accord with 1981 Cum. Supp. See Willis v. Johns, — N.C. App. —, 286 S.E.2d 646 (1982).

II. NOTE TO SECTION 1-38.

Proof Required Where Commissioner's Deed Used as Color. — While a commissioner's deed in a judicial sale constitutes color of title, a party who uses a deed to establish color of title must prove that the boundaries in the deed cover the land in dispute. Willis v. Johns, — N.C. App. —, 286 S.E.2d 646 (1982).

Applied in Kennedy v. Whaley, — N.C. App. —, 285 S.E.2d 621 (1982).

§ 1-39. Seizing within twenty years necessary.

CASE NOTES

Applied in Kennedy v. Whaley, — N.C. App. —, 285 S.E.2d 621 (1982).

§ 1-40. Twenty years adverse possession.

CASE NOTES

Applied in Kennedy v. Whaley, — N.C. App. —, 285 S.E.2d 621 (1982).

§ 1-42. Possession follows legal title; severance of surface and subsurface rights.

Legal Periodicals. —
For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

§ 1-42.7. Additional amount mineral claims extinguished in Chatham County; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interest in an area of land has been severed or separated from

the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interest has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1979, any person having the legal capacity to own land in this State, who has on September 1, 1979, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1979, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1979, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1979, all oil, gas or mineral interests in land severed or separated from th surface fee simple ownership must be listed for ad valorem taxes and notice of such interests must be filed in writing in the manner provided by G.S. 1-42.5(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1979.

This section shall apply to Chatham County only. (1979, c. 343, ss. 1, 2.)

Editor's Note. — This section was enacted as § 1-42.5 by Session Laws 1979, c. 343, and was not previously codified.

§ 1-42.8. Ancient mineral claims extinguished in Rutherford County; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land, and this interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another; or that the record titleholder of any oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which it is located for a period of 10 years prior to February 1, 1982, any person having the legal capacity to own land in this State who has on September 1, 1982, an unbroken chain of title of record to the surface estate of the area of land for at least 50 years, and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the surface estate as provided in the succeeding subsections of this section, subject to any interests and defects as are inherent in the provisions and limitations contained in the muniments that form the chain of record title.

(b) This marketable title shall be held by such persons and shall be taken by his successors in interest free and clear of any and all fee simple, oil, gas or mineral interests in the area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 50 years or more prior to September 1, 1982, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any fee simple oil, gas or mineral interest not already extinguished by existing laws may be preserved and kept effective by recording within two years after September 1, 1982, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of the oil, gas or mineral interest and gives the book and page where recorded. This notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein the area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner, and shall also contain either a sufficient description of the area of land involved as to make the property readily located or due incorporation by reference of the recorded instrument containing the reservation or exception of the oil, gas or mineral interest. The notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing the notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished include those of persons whether within or without the State, and whether natural or corporate, but do not include governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from September 1, 1982, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes, and notice of this interest must be filed in writing in the manner provided by G.S. 1-42.3(b) and recorded in the local registry in the book provided by G.S. 1-42 to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina.

(e) The board of county commissioners shall publish a notice of this section in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to September 1, 1982.

(f) This act applies only to Rutherford County. (1981 (Reg. Sess., 1982), c. 1391, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1391, s. 2, provides: "This act does not revive any oil, gas or mineral interests that have been extinguished under the provisions of any prior law."

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

CASE NOTES

Cited in Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981); Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

§ 1-47. Ten years.

CASE NOTES

I. IN GENERAL.

Applied in Larsen v. Sedberry, 54 N.C. App. 166, 282 S.E.2d 551 (1981).

IV. SUBDIVISION (2) — SEALED INSTRUMENTS.

Effect of Partial Payment on Promissory Note. — The limitations period on an action on a promissory note will begin anew when a partial payment, nothing else appearing, is made by the debtor before the limitations period has expired. Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

§ 1-50. Six years.

CASE NOTES

VI. Subdivision (6) — Defective Product.

I. IN GENERAL.

Applied in Martin v. Smith, 534 F. Supp. 804 (W.D.N.C. 1982).

Cited in Moore v. Moody, — N.C. —, 285 S.E.2d 811 (1982); Tyson v. North Carolina Nat'l Bank, — N.C. —, 286 S.E.2d 561 (1982).

V. SUBDIVISION (5) — DEFECTIVE CONDITION OF IMPROVEMENT TO REAL PROPERTY.

Constitutionality. — The class created by subdivision (5) as it stood prior to the 1981 amendment had a rational basis and it did not violate the U.S. Const., amend. 14 or the law of the land clause of N.C. Const., Art. I, § 19. Lamb v. Wedgewood S. Corp., — N.C. App. —, 286 S.E.2d 876 (1982).

Subdivision (5), as it stood prior to the 1981 amendment, did not grant an exclusive or separate emolument or privilege in contravention of N.C. Const., Art. I, § 32. Lamb v. Wedgewood S. Corp., — N.C. App. —, 286 S.E.2d 876 (1982).

The General Assembly could bar a claim under subdivision (5) as it stood prior to the 1981 amendment which arose more than six years after the last act of the architects against whom the claim was asserted without denying access to the courts in contravention of Const., Art. I, § 18. Lamb v. Wedgewood S. Corp., — N.C. App. —, 286 S.E.2d 876 (1982).

VI. SUBDIVISION (6)—DEFECTIVE PRODUCT.

Constitutionality. — Subdivision (6), because it would absolutely abolish rights to seek redress for injuries, on its face violates N.C. Const., Art. I, § 18, and is unconstitutional and void. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981).

The attempt by the enactment of subdivision (6) to abrogate the right of access to the courts of a person who sustains injury, death, or property damage due to a defect or failure of a product, violates N.C. Const., Art. I, § 18. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981).

Effect. — Because this subdivision (6) attempts to bar absolutely claims arising out of defects or failures in relation to products after a period measured from a date other than the date of accrual of those claims, it does not constitute a statute of limitation; rather, it would, as a matter of substantive law, abolish certain claims recognized prior to its enactment. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981).

Dismissal on Ground of Former § 1-15(b) Error. — In a tort and breach of warranties action the trial court erred in dismissing plaintiffs' negligence and strict liability claims instituted in 1979 for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer on the ground that the claims were barred by the three year limitation of former § 1-15(b) where plaintiffs alleged that the link between their physical injuries and gas fumes in the vehicle was not discovered until 1978, since the claim did not accrue until the injury was discovered or ought reasonably to have been discovered, and whether plaintiffs should have discovered the invasion of their legal rights prior to 1978 was a question for the jury. Gillespie v. American Motors Corp., 51 N.C. App. 535, 277 S.E.2d 100 (1981).

§ 1-52. Three years.

CASE NOTES

XII. Subdivision (16) — Accrual of Actions for Personal Injury or Property Damage.

I. IN GENERAL.

Title VII Litigation. —

The three-year limitations period found in this section is the appropriate limitations period for employment discrimination claims where there is no specific federal statute of limitations. Chisholm v. United States Postal Serv., 516 F. Supp. 810 (W.D.N.C. 1980).

Applied in Hill v. Lassiter, 51 N.C. App. 34, 275 S.E.2d 237 (1981).

Quoted in Selby v. Taylor, — N.C. App. —, 290 S.E.2d 767 (1982).

Stated in Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981); Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981); Chesire v. Carolina Power & Light Co., 54 N.C. App. 467, 283 S.E.2d 810 (1981); Poore v. Swan Quarter Farms, Inc., — N.C. App. —, 290 S.E.2d 799 (1982).

Cited in Gaskins v. McCotter, 52 N.C. App. 322, 278 S.E.2d 302 (1981); Tyson v. North Carolina Nat'l Bank, 53 N.C. App. 189, 280 S.E.2d 478 (1981); Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981); Terry v. Lowrance Hosp., 54 N.C. App. 663, 284 S.E.2d 128 (1981); Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981).

II. SUBDIVISION (1) — CONTRACTS.

The statute begins to run, etc. —

In accord with 2nd paragraph in 1981 Cum. Supp. See Flexolite Elec., Ltd. v. Gilliam, — N.C. App. —, 284 S.E.2d 523 (1981).

Breach of Fiduciary Duty of Executor and Trustee under will. — The fiduciary

duties of an executor and trustee under a will are essentially contractual in nature and any failure to perform in compliance with the duties as a fiduciary is tantamount to a breach of contract; hence, a beneficiary's action to enforce the terms of the arrangment and to recover damages sustained by reason of defendant's breach of fiduciary duty, being essentially grounded in contract, is subject to the three-year limitation of subdivision (1) of this section. Tyson v. North Carolina Nat'l Bank, — N.C. —, 286 S.E.2d 561 (1982).

III. SUBDIVISION (2) — LIABILITY CREATED BY STATUTE.

Claims under 42 U.S.C. §§ 1983 and 1985 (3). — For actions brought under 42 U.S.C. §§ 1983 and 1985 (3), the applicable limitations period is determined by reference to state law, and is three years, which is the time limitation prescribed by subdivision (2) of this section for actions founded on a liability created by statute, either state or federal. Evans v. Chipps, — N.C. App. —, 287 S.E.2d 426 (1982).

V-A. SUBDIVISION (5)—INJURY TO PERSON OR RIGHTS OF ANOTHER.

If the complaint seeks recovery for the intentional infliction of mental distress, etc. —

No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, subdivision (5) of this section, and not by the one-year statute, § 1-54(3). Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

A cause of action for malicious prosecution is subject to a three-year limitation period under subdivision (5) of this section. Evans v. Chipps, — N.C. App. —, 287 S.E.2d 426 (1982).

IX. SUBDIVISION (9) — FRAUD OR MISTAKE.

Knowledge of Law of Fraud Not Required for Action to Accrue. — Knowledge of the law governing alleged fraud is not included in the subdivision (9) requirement of knowledge of the facts constituting the alleged fraud. Hiatt v. Burlington Indus., Inc., — N.C. App. —, 286 S.E.2d 566 (1982).

XII. SUBDIVISION (16)—ACCRUAL OF ACTIONS FOR PERSONAL INJURY OR PROPERTY DAMAGE.

Dismissal on Ground of Former § 1-15(b) Error. — In a tort and breach of warranties action the trial court erred in dismissing plaintiffs' negligence and strict liability claims instituted in 1979 for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer on the ground that the claims were barred by the three year limitation of former § 1-15(b) where plaintiffs alleged that the link between their physical injuries and gas fumes in the vehicle was not discovered until 1978, since the claim did not accrue until the injury was discovered or ought reasonably to have been discovered, and whether plaintiffs should have discovered the invasion of their legal rights prior to 1978 was a question for the jury. Gillespie v. American Motors Corp., 51 N.C. App. 535, 277 S.E.2d 100 (1981).

§ 1-53. Two years.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

CASE NOTES

I. SUBDIVISION (1)—POLITICAL SUBDIVISIONS OF STATE.

Actions for Damages Based on Torts. — This section does not apply to tort actions. Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

§ 1-54. One year.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

CASE NOTES

Subdivision (3) — Action for Intentional Infliction of Mental Distress. —

No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, § 1-52(5), and not by subdivision (3) of this section. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Applied in Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

Stated in Selby v. Taylor, — N.C. App. —, 290 S.E.2d 767 (1982).

Cited in Evans v. Chipps, — N.C. App. —, 287 S.E.2d 426 (1982).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, ten years.

CASE NOTES

I. IN GENERAL.

Cited in Hill v. Lassiter, 51 N.C. App. 34, 275 S.E.2d 237 (1981).

II. ACTIONS TO WHICH APPLICABLE.

A resulting or constructive trust, etc. —

Actions seeking to impose a constructive trust or to obtain an accounting involve conduct which approaches the level of fraud, and for that reason the 10-year statute, this section, applies. Tyson v. North Carolina Nat'l Bank, — N.C. —, 286 S.E.2d 561 (1982).

An action for relief against an executor, etc. —

The 10-year statute of limitations provided in this section applied to a claim for damages for breach of fiduciary duty in the administration of a deceased's estate. Tyson v. North Carolina Nat'l Bank, 53 N.C. App. 189, 280 S.E.2d 478 (1981).

Action for Injunction Prohibiting Practice of Podiatry. — The 10-year statute of limitations of this section did not bar an action by the Board of Podiatry Examiners seeking an injunction prohibiting the practice of podiatry by a defendant who opened a foot clinic some 30 years earlier since defendant's violation of the podiatry statutes is an ongoing violation, and defendant was unlawfully practicing podiatry at the time the action was filed. Costin v. Shell, 53 N.C. App. 117, 280 S.E.2d 42, petition for discretionary review denied, 304 N.C. 193, 285 S.E.2d 97 (1981).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.2. Definitions.

CASE NOTES

Defendant Must Be Legal Entity. — The defendant in a civil action must be an existing legal entity, either natural or artificial; however, it is not necessary to allege in the complaint what type of legal entity the defendant is. Rollins v. Junior Miller Roofing Co., — N.C. App. —, 284 S.E.2d 697 (1981).

§ 1-75.4. Personal jurisdiction, grounds for generally.

CASE NOTES

Purpose of Section. —
This section, commonly referred to as the "long-arm" statute, is a legislative attempt to allow the courts of this State to assert in personam jurisdiction to the full extent permitted by the due process clause of the United States Constitution. Kaplan School Supply Corp. v. Henry Wurst, Inc., — N.C. App. —, 289 S.E.2d 607 (1982).

Liberal Construction. —
In accord with 2nd paragraph in 1981 Cum. Supp. See Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981); Kaplan School Supply Corp. v. Henry Wurst, Inc., — N.C. App. —, 289 S.E.2d 607 (1982).

The resolution of the question of in personam jurisdiction, etc. —
In accord with 1st paragraph in 1981 Cum. Supp. See Kaplan School Supply Corp. v. Henry Wurst, Inc., — N.C. App. —, 289 S.E.2d 607 (1982).

Due process, and not language of statute, etc. —
Since the requisite statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion thereof comports with due process. Kaplan School Supply Corp. v. Henry Wurst, Inc., — N.C. App. —, 289 S.E.2d 607 (1982).

And Due Process Requires Minimum Contacts, etc. —
In addition to meeting the statutory requirements, in order for a court to exercise its jurisdiction the defendant must be found to have certain minimum contacts with the State in compliance with due process requirements. Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

Holder of Note Secured by Deed of Trust on Property Within State. — This section does not give a North Carolina district court jurisdiction in personam over the out-of-state holder of a part interest in a note secured by a deed of trust on property in North Carolina or to do so would violate the rule expressed by the United States Supreme Court in Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). Whitener v. Whitener, — N.C. App. —, 289 S.E.2d 887 (1982).

Applied in Russell v. Tenore, — N.C. App. —, 284 S.E.2d 521 (1981); Robinson v. Robinson, — N.C. App. —, 289 S.E.2d 612 (1982).

§ 1-75.7. Personal jurisdiction — grounds for without service of summons.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

Waiver of Right to Object, etc. —
Where defendant made a general appearance before filing a motion contesting personal jurisdiction, he waived his right to challenge the court's exercise of personal jurisdiction over him from that date forward. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Quoted in Southgate v. Russ, 52 N.C. App. 364, 278 S.E.2d 313 (1981).

§ 1-75.10. Proof of service of summons, defendant appearing in action.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-78. Official bonds, executors and administrators.

CASE NOTES

Quoted in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

§ 1-82. Venue in all other cases.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Stated in Holland v. Gryder, 54 N.C. App. 490, 283 S.E.2d 792 (1981).

§ 1-83. Change of venue.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

IV. APPEAL.

B. Convenience of Witnesses and Ends of Justice Promoted.

Abuse of Discretion. —
In accord with 1981 Cum. Supp. See Holland v. Gryder, 54 N.C. App. 490, 283 S.E.2d 792 (1981).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

ARTICLE 9.

Prosecution Bonds.

§ 1-110. Suit as a pauper; counsel.

CASE NOTES

Appointment of Counsel in Action under § 42 U.S.C. § 1983. — Absent a showing of abuse of discretion, the trial court's refusal to appoint counsel for plaintiff in an action under 42 U.S.C. § 1983 "to obtain redress for the deprivation, under color of state law, of rights secured by the United States Constitution" was not a violation of this section. Loren v. Jackson, — N.C. App. —, 291 S.E.2d 310 (1982).

ARTICLE 10.

Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.

Legal Periodicals. — For a note on acquiring diversity jurisdiction over an unincorporated association, see 60 N.C.L. Rev. 194 (1981).

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.

CASE NOTES

In General. —

In accord with 1st paragraph in original. See Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

In accord with 1981 Cum. Supp. See Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

This section and §§ 1-118 and 47-18 serve to provide record notice upon the absence of which a prospective innocent purchaser may rely. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

§ 1-118. Effect on subsequent purchasers.

CASE NOTES

The purpose of this section is to supplement the registration statute by providing a simple and readily available means of ascertaining the existence of adverse claims to property not otherwise disclosed by the public registry. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Effect of Lis Pendens Statutes. —
In accord with 1981 Cum. Supp. See Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

This section and §§ 1-116 and 47-18 serve to provide record notice upon the absence of which a prospective innocent purchaser may rely. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Cited in Huff v. Trent Academy of Basic Educ., Inc., 53 N.C. App. 113, 280 S.E.2d 17 (1981).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

Trial.

§ 1-174. Issues of fact before the clerk.

CASE NOTES

Cited in Hill v. Smith, 51 N.C. App. 670, 277 S.E.2d 542 (1981).

§ 1-181. Requests for special instructions.

CASE NOTES

Section Mandatory. —
The trial court is not required to give a requested instruction in the exact language of the request; however, when the request is correct in law and supported by the evidence in the case, the court must give the instructions in substance, and it is error for the court to change the sense or to so qualify the requested instruction as to weaken its force. State v. Puckett, 54 N.C. App. 576, 284 S.E.2d 326 (1981).

Cited in State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

CASE NOTES

Consent Required to Set Aside Consent Judgment. — The law of this State is well-settled that a consent judgment cannot be modified or set aside, absent fraud or mutual mistake, without the consent of the parties. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Change in or Misconstruction of Law Not Grounds to Set Aside Consent Judgment. — A consent order is a final and binding decree. Neither a subsequent change in the law, nor counsel's misconstruction of the law at the time the consent order was entered, is a ground for setting aside the order. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

A consent judgment will not be set aside even where a statute upon which it was predicated was later declared unconstitutional. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Procedure to Set Aside Consent Judgment — In General. — Even with the consent of the parties, a consent judgment may not be later opened, changed or set aside unless the appropriate legal proceeding is instituted. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Same — For Want of Consent. — The proper procedure to set aside the judgment for reasons of want of consent is by a motion in the cause. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Same — For Fraud or Mistake. — The proper procedure to vacate a consent judgment for fraud or mutual mistake is by an independent action. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

The entry of default by the clerk is not a final judgment and it is not appealable; rather, it is an interlocutory act looking toward the subsequent entry of a final judgment by default. However, an exception to such an interlocutory order, properly preserved, may be reviewed on an appeal from the final judgment. Looper v. Looper, 51 N.C. App. 569, 277 S.E.2d 78 (1981).

Cited in Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981).

Article 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

CASE NOTES

Applied in Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473 (1981).

Cited in Nationwide Mut. Ins. Co. v. Taylor, — N.C. App. —, 284 S.E.2d 532 (1981); Bowlin v. Bowlin, — N.C. App. —, 285 S.E.2d 273 (1981); Bowens v. Board Law Exmrs., — N.C. App. —, 291 S.E.2d 170 (1982).

§ 1-258. Review.

CASE NOTES

Findings of Fact Conclusive. — The trial court's findings of fact in a declaratory judgment are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed even though there is evidence which might sustain findings to the contrary and even though incompetent evidence may have been admitted. Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.

CASE NOTES

Cited in Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473 (1981).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-271. Who may appeal.

CASE NOTES

Parties of Record. —
In accord with original. See In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).
Cited in Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981); Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982).

§ 1-272. Appeal from clerk to judge.

CASE NOTES

Construed in Pari Materia with § 1-276.—
Section 1-276, giving the power to the superior court judge to determine all matters in controversy when a special proceeding is transferred for any ground from the clerk, must be construed in pari materia with this section. Journeys Int'l, Inc. v. Corbett, 53 N.C. App. 124, 280 S.E.2d 5 (1981).
Cited in Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 289 S.E.2d 134 (1982).

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

CASE NOTES

Applied in Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).
Quoted in Davidson v. Gaston County Dep't of Social Servs., — N.C. App. —, 290 S.E.2d 399 (1982).
Stated in Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981).

§ 1-276. Judge determines entire controversy; may recommit.

CASE NOTES

Construed in Pari Materia with § 1-272.— This section must be construed in pari materia with § 1-272, which allows appeals from the clerk only by parties aggrieved. Journeys Int'l, Inc. v. Corbett, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

Quoted in Davidson v. Gaston County Dep't of Social Servs., — N.C. App. —, 290 S.E.2d 399 (1982).

§ 1-277. Appeal from superior or district court judge.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

II. APPEAL IN GENERAL.

A. General Consideration.

Reason for This Section. —
The reason for this section and §§ 7A-27 and 1A-1, Rule 54, is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Who May Appeal. — An appeal must be prosecuted by the aggrieved real party in interest. Carawan v. Tate, — N.C. —, 286 S.E.2d 99 (1982).

Applicability of Subsection (b). — The right of immediate appeal of an adverse ruling as to jurisdiction over the person, under subsection (b) of this section, is limited to rulings on "minimum contacts" questions. To the extent that they are inconsistent with this interpretation, the decisions in Kahan v. Lonzigiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980); Smith v. American Radiator & Standard Sanitary Corp., 38 N.C. App. 457, 248 S.E.2d 462, cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1978); Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975), are overruled. Love v. Moore, — N.C. —, 291 S.E.2d 141 (1982).

Subsection (b) of this section applies to the State's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. If the court has the jurisdictional power to require that the party defend and the challenge is merely to the process or service used to bring the party before the court, subsection (b) of this section does not apply. Love v. Moore, — N.C. —, 291 S.E.2d 141 (1982).

Construing under subsection (b) of this section to the general rule of nonappealability of interlocutory orders as applying only to cases involving the court's authority to require the defendant to come into court — whether that authority arises from jurisdiction in personam, quasi in rem or in rem — will allow immediate appeals concerning only "minimum contacts" questions and will leave for appeals from final judgment the questions of technical error involving service and process. In the former, the issue is whether the courts of this State have any right to force the defendant to a trial; in the latter, the authority to bring the defendant into court is unquestioned, the issue being whether there is any technical error in the attempt of the plaintiff to invoke that jurisdiction. Allowing an immediate appeal only for "minimum contacts" jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than "minimum contacts" with this State will never be forced to trial against their wishes. Love v. Moore, — N.C. —, 291 S.E.2d 141 (1982).

Applied in Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981); Boyce v. Boyce, 51 N.C. App. 422, 276 S.E.2d 494 (1981); Briggs v. Mid-State Oil Co., 53 N.C. App. 203, 280 S.E.2d 501 (1981); Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982).

Stated in Bacon v. Leatherwood, 52 N.C. App. 587, 279 S.E.2d 86 (1981); Journeys Int'l, Inc. v. Corbett, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

Cited in Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889 (1981); Harris v. Jim Stacy Racing, Inc., 53 N.C. App. 597, 281 S.E.2d 455 (1981); Southern Spindle & Flyer Co. v. Milliken & Co., 53 N.C. App. 785, 281 S.E.2d 734 (1981); Glyk & Assocs. v. Winston-Salem Southbound Ry., — N.C. App. —, 285 S.E.2d 277 (1981); Patterson v. Phillips, — N.C. App. —, 289 S.E.2d 48 (1982).

B. From What Decisions, Orders, etc., Appeal Lies.

Final Judgment. —

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

Extent to Which Certification, etc. —

Actions by the trial court, if not final or if final but not properly certified by the trial judge pursuant to Rule 54(b), are nonetheless immediately appealable if the denial of an immediate appeal would affect a substantial right and work an injury to the appellant. Harris v. DePencier, 52 N.C. App. 161, 278 S.E.2d 759 (1981).

Interlocutory Orders. —

In accord with 8th paragraph in 1981 Cum. Supp. See Shaw v. Pedersen, 53 N.C. App. 796, 281 S.E.2d 700 (1981).

Where an interlocutory order "affects a substantial right" of the party appealing or "in effect determines the action and prevents a judgment from which an appeal might be taken" the party has a right to appeal under this section or § 7A-27. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

While final judgments are always appealable, interlocutory decrees are immediately appealable only when they affect some substantial right of the appellant and will cause an injury to him if not corrected before an appeal from final judgment. Ball v. Ball, — N.C. App. —, 284 S.E.2d 555 (1981).

III. APPEAL AS TO PARTICULAR SUBJECTS.

G. Appeals as to Miscellaneous Subjects.

Denial of Motion Challenging Subject Matter Jurisdiction. — Subsection (b) of this section has no application in the denial of a motion challenging "subject matter" jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. Shaver v. N.C. Monroe Constr. Co., 54 N.C. App. 486, 283 S.E.2d 526 (1981).

The denial of a motion to strike an order vacating a default judgment does not affect a substantial right within the meaning of this section. Love v. Moore, — N.C. —, 291 S.E.2d 141 (1982).

An interlocutory order denying a motion for jury trial in a proceeding to terminate parental rights affects a substantial right and is immediately appealable. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

Summary Judgment on Dependent Claim. — Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to § 7A-27(d). Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970) and other prior decisions recognizing a right of immediate appeal from orders and awards pendente lite are overruled. Thus, where a husband in a divorce action appealed an order by the trial court for alimony pendente lite, child support pendente lite, and attorney fees pendente lite, the appeal was premature and therefore was dismissed. Stephenson v. Stephenson, — N.C. App. —, 285 S.E.2d 281 (1981).

Order Allowing Assertion of Counterclaims only as Set-offs. — In an action arising out of a contract whereby defendants agreed to construct a house on a piece of property owned by them and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass but allowing defendants to assert these counterclaims as set-offs to plaintiffs' claim was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Order to Allow Surveyor to Enter upon Land. — Interlocutory order by which defendants are simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property is not appealable. Ball v. Ball, — N.C. App. —, 284 S.E.2d 555 (1981).

§ 1-279. Manner and time for taking appeal in civil action or special proceeding.

CASE NOTES

Letter to Clerk Not Notice of Appeal. — In an action challenging a divorce judgment where the defendant wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, the letter was not a written notice of appeal showing that the defendant sought a review by the Court of Appeals but was a Rule 59 motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

Applied in Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981).

Cited in Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); Rokes v. Rokes, — N.C. App. —, 285 S.E.2d 306 (1982).

§ 1-289. Undertaking to stay execution on money judgment.

CASE NOTES

Applicability to Alimony Order. — This section is applicable only in cases involving a "judgment directing the payment of money," and the courts have generally held that an order requiring the payment of alimony is a "judgment directing the payment of money." Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

Portions of a judgment requiring a defendant to pay alimony and counsel fees constituted a "judgment directing the payment of money" within the meaning of this section, and the court had authority to require the defendant to post a bond in order to stay execution pending appeal of the judgment; however, the court did not have the authority under this section to dismiss the defendant's appeal for failure of the defendant to post the required bond but had authority only to dissolve any stay already issued. Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

Stated in Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

§ 1-290. How judgment for personal property stayed.

CASE NOTES

Effect on Appeal of Failure to Post Bond. — While this section and § 1-292 give the court authority to stay execution on a judgment requiring a party to transfer personal and real property upon the posting of a bond, the court has no authority to dismiss an appeal for an appellant's failure to post the bond. Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

§ 1-292. How judgment for real property stayed.

CASE NOTES

Bond Not Condition of Appeal. —

While § 1-290 and this section give the court authority to stay execution on a judgment requiring a party to transfer personal and real property upon the posting of a bond, the court has no authority to dismiss an appeal for an appellant's failure to post the bond. Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

§ 1-294. Scope of stay; security limited for fiduciaries.

CASE NOTES

Authority of Lower Court Terminated. — Where defendant appealed an order with respect to child visitation privileges, the trial court was without jurisdiction pending the appeal to entertain plaintiff's motion in the cause seeking to have defendant adjudged in contempt for failure to comply with the order appealed from and seeking to have the order modified. Webb v. Webb, 50 N.C. App. 677, 274 S.E.2d 888 (1981).

Cited in Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

§ 1-298. Procedure after determination of appeal.

CASE NOTES

The mandate of an appellate court is binding on the trial court, which must strictly adhere to its holdings. Campbell v. First Baptist Church, 51 N.C. App. 393, 276 S.E.2d 712 (1981).

Interpreting Expressions of Appellate Court. — Expressions contained in an appellate court decision must be interpreted in the context of the factual situation under review, or the framework of the particular case. Campbell v. First Baptist Church, 51 N.C. App. 393, 276 S.E.2d 712 (1981).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-305. Clerk to issue, in six weeks; penalty; limitations on issuance.

(a) Subject to the provisions of G.S. 1A-1 (Rule 62) and subsection (b) below, the clerk of superior court shall issue executions on all unsatisfied judgments rendered in his court, which are in full force and effect, upon the request of any party or person entitled thereto and upon payment of the necessary fees; provided, however, that the clerks of the superior court shall issue executions on all judgments rendered in their respective courts on forfeiture of bonds in criminal cases within six weeks of the rendition of the judgment, without any request or any advance payment of fees. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars ($100.00) for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond.

(b) The clerk may not issue an execution unless

(1) The judgment debtor's exemptions have been designated, or

(2) The judgment debtor has waived his exemptions as provided in G.S. 1C-1601(c), or

(3) The clerk determines that the exemptions are inapplicable to the particular claim as authorized by G.S. 1C-1603(a)(3). (1850, c. 17, ss. 1, 2, 3; R. C., c. 45, s. 29; Code, s. 470; Rev., s. 618; C. S., s. 666; 1953, c. 470; 1959, c. 1295; 1973, c. 1070, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 15.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, designated the former provisions of this section as subsection (a) and added subsection (b). In present subsection (a), the amendment inserted "and subsection (b) below" near the beginning of the first sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

Article 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.

Legal Periodicals. —
For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

Article 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.47. Sale to be made for cash.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

Article 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

CASE NOTES

Stated in Wright v. Wright, — N.C. —, 289 S.E.2d 347 (1982).

ARTICLE 31.

Supplemental Proceedings.

§ 1-359. Debtors of judgment debtor may satisfy execution.

CASE NOTES

Payment by Bank of Amount in Debtor's Account. — Under this section a bank voluntarily can pay, if it chooses, to the sheriff the amount in a judgment debtor's bank account when it is notified that there is an outstanding writ of execution against its depositor. Faught v. Branch Banking & Trust Co., 53 N.C. App. 132, 280 S.E.2d 26 (1981).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

CASE NOTES

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-410. In what cases arrest allowed.

Legal Periodicals. — For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

ARTICLE 37.

Injunction.

§ 1-485. When preliminary injunction issued.

CASE NOTES

I. GENERAL CONSIDERATION.

Appeal. —

In accord with original. See State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981).

III. GROUNDS OF RELIEF.

C. Application of Section.

When Temporary Injunction Granted. — In accord with original. See State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

§ 1-502. In what cases appointed.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

§ 1-505. Sale of property in hands of receiver.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-538.1. Strict liability for damage to person or property by minors.

CASE NOTES

Cited in Moore v. Crumpton, — N.C. App. —, 285 S.E.2d 842 (1982).

ARTICLE 43D.

Abolition of Parent-Child Immunity in Motor Vehicle Cases.

§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases.

CASE NOTES

"Arising Out of the Operation of a Motor Vehicle". — In an action seeking recovery for personal injuries sustained by plaintiff when defendant's vehicle struck plaintiff after she exited her mother's car to "trick or treat" and ran in front of defendant's car, the trial court erred in dismissing defendant's third-party complaint against plaintiff's mother for contribution, since the allegations of the third-party complaint stated a cause of action for contribution for the mother's negligence "arising out of the operation of a motor vehicle." Snow v. Nixon, 52 N.C. App. 131, 277 S.E.2d 850 (1981).

Cited in Furr v. Pinoca Volunteer Fire Dep't, 53 N.C. App. 458, 281 S.E.2d 174 (1981); Carver v. Carver, — N.C. App. —, 286 S.E.2d 799 (1982).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

CASE NOTES

I. GENERAL CONSIDERATION.

A plea of accord and satisfaction is recognized as a method, etc. —

In accord with original. See Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

Elements of Accord and Satisfaction. —

In accord with original. See Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

The word "agreement," etc. —

In accord with original. See Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

Agreements are reached by an offer, etc. —

In accord with original. See Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

IV. PROCEDURE.

When Accord and Satisfaction Question of Law. — Normally, the existence of an accord and satisfaction is a question of fact for the jury. But where the only reasonable inference is existence or nonexistence, accord and satisfaction is a question of law and may be

adjudicated by summary judgment when the essential facts are made clear of record. Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.

CASE NOTES

Applied in Carver v. Carver, — N.C. App. —, 286 S.E.2d 799 (1982).

§ 1-540.3. Advance payments.

CASE NOTES

Legislative Purpose. — The obvious purpose of the legislature in enacting this section was to alleviate the harsh consequences of application of the accord and satisfaction doctrine to personal injury cases and to encourage the making of partial payments to the claimant prior to an agreement on a final settlement. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

Effect of Section. — As a result of this statute, seriously injured persons who require long-term medical treatment can now accept piecemeal payments from an insurer before any determination of liability, and those payments represent neither an admission of liability on the part of the insurer nor full satisfaction of the injured party's claims. Under the present law, acceptance of partial or advance payments, absent a properly executed full settlement agreement, does not bar the party receiving the payments from suing on the underlying claim. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

Intent of Parties Determines Whether Payment Partial or Final. — Although this section is concerned solely with advance or partial payments, it nowhere defines those terms or indicates how the character of the payment is to be determined. Whether the payment was partial or final under the statute depends upon the intent of the parties giving and receiving it. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

And the determination of intent is a question of fact and, therefore, can be resolved only by the trier of fact unless the evidence of intent is undisputed. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

Issue of Fact Created Absent Settlement Agreement. — Absent a properly executed settlement agreement, a claimant's testimony that he or she, at the time of the agreement, intended the settlement to be partial or advance creates an issue of fact and is enough to take the case to the jury. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

Power to Order Reimbursement of Payment in Final Settlement. — This section, by its express terms, applies only to partial or advance payment and prohibits claims for reimbursement only when the payment made was partial or advance; it does not affect the power of a trial judge to order reimbursement when the payment or payments made were in final settlement of all claims. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

Reimbursement Order Improper Where Issue of Fact Existed. — In an action to recover for personal injuries sustained by plaintiff in an automobile accident where there was an issue of fact as to whether a payment made to plaintiff by defendants' insurer was a partial or final settlement, the trial court's reimbursement order with which plaintiff did not comply was improperly entered, since under this section acceptance of partial or advance payments, absent a properly executed full settlement agreement, does not bar the party receiving the payments from suing on the underlying claims. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

ARTICLE 45A.

Arbitration and Award.

§ 1-567.1. Short title.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

CASE NOTES

Attempt to Frustrate Federal Arbitration by Filing State Action. — Where a construction contract contained a broad arbitration clause, the "reactive" filing of a state declaratory action by one party, asserting the nonarbitrability of a dispute before the other party had any real opportunity to seek arbitration, could not frustrate the right of the other party to an order of arbitration by the federal district court pursuant to the Federal Arbitration Act. Mercury Constr. Corp. v. Moses H. Cone Mem. Hosp., 656 F.2d 933 (4th Cir.), rehearing denied, 664 F.2d 936 (4th Cir. 1981).

§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.

CASE NOTES

Legislative Intent. — By enacting this Article the legislature intended to encourage parties to submit disputed matters to arbitration when it is feasible and expedient for them to do so. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Existence of Agreement to Arbitrate. — General contract law governs the issue of the existence of an agreement to arbitrate. Southern Spindle & Flyer Co. v. Milliken & Co., 53 N.C. App. 785, 281 S.E.2d 734 (1981).

Party Must Be Content with Results. — Public policy includes the judicial admonition that a party who has accepted this form of adjudication must be content with the results. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Disputes concerning spousal support are arbitrable under this section. Crutchley v. Crutchley, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

§ 1-567.3. Proceedings to compel or stay arbitration.

CASE NOTES

Stated in Southern Spindle & Flyer Co. v. Milliken & Co., 53 N.C. App. 785, 281 S.E.2d 734 (1981).

Cited in R.B. Brunemann & Sons v. Duke Univ., 533 F. Supp. 365 (M.D.N.C. 1982).

§ 1-567.5. Majority action by arbitrators.

CASE NOTES

Quoted in Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

§ 1-567.13. Vacating an award.

CASE NOTES

Attacks on Regularity or Fairness of Awards Generally. — The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

An arbitration award is ordinarily presumed valid. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

And the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the arbitrators acted improperly. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Arbitrators Generally Required to Be Impartial. — Public policy generally requires that arbitrators be impartial and that they have no connection with the parties involved or the subject matter of the dispute. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

But May Be Acquainted with Case or Parties. — This section by its terms, does not necessarily prevent parties from accepting arbitrators who they know are acquainted in some way with the case or the parties. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Defendant was not entitled to have an arbitration award set aside under subdivision (a)(2) of this section because the arbitrator appointed by plaintiff had prior knowledge of the facts and a business connection with plaintiff where the written arbitration agreement between the parties shows that defendant accepted the arbitrator appointed by plaintiff with full knowledge of his business dealings with plaintiff and the possible bias that could result from that connection. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Partiality of Arbitrator Not Appointed as Neutral. — This section does not provide relief from an award when there is "evident partiality" by an arbitrator who is not appointed as a neutral or umpire. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Waiver of Disability of Arbitrator. — The disability of an arbitrator is waived if the complaining party had prior knowledge of it. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

§ 1-567.14. Modification or correction of award.

CASE NOTES

Waiver after 90-Day Period. — Where plaintiff filed a motion requesting modification of an order confirming an arbitration award and the award itself so as to increase the amount for alimony and child support more than 90 days after delivery of a copy of the award, he waived his ability to contend that the award was imperfect. Crutchley v. Crutchley, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

§ 1-567.18. Appeals.

CASE NOTES

Stated in Crutchley v. Crutchley, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

Article 50.

General Provisions as to Legal Advertising.

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.

CASE NOTES

Legislative Intent. — The legislature intended that this section apply to all legal notices required to be published in newspapers. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

The term "general circulation," when applied to newspapers, refers not so much to the numerical or geographic distribution of the newspaper as it does to the contents of the paper itself. The primary consideration is whether the newspaper contains information of general interest. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

A newspaper of general circulation is a publication to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinions, and advertisements, and thereby to render it probable that a "notice" would be brought to the attention of the general public. Great S. Media, Inc. v. McDowell County, 50 N.C. App. 705, 275 S.E.2d 226, aff'd, 304 N.C. 427, 284 S.E.2d 457 (1981).

Whether a newspaper is one of general circulation is not determined merely by the number of its subscribers, but by the diversity of those subscribers, and even if the newspaper is of particular interest to a particular class of persons, if it contains news of a general character and interest to the community, although that news may be limited in amount, the newspaper qualifies as one of general circulation. Great S. Media, Inc. v. McDowell County, 50 N.C. App. 705, 275 S.E.2d 226, aff'd, 304 N.C. 427, 284 S.E.2d 457 (1981).

Newspaper Publishing Notices of Tax Lien Sales. — In order to qualify to publish notices of tax lien sales a newspaper must meet the "general circulation" requirements of both §§ 105-369(d), and this section. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Reading both this section and § 105-369(d) together and giving effect to each, in order for a newspaper to qualify to publish notices of tax lien sales it must be a newspaper of general circulation to actual paid subscribers in the taxing unit. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

For a newspaper to be one of general circulation to actual paid subscribers in the taxing unit, as is required by this section and § 105-369(d), it must meet a four-pronged test: first, it must have a content that appeals to the public generally; second, it must have more than a de minimis number of actual paid subscribers in the taxing unit; third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit; fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

The "general circulation" provision in § 105-369(d) does not conflict with its counterpart in this section. It simply specifies the geographic area, i.e., "the taxing unit" in which there must be a newspaper of general circulation and the times at which publication must be made. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

A newspaper publishing notices of tax lien sales must be one with a "general circulation to actual paid subscribers" as required by this section rather than merely one of "general circulation in the taxing unit" as required by § 105-369(d). Great S. Media, Inc. v. McDowell County, 50 N.C. App. 705, 275 S.E.2d 226, aff'd, 304 N.C. 427, 284 S.E.2d 457 (1981).

§ 1-599. Application of two preceding sections.

CASE NOTES

Quoted in Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Chapter 1A.

Rules of Civil Procedure.

§ 1A-1. Rules of Civil Procedure.

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

CASE NOTES

Application of Rules. —
Actions for permanent alimony are unquestionably of a civil nature, and there is no "differing procedure" prescribed by statute which governs the action. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

Cited in Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981); State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 303 N.C. 287, 278 S.E.2d 248 (1981); Shugar v. Guill, 304 N.C. 332, — S.E.2d — (1981).

Rule 2. One form of action.

CASE NOTES

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

Quoted in Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981).

Stated in Roshelli v. Sperry, — N.C. App. —, 291 S.E.2d 355 (1982).

Cited in Terry v. Lowrance Hosp., 54 N.C. App. 663, 284 S.E.2d 128 (1981); Evans v. Chipps, — N.C. App. —, 287 S.E.2d 426 (1982).

Rule 4. Process.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1041 (1981).

CASE NOTES

Compliance Required for Valid Service. —
Process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit. Roshelli v. Sperry, — N.C. App. —, 291 S.E.2d 355 (1982).

Time Limit for Issuance of Summons. — The purpose for the provision in section (a) of this rule, requiring that the summons be issued "in any event within five days," and the legislative intent as reflected in the comment following this rule was to establish an outer limit of five days after filing the complaint for issuance of summons. Roshelli v. Sperry, — N.C. App. —, 291 S.E.2d 355 (1982).

Applicability of Section (d). — The provisions in section (d) of this rule for an endorsement on the original summons or issuance of an alias or pluries summons apply only when the original summons was not served, and their purpose is to keep the action alive until service can be made. They are not applicable where the original summons was not issued for service on a defendant, but on a person not a party to the action. Roshelli v. Sperry, — N.C. App. —, 291 S.E.2d 355 (1982).

Leaving Process under Subdivision (j)(5)c with Spouse. — The service of process in subdivision (j)(5)c of this rule explicitly requires personal service on certain named officials or agents, and does not permit leaving the process with other persons, even their spouses, as is allowed where the action is against a "natural" person. Long v. Cabarrus County Bd. of Educ., 52 N.C. App. 625, 279 S.E.2d 95 (1981).

Applied in Terry v. Lowrance Hosp., 54 N.C. App. 663, 284 S.E.2d 128 (1981).

Quoted in Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981).

Stated in Southgate v. Russ, 52 N.C. App. 364, 278 S.E.2d 313 (1981).

Cited in Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981); Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Smith v. Smith, — N.C. App. —, 290 S.E.2d 390 (1982).

Rule 5. Service and filing of pleadings and other papers.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

This rule is not applicable to motions of counsel to withdraw. Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

Report of Commissioners, etc. —
A report of commissioners is a "similar paper" within the contemplation of this rule and must be "served" upon each of the interested parties. Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981).

Sufficient notice of the filing of a report of commissioners is given to a party to a partition proceeding when a copy of the report is duly mailed as provided by section (b) of this rule. Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981).

There was sufficient compliance with section (b) of this rule where the clerk found as a fact that on the same day the commissioners' report was filed, a copy of the report was mailed by the clerk to respondents at the same address at which they admitted receiving a copy of the decree of confirmation which was mailed to them approximately two weeks later. Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981).

Rule 6. Time.

CASE NOTES

A paper writing is deemed to be filed when it is delivered for that purpose to the proper officer and received by him. Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981).

Refusal to Accept Late Affidavits. — While sections (b) and (d) give the trial court discretion to allow the late filing of affidavits in opposition to a motion for summary judgment, the court does not abuse its discretion when it refuses to accept late affidavits absent a showing of excusable neglect. Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

Time for Ruling on Motion to Amend Judgment. — Rule 59(e) and section (b) of this rule do not circumscribe the trial court's authority to rule on a timely motion to alter or amend a judgment; they merely require that a party make such a motion within 10 days after judgment or require that a trial court acting on its own motion amend judgment within 10 days after its entry. It is not required under these rules that a trial court's ruling on a timely motion by a party must also be made within 10 days after entry of the original judgment. Housing, Inc. v. Weaver, — N.C. —, 290 S.E.2d 642 (1982).

Cited in Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

CASE NOTES

Applied in Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981); Connor v. Royal Globe Ins. Co., — N.C. App. —, 286 S.E.2d 810 (1982).

Stated in Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981).

Cited in Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Rule 8. General rules of pleadings.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

CASE NOTES

Detailed Fact Pleading, etc. —

Under the notice theory of this rule, pleadings need not contain detailed factual allegations to raise issues. Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

The requirement of particularity in Rule 9(b) must be reconciled with this rule which requires a short and concise statement of claims and with the general notice pleading theory of the Rules of Civil Procedure. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

A defense which introduces new matter in an attempt to avoid defendant's counterclaim, regardless of the truth or falsity of the allegations in the counterclaim, is an affirmative defense. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

And Laches. —

Laches is an affirmative defense and the defendant is required to show that plaintiff's

delay in bringing this action (1) was inexcusable and (2) has resulted in prejudice to the defendant. Larsen v. Sedberry, 54 N.C. App. 166, 282 S.E.2d 551 (1981).

Failure to Plead Defense, etc. —

Where a defendant does not raise an affirmative defense in his pleadings or in the trial, he cannot present it on appeal. Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27, petition for discretionary review denied, 304 N.C. 194, 285 S.E.2d 97 (1981).

Defenses Raised in Hearing, etc. —

A party whose responsive pleading is not yet due may by motion for summary judgment and in support of the motion raise an affirmative defense to an asserted claim before the party pleads responsively to the claim. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Applied in Connor v. Royal Globe Ins. Co., — N.C. App. —, 286 S.E.2d 810 (1982); Whichard v. Oliver, — N.C. App. —, 287 S.E.2d 461 (1982).

Quoted in Cranford v. Helms, 53 N.C. App. 337, 280 S.E.2d 756 (1981); Ridings v. Ridings, — N.C. App. —, 286 S.E.2d 614 (1982).

Stated in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981); Patterson v. Phillips, 53 N.C. App. 802, 281 S.E.2d 716 (1981); Federal Realty Inv. Trust v. Belk-Tyler of Elizabeth City, Inc., — N.C. App. —, 289 S.E.2d 145 (1982); Loman-Garrett Supply Co. v. Dudney, — N.C. App. —, 289 S.E.2d 600 (1982).

Rule 9. Pleading special matters.

CASE NOTES

Type of Legal Entity Defendant Is Need Not Be Alleged. — The defendant in a civil action must be an existing legal entity, either natural or artificial; however, it is not necessary to allege in the complaint what type of legal entity the defendant is. Rollins v. Junior Miller Roofing Co., — N.C. App. —, 284 S.E.2d 697 (1981).

The requirement of particularity in section (b) must be reconciled with Rule 8 which requires a short and concise statement of claims and with the general notice pleading theory of the Rules of Civil Procedure. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Requirements in Pleading Actual Fraud. —

In pleading actual fraud the particularity requirement of this rule is met by alleging time, place and content of the fraudulent representation and what was obtained as a result of the fraudulent acts or representations. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Facts giving rise to special damages, etc. —

Special damages must be specifically pleaded and proved, and the facts giving rise to the special damages must be sufficient to inform the defendant of the scope of plaintiff's demand. Gillespie v. Draughn, 54 N.C. App. 413, 283 S.E.2d 548 (1981).

Applied in Bond Park Truck Serv. v. Hill, 53 N.C. App. 443, 281 S.E.2d 61 (1981).

Stated in Murray v. Allstate Ins. Co., 51 N.C. App. 10, 275 S.E.2d 195 (1981); Briggs v. Mid-State Oil Co., 53 N.C. App. 203, 280 S.E.2d 501 (1981); Gower v. Strout Realty, Inc., — N.C. App. —, 289 S.E.2d 880 (1982); Poore v. Swan Quarter Farms, Inc., — N.C. App. —, 290 S.E.2d 799 (1982).

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleading.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

Appeal Based on Lack of Subject Matter Jurisdiction. — The denial of a motion to dismiss on the grounds that the superior court lacks subject matter jurisdiction is not immediately appealable. Teachy v. Coble Dairies, Inc., 54 N.C. App. 688, 284 S.E.2d 332 (1981).

Motions under Subsections (b)(2), (b)(4), and (b)(5) Distinguished. — A challenge to the court's jurisdiction over the person under subsection (b)(2) concerns whether the court has power, assuming it is properly invoked, to require the defendant to come into court to adjudicate the claim, a test which has come to be known as "minimum contacts." Challenges to sufficiency of process and service do not concern the State's fundamental power to bring a defendant before its courts for trial; instead they concern the means by which a court gives notice to the defendant and asserts jurisdiction over him. Love v. Moore, — N.C. —, 291 S.E.2d 141 (1982).

And ordinarily no appeal lies, etc. —

The denial of a section (b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is not immediately appealable. Teachy v. Coble Dairies, Inc., 54 N.C. App. 688, 284 S.E.2d 332 (1981).

Mislabeled Motion to Dismiss. — Where defendants' motion was in fact a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to this rule, and the effect of the trial court's judgment was to treat it as such, the label "judgment on the pleadings" which was inadvertently entered in the notice of hearing to plaintiff and the trial court's judgment could not have prejudiced plaintiff, the motion being properly treated according to its substance rather than its label. Harrell v. Whisenant, 53 N.C. App. 615, 281 S.E.2d 453 (1981).

Allegations Treated as True. —

In accord with 1st paragraph in 1981 Cum. Supp. See Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, — U.S. —, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981).

For purposes of ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted. Snug Harbor Property Owners Ass'n v. Curran, — N.C. App. —, 284 S.E.2d 752 (1981).

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be presumed true. Mebane v. Board of Medical Exmrs., — N.C. App. —, 286 S.E.2d 112 (1982).

Sufficiency of Complaint. —

In accord with 1st paragraph in 1981 Cum. Supp. See Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, — U.S. —, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); Deitz v. Jackson, — N.C. App. —, 291 S.E.2d 282 (1982).

With regard to its sufficiency, the question is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory. Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981).

This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. Snug Harbor Property Owners Ass'n v. Curran, — N.C. App. —, 284 S.E.2d 752 (1981).

Claim Should Not Be Dismissed Unless, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Mebane v. Board of Medical Exmrs., — N.C. App. —, 286 S.E.2d 112 (1982); Deitz v. Jackson, — N.C. App. —, 291 S.E.2d 282 (1982).

In accord with 2nd paragraph in 1981 Cum. Supp. See Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981); Morrow v. Kings Dep't Stores, Inc., — N.C. App. —, 290 S.E.2d 732 (1982).

In accord with 3rd paragraph in 1981 Cum. Supp. See Snug Harbor Property Owners Ass'n v. Curran, — N.C. App. —, 284 S.E.2d 752 (1981).

In accord with 5th paragraph in 1981 Cum. Supp. See Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981).

A defendants' motion to dismiss pursuant to this rule should not be allowed unless it appears from the complaint that the plaintiffs can prove no state of facts that will entitle them to relief. Pedwell v. First Union Nat'l Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981).

Incorrect Choice of Legal Theory. — In testing the sufficiency of the claim, the complaint must be liberally construed, and when the allegations give sufficient notice of the wrong of which plaintiff complains, the incorrect choice of the legal theory upon which the claim is bottomed should not result in dismissal if the allegations are sufficient to state a claim under some legal theory. Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

A claim for relief must still satisfy the requirements of the substantive laws which

gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim. While an incorrect choice of theory should not result in dismissal of the claim, the allegations must suffice to state a claim under some legal theory. Morrow v. Kings Dep't Stores, Inc., — N.C. App. —, 290 S.E.2d 732 (1982).

But Not to Defective Statement of Good Claim. —

In accord with 1st paragraph in 1981 Cum. Supp. See Deitz v. Jackson, — N.C. App. —, 291 S.E.2d 282 (1982).

Complaint without Merit May Be Dismissed. —

In accord with 1st paragraph in 1981 Cum. Supp. See Morrow v. Kings Dep't Stores, Inc., — N.C. App. —, 290 S.E.2d 732 (1982).

In accord with 4th paragraph in 1981 Cum. Supp. See Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

A motion to dismiss will be allowed if a complaint is clearly without merit; this lack of merit may consist in an absence of law to support a claim, or in the disclosure of some fact that will necessarily defeat the claim, or when the complaint shows on its face that there is an insurmountable bar. Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981).

Dismissal of Less Than All Claims Permitted. — Section (b) of this rule permits assertion by motion of a defense to "a claim for relief in any pleading." It does not require that the assertion be to "the claims for relief." Thus, it appears the clear intent of the rule to permit dismissal of some claims without requiring dismissal of all. Morrow v. Kings Dep't Stores, Inc., — N.C. App. —, 290 S.E.2d 732 (1982).

Motions under sections (b)(6) and (c) of this rule can be treated as summary judgment, etc. —

In accord with 3rd paragraph in 1981 Cum. Supp. See Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

Judgment on the pleadings is proper, etc. —

Under section (c) of this rule, a party moving for judgment on the pleadings is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

And facts and permissible inferences are viewed, etc. —

In passing on a motion for judgment on the pleading, the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

A judgment on the pleadings based upon a plea of the statute of limitations is proper only when the pleadings fail to present any issue of fact for determination by a jury. Flexolite Elec., Ltd. v. Gilliam, — N.C. App. —, 284 S.E.2d 523 (1981).

A judgment on the pleadings in favor of a defendant who asserts the statute of limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted. Flexolite Elec., Ltd. v. Gilliam, — N.C. App. —, 284 S.E.2d 523 (1981).

Applied in State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981); Selby v. Taylor, — N.C. App. —, 290 S.E.2d 767 (1982); Bowens v. Board of Law Exmrs., — N.C. App. —, 291 S.E.2d 170 (1982).

Quoted in Southgate v. Russ, 52 N.C. App. 364, 278 S.E.2d 313 (1981).

Stated in Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981); Snow v. Nixon, 52 N.C. App. 131, 277 S.E.2d 850 (1981); Gaskins v. McCotter, 52 N.C. App. 322, 278 S.E.2d 302 (1981); Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981); Journeys Int'l, Inc. v. Corbett, 53 N.C. App. 124, 280 S.E.2d 5 (1981); Coleman v. Shirlen, 53 N.C. App. 573, 281 S.E.2d 431 (1981); Carver v. Carver, — N.C. App. —, 286 S.E.2d 799 (1982); Propst Constr. Co. v. North Carolina Dep't of Transp., — N.C. App. —, 290 S.E.2d 387 (1982).

Cited in Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981); Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981); Murray v. Allstate Ins. Co., 51 N.C. App. 10, 275 S.E.2d 195 (1981); Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981); Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981); Earp v. Earp, 52 N.C. App. 145, 277 S.E.2d 877 (1981); Dorn v. Dorn, 52 N.C. App. 370, 278 S.E.2d 281 (1981); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); Broome v. Pistolis, 53 N.C. App. 366, 280 S.E.2d 794 (1981); Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981); Cobb v. Cobb, 54 N.C. App. 230, 282 S.E.2d 591 (1981); Gragg v. W.M. Harris & Son, 54 N.C. App. 607, 284 S.E.2d 183 (1981); Russell v. Tenore, — N.C. App. —, 284 S.E.2d 521 (1981); Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981); Rokes v. Rokes, — N.C. App. —, 285 S.E.2d 306 (1982); Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982); Simmons v. United States, — N.C. —, 285 S.E.2d 828 (1982); Moore v. Crumpton, — N.C. App. —, 285 S.E.2d 842 (1982); Buie v. Daniel Int'l Corp., — N.C. App. —, 289 S.E.2d 118 (1982); Gower v. Strout Realty, Inc., — N.C. App. —, 289 S.E.2d 880 (1982); Poore v. Swan Quarter Farms, Inc., — N.C. App. —, 290 S.E.2d 799 (1982); Dailey v. Integon Gen. Ins. Corp., — N.C. App. —, 291 S.E.2d 331 (1982).

Rule 13. Counterclaim and crossclaim.

CASE NOTES

The purpose of section (a). —
Section (a) of this rule is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other. Curlings v. Macemore, — N.C. App. —, 290 S.E.2d 725 (1982).

In order to find that an action, etc. —
In accord with 1st paragraph in 1981 Cum. Supp. See Curlings v. Macemore, — N.C. App. —, 290 S.E.2d 725 (1982).

Cited in Cox v. Haworth, — N.C. —, 284 S.E.2d 322 (1981).

Rule 14. Third-party practice.

CASE NOTES

Cited in Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889 (1981).

Rule 15. Amended and supplemental pleadings.

CASE NOTES

But the thrust of this rule, etc. —
The enactment of the North Carolina Rules of Civil Procedure, especially this rule virtually destroyed the former strict code doctrine of variance. Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

The need for amendment under section (b) of this rule does not arise, unless the evidence raises issues. Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

But failure to make the amendment, etc. —
While it is the better practice to amend the pleadings so that they actually reflect the theory of recovery, failure to do so may be without real import. Coley v. Eudy, 51 N.C. App. 310, 276 S.E.2d 462 (1981).

In ruling on a motion to allow a supplemental pleading, etc. —
Although the ruling on a motion to allow supplemental pleadings is within the trial judge's discretion, that discretion is not unlimited. Generally, the motion should be allowed unless its allowance would impose a substantial injustice upon the opposing party, for it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities. Foy v. Foy, — N.C. App. —, 290 S.E.2d 748 (1982).

Applied in Vance Trucking Co. v. Phillips, 51 N.C. App. 85, 275 S.E.2d 497 (1981); Terry v. Lowrance Hosp., 54 N.C. App. 663, 284 S.E.2d 128 (1981); In re Smith, — N.C. App. —, 287 S.E.2d 440 (1982).

Quoted in Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Cranford v. Helms, 53 N.C. App. 337, 280 S.E.2d 756 (1981).

Stated in Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

Cited in Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981); Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981); Carolina Bldrs. Corp. v. Gelder & Assocs., — N.C. App. —, 289 S.E.2d 628 (1982); Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982).

Rule 16. Pretrial procedure; formulating issues.

CASE NOTES

Applied in Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

Stated in Thomas v. Poole, 54 N.C. App. 239, 282 S.E.2d 515 (1981).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

CASE NOTES

Substitution of General Guardian for Guardian Ad Litem. — Since the trial court clearly had authority under this rule to determine whether it was expedient for a guardian ad litem to bring and maintain an action for an incompetent when the incompetent had a general guardian or trustee in the state, the trial court manifestly had authority to substitute the general guardian or trustee as party plaintiff for the guardian ad litem in an action brought on behalf of the incompetent. Gaskins v. McCotter, 52 N.C. App. 322, 278 S.E.2d 302 (1981).

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981).

Rule 19. Necessary joinder of parties.

CASE NOTES

Cited in Cox v. Haworth, — N.C. —, 284 S.E.2d 322 (1981).

Rule 20. Permissive joinder of parties.

CASE NOTES

Quoted in Whichard v. Oliver, — N.C. App. —, 287 S.E.2d 461 (1982).

Cited in Cox v. Haworth, — N.C. —, 284 S.E.2d 322 (1981).

Rule 21. Procedure upon misjoinder and nonjoinder.

CASE NOTES

Cited in Cox v. Haworth, — N.C. —, 284 S.E.2d 322 (1981).

Rule 23. Class actions.

CASE NOTES

Objectives of Rule. —
The purpose of section (a) of this rule is to assure the adequacy of the representation afforded the class. Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981).

Who May Bring Class Action. — As is obvious from the wording of section (a), one who is not a member of the represented class may not bring a class action representing that class. Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981).

Cited in Lowe v. Bryant, — N.C. App. —, 286 S.E.2d 652 (1982); Whichard v. Oliver, — N.C. App. —, 287 S.E.2d 461 (1982).

Rule 24. Intervention.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

CASE NOTES

Effect of Privilege Against Self-Incrimination. — The right of discovery must yield to the privilege against compulsory self-incrimination. Stone v. Martin, — N.C. App. —, 289 S.E.2d 898 (1982).

Courts cannot compel disclosure of information which would tend to incriminate the person from whom it is sought and cannot impose sanctions on one who refuses to disclose privileged information. Stone v. Martin, — N.C. App. —, 289 S.E.2d 898 (1982).

Stated in Shepherd v. Oliver, — N.C. App. —, 290 S.E.2d 761 (1982).

Rule 28. Persons before whom depositions may be taken.

CASE NOTES

Applied in Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981).

Rule 30. Depositions upon oral examination.

CASE NOTES

Cited in Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981).

Rule 32. Use of depositions in court proceedings.

CASE NOTES

Cross-Examination Concerning Deposition Taken in Unrelated Case. — In a personal injury action the defense counsel could cross-examine plaintiff concerning his deposition taken in another pending, unrelated case. Plaintiff's statements concerning his lack of prior medical problems contradicted plaintiff's testimony as to the extent of his injuries sustained as a result of the collision with defendant; therefore, his prior inconsistent statements were used for purposes of impeachment and were admissible. Gillespie v. Draughn, 54 N.C. App. 413, 283 S.E.2d 548 (1981).

Quoted in Property Shop, Inc. v. Mountain City Inv. Co., — N.C. App. —, 290 S.E.2d 222 (1982).

Rule 33. Interrogatories to parties.

CASE NOTES

Quoted in Holcomb v. Hemric, — N.C. App. —, 289 S.E.2d 620 (1982).

Stated in Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981).

Cited in Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Beatty v. H.B. Owsley & Sons, 53 N.C. App. 178, 280 S.E.2d 484 (1981).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

Cited in Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981).

Rule 35. Physical and mental examination of persons.

CASE NOTES

Cited in Durham County v. Riggsbee, — N.C. App. —, 289 S.E.2d 579 (1982).

Rule 36. Requests for admission; effect of admission.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

Applied in Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981).

Stated in Overnite Transp. Co. v. Styer, — N.C. App. —, 291 S.E.2d 179 (1982).

Cited in Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

Rule 37. Failure to make discovery; sanctions.

CASE NOTES

Effect of Privilege Against Self-Incrimination. — A defendant has the right to refuse to answer interrogatories and requests for admission on the ground that to answer may tend to incriminate him. Invocation of this constitutional privilege may legitimately serve as a shield, with potential to protect defendant from criminal responsibility which may ensue from the acts and omissions alleged. It is not an abuse of discretion, however, to refuse to allow that privilege to serve also as a sword, with potential to defeat civil actions which may likewise ensue from those acts and omissions. Stone v. Martin, 53 N.C. App. 600, 281 S.E.2d 402 (1981).

Where a defendant had the right to refuse to answer interrogatories and requests for admission on the ground that to answer might tend to incriminate him, the trial court could nevertheless impose sanctions provided by this rule for defendant's failure to obey an order to permit discovery. Stone v. Martin, 53 N.C. App. 600, 281 S.E.2d 402 (1981).

Denial of Attorney's Fees Error. — The trial court erred in denying plaintiff attorney's fees for the expense of compelling discovery where the trial court's justification for this denial bore no relation whatsoever to the matter before it on the hearing on plaintiff's motion to compel, and therefore, the court was required by the mandatory language of section (a)(4) of this rule to order defendant to pay plaintiff's attorney's fees. Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, aff'd and modified, 303 N.C. 675, 281 S.E.2d 43 (1981).

Sanctions in Response to Motion In Limine Improper. — A sanction under section (b)(2)(B) of this rule may only be imposed for failure of a party to comply with a court order compelling discovery. Thus, where the trial court ordered imposition of section (b)(2)(B) sanctions in response to a motion in limine, and the movant did not obtain an order compelling discovery, there was no failure to comply with a discovery order, and the court improperly granted the motion in limine. Stilley v. Automobile Enters. of High Point, Inc., — N.C. App. —, 284 S.E.2d 684 (1981); Stone v. Martin, — N.C. App. —, 289 S.E.2d 898 (1982).

Stated in Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981); Shepherd v. Oliver, — N.C. App. —, 290 S.E.2d 761 (1982).

Cited in Rhoads v. Bryant, — N.C. App. —, 289 S.E.2d 637 (1982).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

CASE NOTES

A party may waive, etc. —

Failure of a party to serve demand for trial by jury as required by the Rules of Civil Procedure constitutes a waiver of trial by jury. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, — N.C. —, 286 S.E.2d 89 (1982).

Proceeding for Termination of Parental Rights. — The North Carolina constitutional requirement of trial by jury is not applicable to

a proceeding for termination of parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

Stated in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

Cited in North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Rule 39. Trial by jury or by the court.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

CASE NOTES

Stated in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

Rule 40. Assignment of cases for trial; continuances.

Legal Periodicals. —

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Continuances are addressed, etc. —

In accord with 2nd paragraph in 1981 Cum. Supp. See State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981).

In accord with 5th paragraph in 1981 Cum. Supp. See Daniel Boone Complex, Inc. v. Furst, — N.C. App. —, 291 S.E.2d 296 (1982).

And ruling thereon is not reviewable, etc. —

In accord with 1981 Cum. Supp. See State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981).

Where a motion for a continuance raises a constitutional issue, the trial court's decision thereon involves a question of law, not fact, which may be reviewed by an examination of the circumstances of each case. State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981).

Party seeking continuance has burden, etc. —

In accord with 1981 Cum. Supp. See Daniel Boone Complex, Inc. v. Furst, — N.C. App. —, 291 S.E.2d 296 (1982).

Rule 41. Dismissal of actions.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

CASE NOTES

Limitations Bar Not Avoided by Filing Federal Complaint. — A civil action is commenced, in such a manner as to avoid a statute of limitations bar pursuant to this Rule, if, within the period of limitations prescribed, a plaintiff files "a complaint with the court"; hence, a plaintiff's filing of a complaint in federal district court was unavailing to prevent a statute of limitations bar in action brought in state court. Evans v. Chipps, — N.C. App. —, 287 S.E.2d 426 (1982).

Adoption of One-Year Tolling Provision in Federal Diversity Action. — See Haislip v. Riggs, 534 F. Supp. 95 (W.D.N.C. 1981).

Effect of Order Dismissing with Prejudice After Voluntary Dismissal. — Plaintiffs' dismissal was effective upon its announcement, and an order dismissing the case with prejudice entered after plaintiffs' voluntary dismissal, was invalid and had no effect upon plaintiffs' rights. Lowe v. Bryant, — N.C. App. —, 286 S.E.2d 652 (1982).

Function of Judge on Motion under Section (b). —

In accord with 1st paragraph in 1981 Cum. Supp. See Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., — N.C. —, 291 S.E.2d 137 (1982).

Evidence Need Not Be Viewed in Light Most Favorable to Plaintiff. — In ruling on a motion for involuntary dismissal at the close of plaintiff's evidence pursuant to section (b) of this rule, the trial judge need not view the evidence in the light most favorable to plaintiff. Dealers Specialities, Inc. v. Neighborhood Hous. Servs., Inc., — N.C. —, 291 S.E.2d 137 (1982).

Dismissal for Failure to Prosecute. —

In accord with 2nd paragraph in 1981 Cum. Supp. See Jones v. Stone, 52 N.C. App. 502, 279 S.E.2d 13, petition for discretionary review denied, 304 N.C. 195, 285 S.E.2d 99 (1981).

A mere lapse of time does not justify dismissal if the plaintiff has not been lacking in diligence. Jones v. Stone, 52 N.C. App. 502, 279 S.E.2d 13, petition for discretionary review denied, 304 N.C. 195, 285 S.E.2d 99 (1981).

Failure to Comply with Erroneous Order. — A dismissal under section (b) of this rule may not be premised upon a party's failure to comply with an erroneous order. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

Applied in Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360 (1981); Young v. Kuehne Chem. Co., 53 N.C. App. 806, 281 S.E.2d 742 (1981).

Stated in Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982); Cole v. Adams, — N.C. App. —, 289 S.E.2d 918 (1982).

Cited in Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Eller v. Coca-Cola Co., 53 N.C. App. 500, 281 S.E.2d 81 (1981); Greensboro Hous. Auth. v. Kirkpatrick & Assocs., — N.C. App. —, 289 S.E.2d 115 (1982).

Rule 42. Consolidation; separate trials.

CASE NOTES

Consolidation Ruling of One Judge May Not Be Forced upon Another. — The discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial; therefore, the trial court in a child custody hearing erred in granting defendant's motion to consolidate plaintiffs' custody action and petition for adoption for trial in the superior court where the judge had a hearing on defendant's motion and entered his order of consolidation out of term and out of session, but there was no indication that he was scheduled to preside at the session of court during which he set the consolidated cases to be presented for trial. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Rule 43. Evidence.

Legal Periodicals. —

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

CASE NOTES

Witness Must in Fact Be Hostile. — Leading questions may be asked on cross-examination, but the cross-examiner may be barred from doing so when the witness is not in fact unwilling or hostile. Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981).

The rulings of the judge on the use of leading questions are discretionary and may not be reversed absent an abuse of that discretion. Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981).

Stated in State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 303 N.C. 287, 278 S.E.2d 248 (1981); Propst Constr. Co. v. North Carolina Dep't of Transp., — N.C. App. —, 290 S.E.2d 387 (1982).

Rule 44. Proof of official record.

CASE NOTES

Applied in Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981).

Rule 46. Objections and exceptions.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

Rule 48. Juries of less than twelve — majority verdict.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

Rule 49. Verdicts.

CASE NOTES

The judge is required, etc. —
In accord with 3rd paragraph in 1981 Cum. Supp. See Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 304 N.C. 174, 282 S.E.2d 426 (1981).

Ordinarily, the form, etc. —
The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 304 N.C. 174, 282 S.E.2d 426 (1981).

Stated in Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981).

Cited in Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 51 N.C. App. 203, 281 S.E.2d 664 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

Any party may move for a directed verdict at the close of all the evidence. Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

Motion for Summary Judgment Compared. — The mechanics of the motion for summary judgment and motion for directed verdict differ at times, as, for example, where defendant is moving for summary judgment on the ground that plaintiff's claim lacks merit. At trial the plaintiff has the burden of, and must take the initiative in, establishing the prima facie elements of his claim; and if he does not the defendant is entitled to a directed verdict.

But if the defendant moves for summary judgment on the ground that plaintiff does not have an enforceable claim he has the burden of clearly establishing the lack of any triable issue of fact and must take the initiative of marshalling a record so showing. Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

Effect of Earlier Denial of Summary Judgment. — The earlier denial of a motion for summary judgment should not, in any way, be considered a barrier to later consideration of a motion for directed verdict. Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

Directed verdicts are appropriate, etc. —

A motion for a directed verdict is appropriate only in a jury trial. Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

Question Presented, etc. —

A motion for a directed verdict presents the question of whether the evidence is sufficient to carry the case to the jury. Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

A motion for directed verdict under this rule presents the question whether the evidence was sufficient to entitle the party against whom the motion is made to have a jury pass on it. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

A motion for a directed verdict raises the question as to whether there is sufficient evidence to go to the jury. Vance Trucking Co. v. Phillips, 51 N.C. App. 85, 275 S.E.2d 497, petition for discretionary review denied, 303 N.C. 320, 281 S.E.2d 659 (1981).

A motion for a directed verdict may be granted only if, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, rev'd on other grounds, — N.C. —, 283 S.E.2d 518 (1981); Cantey v. Barnes, 51 N.C. App. 356, 276 S.E.2d 490 (1981).

A directed verdict is not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981).

The standard for entry of a directed verdict is that the evidence, when viewed in the light most favorable to the nonmovant, is insufficient as a matter of law to support a verdict in favor of the nonmovant. Oakley v. Oakley, 54 N.C. App. 161, 282 S.E.2d 589 (1981).

Trial Judge Must Consider Evidence in Light Most Favorable, etc. —

In accord with 3rd paragraph in 1981 Cum. Supp. See Dorsey v. Buchanan, 52 N.C. App. 597, 279 S.E.2d 92 (1981); Cooper v. Henderson, — N.C. App. —, 284 S.E.2d 756 (1981).

In accord with 11th paragraph in 1981 Cum. Supp. See Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 907 (1981).

In accord with 16th paragraph in 1981 Cum. Supp. See Jones v. Allred, 52 N.C. App. 38, 278 S.E.2d 521, aff'd, — N.C. —, 283 S.E.2d 517 (1981).

In accord with 21st paragraph in 1981 Cum. Supp. See Cantey v. Barnes, 51 N.C. App. 356, 276 S.E.2d 490 (1981).

In accord with 23rd paragraph in 1981 Cum. Supp. See Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, rev'd on other grounds, — N.C. —, 283 S.E.2d 518 (1981).

In accord with 25th paragraph in 1981 Cum. Supp. See Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981).

The evidence must be considered in the light most favorable to the party opposing the motion, and the opponent is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts in the evidence are resolved in favor of the opponent. Morrison v. Concord Kiwanis Club, 52 N.C. App. 454, 279 S.E.2d 96, petition for discretionary review, 304 N.C. 196, 285 S.E.2d 100 (1981).

Conflicts Resolved, etc. —

In accord with 2nd paragraph in 1981 Cum. Supp. See Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 907 (1981).

If Credibility of Movant's Evidence Manifest. —

In accord with 1st paragraph in 1981 Cum. Supp. See Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

But a verdict may never be directed when the facts, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, petition for discretionary review denied, 303 N.C. 320, 281 S.E.2d 659 (1981).

Thus, the judge cannot direct a verdict upon any controverted, etc. —

Normally the motion for a directed verdict is made against the party who has the burden of proof. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

And the credibility of testimony, etc. —

The trial judge cannot direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

When Directed Verdict in Favor of Party with Burden, etc. —

A directed verdict for the party with the burden of proof is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

A directed verdict, or a judgment n.o.v., can be granted for the party having the burden of proof only where the credibility of movant's evidence is manifest as a matter of law. Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981).

Where the moving party has the burden of proof, the courts generally will not direct a verdict if credibility remains an issue unless the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn. Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

Directed Verdict Seldom Appropriate in Negligence Cases. — A nonsuit on the issue of negligence should not be allowed unless the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of defendant, or that his negligence was not the proximate cause therefore, of the injury; a directed verdict is seldom appropriate in a negligence case. Alva v. Cloninger, 51 N.C. App. 602, 277 S.E.2d 535 (1981).

Defendant is not entitled to a directed verdict or to judgment notwithstanding the verdict unless plaintiff has failed as a matter of law to establish the elements of actionable negligence or unless the evidence, viewed in the light most favorable to plaintiff, shows contributory negligence as a matter of law. Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981).

Directed Verdict When Plaintiff's Evidence Shows Contributory Negligence. —

In accord with 4th paragraph in 1981 Cum. Supp. See Davis v. Gamble, — N.C. App. —, 286 S.E.2d 629 (1982).

Judgment as a matter of law on the ground of contributory negligence should be granted only when plaintiff's contributory negligence is so clearly established that no other reasonable inference or conclusion may be drawn. Seaman v. McQueen, 51 N.C. App. 500, 277 S.E.2d 118 (1981).

In order for a directed verdict to be granted for a defendant on the grounds of contributory negligence, it is required that the plaintiff establish his own negligence so clearly by his own evidence that no other reasonable inference or conclusion can be drawn therefrom. Beatty v. H.B. Owsley & Sons, 53 N.C. App. 178, 280 S.E.2d 484, cert. denied, 304 N.C. 192, 285 S.E.2d 95 (1981).

Specific Grounds Must Be Stated, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Jones v. Allred, 52 N.C. App. 38, 278 S.E.2d 521, aff'd, — N.C. —, 283 S.E.2d 517 (1981).

However, the courts need not inflexibly enforce the rule, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Humphrey v. Hill, — N.C. App. —, 285 S.E.2d 293 (1982).

Nor from Granting of Motion Where Such Failure Not Objected to. —

In accord with 2nd paragraph in 1981 Cum. Supp. See Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

When Motion May Be Granted. —

In accord with 1981 Cum. Supp. See Mesimer v. Stancil, 52 N.C. App. 361, 278 S.E.2d 530 (1981).

What Is Motion for Judgment N.O.V. —

In accord with 1981 Cum. Supp. See Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981).

Appropriate Motion for Directed Verdict Is Prerequisite, etc. —

Plaintiffs have no standing after the verdict to move for judgment n.o.v. where they did not move for directed verdict at the close of their evidence or at the close of all the evidence. Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981).

Sufficiency of Evidence is Questioned, etc. —

A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it. Morrison v. Concord Kiwanis Club, 52 N.C. App. 454, 279 S.E.2d 96, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

And Evidence of Party Opposing, etc. —

In accord with 4th paragraph in 1981 Cum. Supp. See Seaman v. McQueen, 51 N.C. App. 500, 277 S.E.2d 118 (1981).

Trial Judge Must Rule on Alternative Motion for New Trial. —

When a motion for judgment n.o.v. is joined with a motion for a new trial, it is the duty of the trial court to rule on both motions. Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981).

Entry of Judgment N.O.V. after Adjournment of Term. — The legislature, in delineating the precise time periods of section (b) of this rule and Rule 59(e), did not intend for these specific periods to be curtailed by the adjournment of the term of court at which judgment was rendered, as to attribute any such intent to the legislature would vitiate the purpose of both rules; thus a trial court may alter or amend a judgment pursuant to Rule 59 and a trial court may enter judgment n.o.v. pursuant to this rule (including the alteration of a

judgment entered upon such a verdict) after the adjournment of the term during which the judgment was entered. Housing, Inc. v. Weaver, — N.C. —, 290 S.E.2d 642 (1982).

Applied in Lowery v. Newton, 52 N.C. App. 234, 278 S.E.2d 566 (1981); Carawan v. Tate, — N.C. —, 286 S.E.2d 99 (1982); Cowan v. Laughridge Constr. Co., — N.C. App. —, 291 S.E.2d 287 (1982); Rivenbark v. Moore, — N.C. App. —, 291 S.E.2d 293 (1982).

Stated in Sullivan v. Smith, — N.C. App. —, 289 S.E.2d 870 (1982).

Cited in Housing, Inc. v. Weaver, 52 N.C. App. 662, 280 S.E.2d 191 (1981); Ferguson v. Ferguson, — N.C. App. —, 285 S.E.2d 288 (1982).

Rule 51. Instructions to jury.

CASE NOTES

This rule requires, etc. —

Two duties are required of the trial judge under this rule: (1) to declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case. Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

The chief purpose of a charge, etc. —

In accord with 2nd paragraph in 1981 Cum. Supp. See Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982).

The purpose of the court's charge is to eliminate irrelevant matters so that the jury may understand and appreciate the facts which determine the case. Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

Judge May Not Convey His Opinion, etc. —

A trial judge may not convey to the jury his opinion of the facts to be proven in any case. Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

The trial judge's failure to change the law, etc. —

In accord with 4th paragraph in 1981 Cum. Supp. See Clifford v. River Bend Plantation, Inc., — N.C. App. —, 286 S.E.2d 352 (1982).

When a party aptly tenders, etc. —

In accord with 1981 Cum. Supp. See Property Shop, Inc. v. Mountain City Inv. Co., — N.C. App. —, 290 S.E.2d 222 (1982).

Defining Negligence, etc. —

Under this section the trial court must relate to the jury the specific acts or omissions which, under the pleadings and evidence, could constitute negligence or contributory negligence. Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981).

It is not enough that the trial court recites a general explanation of the law of negligence or contributory negligence. The trial court must relate to the jury specific acts or omissions arising from the evidence which would constitute negligence or contributory negligence. Zach v. Surry-Yadkin Elec. Membership Corp., — N.C. App. —, 291 S.E.2d 290 (1982).

Submission of Defense. — When a party contends that certain acts constitute a defense against another, the trial court must submit the issue to the jury with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted. Plymouth Pallet Co. v. Wood, 51 N.C. App. 702, 277 S.E.2d 462, cert. denied, 303 N.C. 545, 281 S.E.2d 393 (1981).

Applied in Cantey v. Barnes, 51 N.C. App. 356, 276 S.E.2d 490 (1981).

Quoted in Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); White v. Greer, — N.C. App. —, 285 S.E.2d 848 (1982).

Stated in Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981); Furr v. Pinoca Volunteer Fire Dep't, 53 N.C. App. 458, 281 S.E.2d 174 (1981).

Cited in Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Sugg v. Parrish, 51 N.C. App. 630, 277 S.E.2d 557 (1981).

Rule 52. Findings by the court.

CASE NOTES

When the trial court is not required to find facts, etc. —

In accord with 1981 Cum. Supp. See Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

Findings Not Required Unless Requested. —

Under subsection (a)(2), the trial judge need not make findings of fact and conclusions of law when making a decision on a motion unless they are requested by a party or required by § 1A-1, Rule 41(b). Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

The trial judge is required to find and state, etc.—

While section (a) of this rule does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

The facts required to be found by this rule specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

Amount of Permanent Alimony. — Under subsection (a)(1) of this rule, findings of fact are required to support the amount of permanent alimony awarded by a trial judge. The statement in Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), that, "findings of fact are not required to support the trial judge's finding of the amount of alimony in actions for divorce from bed and board or in actions for alimony pendente lite," is overruled. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

Findings of Fact upon Application for Alimony Pendente Lite.—

While it is true that section (a) of this rule does not apply in proceedings to determine the amount of alimony pendente lite, the fact-finding requirements of § 50-16.8(f) are no less stringent than those required by section (a) of this rule. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

Quoted in Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

Stated in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

Cited in Eller v. Coca-Cola Co., 53 N.C. App. 500, 281 S.E.2d 81 (1981); Young v. Kuehne Chem. Co., 53 N.C. App. 806, 281 S.E.2d 742 (1981); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

The reason for §§ 1-277, 7A-27 and this rule, is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Under section (b), the trial court performs, etc. —

The procedure of this rule establishes the trial court as the "dispatcher" of appeals to the appellate division. Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889, cert. granted, 303 N.C. 314, 281 S.E.2d 651 (1981).

Definition of Final Judgment. —

In accord with 2nd paragraph in original. See Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Definition of Interlocutory Order. —

In accord with 3rd paragraph in original. See Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Extent to Which Certification Procedure Bypassed. —

Actions by the trial court, if not final or if

final but not properly certified by the trial judge pursuant to section (b), are nonetheless immediately appealable if the denial of an immediate appeal would affect a substantial right and work an injury to the appellant. Harris v. DePencier, 52 N.C. App. 161, 278 S.E.2d 759 (1981).

The addition of the language, "except as expressly provided by these rules or other statutes," etc. —

In accord with 4th paragraph in 1981 Cum. Supp. See Bacon v. Leatherwood, 52 N.C. App. 587, 279 S.E.2d 86 (1981).

Orders for child support which are entered in conjunction with orders awarding alimony pendente lite are not appealable until entry of a final order on the plaintiff's claim for permanent alimony. To hold otherwise would allow appeal from an order which adjudicates fewer than all claims in violation of this rule. Fliehr v. Fliehr, — N.C. App. —, 289 S.E.2d 105 (1982).

Applied in Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360 (1981); Boyce v. Boyce, 51 N.C. App. 422, 276 S.E.2d 494 (1981); Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981); Harris v. Jim Stacy Racing, Inc., 53 N.C. App. 597, 281 S.E.2d 455 (1981).

Stated in Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981); Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551 (1981); Briggs v. Mid-State Oil Co., 53 N.C. App. 203, 280 S.E.2d 501 (1981); Lamb v. Wedgewood S. Corp., — N.C. App. —, 286 S.E.2d 876 (1982).

Cited in Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982); Dailey v. Integon Gen. Ins. Corp., — N.C. App. —, 291 S.E.2d 331 (1982); Con Co., Inc. v. Wilson Acres Apts. Ltd., — N.C. App. —, 289 S.E.2d 633 (1982).

Rule 55. Default.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

CASE NOTES

If the default is established, etc. —

In accord with 1981 Cum. Supp. See Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

Default Precluded by Late Answer. — A default should not be entered, even though technical default is clear, if justice may be served otherwise; therefore, defaults may not be entered after an answer has been filed, even though the answer is late. Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981).

And Judge Is Not Deprived of Jurisdiction Thereby. —

In accord with 1981 Cum. Supp. See Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

A motion to set aside a default, etc. —

In accord with 5th paragraph in 1981 Cum. Supp. See Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

A motion to set aside an entry of default is addressed to the sound discretion of the trial judge and the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of that discretion. Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981).

Applied in Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263 (1981).

Cited in Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981); Shaw v. Pedersen, 53 N.C. App. 796, 281 S.E.2d 700 (1981).

Rule 56. Summary judgment.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1058 (1981).

CASE NOTES

When Rule 12 (b)(6) Motion Converted, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

Motion for Directed Verdict Compared. — The mechanics of the motion for summary judgment and motion for directed verdict differ at times, as, for example, where defendant is moving for summary judgment on the ground that plaintiff's claim lacks merit. At trial the plaintiff has the burden of, and must take the initiative in, establishing the prima facie elements of his claim; and if he does not the defendant is entitled to a directed verdict. But if the defendant moves for summary judgment on the ground that plaintiff does not have an enforceable claim he has the burden of clearly establishing the lack of any triable issue of fact and must take the initiative of marshalling a record so showing. Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

Rule Must Be Used Cautiously. —

In accord with 10th paragraph in 1981 Cum. Supp. See Holcomb v. United States Fire Ins. Co., 52 N.C. App. 474, 279 S.E.2d 50 (1981).

Motion May Be Granted before Responsive Pleading. —

A party whose responsive pleading is not yet due may by motion for summary judgment and in support of the motion raise an affirmative defense to an asserted claim before the party pleads responsively to the claim. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Section (a) contemplates, etc. —

Summary judgment may be granted for any type of claim, including a claim for specific performance of a contract. Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

This rule is not limited in its application, etc. —

In accord with 1981 Cum. Supp. See Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

Two types of cases are involved, etc. —

In accord with 1981 Cum. Supp. See Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, petition for discretionary review denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

It is only in the exceptional negligence case, etc. —

In accord with 8th paragraph in 1981 Cum. Supp. See Hockaday v. Morse, — N.C. App. —, 290 S.E.2d 763 (1982); Roberson v. Griffeth, — N.C. App. —, 291 S.E.2d 347 (1982).

It is only in the exceptional negligence case that summary judgment should be invoked. Even when there is no substantial dispute as to what occurred, it usually remains for the jury to apply the standard of the reasonably prudent man to the facts of the case. Roberson v. Griffeth, — N.C. App. —, 291 S.E.2d 347 (1982).

It is elemental that it is usually the jury's prerogative to apply the standard of reasonable care in a negligence action, and summary judgment is, therefore, appropriate only in exceptional cases where the movant shows that one or more of the essential elements of the claim do not appear in the pleadings or proof at the discovery stage of the proceedings. Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510, petition for discretionary review denied, — N.C. —, 285 S.E.2d 838 (1981).

When Summary Judgment for Defendant Proper in Negligence Action. —

Summary judgment is generally not feasible in negligence actions where the standard of the prudent man must be applied, but, nevertheless, summary judgment is proper where it appears there can be no recovery even if the facts as claimed by plaintiff are true. Long v. Southern Bell Tel. & Tel. Co., 53 N.C. App. 110, 280 S.E.2d 3 (1981).

In an action based on negligence, summary judgment for a defendant is proper where the evidence demonstrates no negligence by the defendant or contributory negligence by the plaintiff or where it is established that the defendant's negligence was not the proximate cause of the plaintiff's injury. Edwards v. Akion, 52 N.C. App. 688, 279 S.E.2d 894, aff'd, — N.C. —, 284 S.E.2d 518 (1981).

The purpose of the summary judgment rule, etc. —

The purpose of a summary judgment motion is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue. Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 907 (1981).

The procedure for a summary judgment motion is designed to allow a "preview" or "forecast" of the proof of the parties in order to determine whether a jury trial is necessary. Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 907 (1981).

Court's Function on Motion for Summary Judgment. —

In accord with 6th paragraph in 1981 Cum. Supp. See Stanback v. Stanback, 53 N.C. App. 243, 280 S.E.2d 498, cert. denied, 304 N.C. 197, 285 S.E.2d 101 (1981).

In accord with 14th paragraph in 1981 Cum. Supp. See Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, cert. granted, 303 N.C. 180, 280 S.E.2d 451, rev'd on other

grounds, — N.C. —, 283 S.E.2d 518 (1981); Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102 (1981).

In ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any genuine issue of material fact. Southland Assocs. v. Peach, 52 N.C. App. 340, 278 S.E.2d 293, cert. denied, 303 N.C. 546, 281 S.E.2d 394 (1981).

Test is Whether, etc. —

The test for summary judgment is twofold: Is there a genuine issue of material fact and is the moving party entitled to judgment as a matter of law? Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102 (1981).

Motion Granted Only Where, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Kent v. Humphries, 303 N.C. 675, 281 S.E.2d 43 (1981); Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 54 N.C. App. 46, 283 S.E.2d 155 (1981).

In accord with 2nd paragraph in 1981 Cum. Supp. See Ft. Recovery Indus., Inc. v. Perry, — N.C. App. —, 291 S.E.2d 329 (1982).

In accord with 3rd paragraph in 1981 Cum. Supp. See Miller v. Triangle Volkswagen, Inc., — N.C. App. —, 286 S.E.2d 608 (1982).

Summary judgment is proper only when the pleadings and affidavits demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Summary judgment should be granted only when the pleadings and supporting materials show that no genuine issue as to any material fact exists, and the movant is entitled to a judgment as a matter of law. The burden is on the movant to establish that there are no material questions of fact in issue. Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 907 (1981).

When Issue Is Material. —

In accord with 1st paragraph in 1981 Cum. Supp. See Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 907 (1981).

The burden is on the moving party, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Stanback v. Stanback, 53 N.C. App. 243, 280 S.E.2d 498, cert. denied, 304 N.C. 197, 285 S.E.2d 101 (1981).

In accord with 2nd paragraph in 1981 Cum. Supp. See Miller v. Triangle Volkswagen, Inc., — N.C. App. —, 286 S.E.2d 608 (1982).

In accord with 6th paragraph in 1981 Cum. Supp. See Southland Assocs. v. Peach, 52 N.C. App. 340, 278 S.E.2d 293, cert. denied, 303 N.C. 546, 281 S.E.2d 394 (1981).

In accord with 22nd paragraph in 1981 Cum. Supp. See Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

In accord with 24th paragraph in 1981 Cum. Supp. See O'Neal v. Kellett, — N.C. App. —, 284 S.E.2d 707 (1981).

On motion for summary judgment, the burden on the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined, and if the movant carries this burden by showing that an essential element of the opposing party's claim is nonexistent, then the burden shifts to the nonmoving party to either show that a genuine issue of material fact does exist or provide an excuse for not so doing. Blue Jeans Corp. v. Pinkerton, Inc., 51 N.C. App. 137, 275 S.E.2d 209 (1981).

The moving party must clearly establish that there is no triable issue of fact and that it is entitled to judgment as a matter of law. Edwards v. Akion, 52 N.C. App. 688, 279 S.E.2d 894, aff'd, — N.C. —, 284 S.E.2d 518 (1981).

And Court Must View Record in Light, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Holcomb v. United States Fire Ins. Co., 52 N.C. App. 474, 279 S.E.2d 50 (1981).

The movant can satisfy his burden, etc. —

In accord with 1981 Cum. Supp. See Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981); Tyson v. North Carolina Nat'l Bank, 53 N.C. App. 189, 280 S.E.2d 478 (1981).

A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Nonmovant Not Required to Make Out Prima Facie Case for Jury.—

Summary judgment is a device by which a defending party may force the claimant to produce a forecast of the claimant's evidence demonstrating that the claimant will, at trial, be able to make out at least a prima facie case or that he will be able to surmount an affirmative defense; thus, under such circumstances the claimant need not present all the evidence available in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is nonexistent or that he cannot surmount an affirmative defense. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Party Opposing Properly Supported Motion May Not Rely, etc. —

Once a motion for summary judgment has been made and supported as provided by this rule, the opposing party may not rest upon the mere allegations and denials of his pleadings, but must come forth, by affidavits or as otherwise provided in this rule, with specific facts showing that a genuine issue for trial exists. First Citizens Bank & Trust Co. v. Holland, 51 N.C. App. 529, 277 S.E.2d 108 (1981).

When the party moving for summary judgment supports his motion as provided in this rule, the party opposing the motion may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

But Must Set Forth Specific Facts, etc. — An adequately supported motion for summary judgment triggers the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate he will be able to sustain his claim at trial. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Evidence which may be considered, etc. —

This rule does not limit consideration of a motion for summary judgment to the pleadings; the court may consider depositions, answers to interrogatories, admissions on file and affidavits. Ridings v. Ridings, — N.C. App. —, 286 S.E.2d 614 (1982).

Unpleaded Defenses, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Ridings v. Ridings, — N.C. App. —, 286 S.E.2d 614 (1982); Chrysler Credit Corp. v. Belk, — N.C. App. —, 286 S.E.2d 886 (1982).

In accord with 2nd paragraph in 1981 Cum. Supp. See Ridings v. Ridings, — N.C. App. —, 286 S.E.2d 614 (1982).

If an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for summary judgment, the motion must ordinarily refer expressly to the affirmative defense relied upon. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Oral Testimony Is Admissible. —

The trial court did not err in allowing oral testimony to be introduced into the record at the summary judgment hearing; such oral testimony is permissible as long as it is not used overzealously. Propst Constr. Co. v. North Carolina Dep't of Transp., — N.C. App. —, 290 S.E.2d 387 (1982).

Verified Pleading Treated as Affidavit. —

In accord with 3rd paragraph in 1981 Cum. Supp. See Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

Section (e) of this rule does not deny that a properly verified pleading which meets all the requirements for affidavits may effectively set forth specific facts showing that there is a genuine issue for trial. Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

Summary Judgment Where Deposition Repudiates Allegations of Complaint. —

A party may not defeat summary judgment by presenting deposition testimony which contradicts the prior judicial admissions of his pleadings. Rollins v. Junior Miller Roofing Co., — N.C. App. —, 284 S.E.2d 697 (1981).

Constitutional Arguments Susceptible to Summary Judgment. — Since the general rule is that the constitutionality of a statute is to be determined from merely an examination of the statute itself and of only those matters of which the court may take judicial notice, plaintiff's constitutional arguments presented a question of law and were properly susceptible to summary judgment. Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

Summary Judgment for Defendant in Fraud Cases. —

To overcome defendant's motion for summary judgment in an action alleging fraud, breach of contract, and unfair trade practices, plaintiff needed only to forecast evidence (1) that defendant made a definite and specific representation to her that was materially false; (2) that defendant made the representation with knowledge of its falsity; and (3) that plaintiff reasonably relied on the representation to her detriment. Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, aff'd and modified, 303 N.C. 675, 281 S.E.2d 43 (1981).

Applied in Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981); Easter v. Lexington Mem. Hosp., 303 N.C. 303, 278 S.E.2d 253 (1981); American Foods, Inc. v. Goodson Farms, Inc., 50 N.C. App. 591, 275 S.E.2d 184 (1981); Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982); Whitman v. Forbes, — N.C. App. —, 286 S.E.2d 889 (1982); Fuller v. Southland Corp., — N.C. App. —, 290 S.E.2d 754 (1982); Smith v. Dickinson, — N.C. App. —, 290 S.E.2d 770 (1982); Overnite Transp. Co. v. Styer, — N.C. App. —, 291 S.E.2d 179 (1982).

Quoted in Jerome v. Great Am. Ins. Co., 52 N.C. App. 573, 279 S.E.2d 42 (1981).

Stated in Coleman v. Shirlen, 53 N.C. App. 573, 281 S.E.2d 431 (1981); Treadway v. Clinchfield R.R., 53 N.C. App. 759, 281 S.E.2d 707 (1981); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981); Key v. Floyd, — N.C. App. —, 285 S.E.2d 864 (1982); Brooks v. Carolina Tel. & Tel. Co., — N.C. App. —, 290 S.E.2d 370 (1982).

Cited in Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981); Dorn v. Dorn, 52 N.C. App. 370, 278 S.E.2d 281 (1981); Faught v. Branch Banking & Trust Co., 53 N.C. App. 132, 280 S.E.2d 26 (1981); Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981); Rathburn v. Hawkins, — N.C. App. —, 286 S.E.2d 827 (1982); Rhoads v. Bryant, — N.C. App. —, 289 S.E.2d 637 (1982).

Rule 58. Entry of judgment.

CASE NOTES

Applied in Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981).

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

Rule 59. New trials; amendment of judgments.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

Effect of Enactment of Rules. — The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of the State to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those rules did not enlarge the scope of appellate review of a trial judge's exercise of that power. Worthington v. Bynum, — N.C. —, 290 S.E.2d 599 (1982).

A motion to set aside the verdict, etc. — The trial judge has the discretionary power to set aside a verdict or grant a new trial when, in his opinion, it would work injustice to let the jury's verdict stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion. Seaman v. McQueen, 51 N.C. App. 500, 277 S.E.2d 118 (1981).

The courts have held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion. Worthington v. Bynum, 53 N.C. App. 409, 281 S.E.2d 166 (1981).

Scope of Appellate Review. — An appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. Worthington v. Bynum, — N.C. —, 290 S.E.2d 599 (1982).

The appellate use of a vague test to measure the "reasonable range" of a given verdict's amount does not provide a more effective, consistent or precise method of determining whether a trial judge has exceeded the bounds of discretion in the grant or denial of a new trial; Howard v. Mercer, 36 N.C. App. 67, 243 S.E.2d 168, discretionary review granted, 295 N.C. 466, 246 S.E.2d 9 (1978) (petition later withdrawn on defendant's motion), is overruled to the extent that it attempts to define generally what a reversible abuse of discretion is under section (a)(6) of this rule. Worthington v. Bynum, — N.C. —, 290 S.E.2d 599 (1982).

When Discretionary Order May Be Reversed. — A trial judge's discretionary order pursuant to this rule for or against a new trial upon any ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown. Worthington v. Bynum, — N.C. —, 290 S.E.2d 599 (1982).

An appellate court should not disturb a discretionary order under this rule unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice. Worthington v. Bynum, — N.C. —, 290 S.E.2d 599 (1982).

New Trial as to Only One Issue. — Under section (a) of this rule, the courts of this State have the authority to set aside a verdict as to one issue and order a new trial as to it while leaving the verdict for the remaining issues intact. Housing, Inc. v. Weaver, 52 N.C. App. 662, 280 S.E.2d 191, petition for discretionary review denied, — N.C. —, 285 S.E.2d 832 (1981).

Grounds of Irrelevant Testimony. — In order to receive a new trial in a civil suit on the grounds that defense counsel improperly elicited irrelevant testimony on several occasions, the plaintiff must demonstrate the following: (1) that the evidence did not have any logical tendency to prove a fact in issue and (2) that its improper admission misled the jury or prejudiced his case. Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981).

Trial Judge Must Rule, etc. —
When a motion for judgment n.o.v. is joined with a motion for a new trial, it is the duty of the trial court to rule on both motions. Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981).

Alteration or Amendment of Judgment after Adjournment of Term. — The Legislature, in delineating the precise time periods of Rule 50(b) and section (e) of this rule, did not intend for these specific periods to be curtailed by the adjournment of the term of court at which judgment was rendered, as to attribute any such intent to the Legislature would vitiate the purpose of both rules, and thus a trial court may alter or amend a judgment pursuant to this rule and a trial court may enter judgment n.o.v. pursuant to Rule 50 (including the alteration of a judgment entered upon such a verdict) after the adjournment of the term during which the judgment was entered. Housing, Inc. v. Weaver, — N.C. —, 290 S.E.2d 642 (1982).

Applied in Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981); Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981); Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981).

Cited in Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981); Ferguson v. Ferguson, — N.C. App. —, 285 S.E.2d 288 (1982); Carawan v. Tate, — N.C. —, 286 S.E.2d 99 (1982).

Rule 60. Relief from judgment or order.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

CASE NOTES

I. IN GENERAL.

Motion Not Substitute for Appellate Review. — Erroneous judgments may be corrected only by appeal, and a motion under this rule cannot be used as a substitute for appellate review. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115, appeal dismissed and petition for discretionary review denied, 303 N.C. 319, 281 S.E.2d 659 (1981).

A judge of the district court cannot modify a judgment or order of another judge of the district court absent mistake, fraud, newly discovered evidence, satisfaction and release, or a showing based on competent evidence that justice requires it. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115, appeal dismissed and petition for discretionary review denied, 303 N.C. 319, 281 S.E.2d 659 (1981).

In ruling on a subsection (b)(6) motion to set aside a default judgment, the trial court had no authority to determine whether the defendant had made an appearance in the case where the trial court which entered the default judgment had previously ruled that the defendant had made no appearance. Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263, cert. denied, 184 N.C. 303, 280 S.E.2d 459 (1981).

Applied in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); Wachovia Bank & Trust Co. v. Bounous, 53 N.C. App. 700, 281 S.E.2d 712 (1981); Overnite Transp. Co. v. Styer, — N.C. App. —, 291 S.E.2d 179 (1982).

Stated in Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981); Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918 (1981).

Cited in Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981); DuBose v. Gastonia Mut. Sav. & Loan Ass'n, — N.C. App. —, 286 S.E.2d 617 (1982); Emdur Metal Prods., Inc. v. Super Dollar Stores, Inc., — N.C. App. —, 286 S.E.2d 642 (1982); In re Burgess, — N.C. App. —, 291 S.E.2d 323 (1982).

IV. PLEADING AND PRACTICE.

Any Party May Seek Relief. — Section (b) of this rule has no language suggesting that the movant for relief from a judgment must be the losing party, in general any party may seek relief under the rule. Love v. Moore, 54 N.C. App. 406, 283 S.E.2d 801 (1981).

What Constitutes Reasonable Time. — While motions pursuant to subsections (1), (2), and (3) of section (b) of this rule must be made "not more than one year after the judgment, order, or proceeding was entered or taken," as well as being made "within a reasonable time," motions pursuant to sections (4), (5), and (6) of this rule, simply "shall be made within a reasonable time," and what constitutes a "reasonable time" depends upon the circumstances of the individual case. Nickels v. Nickels, 51 N.C. App. 690, 277 S.E.2d 577, cert. denied, 303 N.C. 545, 281 S.E.2d 392 (1981).

Rule 61. Harmless error.

CASE NOTES

Applied in Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981); Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981).

Cited in Lowery v. Newton, 52 N.C. App. 234, 278 S.E.2d 566 (1981); Hasty v. Turner, 53 N.C. App. 746, 281 S.E.2d 728 (1981).

Rule 62. Stay of proceedings to enforce a judgment.

CASE NOTES

Cited in Glyk & Assocs. v. Winston-Salem Southbound Ry., — N.C. App. —, 285 S.E.2d 277 (1981); DuBose v. Gastonia Mut. Sav. & Loan Ass'n, — N.C. App. —, 286 S.E.2d 617 (1982); In re Burgess, — N.C. App. —, 291 S.E.2d 323 (1982).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

CASE NOTES

Cited in State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981); Glyk & Assocs. v. Winston-Salem Southbound Ry., — N.C. App. —, 285 S.E.2d 277 (1981).

Rule 68. Offer of judgment and disclaimer.

CASE NOTES

Attorney's Fees as Part of Accrued Costs. — This rule does not expressly authorize exclusion of attorney's fees from the tender of "costs then accrued." It requires, as part of an offer of judgment valid thereunder, tender of "costs then accrued." Purdy v. Brown, — N.C. App. —, 290 S.E.2d 397 (1982).

An attorney's fee allowed in a personal injury suit where the judgment is $5,000 or less is a part of the costs, and a fee for attorney services rendered through the time the offer under this rule is extended is a part of the "costs then accrued" within the intent and meaning of that phrase as used in the rule. Purdy v. Brown, — N.C. App. —, 290 S.E.2d 397 (1982).

An exclusion of attorney's fees for services through the time of offer renders an offer of judgment in nonconformance with the requirement of the rule that the offer include "costs then accrued." Purdy v. Brown, — N.C. App. —, 290 S.E.2d 397 (1982).

Where an offer of judgment expressly excludes attorney's fees from the tender of "costs then accrued," it is fatally defective and invalid under this rule, and any subsequent awards were in the discretion of the court. Purdy v. Brown, — N.C. App. —, 290 S.E.2d 397 (1982).

Applied in Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496 (1981).

Stated in Taylor v. Brigman, 52 N.C. App. 536, 279 S.E.2d 82 (1981).

Rule 68.1. Confession of judgment.

Legal Periodicals. —

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

Chapter 1B.

Contribution.

ARTICLE 1.

Uniform Contribution Among Tort-Feasors Act.

§ 1B-1. Right to contribution.

CASE NOTES

Quoted in Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982).

Cited in Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889 (1981).

§ 1B-4. Release or covenant not to sue.

CASE NOTES

Applied in Macklin v. Dowler, 53 N.C. App. 488, 281 S.E.2d 164 (1981).

Quoted in Sullivan v. Smith, — N.C. App. —, 289 S.E.2d 870 (1982).

Chapter 1C.

Enforcement of Judgments.

Article 16.

Exempt Property.

Sec.
1C-1601. What property exempt; waiver; exceptions.
1C-1602. Alternative exemptions.
1C-1603. Procedure for setting aside exempt property.

Article 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

(b) Definition. — "Value" as used in this Article means fair market value of an individual's interest in property, less valid liens superior to the judgment lien sought to be enforced.

(c) Waiver. — The exemptions provided in this Article and in Sections 1 and 2 of Article X of the North Carolina Constitution, cannot be waived except by:

(1) Transfer of property allocated as exempt (and in that event only as to the specific property transferred), or

(2) Written waiver, after judgment, approved by the clerk or district court judge. The clerk or district court judge must find that the waiver is made freely, voluntarily, and with full knowledge of the debtor's rights to exemptions and that he is not required to waive them;

(3) Failure to assert the exemption after notice to do so pursuant to G.S. 1C-1603. The clerk or district court judge may relieve such a waiver made by reason of mistake, surprise or excusable neglect, to the extent that the rights of innocent third parties are not affected.

(e) Exceptions. — The exemptions provided in this Article are inapplicable to claims

(1) Of the United States or its agencies as provided by federal law;

(2) Of the State or its subdivisions for taxes, appearance bonds or fiduciary bonds;

(3) Of lien by a laborer for work done and performed for the person claiming the exemption, but only as to the specific property affected;

(4) Of lien by a mechanic for work done on the premises, but only as to the specific property affected;

(5) For payment of obligations contracted for the purchase of the specific real property affected;

(6) Repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 6, effective September 1, 1982;

(7) For contractual security interests in the specific property affected; provided, that the exemptions shall apply to the debtor's household goods notwithstanding any contract for a nonpossessory, nonpurchase money security interest in any such goods;

(8) For statutory liens, on the specific property affected, other than judicial liens;

(9) For child support, alimony or distributive award order pursuant to Chapter 50 of the General Statutes.

(1981 (Reg. Sess., 1982), c. 1224, ss. 1-7, 20.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, substituted "Article" for "section" and "less valid liens superior to the judgment liens sought to be enforced" for "exclusive of valid liens" at the end of subsection (b). The amendment deleted the former first sentence of subsection (c), which read "The court may not permit waiver of the exemptions provided in this Article to the extent the exemptions are necessary to ensure the reasonable support needs of the judgment debtor's dependants," and inserted "and in sections 1 and 2 of Article X of the North Carolina Constitution," and deleted "otherwise" following "cannot" in the introductory language in subsection (c); in subdivision (c)(2) the amendment substituted "clerk or district court judge" for "court" in two places, and in subdivision (c)(3) the amendment deleted "if the court finds that the debtor had a reasonable opportunity to assert the exemption" at the end of the first sentence and substituted "clerk or district court judge" for "court" near the beginning of the second sentence. In subsection (e), the amendment substituted a comma for "or" following "taxes" and added "or fiduciary bonds" in subdivision (2), inserted "real" in subdivision (5), deleted subdivision (6), which read "For the repair or improvement of the specific property affected," and substituted a comma for "or" following "support" and inserted "or distributive award" in subdivision (9).

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (b), (c) and (e) are set out.

Legal Periodicals. —

For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 1C-1602. Alternative exemptions.

The debtor may elect to take the personal property and homestead exemptions provided in Article X of the Constitution of North Carolina instead of the exemptions provided by G.S. 1C-1601. If the debtor elects to take his constitutional exemptions, the exemptions provided in G.S. 1C-1601 shall not apply and in that event the exemptions provided in this Article shall not be construed so as to affect the personal property and homestead exemptions granted by Article X of the Constitution of North Carolina. If the debtor elects to take his constitutional exemptions, the clerk or district court judge must designate the property to be exempt under the procedure set out in G.S. 1C-1603. The debtor is entitled to have one thousand dollars ($1,000) in value in real property owned and occupied by him and five hundred dollars ($500.00) in value in his personal property exempted from sale under execution. If the value of the property in which the debtor claims his constitutional exemption is in excess of his exemptions, the clerk, in an execution, may order the sale of the property with the proceeds of the sale being distributed first to the debtor to satisfy his exemption and the excess to be distributed as ordered. (1981, c. 490, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 8.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, rewrote the first sentence, which formerly read "If the allocation of amounts provided in this Article is insufficient to meet constitutionally mandated exemptions, the court may upon motion of the debtor assign as exempt the additional property required to satisfy those requirements," substituted "his constitutional exemptions" for "the personal property and homestead exemptions provided in Article X of the Constitution of North Carolina in property other than that exempted by G.S. 1C-1601" in the second sentence and added the third, fourth and fifth sentences.

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

§ 1C-1603. Procedure for setting aside exempt property.

(a) Motion or Petition; Notice. —

(1) A judgment debtor may have his exempt property designated by motion after judgment has been entered against him.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1224, s. 10, effective September 1, 1982.

(3) The clerk or district court judge may determine that particular property is not exempt even though there has been no proceeding to designate the exemption.

(4) After judgment, except as provided in G.S. 1C-1603(a)(3) or when exemptions have already been designated, the clerk may not issue an execution or writ of possession unless notice from the court has been served upon the judgment debtor advising him of his rights. The judgment creditor must cause the notice to be served on the debtor as provided in G.S. 1A-1, Rule 4(j)(1). If the judgment debtor cannot be served as provided above, the judgment creditor may serve him by mailing a copy of the notice to the judgment debtor at his last known address. Proof of service by certified or registered mail or personal service is as provided in G.S. 1A-1, Rule 4. The judgment creditor may prove service by mailing to last known address by filing a certificate that the notice was served indicating the circumstances warranting the use of such service and the date and address of service. The notice must be substantially in the following form:

NORTH CAROLINA . . . . . COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION CvD
. . . . .) Judgment Creditor)) vs.) . . . . .) Judgment Debtor)	NOTICE OF PETITION (OR MOTION) TO SET OFF DEBTOR'S EXEMPT PROPERTY

GREETINGS:

You have been named as a "judgment debtor" in a proceeding initiated by a "judgment creditor". A "judgment debtor" is a person who a court has declared owes money to another, the "judgment creditor". The purpose of this proceeding is to make arrangements to collect that debt from you personally or from property you own.

It is important that you respond to this notice no later than 20 days after you receive it because you may lose valuable rights if you do nothing. You may wish to consider hiring an attorney to help you with this proceeding to make certain that you receive all the protections to which you are entitled under the North Carolina Constitution and laws.

(d) Notice to Persons Affected. — If the judgment debtor moves to designate his exemptions, a copy of the motion and schedule must be served on the judgment creditor as provided in G.S. 1A-1, Rule 5.

(e) Procedure for Setting Aside Exempt Property. —

(1) When served with the notice provided in G.S. 1C-1603(a)(4), the judgment debtor may either file a motion to designate his exemptions with a schedule of assets or may request, in writing, a hearing before the clerk to claim exemptions.

(2) If the judgment debtor does not file a motion to designate exemptions with a schedule of assets within 20 days after notice of his rights was served in accordance with G.S. 1C-1603(a)(4) or if he does not request

a hearing before the clerk within 20 days after service of the notice of rights and appear at the requested hearing, the judgment debtor has waived the exemptions provided in this Article and in Sections 1 and 2 of Article X of the North Carolina Constitution. Upon request of the judgment creditor, the clerk shall issue a writ of execution or writ of possession.

(3) If the judgment debtor moves to designate his exemptions by filing a motion and schedule of assets, the judgment creditor is served as provided in G.S. 1C-1603(d).

(4) If the judgment debtor requests a hearing before the clerk to claim exemptions, the clerk sets a hearing date and gives notice of the hearing to the judgment debtor and judgment creditor. At the hearing, the judgment debtor may claim his exemptions.

(5) The judgment creditor has 10 days from the date served with a motion and schedule of assets or from the date of a hearing to claim exemptions to file an objection to the judgment debtor's schedule of exemptions.

(6) If the judgment creditor files no objection to the schedule filed by the judgment debtor or claimed at the requested hearing, the clerk shall enter an order designating the property allowed by law and scheduled by the judgment debtor as exempt property. Upon request of the judgment creditor, the clerk shall issue an execution or writ of possession except for exempt property.

(7) If the judgment creditor objects to the schedule filed or claimed by the judgment debtor, the clerk must place the motion for hearing by the district court judge, without a jury, at the next civil session.

(8) The district court judge must determine the value of the property. The district court judge or the clerk, upon order of the judge, may appoint a qualified person to examine the property and report its value to the judge. Compensation of that person must be advanced by the person requesting the valuation and is a court cost having priority over the claims.

(9) The district court judge must enter an order designating exempt property. Supplemental reports and orders may be filed and entered as necessary to implement the order.

(10) Where the order designating exemptions indicates excess value in exempt property, the clerk, in an execution, may order the sale of property having excess value and appropriate distribution of the proceeds.

(11) The clerk or district court judge may permit a particular item of property having value in excess of the allowable exemption to be retained by the judgment debtor upon his making available to judgment creditors money or property not otherwise available to them in an amount equivalent to the excess value. Priorities of judgment creditors are the same in the substituted property as they were in the original property.

(12) Appeal from a designation of exempt property by the clerk is to the district court judge. A party has 10 days from the date of entry of an order to appeal. Appeal from a designation of exempt property by a district court judge is to the Court of Appeals. Decisions of the Court of Appeals with regard to questions of valuation of property are final as provided in G.S. 7A-28. Other questions may be appealed as provided in G.S. 7A-30 and 7A-31.

(f) Notation of Order on Judgment Docket. — A notation of the order setting aside exempt property must be entered by the clerk of court on the judgment docket opposite the judgment that was the subject of the enforcement proceeding. If real property located in a county other than the county in which the

judgment was rendered is designated as exempt and the judgment has already been docketed in that county, the clerk must send a notice of the designation of exempt property to the county where the property is located. The clerk of the county where the land is located shall enter a notation of the designation of exempt property on the judgment docket. If a judgment is docketed in a county where real property is located after that real property has been designated as exempt, the transcript of judgment must indicate that the exemptions have been designated. The clerk in the county receiving the transcript must enter the notation of designation of exempt property as well as docket the judgment.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1224, s. 14, effective September 1, 1982. (1981, c. 490, s. 1; 1981 (Reg. Sess., 1982), c. 1224, ss. 9-14, 18, 19.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, rewrote subdivision (a)(1), deleted subdivision (a)(2), which provided that a judgment creditor might have the exempt property of the debtor designated in a proceeding force in money judgment, including an execution or supplemental proceeding, and substituted the present first through fifth sentences of subdivision (a)(4) for the former first sentence, which read "If it appears in proceeding for enforcement of a money judgment (including an execution or a supplemental proceeding) that exempt property may be affected and there has been no allocation of exempt property, the court must cause notice to be served upon the judgment debtor advising him of his rights" and substituted "The clerk or district court judge" for "In a proceeding for the enforcement of a money judgment (including an execution or a supplemental proceeding) the court" at the beginning of subdivision (a)(3). The amendment rewrote subsections (d) and (e), so changing them that a detailed comparison is not here practical, substituted the present second through fifth sentences of subsection (f) for the former second sentence, which read "If the exempt property is designated in a separate action, notation of the order shall be entered on the judgment docket," and deleted subsection (h), which provided that determinations in any proceeding set aside exempt property may be made by the clerk or judge.

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

Only Part of Section Set Out. — As only subsections (a), (d), (e), (f) and (h) were changed by the amendment, the other subsections are not set out.

Chapter 4.

Common Law.

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

CASE NOTES

II. ILLUSTRATIVE CASES.

A. Civil.

There is no dramshop act in North Carolina. — Therefore, the common-law rules that it is not a tort to sell or give intoxicating liquor to an able-bodied person and that there is no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person drinking the liquor are in full force and effect. Chastain v. Litton Systems, 527 F. Supp. 527 (W.D.N.C. 1981).

Chapter 5A.

Contempt.

ARTICLE 1.

Criminal Contempt.

§ 5A-11. Criminal contempt.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

IV. ACTS CONSTITUTING CONTEMPT.

A. In General.

"Willful" and "Unlawful" Distinguished. —

In accord with original. See Clayton v. Clayton, 54 N.C. App. 612, 284 S.E.2d 125 (1981).

V. PRACTICE AND PROCEDURE.

Appealability of Acquittal of Criminal Contempt. — In a domestic relations case in which plaintiff sought to have defendant's attorney held in contempt in harboring a child for the purpose of resisting and interfering with a court order granting temporary custody to the plaintiff, the charges were in the nature of criminal contempt, and the court's order finding that the attorney's conduct did not constitute contempt was not appealable, since the acquittal did not affect any substantial right of the plaintiff. Patterson v. Phillips, — N.C. App. —, 289 S.E.2d 48 (1982).

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

CASE NOTES

Stated in Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

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

CASE NOTES

Stated in State v. Johnson, 52 N.C. App. 592, 279 S.E.2d 77 (1981).

§ 5A-14. Summary proceedings for contempt.

CASE NOTES

The term "substantially contemporaneously with the contempt" in subsection (a) of this section is construed in light of its legislative purpose of meeting due process

safeguards. The word "substantially" qualifies the word "contemporaneously," and clearly does not require that the contempt proceedings immediately follow the misconduct. Factors bearing on the time lapse include the contemnor's notice or knowledge of the charged misconduct, the nature of the misconduct, and other circumstances that may have some bearing upon the defendant's right to a fair and timely hearing. State v. Johnson, 52 N.C. App. 592, 279 S.E.2d 77, cert. denied, 303 N.C. 549, 281 S.E.2d 390 (1981).

§ 5A-15. Plenary proceedings for contempt.

CASE NOTES

Stated in State v. Johnson, 52 N.C. App. 592, 279 S.E.2d 77 (1981).

Cited in Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

§ 5A-17. Appeals.

CASE NOTES

Appealability of Acquittal of Criminal Contempt. — In a domestic relations case in which plaintiff sought to have defendant's attorney held in contempt in harboring a child for the purpose of resisting and interfering with a court order granting temporary custody to the plaintiff, the charges were in the nature of criminal contempt, and the court's order finding that the attorney's conduct did not constitute contempt was not appealable, since the acquittal did not affect any substantial right of the plaintiff. Patterson v. Phillips, — N.C. —, 289 S.E.2d 48 (1982).

Quoted in Patterson v. Phillips, — N.C. App. —, 289 S.E.2d 48 (1982).

ARTICLE 2.

Civil Contempt.

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

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Criminal and Civil Contempt Distinguished. —

Proceedings instituted to vindicate the dignity of the court and to punish attorney for his alleged interference with a custody order, although arising in a civil case, are criminal in nature. Patterson v. Phillips, — N.C. App. —, 289 S.E.2d 48 (1982).

Disobedience Must Be Willful. —

The element of willfulness is required for a finding of civil contempt under § 50-13.4(f)(9) and this section. Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Consent Judgment in Domestic Relations Setting. — In a domestic relations setting, a consent judgment which has been adopted by the court, but which contains unequivocal language to the effect that it is not subject to modification, may nevertheless be enforced by civil contempt. Henderson v. Henderson, — N.C. App. —, 286 S.E.2d 657 (1982).

§ 5A-23. Proceedings for civil contempt.

CASE NOTES

Quoted in Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551 (1981).

§ 5A-24. Appeals.

CASE NOTES

Stated in Patterson v. Phillips, — N.C. App. —, 289 S.E.2d 48 (1982).

Chapter 6.

Liability for Court Costs.

Article 3.

Civil Actions and Proceedings.

§ 6-18. When costs allowed as of course to plaintiff.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Dorsey v. Dorsey, 53 N.C. App. 622, 281 S.E.2d 429 (1981).

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

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in In re North Carolina Nat'l Bank, 52 N.C. App. 353, 278 S.E.2d 330 (1981).

Cited in Dorsey v. Dorsey, 53 N.C. App. 622, 281 S.E.2d 429 (1981).

II. COSTS IN PARTICULAR ACTIONS.

A. Caveats to Wills.

Caveat Unsuccessful — Attorneys' Fees. — This section does not require the court to award attorneys' fees to counsel for unsuccessful caveators to a will but clearly authorizes the court to do so; thus, it is a matter in the discretion of the court, both as to whether to allow fees and the amount of such fees. In re Ridge, 302 N.C. 375, 275 S.E.2d 424 (1981).

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

Cross References. — As to costs where offer of judgment made, see § 1A-1, Rule 68.

CASE NOTES

I. GENERAL CONSIDERATION.

Applicability Governed by Amount Obtained. — The amount of the judgment obtained, not the amount of the judgment sought, governs applicability of this section. Purdy v. Brown, — N.C. App. —, 290 S.E.2d 397 (1982).

Discretion of Judge. —

It is clearly within the discretion of the trial judge as to whether attorney fees shall be allowed. Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, petition for discretionary review denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

Stated in Plow v. Bug Man Exterminators, Inc., — N.C. App. —, 290 S.E.2d 787 (1982).

III. PROCEDURE.

Finding of Unwarranted Refusal, etc. —

A finding of an unwarranted refusal by defendants to pay plaintiff's claim is required only in suits by an insured or beneficiary

against an insurance company. Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, petition for discretionary review denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

No Fees Where Plaintiff Awarded New Trial. — Under this section, attorney's fees are taxed as a part of the court costs, and where plaintiff was awarded a new trial by the appellate court, no judgment for damages was obtained, and, consequently, no attorney's fees would be awarded as part of the cost. Craven v. Chambers, — N.C. App. —, 287 S.E.2d 905 (1982).

IV. SETTLEMENT.

Effect of Settlement. —

In referring to the "presiding" judge in this section as the official to assess attorney fees, the General Assembly did not contemplate that attorney fees would be properly allowed only if the case could not be settled prior to trial. Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, petition for discretionary review denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

Failure to accept offer of judgment under § 1A-1, Rule 68 held not to preclude award of attorney's fee under this section where offer fatally defective. See Purdy v. Brown, — N.C. App. —, 290 S.E.2d 397 (1982).

The fact that third party plaintiff ultimately agreed to accept a judgment for less than the amount offered her by third party defendants' insurance carrier before plaintiff's suit and her cross-claim were filed did not ipso facto deny her the benefit of this section, and the trial judge did not abuse his discretion in awarding a reasonable attorney fee to third party plaintiff in her action against third party defendant. Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, petition for discretionary review denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

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

Legal Periodicals. —

For note on contractual allocation of attorneys' fees as costs of litigation, see 17 Wake Forest L. Rev. 457 (1981).

CASE NOTES

This section represents, etc. —

This section represents a far-reaching exception to the well-established rule against attorneys' fees obligations, and approves specifically an obligation to pay reasonable attorneys' fees found in any note or other evidence of indebtedness. Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Attorneys' Fees Provisions Enforceable When Specifically Authorized. — Although provisions calling for a debtor to pay attorneys' fees incurred by a creditor in the collection of a debt have long been considered against public policy, such provisions are enforceable when specifically authorized by statute. Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Recovery of Attorneys' Fees Pursuant to Promissory Note Not a Deficiency. — Where a provision for attorneys' fees in a promissory note given by defendant to plaintiffs and incorporated in deeds of trust is properly authorized by this section recovery of the fees does not represent a deficiency in violation of § 45-21.38. Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Award in Proceeding under § 105-374 Unaffected. — The amount of an attorney's fee awarded in a tax foreclosure proceeding under § 105-374 is to be determined pursuant to subsection (i) of that section in the discretion of the trial court and is not limited by the provisions of this section. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115, appeal dismissed and petition for discretionary review denied, 303 N.C. 319, 281 S.E.2d 659 (1981).

Subdivision (5) of this section sets no time limit, etc. —

In accord with original. See Gillespie v. DeWitt, 53 N.C. App. 252, 280 S.E.2d 736, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

Applied in Independence Nat'l Bank v. Dye Master Realty, Inc., 15 B.R. 932 (W.D.N.C. 1981).

Quoted in American Foods, Inc. v. Goodson Farms, Inc., 50 N.C. App. 591, 275 S.E.2d 184 (1981).

Chapter 7A.

Judicial Department.

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

Article 5.

Jurisdiction.

Sec.

7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final or valuation of exempt property.

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

Article 6.

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

7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.

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

Article 7.

Organization.

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

Article 8.

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

7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

Article 20.

Original Civil Jurisdiction of the Trial Divisions.

Sec.

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

Article 24B.

Termination of Parental Rights.

7A-289.29. Answer of respondents.

7A-289.31. Disposition.

7A-289.35. Periodic judicial reviews following termination of parental rights and pending permanent placement.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 37.

The Public Defender.

7A-465. (Effective June 1, 1983) Public defender; defender districts; qualifications; compensation.

7A-466. (Effective June 1, 1983) Selection of defender; term; removal.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40A.

North Carolina Courts Commission.

7A-506. Creation; members; terms; qualifications; vacancies.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

Article 58.

Juvenile Law Study Commission.

7A-740. Creation; members; terms; qualifications; vacancies.

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

ARTICLE 5.

Jurisdiction.

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

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981); Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982).

Stated in State v. Martin, 303 N.C. 246, 278 S.E.2d 214 (1981); State v. Bass, 303 N.C. 267, 278 S.E.2d 209 (1981); State v. Freeman, 303 N.C. 299, 278 S.E.2d 207 (1981); Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981); Bacon v. Leatherwood, 52 N.C. App. 587, 279 S.E.2d 86 (1981).

Cited in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889 (1981); Briggs v. Mid-State Oil Co., 53 N.C. App. 203, 280 S.E.2d 501 (1981); Harris v. Jim Stacy Racing, Inc., 53 N.C. App. 597, 281 S.E.2d 455 (1981); State v. Davis, — N.C. —, 290 S.E.2d 574 (1982); State v. Howard, — N.C. —, 290 S.E.2d 591 (1982); State v. Black, — N.C. —, 290 S.E.2d 669 (1982).

III. FINAL JUDGMENTS.

"Final Judgment" Defined. — A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

IV. INTERLOCUTORY ORDERS.

A. Generally.

When Interlocutory Order Appealable Generally. —

In accord with 1st paragraph in original. See Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

In accord with 4th paragraph in original. See Ball v. Ball, — N.C. App. —, 284 S.E.2d 555 (1981).

No Appeal as Matter of Right from Interlocutory Orders in Criminal Cases. —

In accord with 2nd paragraph in original. See State v. Thompson, — N.C. App. —, 289 S.E.2d 132 (1982).

B. Particular Orders.

Order Dismissing Counterclaims Except as Set-offs. — In an action arising out of a contract between the parties whereby defendants agreed to construct a house on a piece of property owned by them and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass but allowing defendants to assert these counterclaims as set-offs to plaintiff's claim was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Partial Summary Judgment in Favor of Defendant Only Secondarily Liable. — Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Orders and awards pendente lite are interlocutory decrees which necessarily do not

affect a substantial right from which lies an immediate appeal pursuant to subsection (d) of this section. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970) and other prior decisions recognizing a right of immediate appeal from orders and awards pendente lite are overruled. Thus, where a husband in a divorce action appealed an order by the trial court for alimony pendente lite, child support pendente lite, and attorney fees pendente lite, the appeal was premature and therefore was dismissed. See Stephenson v. Stephenson, — N.C. App. —, 285 S.E.2d 281 (1981).

Order Allowing Surveyor to Enter Upon Land. — An interlocutory order by which defendants are simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property is not appealable. Ball v. Ball, — N.C. App. —, 284 S.E.2d 555 (1981).

§ 7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final or valuation of exempt property.

(a) Decisions of the Court of Appeals upon review of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise.

(b) Decisions of the Court of Appeals upon review of valuation of exempt property under G.S. 1C are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise. (1981, c. 470, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 16.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

CASE NOTES

Exhaustion Requirement in Federal Habeas Corpus. — The fact that the respondent in an appeal from the order of a United States Magistrate dismissing a claim for habeas corpus relief incorrectly pleaded that the appellant had exhausted his state court remedies and was entitled to adjudication on the merits was neither conclusive nor a waiver of the exhaustion requirement by the State. Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981).

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

CASE NOTES

Appeal of Decisions under § 143-166.4. — The Court of Appeals has no jurisdiction to review an appeal of a decision by the North Carolina Industrial Commission made pursuant to § 143-166.4. In re Vandiford, — N.C. App. —, 287 S.E.2d 912 (1982).

Applied in Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

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

CASE NOTES

Applied in State v. Maher, — N.C. —, 290 S.E.2d 694 (1982).

Stated in State ex rel. Utilities Comm'n v. Duke Power Co., 51 N.C. App. 698, 277 S.E.2d 444 (1981).

Cited in Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 304 N.C. 174, 282 S.E.2d 426 (1981); State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981); Worthington v. Bynum, — N.C. —, 290 S.E.2d 599 1982); In re Peal, — N.C. —, 290 S.E.2d 664 (1982); Dealers Specialties, Inc. v. Neighborhood Hous. Servs. Inc., — N.C. —, 291 S.E.2d 137 (1982); Love v. Moore, — N.C. —, 291 S.E.2d 141 (1982).

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

(a) In any cause in which appeal is taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-345, or the Commissioner of Insurance pursuant to G.S. 58-9.4, or a motion for appropriate relief or valuation of exempt property pursuant to G.S. 7A-28, 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 any of the administrative bodies listed in the preceding sentence 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.

Except in motions within the purview of G.S. 7A-28, the State may move for certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(1981 (Reg. Sess., 1982), c. 1224, s. 17; c. 1253, s. 1.)

Effect of Amendments. —

The first 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, substituted "or valuation of exempt property pursuant to G.S. 7A-28" for "embracing subject matter covered by G.S. 7A-28" in the first sentence of subsection (a).

The second 1981 (Reg. Sess., 1982) amendment inserted the present second sentence of subsection (a).

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsection (a) is set out.

CASE NOTES

Exhaustion Requirement in Federal Habeas Corpus. — The fact that the respondent in an appeal from the order of a United States Magistrate dismissing a claim for habeas corpus relief incorrectly pleaded that the appellant had exhausted his state court remedies and was entitled to adjudication on the merits was neither conclusive nor a waiver of the exhaustion requirement by the State. Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981).

Applied in State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981); State v. Maher, — N.C. —, 290 S.E.2d 694 (1982).

Stated in State v. Bass, 303 N.C. 267, 278 S.E.2d 209 (1981); Cromer v. Cromer, 303 N.C. 307, 278 S.E.2d 518 (1981).

Cited in Chateau X, Inc. v. State ex rel. Andrews, 302 N.C. 321, 275 S.E.2d 443 (1981); North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981); Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981); Zarn, Inc. v. Southern Ry., 304 N.C. 189, 282 S.E.2d 421 (1981); Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982); Adcock v. Perry, — N.C. —, 290 S.E.2d 608 (1982); State v. Jones, — N.C. —, 290 S.E.2d 675 (1982); Hilliard v. Apex Cabinet Co., — N.C. —, 290 S.E.2d 682 (1982).

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

CASE NOTES

Although the State cannot appeal from a verdict of not guilty, it may seek a writ of mandamus to compel a trial court to set aside action taken in excess of its authority. State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981).

The State's attempt appeal of a district court's action in setting aside guilty verdicts in a misdemeanor case entered by it five months previously and entering verdicts of not guilty would be treated as a petition for a writ of mandamus pursuant to subsection (c) of this section and Rule 22, Rules of App. Proc. State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981).

Applied in Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981).

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

CASE NOTES

Cited in Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

ARTICLE 6.

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

§ 7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency justice or emergency judge recalled for temporary active service shall be paid by the State his actual expenses, plus seventy-five dollars ($75.00) for each day of active service rendered upon recall. No recalled retired or emergency justice or judge shall receive from the State total annual compensation for judicial services in excess of that received by an active justice or judge of the bench to which the justice or judge is being recalled. (1967, c. 108, s. 1; 1973, c. 640, s. 3; 1977, c. 736, s. 1; 1979, c. 884, s. 1; 1981, c. 455, s. 3; c. 859, s. 46; 1981 (Reg. Sess., 1982), c. 1253, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the last sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

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

ARTICLE 7.

Organization.

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

The counties of the State are organized into four judicial divisions and 34 judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant district attorneys set forth in the following table:

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1	5
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	3
	3	Carteret, Craven, Pamlico, Pitt	2	8
	4	Duplin, Jones, Onslow, Sampson	2	8
	5	New Hanover, Pender	2	7
	6	Bertie, Halifax, Hertford, Northampton	1	4
	7	Edgecombe, Nash, Wilson	2	7
	8	Green, Lenoir, Wayne	2	8
Second	9	Franklin, Granville, Person, Vance, Warren	1	5
	10	Wake	4	15
	11	Harnett, Johnston, Lee	1	5
	12	Cumberland, Hoke	3	11
	13	Bladen, Brunswick, Columbus	1	5
	14	Durham	3	8
	15A	Alamance	1	3
	15B	Orange, Chatham	1	3
	16	Robeson, Scotland	1	7
Third	17A	Caswell, Rockingham	1	3
	17B	Stokes, Surry	1	2
	18	Guilford	3	13
	19A	Cabarrus, Rowan	2	5
	19B	Montgomery, Randolph	1	3
	20	Anson, Moore, Richmond, Stanly, Union	2	7
	21	Forsyth	3	9
	22	Alexander, Davidson, Davie, Iredell	2	6
	23	Alleghany, Ashe, Wilkes, Yadkin	1	3
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	2
	25	Burke, Caldwell, Catawba	2	7
	26	Mecklenburg	5	19
	27A	Gaston	2	5
	27B	Cleveland, Lincoln	1	3
	28	Buncombe	2	5
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1	5

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1	4

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

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, changed the number of full-time assistant district attorneys in judicial district 17A from two to three and in judicial district 29 from four to five.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

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

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

§ 7A-46. Special sessions.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

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

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

ARTICLE 8.

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

§ 7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency judge of the district or superior court who is assigned to temporary active service by the Chief Justice shall be paid by the State his actual expenses, plus seventy-five dollars ($75.00) for each day of active service rendered upon recall. No recalled retired trial judge shall receive from the State total annual compensation for judicial services in excess of that received by an active judge of the bench to which the judge is recalled. (1967, c. 108, s. 2; 1973, c. 640, s. 4; 1977, c. 736, s. 3; 1979, c. 878, s. 2; 1981, c. 455, s. 6; c. 859, s. 47; 1981 (Reg. Sess., 1982), c. 1253, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the last sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-68. Administrative assistants.

OPINIONS OF ATTORNEY GENERAL

Oath of Office. — Administrative and investigatorial assistants to the district attorney appointed pursuant to this section and § 7A-69 are not required to take an oath of office as public officials, unless the district attorney assigns such duties the performance of which would involve the exercise of sovereign authority of the State. See opinion of Attorney General to Mr. Herbert F. Pierce, Fifteen-A Prosecutorial District, 50 N.C.A.G. 79 (1981).

§ 7A-69. Investigatorial assistants.

OPINIONS OF ATTORNEY GENERAL

Oath of Office. — Administrative and investigatorial assistants to the district attorney appointed pursuant to § 7A-68 and this section are not required to take an oath of office as public officials, unless the district attorney assigns such duties the performance of which would involve the exercise of sovereign authority of the State. See opinion of Attorney General to Mr. Herbert F. Pierce, Fifteen-A Prosecutorial District, 50 N.C.A.G. 79 (1981).

ARTICLE 12.

Clerk of Superior Court.

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

Legal Periodicals. — For survey of 1980 law on civil procedure developments generally, see 59 N.C.L. Rev. 1067 (1981).

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

ARTICLE 14.

District Judges.

§ 7A-140. Number; election; term; qualification; oath.

Effect of Amendments. —
The amendment to this section in Session Laws 1981, c. 504, s. 6, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-192. By whom power of district court to enter interlocutory orders exercised.

CASE NOTES

Cited in Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981).

§ 7A-196. Jury trials.

CASE NOTES

The effect of a verdict of guilty by the district court in a trial of a misdemeanor is tantamount to a verdict of guilty returned by a jury. State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981).

The trial judge's authority over its nonjury verdict is no greater than the authority of the trial judge over a jury verdict. State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981).

§ 7A-198. Reporting of civil trials.

CASE NOTES

Applied in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

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.

CASE NOTES

Institution of Action in Improper Trial Division. — It is fairly common practice for an attorney to institute an action in district court, although not the proper division, in order to schedule an earlier trial date than would be available on the superior court calendar. This practice is allowed since original civil jurisdiction is vested concurrently in both divisions and since a judgment is not void or voidable solely because it was rendered in the improper trial division. Circle J. Farm Center, Inc. v. Fulcher, — N.C. App. —, 290 S.E.2d 798 (1982).

Absent proper objection, an action begun in the wrong division may continue in that division to its conclusion. Circle J. Farm Center, Inc. v. Fulcher, — N.C. App. —, 290 S.E.2d 798 (1982).

Action to Recover for Breach of Duties, Negligence, and Fraud in Administration of Estate. — In action to recover for breach of fiduciary duties, negligence, and fraud arising from administration of estate of plaintiff's husband and a trust created under his will, dismissal for want of subject matter jurisdiction on the ground that the claims alleged should be brought initially before the clerk was improper, since the claims were "justiciable matters of a civil nature," original general jurisdiction over which was vested in the trial division, and their resolution was not part of the administration, settlement, or distribution of an estate so as to make jurisdiction properly exercisable initially by the clerk; moreover, inclusion by plaintiff in her complaint of matters which should have been brought initially before the clerk did not require dismissal for want of subject matter jurisdiction of the entire action. Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981).

§ 7A-241. Original jurisdiction in probate and administration of decedents' estates.

CASE NOTES

Quoted in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

Cited in Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981).

§ 7A-242. Concurrently held original jurisdiction allocated between trial divisions.

CASE NOTES

Institution of Action in Improper Trial Division. — It is fairly common practice for an attorney to institute an action in district court, although not the proper division, in order to schedule an earlier trial date than would be available on the superior court calendar. This practice is allowed since original civil jurisdiction is vested concurrently in both divisions and since a judgment is not void or voidable solely because it was rendered in the improper trial division. Circle J. Farm Center, Inc. v. Fulcher, — N.C. App. —, 290 S.E.2d 798 (1982).

Absent proper objection, an action begun in the wrong division may continue in that division to its conclusion. Circle J. Farm Center, Inc. v. Fulcher, — N.C. App. —, 290 S.E.2d 798 (1982).

§ 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 ten thousand dollars ($10,000) 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 ten thousand dollars ($10,000).

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 require 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; 1981 (Reg. Sess., 1982), c. 1225.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, substituted "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" in two places in the first paragraph.

CASE NOTES

Stated in Circle J. Farm Center, Inc. v. Fulcher, — N.C. App. —, 290 S.E.2d 798 (1982).

Cited in Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981).

§ 7A-244. Domestic relations.

CASE NOTES

Jurisdiction Generally. — In accord with 1st paragraph in original. See Smith v. Smith, — N.C. App. —, 290 S.E.2d 390 (1982).

§ 7A-250. Review of decisions of administrative agencies.

CASE NOTES

Stated in City of Raleigh v. Stell, 53 N.C. App. 776, 281 S.E.2d 774 (1981).

ARTICLE 21.

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

§ 7A-258. Motion to transfer.

CASE NOTES

Stated in Circle J. Farm Center, Inc. v. Fulcher, — N.C. App. —, 290 S.E.2d 798 (1982).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. Huff, — N.C. App. —, 289 S.E.2d 604 (1982).

Cited in State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981).

II. JURISDICTION OVER MISDEMEANORS.

C. Consolidation with Felony.

Death by Vehicle and Failure to Stop at Scene of Accident. — In a prosecution on separate bills of indictment for failing to stop an automobile at the scene of an accident in which an individual was killed (§ 20-166a) and death by vehicle (§ 20-141.4), where the two offenses were based on the same act or transaction, the superior court had jurisdiction of the misdemeanor offense of death by vehicle. State v. Fearing, — N.C. —, 284 S.E.2d 487 (1981).

§ 7A-272. Jurisdiction of district court.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. Huff, — N.C. App. —, 289 S.E.2d 604 (1982).

Cited in State v. Fearing, — N.C. —, 284 S.E.2d 487 (1981); State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981).

ARTICLE 24.

Juvenile Services.

§ 7A-289.2. Definitions.

Legal Periodicals. — For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

ARTICLE 24B.

Termination of Parental Rights.

§ 7A-289.22. Legislative intent; construction of Article.

CASE NOTES

This Article exclusively controls procedure to be followed in termination of parental rights, and the Rules of Civil Procedure (§ 1A-1) are inapplicable to such a proceeding. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

The parental rights of a parent in his child are not to be bartered away at the parent's whim. Foy v. Foy, — N.C. App. —, 290 S.E.2d 748 (1982).

§ 7A-289.23. Jurisdiction.

Legal Periodicals. — For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Appointment of Counsel for Indigent Parents in Proceedings Brought Prior to August 9, 1981. — In proceedings to terminate parental rights brought prior to August 9, 1981, the effective date of the 1981 amendment to this section, relating to appointment of counsel for indigent parents, where other circumstances do not dictate to the contrary an indigent parent is not entitled to appointment of counsel as a matter of law; rather, the right to appointed counsel must be determined on a case by case basis. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

Payment of Fees of Counsel Appointed in Proceedings Brought Prior to August 9, 1981. — Attorney's fees allowed by the court for attorneys appointed in proceedings to terminate parental rights, whether as separate counsel or as guardian ad litem, brought before August 9, 1981, the effective date of the 1981 amendment to this section, shall be borne by the Administrative Office of the Courts. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 7A-289.24. Who may petition.

Legal Periodicals. — For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Stated in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

§ 7A-289.25. Petition.

Legal Periodicals. — For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Stated in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

§ 7A-289.26. Preliminary hearing; unknown parent.

CASE NOTES

Stated in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

§ 7A-289.27. Issuance of summons.

Legal Periodicals. —
For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 7A-289.29. Answer of respondents.

(b) If an answer denies any material allegation of the petition, the court shall appoint a guardian ad litem for the child to represent the best interests of the child. The appointment, duties and payment of the guardian ad litem shall be the same as in G.S. 7A-586 and 7A-588. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1331, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, applicable to actions commencing on or after June 11, 1982, deleted "licensed attorney as" preceding "guardian ad litem" in the first sentence and added the present second sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Legal Periodicals. — For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

No Right to File Counterclaim. — Statutorily established procedure for termination of parental rights under this section does not include the right to file a counterclaim. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

§ 7A-289.30. Adjudicatory hearing on termination.

CASE NOTES

This Article is not unconstitutional in depriving the parties of trial by jury; under Art. I, § 19 of the State Constitution, trial by jury is guaranteed only where the prerogative existed at common law or by statute at the time the Constitution was adopted, and proceedings to terminate parental rights in children were unknown at common law and did not exist by statute until 1969. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

The North Carolina constitutional requirement of trial by jury is not applicable to a proceeding for termination of parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

Stated in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

§ 7A-289.31. Disposition.

(c1) Should the court issue an order terminating the parental rights of a parent, the court shall schedule a review hearing to be conducted within six months after the entry of the order terminating parental rights. The purpose of the review is to ensure that every reasonable effort is being made to provide for a permanent plan for the child which is in the best interest of the child. The clerk shall give a 15-day notice of the review to the child if 12 years of age or over, the legal custodian of the child, the foster parent, the guardian ad litem, and any other person the court may specify. If the child has been placed for adoption prior to the date scheduled for the review, written notice of said placement shall be given to the clerk to be placed in the court file and the review hearing shall be cancelled, with notice of said cancellation given by the clerk to all persons previously notified.

(1981 (Reg. Sess., 1982), c. 1131, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, applicable to actions commencing on or after June 11, 1982, added subsection (c1).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c1) is set out.

Legal Periodicals. —

For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

The children's best interests are paramount, not the rights of the parent. In re Smith, — N.C. App. —, 287 S.E.2d 440 (1982).

Family Integrity May Be Considered. — It is within the court's discretion to consider such factors as family integrity in making its decision of whether termination is in the best interests of the children. In re Smith, — N.C. App. —, 287 S.E.2d 440 (1982).

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 7A-289.32. Grounds for terminating parental rights.

Legal Periodicals. —

For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Section Is Not Unconstitutional. —

Subsection (4) of this section, which permits termination when a child is in the custody of a department of social services and the parent has failed to pay a reasonable portion of the cost of child care for six months preceding filing of the petition, is not unconstitutionally vague and overbroad, since the phrase "reasonable portion of the cost of care for the child" is, by all normal standards, understandable by people of common intelligence without any necessity of guessing as to its meaning or differing as to its application, contains words of such common usage and understanding as to give parents notice of their responsibilities and of the type of conduct which is condemned, and provides boundaries sufficiently distinct that judges may interpret and administer it uniformly. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

Reference in Subdivision (2) to Repealed § 7A-278. — Section 7A-278, referred to in subdivision (2) was repealed, and reference is made to the North Carolina Juvenile Code, including the definition of a neglected juvenile in § 7A-517(21), which tracks the language appearing in former § 7A-278(4). In re Smith, — N.C. App. —, 287 S.E.2d 440 (1982).

Applied in In re Wilkerson, — N.C. App. —, 291 S.E.2d 182 (1982).

Quoted in In re Burney, — N.C. App. —, 291 S.E.2d 177 (1982).

§ 7A-289.33. Effects of termination order.

Legal Periodicals. —
For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Rights of Foster Parents. —
In plaintiffs' action to obtain custody of a child placed in their home pursuant to a foster parent agreement, Court of Appeals erred in relying on this section as the controlling statute, since this section sets forth the effects of a court order terminating the parental rights of a natural parent on the grounds of abuse or neglect of a minor child, and such a court order was not involved, as the natural parents of the child had voluntarily released their parental rights and surrendered the child to defendant for adoptive placement; rather, the action was governed by § 48-9.1. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

§ 7A-289.35. Periodic judicial reviews following termination of parental rights and pending permanent placement.

(a) In any case where parental rights have been terminated as a result of a petition brought by a county department of social services or by a licensed child-placing agency, and custody of the child has been placed in the county department of social services or a licensed child-placing agency, and the child has not been placed for adoption within six months from the date of the termination order or affirmation of the order by the Court of Appeals or by the Supreme Court, whichever is later, the judge shall conduct a review of the case within six months of the date the order was entered and shall conduct subsequent reviews at least every six months thereafter until the child has been placed for adoption.

(b) If, at the time of review, there is a guardian ad litem available who has previously been appointed to represent the child, the judge shall continue the appointment of this person if appropriate. If, at the time of the review, there is not a guardian ad litem available who has previously been appointed to represent the child, the judge may appoint a person to serve as guardian ad litem for the child. The court may continue the case for such time as is necessary for the guardian ad litem to become familiar with the facts of the case.

(c) At the hearing, the court may consider information from the department of social services, the licensed child-placing agency, the juvenile court counselor, the guardian ad litem, the present and previous foster parents, the child and any public or private agency which will aid in its review. The purpose of the review is to ensure that every reasonable effort is being made to provide for a permanent plan for the child which is in the best interest of the child.

(d) In each case, the court shall consider criteria which include the following:

(1) The adequacy of the plan which has been developed by the the county department of social services or the licensed child-placing agency to provide a permanent placement which is in the best interest of the child.

(2) Whether the child has been listed with the North Carolina Adoption Resources Exchange and the North Carolina Photo Adoption Listing Services (PALS) with the North Carolina Division of Social Services in the Department of Human Resources.

(3) The efforts that have been made by the county department of social services or the licensed child-placing agency to find a permanent placement which is in the best interest of the child;

(e) The judge, after making findings of fact, shall enter an order either affirming the adequacy of the steps taken by the county department of social services or the licensed child-placing agency or requiring specific additional steps which are necessary to make a reasonable effort to provide the child with a permanent placement which is in the best interest of the child. At the conclusion of the hearing, the judge shall schedule the next review hearing to be conducted within six months of the date of the first review hearing. Thereafter, the judge shall schedule a subsequent review hearing to be conducted within six months of the last review hearing conducted pursuant to this section. Notice and the conduct of the subsequent review hearings shall be governed by G.S. 7A-289.31(c1) and 7A-289.35. (1981 (Reg. Sess., 1982), c. 1131, s. 2.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1131, s. 4, provides that this section is effective upon ratification and applies to actions commencing on or after its effective date, June 11, 1982.

ARTICLE 26.

Additional Powers of District Court Judges and Magistrates.

§ 7A-292. Additional powers of magistrates.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-305. Costs in civil actions.

CASE NOTES

Stated in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 7A-306. Costs in special proceedings.

CASE NOTES

Fees of Guardian in Defense of Petition for Advancement. — Where petitioner entered a voluntary dismissal of a special proceeding to obtain an advancement from the estate of her incompetent father, the trial court had no authority to order that legal fees incurred by the incompetent's guardian in defending the petition for advancement be charged as part of the costs of the proceeding to be paid by petitioner. In re North Carolina Nat'l Bank, 52 N.C. App. 353, 278 S.E.2d 330, cert. denied, 303 N.C. 544, 281 S.E.2d 393 (1981).

Stated in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

CASE NOTES

Where the witnesses did not testify in obedience to a subpoena, etc. —

It is error for a trial court to tax an expert witness fee as part of the costs when the expert has not testified pursuant to a subpoena. Craven v. Chambers, — N.C. App. —, 287 S.E.2d 905 (1982).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 30.

Judicial Standards Commission.

§ 7A-376. Grounds for censure or removal.

CASE NOTES

I. GENERAL CONSIDERATION.

Focus of Inquiry. — Whether the conduct of a judge can fairly be characterized as "private" or "public" is not the inquiry that the Judicial Standards Commission needs to make; rather, the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

II. DEFINITIONS.

Willful Misconduct Not Limited to Time in Court. — Willful misconduct in office is not limited to the hours of the day when a judge is actually presiding over court, and thus, a judicial official's duty to conduct himself in a manner befitting his professional office does not end at the courthouse door. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

III. ILLUSTRATIVE CASES.

A. Wrongful Conduct.

Sexual Advances to Female Defendants. — Evidence was sufficient to support findings by the Judicial Standards Commission concerning respondent's behavior toward and with two female criminal defendants who had appeared before him that the respondent's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute where the evidence tended to show that respondent followed one defendant in his automobile, indicated that he wanted defendant to get into his car, discussed the pending criminal cases against her, and indicated his willingness to appoint an attorney for her in exchange for sexual favors; respondent subsequently met this same defendant in a parking lot to discuss her situation, and during the course of the conversation made improper advances; respondent went uninvited to the home of the second defendant and there attempted to force himself upon the defendant. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

Presiding Over Session Where Respondent to Appear as Defendant. — Evidence was sufficient to support the conclusion of the Judicial Standards Commission that respondent's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute and the evidence was sufficient to support its recommendation of censure where it tended to show that respondent was charged with failure to stop at a stop sign; he was to appear in district court at a session over which he was scheduled to preside; he knew that it would be improper to preside over that session; he said nothing when his case was called; he did not offer to recuse himself; and the assistant district attorney, upon learning that respondent was the defendant, took a voluntary dismissal in the case. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

CASE NOTES

Appointment of Attorney Employee of State Bar. — The Judicial Standards Commission was authorized to appoint an attorney who was a full time employee of the North Carolina State Bar as special counsel in a proceeding to investigate alleged misconduct by a district court judge. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

Legal Periodicals. —
For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

II. APPOINTMENT OF COUNSEL.

Determination of Right to More Than One Lawyer. —
The appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Appointment of Counsel Where Defendant Conducts Own Defense Generally. — Although a criminal defendant cannot be required to accept the services of court-appointed counsel, a criminal defendant cannot represent himself and, at the same time, accept the services of court-appointed counsel. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

III. APPOINTMENT OF EXPERTS.

Discretion of Trial Judge. —
In accord with 1st paragraph in original. See State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

The decision whether to provide a defendant with an investigator under the provisions of this section and § 7A-454 is a matter within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Whether an expert should be appointed to assist an indigent in the preparation of his case is a question which depends upon the facts of each case and which lies within the discretion of the trial judge. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed, and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

Whether investigative assistance is constitutionally mandated must be determined after consideration of the facts of the case; defendant must demonstrate that the State's failure to provide funds with which to hire an investigator substantially prejudiced his ability to obtain a fair trial. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

When Right to Investigator Arises.

In accord with 3rd paragraph in original. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

In accord with 4th paragraph in original. See State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed, and petition for discre-

tionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

The appointment of an investigator as an expert witness should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

§ 7A-451. Scope of entitlement.

Legal Periodicals. —

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in In re Smith, — N.C. App. —, 287 S.E.2d 440 (1982).

II. RIGHT TO COUNSEL IN PARTICULAR ACTIONS.

This section does not cover appointment of counsel, etc. —

An action under 42 U.S.C. § 1983 "to obtain redress for the deprivation, under color of State law, of rights secured by the United States Constitution" is not covered by subsection (a) of this section. Loren v. Jackson, — N.C. App. —, 291 S.E.2d 310 (1982).

§ 7A-452. Source of counsel; fees; appellate records.

CASE NOTES

Stated in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

Cited in In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

§ 7A-454. Supporting services.

CASE NOTES

When Private Investigators, etc. —

In accord with original. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Discretion of Trial Judge. —

In accord with 1st paragraph in original. See State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

The decision whether to provide a defendant with an investigator under the provisions of those statutes is a matter within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

The appointment of an investigator as an expert witness should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

§ 7A-455. Partial indigency; liens; acquittals.

CASE NOTES

Notice and Opportunity to be Heard Required. — This section provides that the court may enter a civil judgment against a convicted indigent for attorney's fees and costs.

The courts have upheld the validity of such a judgment provided that the defendant is given notice of the hearing held in reference thereto and an opportunity to be heard. State v. Washington, 51 N.C. App. 458, 276 S.E.2d 470 (1981).

Applied in State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

§ 7A-459. Implementing regulations by State Bar Council.

CASE NOTES

Cited in Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766 (1981).

ARTICLE 37.

The Public Defender.

§ 7A-465. (Effective June 1, 1983) Public defender; defender districts; qualifications; compensation.

The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts. Effective July 1, 1978, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A.

Effective January 1, 1981, the office of public defender is established in the third judicial district.

Effective June 1, 1983, the office of public defender is established in judicial district 15B.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 72.)

Cross References. — For this section as in effect until June 1, 1983, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective June 1, 1983, inserted the present next-to-last paragraph.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

§ 7A-466. (Effective June 1, 1983) Selection of defender; term; removal.

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

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

A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a superior court district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16; 1977, c. 1130, s. 7; 1979, 2nd Sess., c. 1284, s. 2; 1981 (Reg. Sess., 1982), c. 1282, s. 73.)

Cross References. — For this section as in effect until June 1, 1983, see the bound volume.

Effect of amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective June 1, 1983, inserted "fifteenth-B" in the first sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

§ 7A-468. Investigative services.

CASE NOTES

No Equal Protection Violation. — In accord with 1st paragraph in original. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

ARTICLE 40A.

North Carolina Courts Commission.

§ 7A-506. Creation; members; terms; qualifications; vacancies.

The North Carolina Courts Commission is hereby created. It shall consist of 15 voting members, five to be appointed by the Governor, five by the President of the Senate, and five by the Speaker of the House of Representatives. At least three of the appointees of each appointing authority shall be practicing attorneys, at least three appointees of each appointing authority shall be members or former members of the General Assembly, and at least one appointee of each appointing authority shall be a layman. Three of the initial appointees of the

Governor shall serve for two years, and two shall serve for four years. Three of the initial appointees of the President and the Speaker shall serve for four years, and two shall serve for two years. All initial terms shall begin July 1, 1979. Subsequent terms are for four years, beginning July 1, 1981, and July 1 of each odd-numbered year thereafter. A vacancy in membership shall be filled by the appointing authority who made the initial appointment. A member whose term expires may be reappointed.

Effective July 1, 1981, the membership of the Commission is increased to 23 voting members. The Governor shall appoint two additional voting members, one of whom shall be a district attorney, and one of whom shall be a member of the General Assembly. The President of the Senate shall appoint three additional voting members, one of whom shall be a regular superior court judge, and two of whom shall be members of the General Assembly. The Speaker of the House shall appoint three additional voting members, one of whom shall be a district court judge, and two of whom shall be members of the General Assembly. The legislators shall each serve a term of four years, or until they cease to be members of the General Assembly, whichever is earlier. The district attorney and trial judges shall serve an initial term of two years, or until they cease to occupy their respective offices, whichever is earlier. Their successors appointed on July 1, 1983, and quadrennially thereafter, shall serve for terms of four years, or until they cease to occupy their respective offices, whichever is later. A vacancy in an additional voting membership shall be filled for the unexpired term by the appointing authority who made the original appointment. An additional voting member whose term expires may be reappointed. (1979, c. 1077, s. 1; 1981, c. 847; 1981 (Reg. Sess., 1982), c. 1253, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "earlier" for "later" at the end of the sixth sentence of the second paragraph.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 41.

Purpose; Definitions.

§ 7A-516. Purpose.

CASE NOTES

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981); In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-517. Definitions.

Legal Periodicals. —

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Applied in In re Register, 303 N.C. 149, 277 S.E.2d 356 (1981); In re Smith, — N.C. App. —, 287 S.E.2d 440 (1982).

Cited in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

ARTICLE 42.

Jurisdiction.

§ 7A-523. Jurisdiction.

Legal Periodicals. — For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

CASE NOTES

Stated in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-524. Retention of jurisdiction.

CASE NOTES

Stated in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

ARTICLE 43.

Screening of Delinquency and Undisciplined Petitions.

§ 7A-530. Intake services.

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-531. Preliminary inquiry.

Legal Periodicals. — For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

§ 7A-532. Evaluation.

CASE NOTES

Applied in In re Tate, — N.C. App. —, 287 S.E.2d 416 (1982).

ARTICLE 44.

Screening of Abuse and Neglect Complaints.

§ 7A-542. Protective services.

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

OPINIONS OF ATTORNEY GENERAL

Investigation of Abuse and Neglect at Day-Care Facilities. — This section requires county departments of social services to investigate reports of child abuse and child neglect at day-care facilities and day-care plans. See opinion of Attorney General to Mr. J. Randolph Riley, District Attorney, 51 N.C.A.G. 6 (1981).

§ 7A-551. Privileges not grounds for excluding evidence.

Legal Periodicals. — For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

ARTICLE 45.

Venue; Petition; Summons.

§ 7A-558. Venue.

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-565. Service of summons.

CASE NOTES

Stated in Yow v. Crater, 526 F. Supp. 240 (M.D.N.C. 1981).

ARTICLE 46.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

§ 7A-571. Taking a juvenile into temporary custody.

Legal Periodicals. — For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

ARTICLE 47.

Basic Rights.

§ 7A-584. Juvenile's right to counsel; presumption of indigence.

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-586. Appointment and duties of guardian ad litem.

CASE NOTES

Stated in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

§ 7A-588. Payment of court appointed attorney or guardian ad litem.

CASE NOTES

Cited in In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

ARTICLE 48.

Law-Enforcement Procedures in Delinquency Proceedings.

§ 7A-594. Role of the law-enforcement officer.

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-596. Authority to issue nontestimonial identification order where juvenile alleged to be delinquent.

CASE NOTES

Applicability to Juvenile Committing Crime Prior to Effective Date of Section. — Application of the provisions of this section and § 7A-598 to take the fingerprints of a juvenile accused of a crime committed prior to their effective date does not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

Section 15A-502(c) and this section are procedural statutes, and a change in the evidentiary or procedural law between the time of the offense and the time of trial does not preclude the State from utilizing the new procedure even though at the time of the offense it was unavailable. In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

§ 7A-597. Time of application for nontestimonial identification order.

CASE NOTES

Stated in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

§ 7A-598. Grounds for order.

CASE NOTES

Applicability to Juvenile Committing Crime Prior to Effective Date of Section. — Application of the provisions of § 7A-596 and this section to take the fingerprints of a juvenile accused of a crime committed prior to their effective date does not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

§ 7A-599. Issuance of order.

CASE NOTES

Stated in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

§ 7A-600. Nontestimonial identification order at request of juvenile.

CASE NOTES

Stated in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

ARTICLE 49.

Transfer to Superior Court.

§ 7A-608. Transfer of jurisdiction of juvenile to superior court.

Legal Periodicals. —
For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

CASE NOTES

Applied in State v. Conrad, — N.C. App. —, 284 S.E.2d 557 (1981).

Stated in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-612. When jeopardy attaches.

CASE NOTES

Juvenile Not Placed in Jeopardy Where Only Probable Cause Determined. —
A probable cause hearing does not suffice to place a juvenile in jeopardy; it may not be equated with an adjudicatory hearing where jeopardy attaches when the judge begins to hear evidence. In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

ARTICLE 50.

Discovery.

§ 7A-618. Disclosure of evidence by petitioner.

CASE NOTES

Stated in In re Coleman, — N.C. App. —, 286 S.E.2d 621 (1982).

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

ARTICLE 51.

Hearing Procedures.

§ 7A-627. Amendment of petition.

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-631. Conduct of hearing.

CASE NOTES

I. GENERAL CONSIDERATION.

Standards for Evaluation of Evidence. — The North Carolina Juvenile Code gives defendants in juvenile adjudication hearings, with certain exceptions, all rights afforded adult offenders, and thus the juvenile respondents are entitled to have the evidence presented in their adjudicatory hearing evaluated by the same standards as apply in criminal proceedings against adults. In re Meaut, 51 N.C. App. 153, 275 S.E.2d 200 (1981).

§ 7A-632. Continuances.

CASE NOTES

The grounds for a motion for a continuance must be fully established. In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

Motion Based Upon Absence of Witness. — When the motion for a continuance is based upon the absence of a witness, the motion should be supported by an affidavit indicating the facts to be proved by the witness. In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

§ 7A-636. Record of proceedings.

CASE NOTES

Stated in In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

§ 7A-639. Predisposition investigation and report.

CASE NOTES

Quoted in In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

§ 7A-640. Dispositional hearing.

CASE NOTES

Effect of Failure to Hold Hearing. — Where the judge held no dispositional hearing, and denied juvenile the opportunity to present evidence as to disposition, and there was no evidence to support the findings made by the judge with respect to disposition, the commitment order would be reversed so that the court could conduct a dispositional hearing. In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

Continuance at Request of Juvenile. — In accord with original. See In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

ARTICLE 52.

Dispositions.

§ 7A-646. Purpose.

CASE NOTES

District Court Not Authorized to Require Creation of Foster Home. — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981); In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

Legal Periodicals. — For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

"Cost of care," does not include counsel fees for the juvenile under which are governed by § 7A-588. In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

District Court Not Authorized to Require Creation of Foster Home. — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981).

§ 7A-648. Dispositional alternatives for delinquent or undisciplined juvenile.

CASE NOTES

District Court Not Authorized to Require Creation of Foster Home. — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-649. Dispositional alternatives for delinquent juvenile.

CASE NOTES

District Court Not Authorized to Require Creation of Foster Home. — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981).

§ 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

CASE NOTES

Findings Must Be Supported by Evidence in Hearing Record. — The essential element in the commitment order is not that it recites detailed findings beyond the two tests enumerated in this section, but that those enumerated findings are supported by some evidence in the record of the dispositional hearing. In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

Effect of Lack of Evidence to Support Findings. — Where the judges held no dispositional hearing, and denied juvenile the opportunity to present evidence as to disposition, and there was no evidence to support the findings made by the judge with respect to disposition, the commitment order would be reversed so that the court could conduct a dispositional hearing. In re Lail, — N.C. App. —, 284 S.E.2d 731 (1981).

§ 7A-657. Review of custody order.

CASE NOTES

Stated in In re Wilkerson, — N.C. App. —, 291 S.E.2d 182 (1982).

ARTICLE 53.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7A-664. Authority to modify or vacate.

CASE NOTES

Applied in Yow v. Crater, 526 F. Supp. 240 (M.D.N.C. 1981).

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

§ 7A-666. Right to appeal.

CASE NOTES

Under this section an adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. In re Taylor, — N.C. App. —, 290 S.E.2d 797 (1982).

§ 7A-667. Proper parties for appeal.

CASE NOTES

Cited in In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

ARTICLE 54.

Juvenile Records and Social Reports.

§ 7A-675. Confidentiality of records.

CASE NOTES

Cited in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

ARTICLE 58.

Juvenile Law Study Commission.

§ 7A-740. Creation; members; terms; qualifications; vacancies.

The Juvenile Law Study Commission is hereby created. It shall consist of 17 voting members, 13 to be appointed by the Governor, two by the President of the Senate, and two by the Speaker of the House of Representatives. Of the members appointed by the Governor, two shall be district court judges, one from an urban district, one from a rural. Three shall be a chief court counselor and two court counselors representing the Intake Division, one from an urban district, one from a rural. Two shall be from Social Services, one from the State level and one from the county. One shall be from the Division of Youth Services. One shall be from a local facility of Community Based Alternatives. Two shall be persons under the age of 21 at the time of their appointment. One shall be from Law Enforcement. One shall be from the North Carolina Juvenile Detention Association. The district court judges and the Social Services members shall serve for three years. The chief court counselor and the court counselors shall serve for two years. The representatives from the Division of Youth Services, Law Enforcement, Community Based Alternatives, and the Juvenile Detention Association shall serve for one year. Two of the legislative members shall serve for four-year terms; two shall serve for two years. All initial terms shall begin July 1, 1980. A vacancy in membership shall be filled by the appointing authority who made the initial appointment. When the members' terms expire, their successors shall serve for the same length of time their predecessors served. A member whose term expires may be reappointed. (1979, 2nd Sess., c. 1283, s. 1; 1981 (Reg. Sess., 1982), c. 1189, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "17" for "15" and "13" for "11" in the second sentence and added the present eighth sentence.

Chapter 8.

Evidence.

ARTICLE 1.

Statutes.

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

CASE NOTES

Absence of Reference by Parties. — Under this section judicial notice of foreign law is required, even in the absence of reference thereto by the parties, when foreign law governs the action. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Stated in Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

ARTICLE 2.

Grants, Deeds and Wills.

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

CASE NOTES

Cited in Whichard v. Oliver, — N.C. App. —, 287 S.E.2d 461 (1982).

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

CASE NOTES

Cited in Whichard v. Oliver, — N.C. App. —, 287 S.E.2d 461 (1982).

ARTICLE 4.

Other Writings in Evidence.

§ 8-40. Proof of handwriting by comparison.

CASE NOTES

Cited in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

§ 8-45. Itemized and verified accounts.

CASE NOTES

Unverified Statements of Account Admissible as Business Records. — In an action to recover for labor and materials supplied by plaintiff in repairing defendant's truck, plaintiff's exhibit which consisted of itemized statements of account for materials supplied and labor performed by plaintiff upon defendant's truck was not admissible pursuant to this section because it was not verified; however, the exhibit was admissible under the business records exception to the hearsay rule where there was testimony that the exhibit properly reflected the work done by plaintiff's shop foreman and charges made pursuant to the work he performed. Bond Park Truck Serv. v. Hill, 53 N.C. App. 443, 281 S.E.2d 61 (1981).

ARTICLE 5.

Life Tables.

§ 8-46. Mortuary tables as evidence.

CASE NOTES

Where testimony tended to show that plaintiff's injuries were permanent, etc. — Before evidence of life expectancy under this section can be introduced, there must be evidence to a reasonable certainty of permanent injury. Mitchem v. Sims, — N.C. App. —, 285 S.E.2d 839 (1982).

ARTICLE 7.

Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.

Legal Periodicals. — For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

CASE NOTES

Personal Performance of Test by Witness Not Required. — This section allows testimony of paternity test results without requiring personal performance of the test. State v. Green, — N.C. App. —, 284 S.E.2d 688 (1981).

Indigent defendant's right to a free blood-grouping test may be rendered meaningless without counsel to advise him of his right to demand such a test, to explain the test's significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence. Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

Effect Where Principle of Res Judicata, etc. —

Before a court is required to order a

blood-grouping test in a civil action, the question of paternity must arise. If a defendant is barred by res judicata or estoppel from raising the issue of paternity, the statutorily imposed obligation of the court to order that the parties submit to blood-grouping tests never arises, and it is error for the court to enter such order. Withrow v. Webb, 53 N.C. App. 67, 280 S.E.2d 22 (1981).

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

Legal Periodicals. —
For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Purpose of Section. —
In accord with 4th paragraph in original. See Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982).

V. EXCEPTIONS.

Purpose of Exception. — The exception to the prohibition of the survivor's testimony when "the executor . . . is examined in his own behalf" is designed to prevent the estate from using this section as both a shield and a sword. Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982).

Executor must Be Voluntary Witness. — The door is opened to the survivor's testimony under the exception in this section only when the executor is a voluntary witness testifying in his own behalf, and not when he is forced upon the witness stand to testify against his interest. Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982).

A party cannot remove his own incompetency by calling the administrator as a witness and examining him concerning the transaction in controversy. Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982).

Responsive Averment Not Sufficient to Open Door to Plaintiff's Testimony. — Where plaintiff's allegations in her complaint against defendant executor put the defendant in a situation in which he had to aver something as required by § 1A-1, Rule 8(b), such a responsive averment did not suffice to "open the door" for testimony of the plaintiff which otherwise would be excluded under this section. Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982).

§ 8-51.1. Dying declarations.

CASE NOTES

It is not necessary for the declarant to state, etc. —
The party seeking admission of the out-of-court statement need not show that the declarant stated he had given up all hope of living or considered himself to be in the throes of death. All that must be shown is that the declarant believes he is going to die. This belief is best shown by his express communication to this effect. However, it is not necessary that declarant personally express his belief that he has no chance of recovery. This may be shown by the circumstances. State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981).

§ 8-53. Communications between physician and patient.

Legal Periodicals. — For article discussing the psychotherapist-patient privilege, see 60 N.C.L. Rev. 893 (1982).

CASE NOTES

II. NATURE AND SCOPE OF PRIVILEGE.

Examination as to Criminal Defendant's Competence. — No physician-patient privilege is created between a physician and a criminal defendant examined by the physician for the purpose of passing on defendant's ability to proceed to trial. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

A psychiatrist appointed by the court for a sanity examination of the defendant is a witness for the court, not the prosecution, and the statements made by the defendant to the psychiatrist are not privileged under the doctor-patient relationship. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

Optometrists Not Covered by Privilege. — The physician-patient privilege against disclosure of confidential communications and information does not extend to optometrists. State v. Shaw, — N.C. —, 289 S.E.2d 325 (1982).

IV. COMPELLED DISCLOSURE.

Trial Judge May Compel Disclosure. — The procedural aspects of the statutory physician-patient privilege, established in this section, are qualified. It is within the discretion of the trial judge alone to compel a physician called as a witness to testify for the proper administration of justice as to matters within the physician-patient relationship. Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 278 S.E.2d 893, petition for discretionary review denied, 304 N.C. 193, 285 S.E.2d 96 (1981).

This section creates only a limited physician-patient privilege, because a trial judge may compel disclosure and deny defendant the benefit of the privilege if this is necessary for the proper administration of justice. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

But Appellate Court Cannot Exercise Trial Judge's Authority. — In order to protect the privilege from abusive treatment by those not directly involved in a case, it is important that only the trial judge, either at trial or prior to trial, be the one to order disclosure by a physician of privileged information. Only the actual trial judge is so involved in the case as to be able adequately to protect the rights of a party who asserts his privilege. Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 278 S.E.2d 893 (1981).

§ 8-53.3. Communications between psychologist and client.

Legal Periodicals. — For article discussing the psychotherapist-patient privilege, see 60 N.C.L. Rev. 893 (1982).

§ 8-54. Defendant in criminal action competent but not compellable to testify.

Legal Periodicals. — For comment on impeaching a criminal defendant by prior acquittals, see 17 Wake Forest L. Rev. 561 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Court's Comment Not Improper. — Trial court in a prosecution for armed robbery did not improperly comment on defendant's failure to testify when defense counsel stated he was going to introduce defendant into evidence and the court replied, "He'll have to take the witness stand," since the court's remark merely explained evidentiary procedure. State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

Error in Sustaining Objections Held Waived. — In a prosecution for first-degree murder, where defendant contended that the

trial court erred in sustaining the State's objections to several of his attempts to explain his answers, thereby violating his right to testify in his own behalf pursuant to this section, any error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

III. CROSS-EXAMINATION OF DEFENDANT.

B. Particular Areas of Inquiry.

And Specific Acts of Misconduct. — When a defendant becomes a witness and testifies in his own behalf, he is subject to cross-examination like any other witness, and, for purposes of impeachment, he may be cross-examined by the district attorney concerning any specific acts of misconduct which tend to impeach his character. State v. Galloway, — N.C. —, 284 S.E.2d 509 (1981).

IV. DEFENDANT NOT TESTIFYING.

A. Effect.

This section unquestionably prohibits any comment before the jury concerning defendant's failure to testify. State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

C. Instructions to Jury.

2. Necessity of Request.

Instruction Discretionary, etc. — Under this section the trial judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant requests the instruction. In fact, it is better not to give such an instruction unless defendant requests it. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

3. Proper.

Proper Instruction. — It is not always prejudicial error to give an unrequested instruction regarding defendant's failure to testify or present evidence. There is no prejudicial error if the instruction makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

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

Legal Periodicals. —

For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For a comment on adverse marital testimony in criminal actions after the modification of the common-law rule by State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).

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

Legal Periodicals. —

For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For a comment on adverse marital testimony in criminal actions after the modification of the common-law rule by State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).

CASE NOTES

I. GENERAL CONSIDERATION.

A. Spouse Incompetent to Testify.

Common-Law Rule Modified. — The common-law rule prohibiting one spouse from testifying against another in a criminal action is modified so as to prohibit such testimony only if the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage. State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

A wife's testimony that her husband shot and killed her brother in her presence in a public place was competent in a prosecution of the husband for first-degree murder of her brother, since the actions of the husband in a public place and in the presence of a third person could not have been a communication made in the confidence of the marital relationship or one

which was induced by affection and loyalty in the marriage. State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

Relationship of Section to Common Law. — This section does not codify the common-law rule prohibiting one spouse from testifying against the other in a criminal action but merely provides that, aside from the exceptions listed therein, the common-law rule remains unchanged and in full effect, and the Supreme Court possesses the authority to alter such judicially created common-law rule. State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

IV. CONFIDENTIAL COMMUNICATIONS.

When Communication Confidential. — In determining whether a spouse's testimony includes a "confidential communication," the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

Testimony of Wife Who Witnessed Killing by Husband. — This section does not render the testimony invalid of a wife who witnessed the killing by her husband of a passenger in the car she was driving as such testimony does not fit the definition of a "confidential communication" between marriage partners. State v. Funderburk, — N.C. App. —, 286 S.E.2d 884 (1982).

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

Legal Periodicals. —
For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

§ 8-57.2. Presumed father or mother as witnesses where paternity at issue.

Legal Periodicals. — For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

CASE NOTES

Rule rendering wife incompetent to prove nonaccess has now been abrogated entirely in all civil and criminal proceedings in which paternity is at issue. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

Cited in Wake County ex rel. Manning v. Green, 53 N.C. App. 26, 279 S.E.2d 901 (1981).

ARTICLE 7A.

Restrictions on Evidence in Rape Cases.

§ 8-58.6. Restrictions on evidence in rape or sex offenses cases.

Legal Periodicals. —
For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

For note discussing the constitutionality of North Carolina's Rape-Shield Law, see 17 Wake Forest L. Rev. 781 (1981).

CASE NOTES

Codification of Rule of Relevance. — Naked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial. This section merely codifies this rule. State v. Galloway, — N.C. —, 284 S.E.2d 509 (1981).

Policy. — It is the policy of this State to prevent unnecessary intrusions into the privacy of victims of sex crimes which are irrelevant to the prosecution of an individual charged with such crimes. State v. Clontz, — N.C. —, 286 S.E.2d 793 (1982).

Evidence that the victim was using birth control pills at the time of the alleged rape was evidence of sexual activity excluded by this section, the probative value of which was outweighed by the prejudicial effect on the victim. State v. Bridwell, — N.C. App. —, 289 S.E.2d 842 (1982).

Psychiatric Examination May Not Be Forced Upon Unwilling Witness. — A trial judge does not have the discretionary power to compel an unwilling witness to submit to a psychiatric examination. To order the victim of a sex crime to unwillingly submit to a psychiatric examination would result in a profound invasion of her privacy which would deter innocent victims of such crimes from ever making complaints. State v. Clontz, — N.C. —, 286 S.E.2d 793 (1982).

ARTICLE 7B.

Expert Testimony.

§ 8-58.12. Hypothetical question not required.

CASE NOTES

Quoted in Simons v. Georgiade, — N.C. App. —, 286 S.E.2d 596 (1982).

Cited in Owens v. Green Valley Supply Co., — N.C. App. —, 289 S.E.2d 591 (1982).

§ 8-58.13. Opinion testimony permitted.

CASE NOTES

To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact type of subject matter under investigation, nor need he be engaged in any particular profession or other calling; it is enough that, through study or experience or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

Question of whether a witness is sufficiently qualified to be an expert is one of fact ordinarily to be determined at the discretion of the trial judge. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

Finding of Requisite Skill Not Reversed Absent Abuse of Discretion. — Finding by the trial judge that a witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

ARTICLE 13.

Photographs.

§ 8-97. Photographs as substantive or illustrative evidence.

CASE NOTES

Stated in State v. Woods, — N.C. App. —, 287 S.E.2d 431 (1982).

Chapter 8B.

Interpreters for Deaf Persons.

§ 8B-1. Definitions; right to interpreter; determination of competence.

CASE NOTES

Cited in State v. McLellan, — N.C. App. —, 286 S.E.2d 873 (1982).

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.
9-2. Preparation of jury list; sources of names.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-2. Preparation of jury list; sources of names.

(a) It shall be the duty of the jury commission beginning July 1, 1981, (and each biennium thereafter) to prepare a list of prospective jurors qualified under this Chapter to serve in the biennium beginning January 1, 1982, (and each biennium thereafter). Instead of providing a list for an entire biennium, the commission may prepare a list each year if the senior regular resident superior court judge requests in writing that it do so.

(1981 (Reg. Sess., 1982), c. 1226, s. 1.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added the second sentence of subsection (a).

Session Laws 1981 (Reg. Sess., 1982), c. 1226, s. 2, provides that a jury commission may prepare a list for the calendar year 1983 pursuant to the provisions of this act, even though the commission in 1981 prepared a jury list for the entire 1982-83 biennium.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

III. PROOF OF DISCRIMINATION.

Discrimination Not Established. —

Where the evidence showed that jury lists were compiled in strict compliance with this section, the mere fact that only 15 percent of the jury pool was black in a county of 24 percent black was insufficient to show systematic discrimination. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

Article 2.

Petit Jurors.

§ 9-14. Jury sworn; judge decides competency.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

II. CHALLENGE TO JURORS.

The right of challenge, etc. —

A party has no right to seat a particular juror,

but only to reject one who is prejudiced against him. State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, — N.C. —, 284 S.E.2d 495 (1981).

III. COMPETENCY OF JURORS.

The question of whether a juror is competent, etc. —

The trial judge is vested with broad discretion in determining the competency of the jurors. State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, — N.C. —, 284 S.E.2d 495 (1981).

§ 9-15. Questioning jurors without challenge; challenges for cause.

CASE NOTES

II. QUESTIONING PROSPECTIVE JURORS.

A. Nature and Scope of Inquiry.

Purpose of Voir Dire. —

In accord with 1st paragraph in original. See State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

The voir dire examination of jurors allowed by this section serves the dual purpose of ascertaining whether grounds exist for challenge for cause to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31, petition for discretionary review denied, 304 N.C. 197, 285 S.E.2d 102 (1981).

Regulation of Voir Dire, etc. —

In accord with 1st paragraph in original. See State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

Chapter 14.

Criminal Law.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 8.

Assaults.

Sec.

14-34.3. Manufacture, sale, purchase, or possession of teflon-coated types of bullets prohibited.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 31.

Misconduct in Public Office.

14-250. Publicly owned vehicles to be marked.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries and Gaming.

14-292.1. Bingo and raffles.

Article 52A.

Sale of Weapons in Certain Counties.

Sec.

14-403. Permit issued by sheriff; form of permit.

14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

Article 53.

Sale of Weapons in Certain Other Counties.

14-409.2. Permit issued by clerk of court; form of permit.

14-409.3. Issuance or refusal of permit; appeal from refusal; grounds for refusal; clerk's fee.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1.1. Punishment for felonies occurring on and after July 1, 1981.

Legal Periodicals. — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

For comment clarifying the law of parties in North Carolina by punishing accessories before the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Cited in State v. Smith, — N.C. —, 285 S.E.2d 800 (1982).

§ 14-2. Punishment of felonies occurring before July 1, 1981.

CASE NOTES

Cited in State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

§ 14-2.2. Sentencing of person convicted of repeated felony using deadly weapon.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

CASE NOTES

I. GENERAL CONSIDERATION.

Quoted in State v. Jarvis, 50 N.C. App. 679, 274 S.E.2d 852 (1981); State v. Hageman, — N.C. App. —, 289 S.E.2d 89 (1982).

Stated in State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981).

Cited in State v. Huff, — N.C. App. —, 289 S.E.2d 604 (1982); United States v. Ward, 676 F.2d 94 (4th Cir. 1982).

ARTICLE 2.

Principals and Accessories.

§ 14-5.2. Accessory before fact punishable as principal felon.

Legal Periodicals. —

For survey of 1980 criminal law in general, see 59 N.C.L. Rev. 1123 (1981).

For comment clarifying the law of parties in North Carolina by punishing accessories before the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

CASE NOTES

V. PRACTICE AND PROCEDURE.

A. In General.

Jurisdiction Where Accessorial Acts Occur Outside State. — This state may constitutionally assert jurisdiction over a defendant who commits the crime of accessory before the fact to a felony committed within the State when the counselling, procuring or commanding took place without the state. (Decided under former § 14-5). State v. Darroch, — N.C. —, 287 S.E.2d 856 (1982).

§ 14-7. Accessories after the fact; trial and punishment.

Legal Periodicals. — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

Elements of Crime. —
In order to convict a defendant of being an accessory after the fact under this section, the State must prove the following: (1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony. State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, — N.C. —, 284 S.E.2d 495 (1981).

Under this section, the State had to prove three things in its prosecution of defendant as an accessory after the fact: (1) the principal committed a felony; (2) the alleged accomplice personally aided the principal in his attempts to avoid criminal liability by any means calculated to assist him in doing so; and (3) the accomplice gave such help with knowledge that the principal had committed a felony. State v. Fearing, — N.C. —, 284 S.E.2d 479 (1981).

Cited in State v. Duvall, — N.C. —, 284 S.E.2d 495 (1981).

ARTICLE 2A.

Habitual Felons.

§ 14-7.2. Punishment.

CASE NOTES

Quoted in State v. Keyes, — N.C. App. —, 286 S.E.2d 861 (1982).

§ 14-7.3. Charge of habitual felon.

CASE NOTES

Quoted in State v. Keyes, — N.C. App. —, 286 S.E.2d 861 (1982).

§ 14-7.5. Verdict and judgment.

CASE NOTES

Principal Felony Indictment Need Not Mention Recidivist Status. — The legislature did not intend the first indictment notifying the defendant of the substantive charge against him to include a mention of the defendant's recidivist status. State v. Keyes, — N.C. App. —, 286 S.E.2d 861 (1982).

§ 14-7.6. Sentencing of habitual felons.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Quoted in State v. Keyes, — N.C. App. —, 286 S.E.2d 861 (1982).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

Legal Periodicals. —

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

"Without justification or excuse" as an element of murder in the first or second degree means the defendant did not believe it was necessary to kill the victim in order to save herself from death or great bodily harm; or, if she did believe this, her belief under the circumstances as they appeared to her at that time was unreasonable. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

Applied in State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Stanley, — N.C. App. —, 286 S.E.2d 865 (1982).

Cited in State v. Cason, 51 N.C. App. 144, 275 S.E.2d 221 (1981); State v. Powell, 51 N.C. App. 224, 275 S.E.2d 528 (1981); State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

III. MURDER IN THE FIRST DEGREE.

A. Defined.

Murder in the first degree, etc. —

In accord with 1st paragraph in original. See State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, — U.S. —, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, — U.S. —, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

Same — Deliberation Defined. —

In accord with 3rd paragraph in original. See State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

In accord with 5th paragraph in original. See State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose. State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981).

Deliberation means that the intent to kill was formed while defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

"Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time. State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

"Cool state of blood" does not, in the context of determining the existence of deliberation, mean an absence of passion and emotion; although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

B. Premeditation and Deliberation.

1. In General.

Same — Premeditation Defined. —

In accord with 1st paragraph in original. See State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

In accord with 2nd paragraph in original. See State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

Premeditation and Deliberation are Essential Elements, etc. —

In accord with 4th paragraph in original. See State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, — U.S. —, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, — U.S. —, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981).

Murder in the first degree differs from murder in the second degree in that the former requires premeditation and deliberation. State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

Length of Time Immaterial. —

No fixed length of time is required for the mental processes of premeditation and deliberation constituting first-degree murder. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Killing committed during the course of a quarrel or scuffle may constitute first-degree murder provided defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing during the quarrel was the product of this earlier formed intent. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

Passion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time; if the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

Intent Formed Simultaneous with Act, etc. —

Where the killing was the product of a specific intent to kill formed under the influence of the provocation of the quarrel or struggle itself, then there would be no deliberation and hence no murder in the first degree. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

2. Proof.

Proof by Circumstantial Evidence. —

In accord with 3rd paragraph in original. See State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Since premeditation and deliberation are processes of the mind, they are not susceptible to direct proof and must almost always be proved by circumstantial evidence. State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981).

Generally, premeditation and deliberation must be proved by circumstantial evidence because they are not susceptible of proof by direct evidence. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

Deliberation is seldom capable of actual proof, but must be determined by the jury from the circumstances. State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

Circumstances Which May Be Considered. —

Among the circumstances which may be considered as tending to prove premeditation and deliberation are: lack of provocation by the deceased; defendant's acts and comments before and after the killing; the use of grossly excessive force or the infliction of lethal blows after the deceased has been felled; and any history of altercations or ill will between the parties. State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981).

E. Murder Committed in Perpetration of a Felony.

And Premeditation and Deliberation, etc. —

In accord with 7th paragraph in original. See State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

In accord with 9th paragraph in original. See State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

A homicide which is committed in the perpetration or attempted perpetration of a felony is murder in the first degree, irrespective of premeditation and deliberation. In such cases, the law presumes premeditation and deliberation and the State is not put to further proof of either. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

When the law and evidence justify the use of the felony murder rule under this section, the State is not required to prove premeditation and deliberation, nor need the lesser offenses of second-degree murder or manslaughter be submitted to the jury unless there is evidence to support such a finding. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Same — Robbery. —

In accord with 4th paragraph in original. See State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

Circumstance of pecuniary gain is not an essential element of felony murder; this cir-

cumstance examines the motive of the defendant rather than his acts, and while motive does not constitute an element of the offense, it is appropriate to be considered on the question of sentence. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Unbroken Chain of Events Required. — In accord with 1st paragraph in original. See State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

A killing is committed in the perpetration or attempted perpetration of a felony when there is no break in the chain of events leading from the initial felony to the act causing death, and the underlying felony is not deemed terminated prior to the killing merely because the participants have proceeded far enough to be convicted of the underlying felony. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

What Unspecified Felonies, etc. — In accord with 2nd paragraph in original. See State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Same — Discharging Firearm into Occupied Property. — In accord with 3rd paragraph in original. See State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

And No Additional Punishment, etc. — When a defendant is convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction provides no basis for an additional sentence, hence it merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

In a prosecution where defendants were charged with first-degree murder under the felony murder doctrine, the underlying felony became part of the first-degree murder charge, and further prosecution for the underlying felony was prohibited; therefore, the trial court was not required to instruct the jury as to the lesser included offenses of the underlying felony. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Punishment Where Other Felony Not Element. — When a defendant has been convicted of first-degree murder on a theory of premeditation and deliberation and in the process commits some other felony, the other felony is not an element of the murder conviction although the other felony may be part of the same continuous transaction, and therefore, a defendant may in such cases be sentenced upon both the murder conviction and the other felony conviction. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

When a jury is properly instructed upon both theories of premeditation and deliberation and felony murder, and returns a first-degree murder verdict without specifying whether it relied on either or both theories, the case is treated as if the jury relied upon the felony murder theory for purposes of applying the merger rule, and judgment imposed on a conviction for the underlying felony must be arrested. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

IV. MURDER IN THE SECOND DEGREE.

A. In General.

Meaning of Final Sentence. — The final sentence of this section merely indicates that all crimes which were murder at common law remain murder in the second degree, unless otherwise made murder in the first degree under one of the specific classifications of the statutes. State v. Davis, — N.C. —, 290 S.E.2d 574 (1982).

The second and final sentence of this section requires only that all intentional and unlawful killings with malice aforethought be classified as murder in the second degree, unless they have for one or more reasons been declared murder in the first degree by the express terms of the statute. State v. Davis, — N.C. —, 290 S.E.2d 574 (1982).

What Constitutes Second-Degree Murder. —

In accord with 1st paragraph in original. See State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

Elements of the Offense — Proximate Cause. —

In accord with 1st paragraph of 1981 Cumulative Supplement. See State v. Brock, — N.C. —, 290 S.E.2d 566 (1982).

A person is criminally responsible for a homicide only if his act caused or directly contributed to the death of the victim. State v. Brock, — N.C. —, 290 S.E.2d 566 (1982).

Burden of Proof. — In offering evidence of "all other kinds of murder" as that phrase is employed in the second sentence of this section, the State must bear the burden of proving that the killing was intentional, unlawful and done with malice aforethought, even though it may have been proximately caused by the unlawful distribution of controlled substances or proximately caused by the commission or the attempted commission of any felony not specified in the first sentence of this section and without the use of a deadly weapon. State v. Davis, — N.C. —, 290 S.E.2d 574 (1982).

If the State is to carry its burden of proof on a charge of murder in cases in which a killing occurs during the commission of a felony committed or attempted without the use of a deadly weapon and not one of the felonies speci-

fied in this section, it must show that the killing was murder as at common law by proof beyond a reasonable doubt that it was an intentional and unlawful killing with malice aforethought. In such cases the State will have borne the burden of proof necessary to sustain a conviction of murder in the second degree. If the State additionally can prove beyond a reasonable doubt that the murder was premeditated and deliberate, it will have borne its burden of proving the offense was murder in the first degree. State v. Davis, — N.C. —, 290 S.E.2d 574 (1982).

C. Intentional Killing With a Deadly Weapon.

Intentional Killing with Deadly Weapon Creates Presumptions, etc. —

Upon showing that there has been an intentional killing with a deadly weapon, the law permits the jury to infer that the homicide was committed with malice. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

V. DEFENSES AND DENIALS.

F. Self-Defense.

Elements of Perfect Self-Defense. — The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed: (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

Or He Will Not Be Excused, etc. —

In accord with 2nd paragraph in original. See State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

If defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the imperfect right of self-defense, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

VI. PRACTICE AND PROCEDURE.

G. Instructions to Jury.

1. Instructions Concerning Degree of Offense Charged.

Where Jury May Be Instructed, etc. —

In a prosecution where defendants were charged with first-degree murder and the evidence tended to show that defendants killed decedent in the perpetration of the underlying felony of burglary, but there was no evidence that decedent was killed other than in the course of the commission of burglary, the trial court was not required to submit lesser included offenses of second-degree murder and voluntary manslaughter to the jury. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

2. Other Instructions.

Aggravating Factor of Pecuniary Gain. — Submission to the jury of the aggravating factor of pecuniary gain does not relitigate the question of intentional killing or any element of the offense of first-degree murder under the felony-murder rule. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Self-Defense — Use of Force in Resisting Unlawful Arrest. — In a prosecution for the murder of a military policeman while defendant was in a holding cell after he had been unlawfully arrested, trial court did not err in failing to charge that defendant was entitled to use deadly force if such was required to prevent the arrest or to free himself from unlawful confinement, since the victim of an unlawful arrest is not ipso facto entitled to kill or to use deadly force against the person attempting arrest. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, — U.S. —, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Same — Provocation of Fight or Assault. — In a prosecution for the murder of a military policeman while defendant was in a holding cell after having been illegally arrested, trial court's instruction, dealing with the right to kill in self-defense, that "one enters a fight voluntarily if he uses toward his opponent such abusive language which considering all of the circumstances is calculated and intended to bring on a fight, and if a person precipitates an altercation or a fight with the intent to provoke a deadly assault by the victim in order that he might kill him the subsequent killing of the victim in response to the attack is murder" was a correct statement of the law and was supported by the evidence. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, — U.S. —, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

H. Verdict.

Effect of Perfect Right of Self-Defense. — The existence of a perfect right of self-defense requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

Effect of Imperfect Right of Self-Defense. — Where the issue in a homicide case narrows to the exercise of either the perfect or imperfect right of self-defense, as the jury may find, the question for the jury is not limited to whether defendant is guilty of first-degree murder or not guilty by reason of self-defense. When the defendant has exercised the imperfect right of self-defense, the homicide is reduced from murder to manslaughter. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

§ 14-17.1. Crime of suicide abolished.

CASE NOTES

Stated in State v. Hunt, — N.C. —, 287 S.E.2d 818 (1982).

§ 14-18. Punishment for manslaughter.

CASE NOTES

II. MANSLAUGHTER.

A. In General.

Definitions. —

In accord with 1st paragraph in original. See State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

B. Voluntary.

Definitions. —

In accord with 1st paragraph in original. See State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

C. Involuntary.

Definitions. —

In accord with 4th paragraph in original. See State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

In accord with 5th paragraph in original. See State v. McAdams, 51 N.C. App. 140, 275 S.E.2d 500 (1981).

In accord with 7th paragraph in original. See State v. Martin, 52 N.C. App. 373, 278 S.E.2d 305, cert. denied, 303 N.C. 549, 281 S.E.2d 399 (1981); State v. Flaherty, — N.C. App. —, 284 S.E.2d 565 (1981).

Involuntary manslaughter is the unintentional killing of a human being without malice by (1) some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) an act or omission constituting culpable negligence. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

V. CULPABLE NEGLIGENCE.

Culpable Negligence Defined. —

In accord with 3rd paragraph in original. See State v. Flaherty, — N.C. App. —, 284 S.E.2d 565 (1981).

VI. SELF-DEFENSE.

Defense Unavailable for Involuntary Manslaughter. — In a prosecution for second-degree murder in which all the evidence showed that the defendant intentionally shot deceased and thereby caused his death, and the defendant relied on the defense of self-defense which is unavailable for a charge of involuntary manslaughter, the trial court committed prejudicial error in submitting involuntary manslaughter to the jury, and where the jury found the defendant guilty of involuntary manslaughter and acquitted the defendant of all other degrees of homicide, the defendant was entitled to be discharged. State v. Cason, 51 N.C. App. 144, 275 S.E.2d 221 (1981).

ARTICLE 7A.

Rape and Other Sex Offenses.

§ 14-27.1. Definitions.

Legal Periodicals. — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

CASE NOTES

"Any Object" Includes Parts of Human Body. — In defining a "sexual act" in subdivision (4) as "the penetration, however slight, by any object into the genital or anal opening of another person's body," the legislature intended the words "any object" to embrace parts of the human body as well as inanimate or foreign objects; therefore, the State's evidence was sufficient for the jury in a prosecution for second-degree sexual offense where it tended to show that the defendant penetrated the genital opening of the prosecutrix's body with his fingers. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

Penetration is not a necessary element of cunnilingus as the term is used in subdivision (4) of this section; rather, cunnilingus means stimulation by the tongue or lips of any part of a female's genitalia, and the required stimulation is accomplished when there has been the slightest touching by the lips or tongue of another to any part of the female's genitalia. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Degradation to the person of a woman forced to submit or to a small girl incapable of consent is complete in the case of cunnilingus once the perpetrator's lips or tongue have touched any part of her genitalia, whether or not any actual "penetration" of the genitalia takes place. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Applied in State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

Quoted in State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981).

Cited in State v. Edwards, — N.C. —, 289 S.E.2d 360 (1982).

§ 14-27.2. First-degree rape.

Legal Periodicals. —

For an article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For note discussing the constitutionality of North Carolina's Rape-Shield Law, see 17 Wake Forest L. Rev. 781 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Quoted in State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

Cited in State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981); State v. Jones, 304 N.C. 323, — S.E.2d — (1981); State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981); State v. Brown, — N.C. App. —, 287 S.E.2d 421 (1982); State v. Jordan, — N.C. —, 287 S.E.2d 827 (1982).

II. WHO MAY BE GUILTY OF RAPE.

Aider and Abettor of Rape Defined. — An aider or abettor of first-degree rape is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense. Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

III. ELEMENTS OF THE OFFENSE.

First and Second Degree Rape Distinguished. — The sole distinction between the crimes of first and second-degree rape is the

element of the use of a deadly weapon or aiding and abetting. If serious bodily injury is inflicted, the crime is also first-degree rape. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

Child in Thirteenth Year. — By changing the language of the statute from "under the age of 12 years" to "12 years or less" the legislature intended to include within the purview of this section a child who is in her thirteenth year at the time of the rape. State v. Ashley, 54 N.C. App. 386, 283 S.E.2d 805 (1981).

"By Force". —

The phrase "by force and against her will," (now "by force and against the will of the other person") used in this section and §§ 14-27.3, 14-27.4 and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981); State v. Booher, — N.C. —, 290 S.E.2d 561 (1982).

The words "against the will" connote the victim's lack of consent. State v. Booher, — N.C. —, 290 S.E.2d 561 (1982).

Legislative Intent Regarding Use of Deadly Weapon. — The legislature intended to make implicit under this section a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed. State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

Penetration without Emission, etc. —

As vaginal intercourse requires only the slightest penetration, the absence of sperm and other physical symptoms such as swelling or abrasions does not support a finding of attempted rape. State v. Ashley, 54 N.C. App. 386, 283 S.E.2d 805 (1981).

Evidence of Force Held Sufficient. — Where it was established that the victim, a 78-year-old lady, had been severely beaten, resulting in multiple contusions and a large bite on her arm, multiple abrasions on her face, a one and one-half inch long laceration on the left side of her scalp, abrasions on both legs, and fractured ribs on her left side, there was evidence sufficient to support a conviction under this section. State v. Green, — N.C. —, 290 S.E.2d 625 (1982).

IV. DEFENSE OF CONSENT.

Explicit Threat Unnecessary. — The absence of an explicit threat inducing consent is not determinative; it is enough if the totality of the circumstances surrounding the actions of defendant give rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual contact. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

V. PRACTICE AND PROCEDURE.

C. Evidence.

1. Admissibility of Evidence Generally.

Scope of Medical Expert's Testimony. — A medical expert may not testify that the defendant raped the prosecuting witness; however, a physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby. State v. Galloway, — N.C. —, 284 S.E.2d 509 (1981).

Testimony that an examination revealed evidence of traumatic and forcible penetration consistent with an alleged rape is a proper expression for an expert witness to establish whether the victim had been penetrated by force. State v. Galloway, — N.C. —, 284 S.E.2d 509 (1981).

Assaults on Other Women on Same Date. — In a prosecution for first-degree rape, evidence that defendant committed assaults on two other women on the same date as the rape was competent to show defendant's state of mind and his common scheme and design to apply physical force in the commission of crimes of violence; furthermore, the two assaults were sufficiently close in time to the alleged rape that the incidents presented circumstances, not too remote in time to have probative value, which tended to aid the jury in understanding the conduct and motives of defendant. State v. Rick, 51 N.C. App. 383, 276 S.E.2d 768 (1981).

Testimony As to Statements Made by Defendant to Victim. — Testimony by rape victim that defendant acknowledged prior sexual offenses and that he stated he enjoyed degrading white women was admissible evidence relevant to show both defendant's motive for assaulting prosecutrix and possession of criminal intent before the fact. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

D. Instructions.

Reasonableness of Fear and Fear of Violence. — The failure of the trial judge in a prosecution for first degree rape to instruct the jury that the fear which induces consent must be reasonable and that the fear must be of violence was not error. Statements contained in prior cases do not establish an objective standard of reasonableness by which the jury must judge consent, and, even if the reasonableness standard were the rule, instructions that the victim's fear must be reasonable and of violence were unnecessary under the facts of the case. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

Knowledge of Aider and Abettor's Threats. — For defendant to be convicted of first-degree rape based in part on the actions of

codefendant, it is necessary to show only that the two share a common unlawful purpose, i.e., that the two aid and abet one another in the commission of the crime; it is not necessary for each to have full knowledge of all acts committed by the other. Thus, where the trial court fully and adequately instructed on the elements of aiding and abetting, the court did not err in failing to instruct that the defendant must be found to have known of codefendant's threats which induced consent. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

§ 14-27.3. Second-degree rape.

CASE NOTES

First and Second Degree Rape Distinguished. — The sole distinction between the crimes of first and second-degree rape is the element of the use of a deadly weapon or aiding and abetting. If serious bodily injury is inflicted, the crime is also first-degree rape. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

"By Force". —

Phrase "by force and against her will," (now "by force and against the will of the other person") used in this section and §§ 14-27.2, 14-27.4 and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981); State v. Booher, — N.C. —, 290 S.E.2d 561 (1982).

Applied in State v. Jones, 304 N.C. 323, — S.E.2d — (1981); State v. Barnes, — N.C. App. —, 289 S.E.2d 580 (1982).

Stated in State v. Ashley, 54 N.C. App. 386, 283 S.E.2d 805 (1981); State v. Clontz, — N.C. —, 286 S.E.2d 793 (1982).

Cited in State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981); State v. Pace, 51 N.C. App. 79, 275 S.E.2d 249 (1981).

§ 14-27.4. First-degree sexual offense.

CASE NOTES

First and Second Degree Offenses Distinguished. — A second degree offense differs from a first degree offense only in the absence of the alternative elements of aiding and abetting, use or display of a deadly weapon, or infliction of serious bodily injury. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first-degree sexual offense and the court's instruction on second-degree sexual offense was error, since the offense is always first degree when aiding and abetting is proven. State v. Barnette, 304 N.C. 447, — S.E.2d — (1981).

Elements of Proof. — To convict a defendant of a first-degree sexual offense with a child of 12 years or less, the State need only prove that (1) the defendant engaged in a "sexual act," (2) the victim was at the time of the act 12 years old or less, and (3) the defendant was at that time four or more years older than the victim. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

"By Force". — Phrase "by force and against her will," (now "by force and against the will of the other person") used in this section, §§ 14-27.2, 14-27.3, and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981).

Under the sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed "by force and against the will" of the victim. Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent. State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981).

Lack of Consent Essential. — Both a first and second-degree sexual offense, insofar as they may be committed against an adult not physically or mentally handicapped, have as an essential element the lack of the victim's consent because they must be committed "by force and against the will" of the victim. State v. Booher, — N.C. —, 290 S.E.2d 561 (1982).

Testimony of Four Year Old Victim Sufficient Evidence of Cunnilingus. — Testimony of four-year-old girl that defendant "touched me . . . with his tongue . . . between my legs," while indicating the place of touching to the jury, constituted sufficient evidence of cunnilingus to

support a conviction for a first-degree sexual offense. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Taking Indecent Liberties not Lesser Included Offense. — In a prosecution of defendant under subsection (a) of this section for engaging in a sexual act with children under 12, the trial court did not err in failing to instruct on taking indecent liberties with children in violation of § 14-202.1, since taking indecent liberties with children is not a lesser included offense of the crime proscribed by subsection (a). State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

Sufficiency of Indictment. — Section 15-144.2(a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. State v. Berkley, — N.C. App. —, 287 S.E.2d 445 (1982).

While it is essential that the State prove a "sexual act" as defined by § 14-27.1(4) in order to convict a defendant under this section, an indictment which is drafted pursuant to the provisions of § 15-144.2(b) without specifying which "sexual act" was committed is sufficient to charge the crime of the first-degree sexual offense and to inform a defendant of such accusation. If a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars. State v. Edwards, — N.C. —, 289 S.E.2d 360 (1982).

Fatal Variance. — Where all of the state's evidence tended to show that defendant penetrated the vaginal and rectal orifices of two girls by using a tampon, and no evidence in the record tended to show that defendant committed the act of cunnilingus or of anal intercourse with either victim as alleged in the indictment, the trial court erred in failing to dismiss the charges on grounds of a fatal variance between the allegations and the proof at trial. State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

The defendant was not guilty of a first-degree sexual offense where the victim actively encouraged and ultimately induced the defendant to commit the crime of fellatio on him for the purpose of documenting certain facts relative to their relationship and not for the purpose of having the defendant arrested for his acts. State v. Booher, — N.C. —, 290 S.E.2d 561 (1982).

Stated in State v. Jones, 304 N.C. 323, — S.E.2d — (1981).

Cited in State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981); State v. Jordan, — N.C. —, 287 S.E.2d 827 (1982).

§ 14-27.5. Second-degree sexual offense.

CASE NOTES

First and Second Degree Offenses Distinguished. — A second-degree offense differs from a first-degree offense only in the absence of the alternative elements of aiding and abetting, use or display of a deadly weapon, or infliction of serious bodily injury. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

Under § 14-27.4(a) and subsection (a) of this section, when aiding and abetting is proven, the offense is first degree; it can never be a second-degree offense. State v. Barnette, — N.C. —, 284 S.E.2d 298 (1981).

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first-degree sexual offense and the court's instruction on second-degree sexual offense was error, since the offense is always first degree when aiding and abetting is proven. State v. Barnette, 304 N.C. 447, — S.E.2d — (1981).

Conduct Included in "Sexual Act". — In defining a "sexual act" in § 14-27.1(4) as "the penetration, however slight, by any object into the genital or anal opening of another person's body," the legislature intended the words "any object" to embrace parts of the human body as well as inanimate or foreign objects; therefore, the State's evidence was sufficient for the jury in a prosecution for second-degree sexual offense where it tended to show that the defendant penetrated the genital opening of the prosecutrix's body with his fingers. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

"By Force". — The phrase "by force and against her will," (now "by force and against the will of the other person") used in this section and §§ 14-27.2, 14-27.3, and 14-27.4, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981).

Under the sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed "by force and against the will" of the victim. Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force

and negates the consent. State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981).

The threat of serious bodily harm which reasonably induces fear thereof constitutes sufficient force for a second-degree sexual offense under subdivision (a)(1) of this section. State v. Berkley, — N.C. App. —, 287 S.E.2d 445 (1982).

Lack of Consent Essential. — Both a first and second-degree sexual offense, insofar as they may be committed against an adult not physically or mentally handicapped, have as an essential element the lack of the victim's consent because they must be committed "by force and against the will" of the victim. State v. Booher, — N.C. —, 290 S.E.2d 561 (1982).

Sufficiency of Indictment. — Section 15-144.2(a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. State v. Berkley, — N.C. App. —, 287 S.E.2d 445 (1982).

Quoted in State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Stated in State v. Jones, 304 N.C. 323, — S.E.2d — (1981).

Cited in State v. Pace, 51 N.C. App. 79, 275 S.E.2d 254 (1981).

§ 14-27.6. Penalty for attempt.

CASE NOTES

Assault with Intent to Commit Rape under Former § 14-22. —

See State v. Little, 51 N.C. App. 64, 275 S.E.2d 249 (1981).

Conviction under This Section and § 14-32 Not Double Jeopardy. — In a criminal prosecution defendant was not subjected to double jeopardy where he was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury and attempt to commit first-degree rape, though both crimes arose from the same series of events, since each offense charged included an element not common to the other offense. State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981).

Assault on a female is a lesser included offense of charge of attempted first-degree rape as set forth in this section. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

Cited in State v. Jordan, — N.C. —, 287 S.E.2d 827 (1982).

§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

Legal Periodicals. —

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

Article 8.

Assaults.

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

CASE NOTES

I. GENERAL CONSIDERATION.

Purpose. — This section is designed for the protection of life or limb. State v. Cass, — N.C. App. —, 285 S.E.2d 337 (1982).

Prosecution under § 14-34.2 and This Section Not Double Jeopardy. —

Where a defendant was charged and convicted for assault upon a law officer with a firearm while he was in the performance of his duties and also for assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, the defendant was not placed in double jeopardy, however, judgment was arrested in the case charging the lesser included offense of assault upon the offi-

cer with a firearm while he was in the performance of his duties because the constitutional guarantee against double jeopardy protects a defendant from multiple punishment for the same offense. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

Nor Is Prosecution under § 14-27.6 and This Section. — In a criminal prosecution defendant was not subjected to double jeopardy where he was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury and attempt to commit first-degree rape, though both crimes arose from the same series of events, since each offense charged included an element not common to the other offense. State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981).

Asportation of the victim is not an inherent or inevitable feature of an assault; therefore, removal of a victim from the front porch of her home to a more secluded wooded area clearly facilitated the commission of the felony of assault, and thus a separate charge for kidnapping was proper. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Aiding and Abetting Assault on Child Through Silence. — In a prosecution of defendant for aiding and abetting another in assault on defendant's one-year-old child, where the only evidence for the State tended to show that, during the assault, defendant did absolutely nothing, the totality of the circumstances warranted the inference by the jury that defendant knew her silent presence during the beating inflicted upon her son would be regarded by the principal as encouragement and support, particularly in light of testimony that defendant had witnessed prior beatings by the principal, indicating that defendant was aware of the severity of his treatment of her children; that defendant had never interfered in the past; that defendant had herself beaten her children in the principal's presence; and that defendant lied and instructed her children to lie to conceal the principal's complicity in the assault. State v. Walden, 53 N.C. App. 196, 280 S.E.2d 505 (1981).

Applied in State v. Hall, — N.C. —, 286 S.E.2d 552 (1982).

Cited in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

VI. SERIOUS INJURY.

Facts of Particular Case are Determinative. —

In accord with 2nd paragraph in original. See State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981).

Evidence that the victim was hospitalized, etc. —

The injury must be serious, but evidence of hospitalization is not required. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981).

VII. SELF-DEFENSE.

Evidence of Dangerous Character of Victim. — Where the defendant pleads and offers evidence of self-defense, evidence of the character of the victim as a violent and dangerous fighting man is admissible if such character was known to the defendant, and further, such evidence is relevant on the question of the defendant's reasonable apprehension of death or bodily harm in his confrontation with the victim, and it may include specific acts of violence by the deceased. When such evidence is introduced by the defendant, the court, even in the absence of a request, should instruct the jury as to the bearing which this evidence might have on defendant's reasonable apprehension of death or great bodily harm from the attack to which his evidence pointed. State v. Powell, 51 N.C. App. 224, 275 S.E.2d 528 (1981).

VIII. INSTRUCTIONS TO JURY.

Instruction in Prosecution for Aiding and Abetting Assault on Child. — In a prosecution of defendant for aiding and abetting a principal in assault on defendant's one-year-old child, trial court erred in instructing the jury that they could convict defendant if they found that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so, since the instruction allowed the jury to convict defendant if they found that she failed to exercise her parental duty to protect her child, but the indictment did not charge her with breach of her parental duty, but with assault. State v. Walden, 53 N.C. App. 196, 280 S.E.2d 505 (1981).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

CASE NOTES

I. GENERAL CONSIDERATION.

Conviction of misdemeanor assault requires proof of infliction of or attempt to inflict serious injury, while conviction of common-law robbery does not. State v. Malloy,

53 N.C. App. 369, 280 S.E.2d 640 (1981).

II. INCLUDED OFFENSES.

Simple assault is a lesser included offense of assault with intent to commit rape. State v. Little, 51 N.C. App. 64, 275 S.E.2d 249 (1981).

III. ASSAULTS ON FEMALES.

Defendant's Age Not Essential Element of Crime. — Although this section prescribes a greater punishment if defendant is over 18 years of age, defendant's age is not an essential element of the crime of assault upon a female and need not be alleged. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

Fact that defendant is a male person need not be alleged specifically when the indictment charges a rape or related offense, since defendant's sex may be assumed from the nature of the offense charged. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

IV. ASSAULTS ON LAW-ENFORCEMENT OFFICERS.

Burden on State. — To obtain a conviction under this section, the burden is on the State to satisfy the jury from the evidence beyond a reasonable doubt that the party assaulted was a law-enforcement officer performing the duty of his office, and that the defendant knew his victim was a law-enforcement officer. State v. Rowland, 54 N.C. App. 458, 283 S.E.2d 543 (1981).

§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

CASE NOTES

And Can Result in Conviction of First-Degree Murder. —

Conviction for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property is proper. State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

Instruction Held Proper. —

Trial court properly instructed the jury on theory of acting in concert in prosecution for discharging a firearm into an occupied dwelling, where there was evidence tending to show that defendant and two companions were standing together at the scene of the incident and all were armed; that after a shot was fired from victims' dwelling, defendant and his companions all fired shots; that a witness saw all three men fire shots at the dwelling but could not tell whose shots struck the dwelling; and that defendant made conflicting statements as to whether he had fired into the dwelling or had fired only into the air. State v. Musselwhite, 54 N.C. App. 68, 283 S.E.2d 149 (1981).

§ 14-34.2. Assault with a firearm or other deadly weapon upon law-enforcement officer, fireman, or emergency medical services personnel.

CASE NOTES

Prosecution under This Section and § 14-32, etc. —

Where a defendant was charged and convicted for assault upon a law officer with a firearm while he was in the performance of his duties and also for assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, the defendant was not placed in double jeopardy, however, judgment was arrested in the case charging the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties because the constitutional guarantee against double jeopardy protects a defendant from multiple punishment for the same offense. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

§ 14-34.3. Manufacture, sale, purchase, or possession of teflon-coated types of bullets prohibited.

(a) It is unlawful for any person to import, manufacture, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any teflon-coated bullet.

(b) This section does not apply to:

(1) 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;

(2) Importers, manufacturers, and dealers validly licensed under the laws of the United States or the State of North Carolina who possess for the purpose of sale to authorized law-enforcement agencies only;

(3) Inventors, designers, ordinance consultants and researchers, chemists, physicists, and other persons employed by or under contract with a manufacturing company engaged in making or doing research designed to enlarge knowledge or to facilitate the creation, development, or manufacture of more effective police-type body armor.

(c) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in G.S. 14-3(a). (1981 (Reg. Sess., 1982), c. 1272, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1272, s. 2, makes this section effective Oct. 1, 1982.

Article 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Jones, 304 N.C. 323, — S.E.2d — (1981); In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

II. WHAT CONSTITUTES KIDNAPPING.

A. In General.

"Kidnapping" Defined. —

The term "kidnap," by itself, continues to have a precise and definite legal meaning under subsection (a) of this section, to wit, the unlawful seizure of a person against his will. In short, common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent. State v. Hall, — N.C. —, 286 S.E.2d 552 (1982).

Listed Purposes Not Mutually Exclusive. — The purposes specified in subsection (a) of this section are not mutually exclusive. State v. Hall, — N.C. —, 286 S.E.2d 552 (1982).

As used in this section, etc. —

In accord with 1st paragraph of original. See State v. Froneberger, 53 N.C. App. 471, 281 S.E.2d 71 (1981).

The term "restrain". —

In accord with 1st paragraph of the original. See State v. Froneberger, 53 N.C. App. 471, 281 S.E.2d 71 (1981).

The victim's age is not an essential element, etc. —

In accord with original. See State v. Froneberger, — N.C. App. —, 285 S.E.2d 119 (1981).

Likewise Crime May Be Committed by Means of Fraud, etc. —

A kidnapping can be just as effectively accomplished by fraudulent means as by the use of force, threats or intimidation. State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

Aiding and Abetting. — In a prosecution for kidnapping the defendant could be convicted upon the State's showing that he accompanied the principal during the removal of the victim for the purpose of facilitating the commission of the victim's murder, since the overall circumstances, including the defendant's actual presence throughout the entire criminal episode and the defendant's handing of guns to the actual perpetrators of the murder, warranted the inference that the defendant intended to aid and abet the principal by accompanying him. State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied, 303 N.C. 183, 280 S.E.2d 455 (1981).

C. Kidnapping to Facilitate Commission of Felony.

Restraint Which Is Inherent to Another Offense Not Also Kidnapping. — Legislature's intent in enacting this section does not make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping, thus permitting conviction and punishment for both crimes; to construe this section otherwise would allow defendant to be punished twice for essentially the same offense, violating the constitutional prohibition against double jeopardy. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Elements of Kidnapping and Felony, etc. —

Asportation of the victim is not an inherent or inevitable feature of an assault; therefore, removal of a victim from the front porch of her home to a more secluded wooded area clearly facilitated the commission of the felony of assault, and thus a separate charge for kidnapping was proper. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Asportation Insufficient to Support Separate Offense. — Forced removal of clerk to prescription counter of drug store during attempted armed robbery with intent to steal drugs was a mere technical asportation and insufficient to support conviction of separate offense of kidnapping. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

III. PRACTICE AND PROCEDURE.

B. Indictment.

Evidence of More Than One Purpose Where Indictment Charges Only One. — So long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in subsection (a) of this section is immaterial and may be disregarded. State v. Hall, — N.C. —, 286 S.E.2d 552 (1982).

Where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory. Therefore, where the indictment charged that defendant kidnapped one victim for the purpose (1) of committing armed robbery and assault on him, and (2) to facilitate his flight after committing the felonies of armed robbery and murder in his crimes against another victim and in charging the jury the trial judge did not specify either purpose expressed in the indictment, there was error in the vagueness of the judge's charge because the jury could have convicted the defendant of kidnapping the first victim to facilitate his flight after the armed robbery, a charge not named in the indictment. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

C. Burden of Proof.

Only One Purpose Need Be Proved. — Indictments under the kidnapping statute may allege one or several of the purposes set forth in subsection (a), but the state need prove only one purpose in order to sustain its burden of proof as to that element of the crime. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

E. Instructions to Jury.

Refusal To Instruct on Unproved Purposes. — When a trial judge determines that the State has failed to prove one or more of the purposes of kidnapping alleged in the indictment, he may properly refuse to instruct on that purpose or those purposes. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

F. Sentencing.

Determination Made by Judge. —

In accord with 3rd paragraph in original. See State v. Boone, 302 N.C. 561, 276 S.E.2d 354 (1981).

Article 11.

Abortion and Kindred Offenses.

§ 14-45.1. When abortion not unlawful.

Abortion Cannot Be Performed, etc. — The correct citation to the opinion of the Attorney General cited under this catchline in the bound volume is 48 N.C.A.G. 136.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Article 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. Wright, 304 N.C. 349, — S.E.2d — (1981).

Cited in State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981); State v. Jordan, — N.C. —, 287 S.E.2d 827 (1982).

II. ELEMENTS OF OFFENSE.

A. In General.

Intent. —

In accord with 4th paragraph in original. See State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535, petition for discretionary review granted, — N.C. —, 287 S.E.2d 127 (1981).

Storage room built at the back of a house behind a bedroom was "appurtenant" to the main dwelling and a robbery therefrom would constitute first-degree burglary. State v. Green, — N.C. —, 290 S.E.2d 625 (1982).

B. First Degree.

Burglary in the first degree, etc. —

In accord with 3rd paragraph in original. See State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

In accord with 5th paragraph in original. See State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981).

Concealed Officers as Persons in Actual Occupation. — Police officers concealed in a dwelling house with the knowledge and consent of the absent owner are persons in actual occupation within the meaning of this section; breaking and entering such a dwelling house would thus constitute burglary in the first degree. State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535, petition for discretionary review granted, — N.C. —, 287 S.E.2d 127 (1981).

§ 14-52. Punishment for burglary.

Legal Periodicals. —

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

§ 14-54. Breaking or entering buildings generally.

Legal Periodicals. —

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981); State v. Quilliams, — N.C. App. —, 285 S.E.2d 617 (1982); State v. Dawkins, — N.C. —, 287 S.E.2d 885 (1982).

Stated in State v. Wright, 304 N.C. 349, — S.E.2d — (1981); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981).

Cited in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Douglas, — N.C. —, 285 S.E.2d 802 (1982); State v. Perry, — N.C. —, 287 S.E.2d 810 (1982); State v. Rush, — N.C. App. —, 290 S.E.2d 383 (1982).

II. ELEMENTS OF THE OFFENSE.

A. In General.

Items listed in this section denote qualities of permanence and immobility, while those listed in § 14-56 are characterized by a high degree of mobility. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, — N.C. —, 285 S.E.2d 802 (1982); State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

What Constitutes "Building" — Mobile Home. — An unoccupied mobile home not affixed to the premises and intended for retail sale is a "building" within the meaning of this section. State v. Douglas, 51 N.C. App. 594, 277 S.E.2d 467 (1981), aff'd, — N.C. —, 285 S.E.2d 802 (1982).

An unoccupied mobile home located on a dealer's lot is a "building" within the meaning of this section. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, — N.C. —, 285 S.E.2d 802 (1982).

A mobile home, as used in the sense of a residence, distinctly differs in terms of mobility from a "trailer" which is used to haul goods and personal property from place to place or for camping or vacation purposes, as the chief quality of the latter is its mobility, while the former is normally anchored to a foundation and left stationary; thus, a mobile home is a "building" within the meaning of this section and is not covered by § 14-56. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, — N.C. —, 285 S.E.2d 802 (1982).

The mere fact of a mobile home's capability of being transported from place to place on wheels attached to its frame should not remove it from the ambit of this section. State v. Douglas, 51 N.C. App. 594, 277 S.E.2d 467 (1981), aff'd, — N.C. —, 285 S.E.2d 802 (1982).

Same — "Trailers" and Other Items Named in § 14-56. — Whether "trailers," "railroad cars" or other items specifically named in § 14-56 qualify as "buildings" under this section depends upon the circumstances in each case; they may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence. State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

Same — Fenced-In Area. — The word "building" in this section is restricted to that which has, or is intended to have, one or more walls and a roof, thus, as any structure must be ejusdem generis with this definition, a fenced-in area is not contemplated by this section. State v. Gamble, — N.C. App. —, 286 S.E.2d 804 (1982).

Completion of Intended Felony, etc. —

In accord with 2nd paragraph in original. See State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

B. Intent.

Intent Must Be Shown to Establish, etc. —

In accord with 6th paragraph in original. See State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

Proof. —

In accord with 1st paragraph in original. See State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

The jury may infer the requisite specific intent to commit larceny at the time of the breaking or entering from the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged. State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

IV. TRIAL.

D. Instructions to Jury.

Editor's Note. — Annotations under this heading are found in the 1981 Replacement Volume beginning on p. 699.

Proper Instruction — Instruction Allowing Conviction, etc. —

In accord with 1st paragraph in original. See State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

E. Verdict.

Editor's Note. — Annotations under this heading are found in the 1981 Replacement Volume on p. 700.

Larceny Verdict after Acquittal of Felonious Breaking and Entering. — Where a defendant is acquitted of felonious breaking or entering, he cannot be convicted of felonious larceny based on the felonious breaking or

entering charge, and a jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981).

§ 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 of larceny therein such person shall be punished as a Class H felon. (Code, s. 997; Rev., s. 3334; 1907, c. 822; C. S., s. 4236; 1969, c. 543, s. 4; 1979, c. 760, s. 5.)

Editor's Note. — This section is set out above to correct an error in the 1981 Replacement Volume by substituting "Class H felon" for "Class E felon" at the end of the section.

§ 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

CASE NOTES

Items Listed Characterized by High Degree of Mobility. — Items listed in § 14-54 denote qualities of permanence and immobility, while those listed in this section are characterized by a high degree of mobility. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

The chief distinction between the categories of items enumerated in § 14-54 and this section is the property of permanence. The items listed in § 14-54 denote the qualities of permanence and immobility while those listed in this section are characterized by a high degree of mobility. State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

When "Trailers," etc., Qualify as Buildings under § 14-54. — Whether "trailers," "railroad cars" or other items specifically named in this section qualify as "buildings" under § 14-54 depends upon the circumstances in each case; they may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence. State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

The term "trailer" and other property specifically named in this section applies to the specifically named property when being primarily used for its intended purpose. State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

Mobile Home Not Covered by Section. — A mobile home, as used in the sense of a residence, distinctly differs in terms of mobility from a "trailer" which is used to haul goods and personal property from place to place or for camping or vacation purposes, as the chief quality of the latter is its mobility, while the former is normally anchored to a foundation and left stationary; thus, a mobile home is a building within the meaning of § 14-54 and is not covered by this section. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

Trailer on Construction Site. — A trailer used for the storage of tools and equipment of a construction company on the construction site during the building of a bridge lost its characteristics of mobility and became a structure used primarily for storage of property so that it attained the status of a building within the meaning of § 14-54. State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

Quoted in State v. Douglas, 51 N.C. App. 594, 277 S.E.2d 467 (1981).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

Legal Periodicals. —
For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

CASE NOTES

"Burning". — To satisfy the proof of a "burning" it is not necessary that the building be wholly consumed or even materially damaged. It is sufficient if any part, however small, is consumed. A building is burned within the common-law definition of arson when it is charred. State v. Shaw, — N.C. —, 289 S.E.2d 325 (1982).

The crime of arson is consummated by the burning of any, the smallest part of the house, and it is burned within the common-law definition of the offense when it is charred, that is, when the wood is reduced to coal and its identity changed, but not merely scorched or discolored by heat. State v. Oxendine, — N.C. —, 286 S.E.2d 546 (1982).

Some portion of the dwelling itself, in contrast to its mere contents, must be burned to constitute arson; however, the least burning of any part of the building, no matter how small, is sufficient, and it is not necessary that the building be consumed or materially damaged by the fire. State v. Oxendine, — N.C. —, 286 S.E.2d 546 (1982).

Dwelling of "Another". — The need for protection from willful and malicious burning of a dwelling house is so compelling that the common-law arson requirement that the dwelling burned be that of "another" is satisfied by a showing that some other person or persons, together with the arsonist, were joint occupants of the same dwelling unit. State v. Shaw, — N.C. —, 289 S.E.2d 325 (1982).

Burning of Interior Wallpaper Substantiates Charring. — Wallpaper affixed to an interior wall is unquestionably a part of the dwelling's framework, and where the evidence discloses that the wallpaper in a dwelling has been burned, it competently substantiates the charring element of arson. State v. Oxendine, — N.C. —, 286 S.E.2d 546 (1982).

Instructions. —
A trial court is not obligated ex mero motu to make a distinction between a partial burning or slight charring of some portion of the building and a mere scorching or discoloration thereof, not constituting arson, for the jury, where no serious question concerning the nature of the damage caused by the fire is ever raised during trial. State v. Oxendine, — N.C. —, 286 S.E.2d 546 (1982).

§ 14-60. Burning of schoolhouses or buildings of educational institutions.

CASE NOTES

Cited in In re Coleman, — N.C. App. —, 286 S.E.2d 621 (1982).

§ 14-62. Burning of churches and certain other buildings.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Oxendine, — N.C. —, 286 S.E.2d 546 (1982); State v. Jeffries, — N.C. App. —, 285 S.E.2d 307 (1982).

III. EVIDENCE.

Unrelated Previous Fires. — In a prosecution for procuring another to burn a building used for trade, evidence of unrelated previous

fires, absent a showing that they had been deliberately set, that they were criminal in nature, and that charges were ever brought or convictions entered against either defendant or defendant's wife for any of the previous burnings was prejudicial and reversible error. State v. Alley, — N.C. App. —, 284 S.E.2d 215 (1981).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-71. Receiving stolen goods.

CASE NOTES

I. GENERAL CONSIDERATION.

The effect of the 1975 amendment to this section was to alter the standard of proof established in prosecutions thereunder. State v. Fearing, — N.C. —, 284 S.E.2d 487 (1981).

Possessing stolen property in violation of § 14-71.1 is not a lesser included offense of receiving stolen property in violation of this section. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

The unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment; therefore, the legislature intended possession and receiving of stolen goods to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981); State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981).

But a defendant may not be convicted and punished for both receiving and possession of the same stolen property. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

While receiving and possession are distinct and separate crimes for which the legislature could have provided punishment for the same individual, this was not intended by the enactment of the possession statutes. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

§ 14-71.1. Possessing stolen goods.

CASE NOTES

Purpose. —

In accord with original. See State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Legislative Intent. — The legislature's intent was to provide for the State a position to which to recede when it cannot establish the elements of breaking and entering or larceny but can effect proof of possession of the stolen goods. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981); State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

The legislative purpose set forth with regard to this section is to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981).

This section is useful where the State has no evidence as to who committed the larceny and has, by the passage of time, lost the probative benefit of the doctrine of possession of recently stolen property. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981).

The possession statutes were enacted to plug a loophole in the law as it then existed when one was found in possession of stolen goods and

the State was unable to prove either the larceny or receiving. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Possession is a sort of secondary crime based upon a prior commission of the primary crime of larceny. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Elements of Felonious Possession of Stolen Property. — The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

The essential elements of possession of stolen property are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Larceny and possession of property stolen in the larceny are separate crimes. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

And Legislature May Constitutionally Punish a Defendant for Both. — Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the legislature from punishing a defendant for both larceny and possession of property stolen in the larceny. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

But Legislature Did Not Intend to Punish for Both. — The legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Similarly, Receiving and Possession of Same Stolen Property Separate Crimes. — The unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment; therefore, the legislature intended possession and receiving of stolen goods to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981); State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981).

Possessing stolen property in violation of this section is not a lesser included offense of receiving stolen property in violation of § 14-71. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

And Legislature Did Not Intend Punishment for Both. — While receiving and possession are distinct and separate crimes for which the legislature could have provided punishment for the same individual, this was not intended by the enactment of the possession statutes. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Thus, Conviction May Be of Only One of Offenses of Larceny, Receipt, or Possession. — Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

A defendant may not be convicted and punished for both receiving and possession of the same stolen property. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Applied in State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981); State v. Bizzell, 53 N.C. App. 450, 281 S.E.2d 57 (1981).

Cited in State v. Andrews, — N.C. App. —, 286 S.E.2d 850 (1982).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding $400.00 in value.

CASE NOTES

I. GENERAL CONSIDERATION.

Larceny and possession of the property stolen in the larceny are separate and distinct offenses. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

And therefore double jeopardy considerations do not prohibit punishment of the same person for both offenses. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

But Legislature Did Not Intend Punishment for Both Larceny and Possession. — The legislature did not intend to punish an individual for larceny of property and the pos-

session of the same property which he stole. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Although it could have done so, the legislature, by creation of the statutory offense of possession of stolen property, did not intend to punish an individual for both larceny and possession. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

And Conviction May Be of Only One of Offenses of Larceny, Receiving, or Possession. — Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Larceny from the person is a lesser included offense of common-law robbery, which differs from common-law robbery in that it lacks the essential element that the victim be put in fear. State v. Henry, — N.C. App. —, 290 S.E.2d 775 (1982).

Misdemeanor larceny is a lesser included offense of felony larceny, which lacks the essential elements of larceny that the property have a value of over $400.00, or that the larceny was from the person. State v. Henry, — N.C. App. —, 290 S.E.2d 775 (1982).

Larceny Not Lesser Included Offense of Larceny by Employee. —

In accord with original. See State v. Brown, — N.C. App. —, 287 S.E.2d 421 (1982).

Quoted in State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981).

Stated in State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981).

Cited in State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Coward, 54 N.C. App. 488, 283 S.E.2d 536 (1981); State v. Young, — N.C. —, 289 S.E.2d 374 (1982).

II. ELEMENTS OF OFFENSES.

What Constitutes Larceny. —

To establish the offense of larceny, the State must show that defendant took and carried away the goods of another with the intent to deprive the owner thereof permanently. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981).

The essential elements of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

Receiving Stolen Property. —

The essential elements of feloniously receiving stolen property are (1) receiving or aiding in the concealment of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) by someone else, (5) the receiver knowing or having reasonable grounds to believe the property to have been stolen, and (6) the receiver acting with a dishonest purpose. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

Property Must Belong To Another. — An essential element of larceny is that the property taken must belong to another person. State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

Obtaining Title Through Fraud. — When, in addition to possession, the owner voluntarily passes title as well to the alleged thief, not expecting the property to be returned to him or to be disposed of in accordance with his directions, trespass is involved and the taker is not guilty of larceny, even where the owner is induced to part with the title through the fraud and misrepresentation of the alleged thief. Although the acts of the perpetrator of the fraud may be criminal in such a case, they constitute some other crime than common-law larceny. State v. Robertson, — N.C. App. —, 286 S.E.2d 612 (1982).

Possession of Stolen Goods. —

The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

The essential elements of possession of stolen property are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

The elements of taking and carrying away of the property are not essential to the offense of possession of stolen property. State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981).

III. DEGREES OF OFFENSES.

B. Offenses Which Are Felonies Regardless of Value of Property.

Larceny of a firearm is a felony regardless of the value of the weapon stolen and without

regard to whether the larceny was accomplished by means of a felonious breaking or entering. State v. Robinson, 51 N.C. App. 567, 277 S.E.2d 79 (1981).

Larceny Following Breaking and Entering by Stranger. — This section cannot reasonably be interpreted to permit defendant's conviction of felonious larceny merely because he committed the larceny pursuant to or after a breaking or entering by some stranger. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

It is improper, absent the jury's finding that the property stolen exceeded the diacritical amount set forth in the statute, for the trial judge to accept a verdict of guilty of felonious larceny where the jury has failed to find the defendant guilty of the felonious breaking or entering pursuant to which the larceny occurred. State v. Perry, — N.C. —, 287 S.E.2d 810 (1982).

IV. PRACTICE AND PROCEDURE.

A. Indictment.

Ownership of Property. —

It is sufficient if the person alleged in the indictment to be the owner of the property taken has a special property interest, such as that of a bailee or a custodian, or otherwise has possession and control of it. State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

B. Evidence.

Evidence Insufficient. —

In a prosecution for larceny of an automobile, owner's testimony that if he had been planning to sell the automobile he would not have sold it for less than $2,000 was incompetent to show value, and where there was no evidence of the value of the stolen automobile, the jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

C. Presumption from Possession of Recently Stolen Property.

Constitutionality. — Application of the doctrine of possession of recently stolen property is not unconstitutional. State v. McNeill, 54 N.C. App. 675, 284 S.E.2d 206 (1981).

E. Verdict.

Verdict Where Court Failed to Instruct, etc. —

Where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds $400.00 for the larceny to be felonious. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981).

If a defendant is found not guilty of breaking or entering and the felonious larceny charge is based upon its having been accomplished by means of a felonious breaking or entering pursuant to subdivision (b)(2) of this section, it is necessary for the judge to submit to the jury the question of the value of the stolen property in order for the jury to return a verdict of guilty of felonious larceny. State v. Robinson, 51 N.C. App. 567, 277 S.E.2d 79 (1981).

§ 14-72.2. Unauthorized use of a motor-propelled conveyance.

CASE NOTES

Lesser Included Offense of Larceny. —

In accord with original. See State v. Coward, 54 N.C. App. 488, 283 S.E.2d 536 (1981).

§ 14-74. Larceny by servants and other employees.

CASE NOTES

And Must Be Alleged. —

In accord with original. See State v. Brown, — N.C. App. —, 287 S.E.2d 421 (1982).

Age Not Essential Element. — The phrase, "Provided, that nothing contained in this section shall extend to . . . servants within the age of 16 years" withdraws a class of defendants

from the crime of larceny by an employee, while the language before the phrase completely and definitely defines the offense; hence, age is not an essential element which the indictment must allege and the State initially prove. State v. Brown, — N.C. App. —, 287 S.E.2d 421 (1982).

Burden of Raising Age Exception. — To place the burden on defendant to raise the age exception to this section and to prove that he comes within it is not unconstitutional. State v. Brown, — N.C. App. —, 287 S.E.2d 421 (1982).

Article 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

Legal Periodicals. —
For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

A. In General.

The primary purpose, etc. —
This section seeks retribution by punishing a specific offender, rather than deterrence by creating a new crime of possession of a firearm during a robbery. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

This section creates no new offense, etc. —
This section does not create a new crime, it merely increases the punishment which may be imposed from common-law robbery where the perpetrator employs a weapon. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

The focus of this section is not the creation of a new crime for commission of an offense with a firearm, but the punishment of a specific person who has committed a robbery which endangers a specific victim. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

Applied in State v. Reid, — N.C. App. —, 284 S.E.2d 519 (1981); State v. Whitaker, — N.C. App. —, 286 S.E.2d 640 (1982); State v. Thompson, — N.C. App. —, 291 S.E.2d 266 (1982).

Quoted in State v. Mullen, 53 N.C. App. 106, 280 S.E.2d 11 (1981); State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981).

Cited in State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981); State v. Smith, — N.C. —, 285 S.E.2d 800 (1982); In re Stedman, — N.C. —, 286 S.E.2d 527 (1982); State v. Hall, — N.C. —, 286 S.E.2d 552 (1982).

C. Attempted Robbery.

What Constitutes Attempt. —
One of the elements of an attempt to commit a crime is that defendant must have intent to commit the substantive offense. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

II. ELEMENTS OF CRIME.

A. In General.

Prerequisite to conviction for armed robbery, etc. —
In accord with 1st paragraph in original. See State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

Under this section, an armed robbery, etc. —
An armed robbery occurs when an individual takes or attempts to take personal property from the person of another, or in his presence, or from any place of business or residence where there is a person or persons in attendance, by the use or threatened use of a dangerous weapon, whereby the life of a person is endangered or threatened. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Attempted armed robbery occurs when a person with the requisite intent does some overt act calculated to unlawfully deprive another of personal property by endangering or threatening his life with a firearm. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

This section requires, etc. —
In accord with 2nd paragraph in original. See State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981); State v. Chambers, 53 N.C. App. 358, 280 S.E.2d 636, cert. denied, 304 N.C. 197, 285 S.E.2d 103 (1981).

B. Use or Threatened Use of Dangerous Weapons.

State Must Show, etc. —
Mere possession of a firearm during the course of a robbery is insufficient to support an

armed robbery conviction under this section; rather, the section includes an additional requirement that the possession of the firearm threaten or endanger the life of a person. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

In determining whether evidence of the use of a particular instrument constitutes evidence of use of "any firearms or other dangerous weapon, implement or means" within the prohibition of this section, the determinative question is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened. State v. Alston, — N.C. —, 290 S.E.2d 614 (1982).

BB Rifle. — Testimony of defendant that the rifle was a BB rifle constituted affirmative evidence which indicated that the victims' lives were not endangered or threatened in fact by his possession, use or threatened use of the rifle and was affirmative testimony tending to prove the absence of an element of the offense charged under this section; such evidence required submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous weapons. State v. Alston, — N.C. —, 290 S.E.2d 614 (1982).

Remington Pellet Gun. — The testimony by defendant that the rifle he used during the robbery was a Remington pellet gun was sufficient to support a jury finding that the lives of the victims were endangered or threatened by his possession, use or threatened use of the rifle. State v. Alston, — N.C. —, 290 S.E.2d 614 (1982).

IV. INDICTMENT.

Name of Person in Attendance. — It is plain from this section that it is not necessary that the name of the person in attendance in the place of business be set out in the bill of indictment. It is only required that, upon trial, the State must prove that someone was in attendance. State v. Rankin, — N.C. App. —, 286 S.E.2d 119 (1982).

Charge of Aiding and Abetting Unnecessary. — Person who aids or abets another in the commission of armed robbery is guilty under this section, and it is not necessary that the indictment charge him with aiding and abetting. State v. Ferree, 54 N.C. App. 183, 282 S.E.2d 587 (1981).

V. EVIDENCE.

Evidence held sufficient to be submitted, etc. —

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that a store employee was robbed at gunpoint by more than one person; that the persons who robbed him fled from the scene in a red Dodge Aspen; that at least one person fled into the woods at the end of a high speed chase by a county police officer; that police officers used a bloodhound to follow the trail of that person to a location where both defendants were found hiding under a bridge; and that a .32 caliber revolver was also found at that location. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

VI. INSTRUCTIONS.

Instruction on Common-Law Robbery Not Required Where Use or Threat of Weapon Uncontradicted. — While common-law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction of common-law robbery, trial judge is not required to instruct on common-law robbery when defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery was perpetrated by the use or threatened use of what appeared to be a dangerous weapon. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Trial court in an armed robbery case properly refused defendants' request for an instruction on common-law robbery, where victim testified that all he observed during the incident before being rendered unconscious was the barrel of a gun held at his forehead, and there was no evidence in the record to contradict this testimony. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

§ 14-87.1. Punishment for common-law robbery and attempted common-law robbery.

Legal Periodicals. —

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

§ 14-89.1. Safecracking.

CASE NOTES

Safecracking Not Identical to Former Crime of Burglary with Explosives. — Elements of the crimes of burglary with explosives and safecracking are not identical for offenses committed before October 1, 1977; the predecessor to this section provided as an essential element that the safe or vault be used for storing money or other valuables. State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981).

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

CASE NOTES

III. ELEMENTS OF THE OFFENSE.

Elements Generally. —

Elements of embezzlement are as follows: (1) defendant must be the agent of the prosecutor; (2) by the terms of his employment he must receive the property of his principal; (3) he must receive the property in the course of his employment; and (4) he must convert the property to his own use knowing it not to be his own. State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981).

Actual or Constructive Possession. — The phrase "which shall have come into his possession or under his care" contemplates actual and constructive possession. Thus, the possession required by this section to make out a prima facie case of embezzlement may be actual or constructive possession. State v. Jackson, — N.C. App. —, 291 S.E.2d 190 (1982).

IV. PRACTICE AND PROCEDURE.

C. Evidence.

Evidence of Motive. — Evidence which tended to show that defendant was living far and away above the standard to be expected of one earning $265.00 a week was relevant to establish motive under this section. State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

Legal Periodicals. —

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Wilson v. Goodwyn, 522 F. Supp. 1214 (E.D.N.C. 1981); In re Gulledge, 17 B.R. 311 (M.D.N.C. 1982).

II. ELEMENTS OF THE OFFENSE.

Elements Generally. —

It is an essential element of obtaining property by false pretense that the act be done

knowingly and designedly with intent to cheat or defraud. State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981).

Economic Harm Irrelevant. — The court is not required to instruct the jury that the resulting economic harm to the defendant is not the essence of the crime. Such an economic result to the defendant is irrelevant for the purposes of this section. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

§ 14-107. Worthless checks.

CASE NOTES

Applied in Contemporary Plumbing, Inc. v. North Carolina, 16 B.R. 479 (E.D.N.C. 1981).

ARTICLE 19B.

Financial Transaction Card Crime Act.

§ 14-113.9. Financial transaction card theft.

CASE NOTES

Subdivision (a)(1) may be violated in four ways: one may (1) take, (2) obtain or (3) withhold a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or one may (4) receive a financial transaction card with intent to use it or sell it or transfer it to a person other than the issuer or cardholder, knowing at the time that the card has been so taken, obtained or withheld, i.e., knowing at the time he received it that another person had taken, obtained or withheld the card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

Elements of Receiving under Subdivision (a)(1). — The necessary implication from the use of the qualifier "so" in subdivision (a)(1) is that when a defendant is charged with a violation of the receiving portion of the statute, he must have received a card from a third party who also intended to use it. Although this interpretation hinges upon a linguistic technicality, criminal laws must be strictly construed in favor of the defendant. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

Indictment for Receiving under Subdivision (a)(1). — In order to charge receiving under the present wording of subdivision (a)(1), it must be alleged, among other elements, that at the time of receipt the defendant knew that the financial transaction card had been taken, obtained or withheld from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

An indictment attempting to charge a defendant under the receiving portion of subdivision (a)(1) of this section which failed to allege that the defendant knew that the card had been taken, obtained or withheld with the intent to use it, an essential element of the crime for which defendant was tried, failed to charge a crime, and defendant's motion to dismiss should have been allowed. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

CASE NOTES

Forging Signature of Another — Presumption of Authority. —

In a prosecution for forgery and uttering forged checks, the trial court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority where the defendant offered no evidence that he signed the checks with authority but testified that he had never seen the checks. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

Instruction as to Presumption of Forgery. — In a prosecution for forging and uttering forged checks, the trial court's instruction that when a person in possession of a forged check attempts to obtain money or advances upon it, a presumption is raised that the defendant either forged or consented to the forging of such check and, nothing appearing, the defendant would be presumed guilty of forgery described a mere permissive inference which did not violate due process since (1) there was a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and attempting to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist, and (2) there was other evidence in the case which, taken together with the inference, was sufficient for a jury to find the elemental facts beyond a reasonable doubt. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

Stated in Sneed v. Smith, 670 F.2d 1348 (4th Cir. 1982).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

CASE NOTES

Instructions as to Forgery — Presumption of Authority. — In a prosecution for forgery and uttering forged checks, the trial court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority where the defendant offered no evidence that he signed the checks with authority but testified that he had never seen the checks. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

Same — Inference Arising from Attempt to Obtain Money. — In a prosecution for forging and uttering forged checks, the trial court's instruction that when a person in possession of a forged check attempts to obtain money or advances upon it, a presumption is raised that the defendant either forged or consented to the forging of such check and, nothing appearing, the defendant would be presumed guilty of forgery described a mere permissive inference which did not violate due process since (1) there was a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and attempting to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist, and (2) there was other evidence in the case which, taken together with the inference, was sufficient for a jury to find the elemental facts beyond a reasonable doubt. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.

Legal Periodicals. —

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "An Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980), rev'd in part, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

§ 14-127. Willful and wanton injury to real property.

CASE NOTES

Cited in State v. Oxendine, — N.C. —, 286 S.E.2d 546 (1982); United States v. Ward, 676 F.2d 94 (4th Cir. 1982).

§ 14-134. Trespass on land after being forbidden; license to look for estrays.

CASE NOTES

Stated in State v. Freeman, 303 N.C. 299, 278 S.E.2d 207 (1981).

ARTICLE 23.

Trespasses to Personal Property.

§ 14-160. Willful and wanton injury to personal property; punishments.

CASE NOTES

Elements Generally. — Proof of four elements appears essential to sustain an adjudication of delinquency based upon violation of this section: (1) that personal property was injured; (2) that the personal property was that "of another," i.e., someone other than the person or persons accused; (3) that the injury was inflicted "wantonly and willfully"; and (4) that the injury was inflicted by the person or persons accused. In re Meaut, 51 N.C. App. 153, 275 S.E.2d 200 (1981).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

CASE NOTES

Applied in Creech v. Sparkman, 523 F. Supp. 1157 (E.D.N.C. 1981).

Cited in State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981); State v. Shane, — N.C. —, 285 S.E.2d 813 (1982); State v. Jordan, — N.C. —, 287 S.E.2d 827 (1982).

§ 14-190.1. Obscene literature and exhibitions.

Legal Periodicals. — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

§ 14-190.9. Indecent exposure.

CASE NOTES

Stated in State v. Freeman, 303 N.C. 299, 278 S.E.2d 207 (1981).

§ 14-202.1. Taking indecent liberties with children.

Legal Periodicals. — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

CASE NOTES

The purpose of this section is to give broader protection to children than the prior laws provided. State v. Turman, 52 N.C. App. 376, 278 S.E.2d 574 (1981).

Touching Not Required. — It is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of this section. State v. Turman, 52 N.C. App. 376, 278 S.E.2d 574 (1981).

The word "with" is not limited to mean only a physical touching. State v. Turman, 52 N.C. App. 376, 278 S.E.2d 574 (1981).

Violation Not Lesser Included Offense of § 14-27.4(a). — In a prosecution of defendant under § 14-27.4(a) for engaging in a sexual act with children under 12, the trial court did not err in failing to instruct on taking indecent liberties with children in violation of this section, since taking indecent liberties with children is not a lesser included offense of the crime proscribed by § 14-27.4(a). State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

Evidence of Defendant's Age. — An officer's testimony that he had contacted the defendant and had taken a statement from him provided the officer with the observation necessary to render his opinion as to the age of the defendant admissible in a prosecution under this section. State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

Cited in State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

ARTICLE 26A.

Adult Establishments.

§ 14-202.10. Definitions.

CASE NOTES

Cited in Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

§ 14-204. Prostitution and various acts abetting prostitution unlawful.

Legal Periodicals. — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. Punishment for perjury.

CASE NOTES

Solicitation to commit perjury is a felony within the terms of § 14-3(b) and is properly within the jurisdiction of the superior court. State v. Huff, — N.C. App. —, 289 S.E.2d 604 (1982).

§ 14-210. Subornation of perjury.

CASE NOTES

Solicitation to commit perjury is a felony within the terms of § 14-3(b) and is properly within the jurisdiction of the superior court. State v. Huff, — N.C. App. —, 289 S.E.2d 604 (1982).

ARTICLE 30.

Obstructing Justice.

§ 14-221.1. Altering, destroying, or stealing evidence of criminal conduct.

CASE NOTES

Conviction of defendant was not obtained in violation of this section where unidentifiable fingerprints lifted from the scene of the crime were thrown away by the State as irrelevant. State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981).

§ 14-223. Resisting officers.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. McNeil, 54 N.C. App. 454, 283 S.E.2d 565 (1981); State v. Rhodes, — N.C. —, 287 S.E.2d 898 (1982).

§ 14-226. Intimidating or interfering with witnesses.

CASE NOTES

Applied in State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981).

ARTICLE 31.

Misconduct in Public Office.

§ 14-230. Willfully failing to discharge duties.

CASE NOTES

Cited in State v. Jarvis, 50 N.C. App. 679, 274 S.E.2d 852 (1981).

§ 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

Local Modification. — Pamlico: 1981 (Reg. Sess., 1982), c. 1198.

§ 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 county officer or county official 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. Provided, further, that in lieu of the above method of marking vehicles owned by the State and permanently assigned to members of the Council of State, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof the license number assigned to the appropriate member of the Council of State pursuant to G.S. 20-81(4); a member of the Council of State shall not be assessed any registration fee if he elects to have a state-owned motor vehicle assigned to him designated by his official plate number.

The General Assembly may authorize exemptions from the provisions of this section for each fiscal year. Each agency shall submit requests for private tags to the Division of Motor Fleet Management of the Department of Administration. The Division shall report the requests to the Appropriations Committees of the General Assembly by June 1. If urgent need for an exemption arises when the General Assembly is not in session, the Division shall review the request and report it to the Council of State. The Council of State may authorize the exemption if it finds it is expedient and necessary in undercover work by those charged with enforcing the criminal laws of the State. Every 90 days, the Council of State shall report all requests and actions taken on them to the Joint Legislative Commission on Governmental Operations. Exemptions authorized by the Council of State shall expire at the end of the fiscal year in which they are granted or when the General Assembly acts on exemptions for the next fiscal year, whichever is sooner. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866; 1957, c. 1249; 1961, c. 1195; 1965, c. 1186; 1971, c. 3; 1981 (Reg. Sess., 1982), c. 1282, ss. 59, 60.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, in the first paragraph substituted "county officer or county official" for "officer or official in any county in the State" in the second sentence, deleted the former fourth and fifth sentences, relating to authorization of exemptions from the section with respect to any state-owned

vehicle if in the public interest, and added the present last sentence. The amendment also added the second paragraph.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.1. Definitions.

Editor's Note. — In line four of subdivision (2) of this section as set out in the 1981 replacement volume, the word "carriers" should be "carries." In subdivision (3) of this section as set out in the 1981 replacement volume, "of" should be inserted between "State" and "North Carolina" in the third line from the end of the subdivision.

§ 14-288.2. Riot; inciting to riot; punishments.

CASE NOTES

Quoted in State v. Yarborough, — N.C. App. —, 284 S.E.2d 550 (1981).

§ 14-288.4. Disorderly conduct.

Editor's Note. —
In subdivision (a)(5)b of this section as set out in the 1981 replacement volume, the word "assembly" in the first line of the paragraph should be "assemble."

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

CASE NOTES

Cited in State v. Jones, 304 N.C. 323, — S.E.2d — (1981).

OPINIONS OF ATTORNEY GENERAL

Effect on Permit Requirements. — The provisions of this section relating to weapons of mass death and destruction do not abrogate or abolish permit requirements of § 14-409 and § 14-409.9. See opinion of Attorney General to Mr. T.A. Radewicz, Sheriff, New Hanover County, 50 N.C.A.G. 109 (1981).

§ 14-288.20. Certain weapons at civil disorders.

Editor's Note. —
In subdivision (a)(3) of this section as set out in the 1981 replacement volume, "composed or any material" in line six should be "composed of any material".

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-291.2. Pyramid and chain schemes prohibited.

CASE NOTES

Applied in State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981).

§ 14-292. Gambling.

CASE NOTES

Quoted in Walter Kidde & Co. v. Bradshaw, — N.C. App. —, 289 S.E.2d 571 (1982).

§ 14-292.1. Bingo and raffles.

(l) Nothing in this Article except subsection (k) of this section shall apply to bingo games when the only prize given is ten dollars ($10.00) or less or merchandise that is not redeemable for cash and that has a value of ten dollars ($10.00) or less. General Statutes 18B-308 shall apply to those games. (1979, c. 893, s. 2; 1981, c. 962, ss. 1-5; 1981 (Reg. Sess., 1982), c. 1262, s. 1.)

Editor's Note. —
In subsection (g) of this section as set out in the 1981 replacement volume, the word "case" in the first line of the subsection should be "cash".

In subdivision (b)(4)(ii) of this section in the 1981 replacement volume, the word "coporate" should be "corporate."

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, substituted "General Statutes 18B-308" for "G.S. 18A-30(9) and 18A-35(h)" in the second sentence of subsection (l).

Only Part of Section Set Out. — As the rest of section was not changed by the amendment, only subsection (l) is set out.

OPINIONS OF ATTORNEY GENERAL

Real Estate as Prize. — An exempt organization which has complied with this section and other applicable laws may offer real estate as a prize. See opinion of Attorney General to The Honorable J. Randolph Riley, District Attorney, 51 N.C.A.G. 48 (1981).

ARTICLE 39.

Protection of Minors.

§ 14-316.1. Contributing to delinquency and neglect by parents and others.

Legal Periodicals. —
For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

§ 14-318.2. Child abuse a general misdemeanor.

Legal Periodicals. —
For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

CASE NOTES

State's Burden of Proof. —
In accord with 1st paragraph in original. See State v. Armistead, 54 N.C. App. 358, 283 S.E.2d 162 (1981).

Evidence of Separate Incident of Abuse Held not Prejudicial. — Although in a prosecution for child abuse it was error to allow introduction of testimony concerning a separate incident in which defendant struck his child, the error was not prejudicial where there was ample uncontradicted evidence that defendant intentionally inflicted some physical injury on his child and defendant failed to meet the burden of proving a reasonable probability that a different result would have occurred had the court not admitted the testimony. State v. Armistead, 54 N.C. App. 358, 283 S.E.2d 162 (1981).

§ 14-318.4. Child abuse a felony.

Legal Periodicals. —
For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

§ 14-320.1. Transporting child outside the State with intent to violate custody order.

CASE NOTES

Cited in Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Clayton v. Clayton, 54 N.C. App. 612, 284 S.E.2d 125 (1981).

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment and failure to support spouse and children.

Legal Periodicals. —

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

III. NONSUPPORT OF CHILDREN.

Limitation on Prosecution for Nonsupport of Illegitimate Children Held Unconstitutional. — The three-year statute of limitations contained in § 49-4(1) for prosecutions under § 49-2 violates the Equal Protection Clause of the federal Constitution in that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children whereas there is no limitations period for the prosecution under subsection (d) of this section of persons who willfully fail to support their legitimate children. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

Cited in State v. Neeley, — N.C. App. —, 290 S.E.2d 727 (1982).

ARTICLE 52.

Miscellaneous Police Regulations.

§ 14-399. Littering.

Local Modification. — Avery, Burke, Caldwell, Mitchell and Wilkes counties: 1981 (Reg. Sess., 1982), c. 1155.

CASE NOTES

Former Section Unconstitutional. — State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959), noted in the replacement volume under this heading, was overruled by State v. Jones, — N.C. —, 290 S.E.2d 675 (1982).

§ 14-401. Putting poisonous foodstuffs, etc., in certain public places prohibited.

Legal Periodicals. —

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

ARTICLE 52A.

Sale of Weapons in Certain Counties.

§ 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 . . . . . in . . . . . (or) in . . . . . Township, ... County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, a license or permit is therefore hereby given said . . . . . to purchase one 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; 1981 (Reg. Sess., 1982), c. 1395, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in the sheriff's form, deleted a reference to the applicant's street address, following "moral character" deleted "and that the possession of one of the weapons described is necessary for self-defense or the protection of the home," and deleted a comma and "(or if any other weapon is named strike out the word pistol)" following "one pistol."

§ 14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

Upon application, the sheriff shall issue such license or permit to a resident of that county unless the purpose of the permit is for collecting, in which case a sheriff can issue a permit to a nonresident when the sheriff shall have fully satisfied himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation desires the possession of the weapon mentioned for (i) the protection of the home, business, or property, (ii) target shooting, (iii) collecting, or (iv) hunting. If said sheriff shall not be so fully satisfied, he may, for good cause shown, decline to issue said license or permit and shall provide to said applicant within seven days of such refusal a written statement of the reason(s) for such refusal. An appeal from such refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal, and shall be final. A permit may not be issued to the following persons: (i) one who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade), except that if a person has been convicted and later pardoned, he may obtain a permit; (ii) one who is a fugitive from justice; (iii) one who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802); (iv) one who has been adjudicated incompetent on the ground of mental illness

or has been committed to any mental institution. 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 and state that the purpose for the purchase of the firearms is directly related to the law officers' official duties. The sheriff shall charge for his services upon issuing such license or permit a fee of five dollars ($5.00). Each applicant for any such license or permit shall be informed by said sheriff within 30 days of the date of such application whether such license or permit will be granted or denied and, if granted, such license or permit shall be immediately issued to said applicant. (1919, c. 197, s. 3; C. S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 1.)

Local Modification. — Craven: 1981 (Reg. Sess., 1982), c. 1200.

By virtue of Session Laws 1981 (Reg. Sess., 1982), c. 1395, s. 5, Chatham and Orange should be stricken from the replacement volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

ARTICLE 53.

Sale of Weapons in Certain Other Counties.

§ 14-409.2. Permit issued by clerk of court; form of permit.

The clerks of the superior courts of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this Article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,

. . . . . County.

I, ..., Clerk of the Superior Court of said County, do hereby certify that . . . . . ., whose place of residence is . . . . . in . . . . . (or) in . . . . . Township, ... County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, a license or permit is therefore hereby given said . . . . . to purchase one pistol from any person, firm or corporation authorized to dispose of the same.

This . . . . . day of . . . . . ., 19 . . . ..

. . . . . .

Clerk of the Superior Court.

(1919, c. 197, s. 2; C. S., s. 5107; 1981 (Reg. Sess., 1982), c. 1395, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in the clerk's form, deleted reference to the street address of the applicant, following "good moral character" deleted "and that the possession of one of the weapons described is necessary for self-defense or the protection of the home," and deleted a comma and "(or if any other weapon is named strike out the word pistol)" following "one pistol."

§ 14-409.3. Issuance or refusal of permit; appeal from refusal; grounds for refusal; clerk's fee.

Upon application, the clerk of the superior court shall issue such such license or permit to a resident of that county, unless the purpose of the permit is for collecting, in which case a clerk can issue a permit to a nonresident, when the clerk shall have fully satisfied himself by affidavits, oral evidence, or

otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation desires the possession of the weapon mentioned for (i) the protection of the home, business, or property, (ii) target shooting, (iii) collecting, or (iv) hunting. If said clerk of the superior court shall not be so fully satisfied, he may, for good cause shown, decline to issue said license or permit and shall provide to said applicant within seven days of such refusal a written statement of the reason(s) for such refusal. An appeal from such refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the clerk of the superior court's refusal, and shall be final. A permit may not be issued to the following persons: (i) one who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade), except that if a person has been convicted and later pardoned, he may obtain a permit; (ii) one who is a fugitive from justice; (iii) one who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802); (iv) one who has been adjudicated incompetent on the ground of mental illness or has been committed to any mental institution. 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 and state that the purpose for the purchase of the firearms is directly related to the law officers' official duties. The clerk of the superior court shall charge for his services upon issuing such license or permit a fee of five dollars ($5.00). Each applicant for any such license or permit shall be informed by said clerk of the superior court within 30 days of the date of such application whether such license or permit will be granted or denied and, if granted, such license or permit shall be immediately issued to said applicant. (1919, c. 197, s. 3; C. S., s. 5108; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

Chapter 15.

Criminal Procedure.

Article 22.

Review of Criminal Trials.

Sec.
15-217. [Repealed.]
15-218 to 15-222. [Repealed.]

Article 1.

General Provisions.

§ 15-10.2. Mandatory disposition of detainers — request for final disposition of charges; continuance; information to be furnished prisoner.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

Article 2.

Record and Disposition of Seized, etc., Articles.

§ 15-11.1. Seizure, custody and disposition of articles; exceptions.

CASE NOTES

Applied in State v. Thompson, — N.C. App. —, 289 S.E.2d 132 (1982).

Article 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Killing with Malice, etc. — In accord with 1981 Cum. Supp. See State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Cited in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Norwood, 303 N.C. 473, 279 S.E.2d 550 (1981); State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

§ 15-144.2. Essentials of bill for sex offense.

CASE NOTES

Omission of Elements Distinguishing First and Second Degree Offenses. — Subsection (a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. State v. Berkley, — N.C. App. —, 287 S.E.2d 445 (1982).

Specification of Sexual Act Unnecessary. — While it is essential that the State prove a "sexual act" as defined by § 14-27.1(4) in order to convict a defendant under § 14-27.4, an indictment which is drafted pursuant to the provisions of subsection (b) of this section without specifying which "sexual act" was committed is sufficient to charge the crime of first-degree sexual offense and to inform a defendant of such accusation. If a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars. State v. Edwards, — N.C. —, 289 S.E.2d 360 (1982).

Cited in State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981); State v. Locklear, — N.C. —, 284 S.E.2d 500 (1981).

§ 15-153. Bill or warrant not quashed for informality.

CASE NOTES

I. NATURE AND PURPOSE.

Stated in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

II. GENERAL EFFECT.

Evidentiary matters are not required to be alleged in a bill of indictment. State v. Rankin, — N.C. App. —, 286 S.E.2d 119 (1982).

§ 15-155. Defects which do not vitiate.

CASE NOTES

Stated in State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981); State v. Ellers, — N.C. App. —, 289 S.E.2d 924 (1982).

ARTICLE 17.

Trial in Superior Court.

§ 15-166. Exclusion of bystanders in trial for rape and sex offenses.

CASE NOTES

Exclusion of Bystanders Does Not Deny Right to Public Trial. —

In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order entered pursuant to this section that, during the testimony of the seven-year-old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the state's

witnesses, officers of the court, members of the jury, and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

§ 15-169. Conviction of assault, when included in charge.

CASE NOTES

What Indictment Includes — Attempted First-Degree Rape. — In deciding whether trial court erred in submitting assault on a female as a lesser included offense of charge of attempted first-degree rape, the appellate court must consider (1) whether the charge of attempted first-degree rape includes all the essential elements of assault on a female and (2) whether there was some evidence to support a finding of assault on a female. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

§ 15-170. Conviction for a less degree or an attempt.

CASE NOTES

Constitutionality. — This section is not unconstitutional. State v. Young, — N.C. —, 289 S.E.2d 374 (1982).

Application of Section. —

In accord with 4th paragraph in original. See State v. Williams, 51 N.C. App. 397, 276 S.E.2d 715, cert. denied, 303 N.C. 319, 281 S.E.2d 658 (1981).

A crime of "less degree" is not exclusively one which carries a less severe sanction than the crime formally charged in the indictment. State v. Young, — N.C. —, 289 S.E.2d 374 (1982).

Sufficiency of Indictment or Information. —

An indictment is insufficient to charge the commission of a lesser included offense unless, in charging the greater offense, it necessarily includes within itself all of the essential elements of the lesser offense. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

And Conviction of Offense Charged, etc. —

If the defendant is entitled to an instruction on the lesser offense, based on the presence of such evidence, it is of no legal significance that defendant's counsel did not make a specific request for the instruction nor that the defendant was subsequently convicted of the greater offense. State v. Williams, 51 N.C. App. 397, 276 S.E.2d 715, cert. denied, 303 N.C. 319, 281 S.E.2d 658 (1981).

The misdemeanor of larceny is a less degree of the felony, etc. —

In accord with original. See State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

Larceny from the person is a lesser included offense of common-law robbery, and an indictment for common-law robbery will support a conviction for larceny from the person. State v. Young, 54 N.C. App. 366, 283 S.E.2d 812 (1981).

Instructions as to Second Degree Murder, etc. —

Where the law and the evidence justify use of the felony murder rule, the State is not required to prove premeditation and deliberation, nor is the court required to submit the offenses of second-degree murder or manslaughter unless there is evidence to support them. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Necessity for Instructing Jury, etc. —

This section provides that upon the trial of any indictment, the defendant may be convicted of the crime charged therein or of a lesser degree of the same crime. However, the necessity of charging on a crime of a lesser degree arises only when there is evidence from which the jury could find that a crime of lesser degree was committed. State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535, petition for discretionary review denied, — N.C. —, 287 S.E.2d 127 (1981).

Where there is some evidence to support the included offense, the defendant is entitled as a matter of law to have the jury instructed on the lesser offense. The presence of such evidence is the determinative factor. State v. Williams, 51 N.C. App. 397, 276 S.E.2d 715, cert. denied, 303 N.C. 319, 281 S.E.2d 658 (1981).

Trial court is under a duty to instruct the jury upon, and to submit for its consideration, a lesser included offense only when there is evidence tending to show the commission of such lesser included offense. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

When there is evidence of defendant's guilt of a crime which is a lesser included offense of the

crime stated in the bill of indictment, defendant is entitled to have the trial judge submit an instruction on the lesser included offense to the jury. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

The greater crime includes the lesser, etc. —

In accord with 1981 Cum. Supp. See State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

Applied in State v. Shaw, — N.C. —, 289 S.E.2d 325 (1982); State v. Hageman, — N.C. App. —, 289 S.E.2d 89 (1982).

Quoted in State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

Stated in State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

§ 15-173. Demurrer to the evidence.

CASE NOTES

On motion to nonsuit, etc. —

When ruling on a defendant's motion to dismiss, the question for the court is whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. In deciding this question, the trial court must consider the evidence in the light most favorable to the State. State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535, petition for discretionary review denied, — N.C. —, 287 S.E.2d 127 (1981).

Whether Competent or Incompetent. —

In accord with 8th paragraph in original. See State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981).

Effect of Defendant Introducing Testimony at Trial. —

In accord with 2nd paragraph in original. See State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

In accord with 3rd paragraph in original. See State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

Substantial evidence. —

Substantial evidence is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conviction. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Motion Must Be Renewed — Waiver. —

By introducing evidence defendant waived his motion to dismiss made at the close of the State's evidence, and having failed to renew his motion at the close of all evidence, defendant established no basis upon which to appeal denial of his motion. State v. Chambers, 53 N.C. App. 358, 280 S.E.2d 636, cert. denied, 304 N.C. 197, 285 S.E.2d 103 (1981).

When Motion Denied. —

Defendant's motion must be denied if the State has offered substantial evidence against defendant of every element of the crime charged. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Where there is any competent evidence to support the allegations of the indictment, the motion to dismiss is properly denied. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

If there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981).

When the State offers evidence of the corpus delicti in addition to a defendant's extrajudicial confessions, the defendant's motion to nonsuit is correctly denied. State v. Whitfield, 51 N.C. App. 241, 275 S.E.2d 540 (1981).

Sufficiency of Evidence. —

In accord with 31st paragraph in original. See State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981).

In accord with 40th paragraph in original. See State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981).

In accord with 63rd paragraph in original. See State v. Batts, 303 N.C. 155, 277 S.E.2d 385 (1981).

Question for the trial court on a motion to dismiss is whether, upon consideration of the evidence in the light most favorable to the State, there is a reasonable basis upon which the jury might find that the crime charged has been committed and that defendant was a perpetrator of the crime. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

Same — Circumstantial Evidence. —

When the motion to dismiss questions the sufficiency of circumstantial evidence, the court must determine whether a reasonable inference of defendant's guilt could be drawn from the circumstances so that the case may be sent to the jury. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

Same — Prosecution for Drug Offenses. — In a prosecution for drug offenses, testimony about codefendant's delivery of marijuana to Ashe County Airport coupled with identification testimony that defendant was at

the airplane when the marijuana was unloaded was sufficient to overrule defendant's motion for nonsuit on the drug conspiracy charge. State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981).

Test of sufficiency of the evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Consideration of evidence in light most favorable to State. — In ruling on defendant's motion to dismiss, trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

In ruling on a motion for nonsuit, all the evidence, direct and circumstantial, is considered in the light most favorable to the State; moreover, the State is entitled to have all contradictions in the testimony resolved, and all reasonable inferences made in its favor, in determining whether there is substantial evidence of the elements of the offense charged. State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981).

State had no right to appeal from trial court's dismissal of criminal charges against defendant based on defendant's motion to suppress the State's evidence because of entrapment and insufficiency of the evidence, since the charges were dismissed on the merits and involved a determination of guilt or innocence, and further proceedings against defendant were barred under principles of double jeopardy. State v. Murrell, 54 N.C. App. 342, 283 S.E.2d 173 (1981).

Cited in State v. Brackett, — N.C. App. —, 285 S.E.2d 852 (1982).

§ 15-176. Prisoner not to be tried in prison uniform.

CASE NOTES

Applied in State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981).

ARTICLE 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.4. Instruction to jury on consequences of guilty verdict.

CASE NOTES

Cited in State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981).

ARTICLE 19.

Execution.

§ 15-187. Death by administration of lethal gas.

Legal Periodicals. —

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

§ 15-189. Sentence of death; prisoner taken to penitentiary.

Legal Periodicals. — For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

ARTICLE 22.

Review of Criminal Trials.

§ 15-217: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-217.1. Filing petition with clerk; delivery of copy to district attorney; review of petition by judge.

Editor's Note. — This section is erroneously shown as repealed in the 1981 Cumulative Supplement.

§§ 15-218 to 15-222: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 91.

Appeal to Appellate Division.

Sec.

15A-1444. When defendant may appeal; certiorari.

SUBCHAPTER I. GENERAL.

ARTICLE 3.

Venue.

§ 15A-131. Venue generally.

CASE NOTES

Stated in State v. Benfield, — N.C. App. —, 285 S.E.2d 299 (1982).

§ 15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.

CASE NOTES

Stated in State v. Benfield, — N.C. App. —, 285 S.E.2d 299 (1982).

§ 15A-135. Allegation of venue conclusive in absence of timely motion.

CASE NOTES

Cited in State v. Benfield, — N.C. App. —, 285 S.E.2d 299 (1982).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent."

CASE NOTES

Cited in State v. Howard, — N.C. App. —, 286 S.E.2d 853 (1982).

§ 15A-222. Person from whom effective consent may be obtained.

CASE NOTES

Expectation of privacy not relinquished by lack of possession. — In a prosecution for a drug offense where defendant entrusted the safekeeping of his suitcase with codefendant and codefendant told police he could not consent to the search of defendant's suitcase because it was not codefendant's, defendant had not relinquished his expectations of privacy in the contents of the suitcase through his lack of actual possession. State v. Cooke, 54 N.C. App. 33, 282 S.E.2d 800 (1981).

Applied in State v. Carter, — N.C. App. —, 289 S.E.2d 46 (1982).

Cited in State v. Howard, — N.C. App. —, 286 S.E.2d 853 (1982).

§ 15A-223. Permissible scope of consent search and seizure.

CASE NOTES

Seizure of contraband in plain view. — In a prosecution for drug offenses where defendant consented to the search of his aircraft and during the search contraband was found in plain view, seizure of the contraband was not unconstitutional. State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981).

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

CASE NOTES

Where intoxicated passenger of lawfully stopped vehicle suddenly reached down his pants during questioning by officer, and officer jerked passenger's hands out of pants revealing white powder in cellophane package, passenger could not claim evidence revealed was not seized lawfully as being in plain view. State v. Peck, 54 N.C. App. 302, 283 S.E.2d 383 (1981).

Article 11.

Search Warrants.

§ 15A-244. Contents of the application for a search warrant.

CASE NOTES

Probable cause cannot be shown by affidavits which are purely conclusory, etc. — A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded; there must be facts or circumstances in the affidavit which implicate the premises to be searched. State v. Rook, 304 N.C. 201, — S.E.2d — (1981).

Cited in State v. Mavrogianis, — N.C. App. —, 291 S.E.2d 163 (1982).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

CASE NOTES

When Probable Cause Exists. —

In accord with 7th paragraph in 1981 Cum. Supp. See State v. Rook, 304 N.C. 201, — S.E.2d — (1981).

In accord with 8th paragraph in 1981 Cum. Supp. See State v. Rook, 304 N.C. 201, — S.E.2d — (1981).

The probable cause prerequisite to the issuance of a search warrant exists when there is reasonable ground to believe that the proposed search will reveal the presence of objects which will aid in the apprehension or conviction of an offender. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Probable cause to search and seize requires facts and circumstances within the police officer's knowledge based on reasonable and trustworthy information that a search of a particular area will reveal objects being sought in connection with criminal activity or objects which will aid the police in apprehending and convicting a criminal offender. State v. Cooke, 54 N.C. App. 33, 282 S.E.2d 800 (1981).

The test to determine the sufficiency of affidavits, etc. —

Probable cause for a search warrant cannot be established by affidavits which are purely conclusory in nature, and therefore, the affidavit must set forth enough of the underlying facts and circumstances so that the magistrate can perform his detached judicial function as a check upon intrusions by law-enforcement officials into the privacy of individuals. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Affidavit Must Implicate Premises. — It is necessary that an affidavit for a search warrant implicate the premises to be searched. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Ordinarily, a search warrant will be presumed regular on appeal if irregularity does not appear on the face of the record, and when the search warrant does not appear of record, it is assumed in all respects regular on appeal. Furthermore, the wording of the Fourth Amendment would indicate that a valid search warrant is prima facie evidence of the reasonableness of the search. State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318, petition for discretionary review denied, 304 N.C. 199, 285 S.E.2d 106 (1981).

Cited in State v. Mavrogianis, — N.C. App. —, 291 S.E.2d 163 (1982).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

Legal Periodicals. —

For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.

CASE NOTES

Probable cause "particularized" to those present on the premises being searched, as required by the Fourth Amendment, can be clearly inferred from the circumstances under which the limited search pursuant to this section is authorized: Police officers have reason to believe that criminal activity has been or is occurring on the premises, the search pursuant to the warrant fails to uncover any evidence of such activity, and such evidence of the criminal activity could be concealed upon the person of those present at the time of the officer's entry. State v. Brooks, 51 N.C. App. 90, 275 S.E.2d 202, cert. denied, 302 N.C. 630, 280 S.E.2d 441 (1981).

Cited in State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981).

ARTICLE 14.

Nontestimonial Identification.

§ 15A-273. Basis for order.

CASE NOTES

Cited in State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981).

§ 15A-279. Implementation of order.

CASE NOTES

Right to have counsel present during gunshot residue test by virtue of subsection (d). — See State v. Odom, 303 N.C. 163, 277 S.E.2d 352 (1981).

§ 15A-282. Copy of results to person involved.

CASE NOTES

Quoted in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-304. Warrant for arrest.

CASE NOTES

Probable Cause. — Probable cause under this section refers to the existence of a reasonable suspicion in the mind of a prudent person, considering the facts and circumstances presently known. State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

Cited in State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981).

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

Legal Periodicals. —
For note on home arrest in the shelter of search and seizure law, see 59 N.C.L. Rev. 973 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Evidence Not Excluded, etc. —

The arrest being lawful, a reasonable search incident thereto is lawful. State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981).

Stated in State v. Atkins, — N.C. —, 284 S.E.2d 296 (1981); State v. McNeill, 54 N.C. App. 454, 283 S.E.2d 565 (1981); State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

Cited in State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981); State v. Cromartie, — N.C. App. —, 284 S.E.2d 728 (1981); State v. Adams, — N.C. App. —, 286 S.E.2d 371 (1982).

II. ARREST WITHOUT WARRANT.

A. In General.

"Probable Cause". —

Existence of probable cause depends upon whether at the time of the arrest there were facts and circumstances within the knowledge of the arresting officer which would justify a prudent man's belief that a suspect had committed an offense. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Reasonable Ground for Belief May Be Based, etc. —

Where an informant is reliable, probable cause may be based upon information given to police by such informant. State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Temporary Detention to Determine If Criminal Activity is Afoot. — If, from the totality of circumstances, a law enforcement officer has reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain an individual, and if upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

IV. ENTRY ON PREMISES.

Entry Held Lawful. —

Where there was evidence that after a police officer made a lawful entry into defendant's home and read an order for his arrest, but defendant did not submit peacefully, and that the officer called for assistance and another officer came to defendant's home to assist the first officer, the evidence failed to indicate an illegal entry into defendant's home. State v. Rhodes, 54 N.C. App. 193, 282 S.E.2d 809 (1981).

Assistance of Officers Voluntarily Admitted. — Where a law officer makes a lawful entry of a home with consent of the owner to apprehend and arrest a suspect, then other officers may enter the home to assist those officers who have been voluntarily admitted. State v. Rhodes, 54 N.C. App. 193, 282 S.E.2d 809 (1981).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

CASE NOTES

Evidence properly admitted. — Evidence obtained in the search and seizure of an automobile in which defendant was a passenger was properly admitted even though the arresting police officers were outside their territorial jurisdiction as prescribed by this section and defendant's arrest may have been unlawful. State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981).

§ 15A-404. Detention of offenders by private persons.

CASE NOTES

"Detain". — The ordinary meaning of the word "detain," and the meaning the legislature intended when it enacted this section, is "To hold or keep in or as if in custody." State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

Use of Deadly Force. — A private citizen is not allowed to employ deadly force to detain a fleeing misdemeanant in circumstances under which an officer of the law could not have employed similar force to effect such an arrest. State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

CASE NOTES

Quoted in State v. Sanders, 303 N.C. 608, 281 S.E.2d 7 (1981).

Cited in State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Hunter, — N.C. —, 286 S.E.2d 535 (1982).

§ 15A-502. Photographs and fingerprints.

CASE NOTES

Effect of 1979 Amendment. — The amendment of subsection (c) of this section to allow fingerprinting of juveniles pursuant to § 7A-596 constitutes a narrowing of an exclusionary rule of evidence. In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

Fingerprinting of Juvenile Committing Crime Prior to Effective Date of Procedural Change. — Application of the provisions of §§ 7A-596 and 7A-598 to take the fingerprints of a juvenile accused of a crime committed prior to their effective date does not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

Subsection (c) of this section and § 7A-596 are procedural statutes, and a change in the evidentiary or procedural law between the time of the offense and the time of trial does not preclude the State from utilizing the new procedure even though at the time of the offense it was unavailable. In re Stedman, — N.C. —, 286 S.E.2d 527 (1982).

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

CASE NOTES

Cited in State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

ARTICLE 26.

Bail.

§ 15A-536. Release after conviction in the superior court.

CASE NOTES

Cited in State v. Poplin, — N.C. App. —, 289 S.E.2d 124 (1982).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court.

CASE NOTES

Cited in State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

§ 15A-606. Demand or waiver of probable-cause hearing.

CASE NOTES

The purpose of a probable cause hearing is to determine whether the accused should be discharged or whether sufficient probable cause exists to bind the case over to superior court and to seek an indictment against the defendant. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

No Right to Hearing after Indictment. — In accord with 1st paragraph in 1981 Supp. See State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

Purpose of Subsection (f). — Subsection (f) of this section is designed to prevent unnecessary delay in the procedure leading to charges or dismissal of charges against a defendant. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

Court Determines "Good Cause", etc. — It is the trial court's duty to determine good cause and extraordinary cause. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981).

ARTICLE 30.

Probable-Cause Hearing.

§ 15A-612. Disposition of charge on probable-cause hearing.

Legal Periodicals. — For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

Subsequent Prosecution Not Precluded by State's Voluntary Dismissal. — Voluntary dismissal taken by the State at a probable cause hearing does not preclude the State from instituting a subsequent prosecution for the same offense. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Cited in State v. Lay, — N.C. App. —, 290 S.E.2d 405 (1982).

ARTICLE 31.

The Grand Jury and Its Proceedings.

§ 15A-623. Grand jury proceedings and operations in general.

CASE NOTES

Trial court did not err in denying defendant's request for a transcript of the grand jury proceedings concerning his indictment, since such proceedings are considered secret, and defendant is adequately protected by his right to object to improper evidence and to cross-examine the witnesses presented against him at trial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Applied in State v. Dukes, — N.C. —, 289 S.E.2d 561 (1982).

§ 15A-627. Submission of bill of indictment to grand jury by prosecutor.

CASE NOTES

The State may bypass the preliminary hearing entirely, and initially seek an indictment from the grand jury. State v. Lay, — N.C. App. —, 290 S.E.2d 405 (1982).

Effect of Probable Cause Hearing on Grand Jury. —

Despite a finding of no probable cause made by a district court, the State may subsequently seek an indictment on the same felony charge. State v. Lay, — N.C. App. —, 290 S.E.2d 405 (1982).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

Legal Periodicals. — For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-644. Form and content of indictment, information or presentment.

CASE NOTES

Stated in State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

§ 15A-646. Superseding indictments and informations.

CASE NOTES

Applied in State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions.

Legal Periodicals. —

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For article on methods for statistical prediction of time consumption and backlogs of court cases, see 60 N.C.L. Rev. 103 (1981).

CASE NOTES

Trial Judge Calculates Exclusionary Periods. — The speedy trial act authorizes the trial judge, who hears the motion to dismiss on the grounds that defendant was not given a speedy trial, to calculate exclusionary periods. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

When 120-Day Period Triggered. — This section reflects the clear intent of the General Assembly that it is the last occurring of either arrest or indictment which triggers the running of the 120-day period within which trial must begin. State v. Charles, 53 N.C. App. 567, 281 S.E.2d 438 (1981).

Excludable Delay for Mental Examination. —

In accord with 1st paragraph in 1981 Cum. Supp. See State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Letterlough, 53 N.C. App. 693, 281 S.E.2d 749 (1981).

In accord with 2nd paragraph in 1981 Cum. Supp. See State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Where defendant was indicted for armed robbery and assault and tried on those charges 140 days after the date of the indictment, he was not denied his statutory right to a speedy trial, as the period of delay caused by codefendant's request for continuance to receive a psychiatric examination was properly excluded when computing defendant's, as well as codefendant's, statutorily prescribed time limit for trial. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

No county is exempt due to the limited number of terms of court scheduled there. State v. Vaughan, 51 N.C. App. 408, 276 S.E.2d 518, cert. vacated, — N.C. —, 283 S.E.2d 525 (1981).

Section 15A-702 does not exempt counties with fewer court sessions from the operation of the time limits stated in this section. Rather, justifiable delay caused by a county's number of court sessions is a period which may be excluded from the required timetable of this section. State v. Fearing, — N.C. —, 284 S.E.2d 479 (1981).

Remedy for Delay Caused by Limited Court Sessions. — A defendant does have a remedy when his trial has been deferred beyond the limits of this section due to the unavailability of court sessions in the county of venue; he may move for a prompt trial, in which event, the trial judge may order his trial within 30 days, under subsections (a) and (b) of § 15A-702. State v. Fearing, — N.C. —, 284 S.E.2d 479 (1981).

State's Burden Where Number of Court Terms Limited. — On a motion to dismiss on grounds of denial of a speedy trial in a prosecu-

tion for armed robbery, the State's burden under the facts was to show not just that a "limited" number of terms of court were available to try defendant, but that due to such limited number of terms of court, the time limitation of the statute could not reasonably be met. State v. Vaughan, 51 N.C. App. 408, 276 S.E.2d 518, cert. vacated, — N.C. —, 283 S.E.2d 525 (1981).

In a prosecution for kidnapping, the defendant's right to a speedy trial as provided by this section was not violated, though the defendant was indicted on December 5, 1979, and tried more than 120 days later during the April 1980, session of criminal court in McDowell County, since McDowell County is a county where, due to the limited number of court sessions scheduled for the county, the time limitations of the section cannot reasonably be met; therefore, pursuant to subdivision (b)(8) of this section, the 120-day requirement for trial did not apply to defendant's trial. State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269, cert. denied, 303 N.C. 182, 280 S.E.2d 454 (1981).

Trial court's finding that defendant's trial for felonious escape was not reached at the scheduled session because of the press of other criminal cases being heard by the Court during such session provided a sufficient factual basis for a determination that the case could not reasonably have been tried during the scheduled session, and a 46-day continuance ordered at the scheduled session was properly excluded from the 120-day speedy trial period pursuant to this section. State v. Parnell, 53 N.C. App. 793, 281 S.E.2d 732 (1981).

No Violation of Time Limits Found. — Defendant's trial began within the 120-day limitation of this article where the State first proceeded against defendant by warrant dated December 12, 1979, charging defendant with misdemeanor child abuse on December 8, 1979; the charge was dismissed on April 25, 1980; a second warrant for defendant's arrest was issued on April 3, 1980; pursuant to this warrant defendant was indicted on April 28, 1980, for the December 9, 1979, assault upon her son; the evidence was uncontradicted that there were two separate assaults on December 8 and December 9, 1979, and there was nothing to indicate a plan or scheme of extended abuse of defendant's son; and defendant's trial began on August 25, 1980, which was within the 120-day limitation. State v. Walden, 53 N.C. App. 196, 280 S.E.2d 505 (1981).

Time delays caused by a 20-day continuance requested by the State to prepare for trial, a mental examination for defendant, and appointment and preparation of new counsel for defendant were properly excluded from computation of the statutory speedy trial period; had defendant been concerned that his right to a speedy trial was being violated, he should have insisted on an earlier trial date rather than agreeing to a later one. State v. Letterlough, 53 N.C. App. 693, 281 S.E.2d 749 (1981).

Applied in State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Avery, 302 N.C. 517, 276 S.E.2d 699 (1981); State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981); State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981).

Quoted in State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); State v. Brackett, — N.C. App. —, 285 S.E.2d 852 (1982).

Cited in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981); State v. Vaughan, 304 N.C. 383, — S.E.2d — (1981); State v. Dunlap, — N.C. App. —, 290 S.E.2d 744 (1982).

§ 15A-702. Counties with limited court sessions.

CASE NOTES

Applicability. — By its terms, this section only addresses the situation where a defendant elects to move for a prompt trial, after the applicable time period of § 15A-701 has expired due to the limited terms of court in the county of venue. State v. Fearing, — N.C. —, 284 S.E.2d 479 (1981).

Counties Not Exempt from Time Limits in § 15A-701. — This section does not exempt counties with fewer court sessions from the operation of the time limits stated in § 15A-701. Rather, justifiable delay caused by a county's number of court sessions is a period which may be excluded from the required timetable of § 15A-701. State v. Fearing, — N.C. —, 284 S.E.2d 479 (1981).

Quoted in State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981).

Stated in State v. Parnell, 53 N.C. App. 793, 281 S.E.2d 732 (1981).

Cited in State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981); State v. Vaughan, 304 N.C. 383, — S.E.2d — (1981).

§ 15A-703. Sanctions.

Legal Periodicals. —
For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

Effect of Award of New Trial on Another Ground by Appellate Court. — Whether a particular defendant is entitled to a dismissal of the charges against him within the purview of the Speedy Trial Act is not a question which is mooted, resolved or properly deferred by an appellate court's award of a new trial to defendant upon another ground. For, if a defendant receives a dismissal under the act with prejudice, the State is altogether prohibited from further prosecution of the same offense, and on the other hand, even if the case were only subject to dismissal without prejudice under the act, the State would still be required to commence its case against defendant anew, beginning at the indictment stage of the criminal process, in order to reset the statutory speedy trial time clock. State v. Fearing, — N.C. —, 284 S.E.2d 479 (1981).

Applied in State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981); State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981).

Quoted in State v. Vaughan, 51 N.C. App. 408, 276 S.E.2d 518 (1981); State v. Charles, 53 N.C. App. 567, 281 S.E.2d 438 (1981).

Stated in State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981); State v. Letterlough, 53 N.C. App. 693, 281 S.E.2d 749 (1981).

Cited in State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981); State v. Vaughan, 304 N.C. 383, — S.E.2d — (1981).

§ 15A-704. No bar to claim of denial of speedy trial.

CASE NOTES

Cited in State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-721. Definitions.

CASE NOTES

An extradition proceeding is intended, etc. —
In accord with 1981 Cum. Supp. See State v. Owen, 53 N.C. App. 121, 280 S.E.2d 44 (1981).

§ 15A-722. Duty of Governor as to fugitives from justice of other states.

CASE NOTES

A Governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. State v. Owen, 53 N.C. App. 121, 280 S.E.2d 44, petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 107 (1981).

Power of Court Considering Release on Habeas Corpus. — Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. State v. Owen, 53 N.C. App. 121, 280 S.E.2d 44, petition for discretionary review denied, 304 N.C. 200, 285 S.E.2d 107 (1981).

§ 15A-723. Form of demand for extradition.

CASE NOTES

What Law Determines Whether Indictment Charges Crime. — The law of the demanding State furnishes the test of whether the indictment has substantially charged a crime. Dodd v. State, — N.C. App. —, 287 S.E.2d 435 (1982).

Petitioner had the burden of showing beyond a reasonable doubt that she was not the person named in the extradition papers. Dodd v. State, — N.C. App. —, 287 S.E.2d 435 (1982).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

CASE NOTES

Time Limit Inapplicable Where Defendant's Return Not Procured Pursuant to Agreement. — Where the record contained no evidence establishing compliance by a foreign state with the requirements of article IV(b) of this section, there was no showing that the trial court erred in concluding that defendant's return to North Carolina was not procured pursuant to the Interstate Agreement on Detainers and that the provision requiring trial within 120 days of defendant's return to North Carolina was thus inapplicable. State v. Rose, 53 N.C. App. 608, 281 S.E.2d 404 (1981).

Quoted in State v. Dunlap, — N.C. App. —, 290 S.E.2d 744 (1982).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 43.

Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

§ 15A-813. Witness from another state summoned to testify in this State.

CASE NOTES

Cited in Jackson v. Garrison, 677 F.2d 371 (4th Cir. 1981).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-901. Application of Article.

CASE NOTES

Cited in State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

§ 15A-902. Discovery procedure.

CASE NOTES

Voluntary Disclosure Not Required. — Under the statutory discovery scheme neither the State nor the defendant is required to respond voluntarily to a request for discovery. The request for voluntary disclosure is merely a prerequisite to the filing of a motion for an order requiring disclosure. State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981).

Thus, Motion for Order Is Remedy for Failure of Voluntary Disclosure. — Ordinarily one party in a criminal action may not complain of the other's failure to respond voluntarily to a request for disclosure. The remedy for such a failure is to move for a compulsory order. State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981).

Duty of Party Offering Voluntary Disclosure. — Discovery statutes are designed to encourage voluntary disclosures of items which ultimately a party may be ordered to disclose. Thus if either party unequivocally advises the other that it will respond voluntarily to the other's request for disclosure, that party thereby assumes the duty fully to disclose all of those items which could be obtained by court order. State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981).

Subsection (d) Gives Right to Defendant, Not Defense Counsel. — In a criminal prosecution, there was no merit to the defendant's contention that the trial judge's denial of the opportunity to conduct discovery after counsel was appointed violated this section, since the section did not guarantee defense counsel at least 10 days after he was appointed in which to conduct discovery, but instead gave the defen-

dant the right to seek discovery not later than the tenth day after appointment of counsel; the defendant did this during his vigorous representation of himself; and the defendant therefore could not argue that, since the State did not comply with the statutory discovery procedure, he had 10 more days to conduct discovery. State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269, cert. denied, 303 N.C. 182, 280 S.E.2d 454 (1981).

Stated in State v. Jeffries, — N.C. App. —, 285 S.E.2d 307 (1982).

Cited in State v. Hodges, 51 N.C. App. 229, 275 S.E.2d 533 (1981); State v. Carter, — N.C. App. —, 284 S.E.2d 733 (1981); State v. Poplin, — N.C. App. —, 289 S.E.2d 124 (1982); State v. Elam, — N.C. App. —, 289 S.E.2d 857 (1982).

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure.

CASE NOTES

Scope of Subsection (a). —

Defendant's discovery of his oral statements is restricted to those made by him to persons acting on behalf of the State. State v. Walker, — N.C. App. —, 287 S.E.2d 455 (1982).

Statements by Codefendant. —

In accord with 1981 Cum. Supp. See State v. Lake, — N.C. —, 286 S.E.2d 541 (1982).

Recess Proper after Failure to Comply with Subsection (e). — Even if it is assumed that the State failed to comply with subsection (e) of this section in failing to notify defense counsel of tests performed upon the deceased's bedcovers and a bullet removed from her body until three days before trial, the trial court properly acted within its discretion in refusing to suppress evidence of the tests and in ordering a recess to permit defendant to examine the evidence and question the State's witnesses and offering to continue the recess to allow defendant to locate a ballistics expert, especially since the district attorney notified defendant of the tests as soon as he became aware of them. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Identification Procedure Held Not Experiment. — In a prosecution for murder, a procedure in which a witness for the State identified defendant's van as being the vehicle which she had seen near the crime scene did not constitute an experiment; therefore, testimony concerning the van identification was not rendered inadmissible because of the State's failure to comply with established procedures governing the admission into evidence of experiments or because the prosecutor failed to inform defense counsel of the results of the identification procedure pursuant to subsection (e) of this section. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Only statements made by defendant to agents of the government are discoverable. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

List of State Witnesses. —

Defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Quoted in State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981); State v. Brackett, — N.C. App. —, 285 S.E.2d 852 (1982); State v. Christmas, — N.C. —, 290 S.E.2d 613 (1982).

Stated in State v. Jeffries, — N.C. App. —, 285 S.E.2d 307 (1982).

Cited in State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (1981); State v. Poplin, — N.C. App. —, 289 S.E.2d 124 (1982).

§ 15A-904. Disclosure of evidence by the State — certain reports not subject to disclosure.

CASE NOTES

Witnesses' Statements. —

The State can properly resist discovery of its witness's statement under subsection (a). State v. Lake, — N.C. —, 286 S.E.2d 541 (1982).

Quoted in State v. Brackett, — N.C. App. —, 285 S.E.2d 852 (1982).

Stated in State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981).

§ 15A-907. Continuing duty to disclose.

CASE NOTES

Applied in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

§ 15A-910. Regulation of discovery — failure to comply.

CASE NOTES

Particular Remedy, etc. —

In accord with 6th paragraph in 1981 Cum. Supp. See State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

The choice of sanction, if any, rests within the discretion of the trial court. State v. Carter, — N.C. App. —, 284 S.E.2d 733 (1981).

And not reviewable, etc. —

In accord with original. See State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Carter, — N.C. App. —, 284 S.E.2d 733 (1981).

As this section is permissive and not mandatory and the remedy for failure to provide discovery rests within the trial court's discretion, its ruling is not reviewable on appeal absent an abuse of discretion. State v. Dukes, — N.C. —, 289 S.E.2d 561 (1982).

Exclusionary Sanction Permissive. — The exclusionary sanction imposed by the Criminal Procedure Act for failure to comply with discovery orders is permissive rather than mandatory. State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981).

Applied in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Jeffries, — N.C. App. —, 285 S.E.2d 307 (1982); State v. Jarvis, — N.C. App. —, 290 S.E.2d 228 (1982).

Stated in State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Poplin, — N.C. App. —, 289 S.E.2d 124 (1982).

Cited in State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-922. Use of pleadings in misdemeanor cases generally.

CASE NOTES

Amendment of Warrant. — This section conforms to the long-held principle in this State that an amendment to a warrant under which a defendant is charged is permissible as long as the amended warrant does not charge the defendant with a different offense. State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981).

In a trial de novo in the superior court upon a warrant alleging death by vehicle, the trial court did not err in allowing the State to amend the warrant at the close of the State's evidence by striking an allegation of "following too closely" and adding an allegation of "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)," since the nature of the offense with which the defendant was charged, death by vehicle, was not changed by the amendment. State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

CASE NOTES

The term "amendment", etc. —

In accord with 1981 Cum. Supp. See State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981).

Amending Typographical Error. — Where defendant was charged in an arrest warrant and a bill of indictment for felonious assault, amending a mere typographical error in the bill of indictment involving the case number did not alter the charge in any way and was not violative of this section. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

Legal Periodicals. — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

Identification of Person Charged. — An indictment must clearly and positively identify the person charged with the commission of the offense; the name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

Failure to Identify Fatal. — The omission of his name, or a sufficient description if his name is unknown, is a fatal and incurable defect. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

The failure to name the party whom the defendant aided and abetted did not violate this section by failing to assert a fact supporting an element of the offense. State v. Poplin, — N.C. App. —, 289 S.E.2d 124 (1982).

Quoted in State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

Stated in State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981); State v. Rankin, — N.C. App. —, 286 S.E.2d 119 (1982); State v. Ellers, — N.C. App. —, 289 S.E.2d 924 (1982).

Cited in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981); State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981); State v. Hall, — N.C. —, 286 S.E.2d 552 (1982); State v. Huff, — N.C. App. —, 289 S.E.2d 604 (1982).

§ 15A-925. Bill of particulars.

CASE NOTES

Remedy by Motion, etc. —

Where the defendant seeks clarification of the State's theory for prosecution, the proper procedure is a motion for a bill of particulars. State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327, cert. denied, 303 N.C. 548, 281 S.E.2d 398 (1981).

The function of a bill of particulars. —

In accord with 1st paragraph in original. See State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Election Between Legal Theories Not Required. — It is well settled that the State is not generally required to elect between legal theories in a murder prosecution prior to trial, and where the factual basis for the prosecution is sufficiently pleaded, defendant must be prepared to defend against any and all legal theories which these facts may support. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Granting or Denial of Motion Within Trial Court's Discretion. —

In accord with 2nd paragraph in original. See State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

A motion for a bill of particulars is addressed to the sound discretion of the trial court. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

And not subject to review, etc. —

In accord with original. See State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Applied in State v. Williams, 304 N.C. 394, — S.E.2d — (1981).

Cited in State v. Rankin, — N.C. App. —, 286 S.E.2d 119 (1982).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

I. GENERAL CONSIDERATION.

In General. —

In accord with 13th paragraph in original. See State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, — N.C. —, 281 S.E.2d 390 (1981).

Consolidation Is within Discretion of Court. —

In accord with 4th paragraph in original. See State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

In accord with 7th paragraph in original. See State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981).

As a general rule, whether defendants who are jointly indicted should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, — N.C. —, 281 S.E.2d 390 (1981).

The decision to consolidate charges is within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981).

The trial judge's exercise of discretion in consolidating charges will not be disturbed on appeal absent a showing that the defendant has been denied a fair trial by the order of consolidation. State v. Oxendine, 303 N.C. 235, 278 S.E.2d 200 (1981).

Motion to consolidate is addressed to the sound discretion of the trial court and is not reviewable on appeal absent a showing of abuse of discretion. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Exercise of Discretion by Court. —

In accord with 5th paragraph in original. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Under this section there must be, etc. —

In accord with 1981 Cum. Supp. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Mere finding of the transactional connection required by this section is not enough; in ruling on a motion to consolidate, trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial, and if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981).

Determination of Prejudice Resulting from Joinder. —

In accord with 1981 Cum. Supp. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

In determining whether an accused has been prejudiced by joinder, the question is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Avery, 302 N.C. 517, 276 S.E.2d 699 (1981).

In deciding whether two or more offenses should be joined for trial, the trial court must determine whether the offenses are so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant. State v. Oxendine, 303 N.C. 235, 278 S.E.2d 200 (1981).

The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial. State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

Correctness of Joinder to Be Determined As of Time of Decision to Join. — Joinder is a decision which is made prior to trial; the nature of the decision and its timing indicate that the correctness of the joinder must be determined as of the time of the trial court's decision and not with the benefit of hindsight. State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981).

Applied in State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); State v. Fearing, — N.C. —, 284 S.E.2d 487 (1981).

Cited in State v. Jarvis, 50 N.C. App. 679, 274 S.E.2d 852 (1981); State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981); State v. Lake, — N.C. —, 286 S.E.2d 541 (1982).

II. ILLUSTRATIVE CASES.

A. Joinder of Offenses.

Offenses During Escape from Jail. — In a criminal prosecution the "transactional connection" required by this section for joinder of offenses at trial existed and the State's motion for joinder was properly allowed where all the offenses involved related directly to defendant's escape from jail and his efforts to avoid recapture. State v. Avery, 302 N.C. 517, 276 S.E.2d 699 (1981).

Assaults During Flight from Scene of Other Offenses. — The trial court did not err in consolidating for trial charges against defendant for assault with a deadly weapon on a law officer in the performance of his duties and assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries not resulting in death and charges against defendant for breaking and entering a restaurant, breaking and entering another building and larceny from the second building where the assaults occurred when the officer attempted to arrest defendant while defendant was fleeing from the scene of the other crimes, since all of the charges against defendant were based on the same series of acts or transactions connected together within the meaning of subsection (a) of this section. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

Robbery. —

Three charges against defendant for common-law robbery were properly consolidated for trial on the ground that the offenses were based on a series of acts or transactions connected together or constituting parts of a single scheme or plan where all of the offenses occurred within 10 days on the same street in Wilmington; all occurred in the late afternoon; in each case, two black males physically assaulted the attendant of a small business and took petty cash from the person of the victim or the cash box of the business; the assaults were of a similar nature, and each was without weapons, involved an element of surprise and involved choking, beating and kicking the victim; and in each case, the robbers escaped on foot. State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

B. Joinder of Defendants for Trial.

Consolidation of Indictments Charging Defendants with Murder, etc. —

In a prosecution of defendants for felony murder, the trial court did not err in granting the State's motion to consolidate defendants' cases for trial where each defendant was charged with having committed the same offense at the same time, neither defendant acted at trial in such a way as to incriminate the other and their defenses were not antagonistic, and while the State on occasion presented evidence that was competent against only one defendant, the trial court proceeded at those times to instruct the jury that such evidence was competent against only a particular defendant. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Consolidated Trial on Armed Robbery Charges. — Trial court did not err in granting the State's motion to join defendant's case with that of a codefendant for trial, since both defendants were charged with accountability for the same armed robbery, and there was no merit to defendant's contention that, had the parties been tried separately, witness's testimony that he saw a man not fitting defendant's description leave getaway vehicle and run into the woods would not have been admissible against him, since the witness's testimony would have been admissible against defendant in any event as the witness's personal observation of one of the events taking place during the incident, and the testimony would be more favorable to defendant than prejudicial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

Discretion of Trial Judge. —

Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, — N.C. —, 281 S.E.2d 390 (1981).

Decision to join the charges against two or more defendants for trial is within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Showing Required to Overturn Joinder. — Defendant seeking to overturn the discre-

tionary ruling of the trial judge must show that the joinder has deprived him of a fair trial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

The ruling upon a motion for severance shall not be disturbed on appeal unless defendant demonstrates an abuse of judicial discretion which effectively deprived him of a fair trial. State v. Lake, — N.C. —, 286 S.E.2d 541 (1982).

Defendant Not Prejudiced, etc. —

In a prosecution for armed robbery there was no merit to defendant's contention that the trial court erred in joining his case for trial with that of a codefendant and that he was unfairly prejudiced by admission of codefendant's statements at their joint trial, since codefendant's extrajudicial statements were admissible against defendant under the spontaneous utterance exception to the hearsay rule, and defendant failed to show an abuse of the trial court's discretion in joining the charges against the two defendants. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Trial court did not err in granting the State's motion to join defendant's case with that of a codefendant for trial, since both defendants were charged with accountability for the same armed robbery; moreover, there was no merit to defendant's contention that, had the parties been tried separately, a witness's testimony that he saw a man not fitting defendant's description leave the getaway vehicle and run into the woods would not have been admissible against him, since the witness's testimony would have been admissible against defendant in any event as the witness's personal observation of one of the events taking place during the incident, and the testimony would be more favorable to defendant than prejudicial. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Subdivision (c)(1) of this section codifies substantially the decision in Bruton v. United States, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See State v. Whilhite, — N.C. App. —, 289 S.E.2d 111 (1982).

Applied in State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981).

Quoted in State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

Article 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

CASE NOTES

Subsequent Prosecution Not Precluded by Voluntary Dismissal at Probable Cause Hearing. — Voluntary dismissal taken by the State at a probable cause hearing does not preclude the State from instituting a subsequent prosecution for the same offense. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Applied in State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (1981).

Article 51.

Arraignment.

§ 15A-941. Arraignment before judge.

CASE NOTES

Failure to Conduct Formal Arraignment. —

Failure of the record to show a formal arraignment does not entitle defendant to a new trial where the record indicates that defendant was tried as if he had been arraigned and

had entered a plea of not guilty. State v. Benfield, — N.C. App. —, 285 S.E.2d 299 (1982).

Charges read to a defendant need not appear in the record. State v. Benfield, — N.C. App. —, 285 S.E.2d 299 (1982).

§ 15A-943. Arraignment in superior court — required calendaring.

CASE NOTES

Legislative Intent. —
In accord with 1st paragraph in 1981 Cum. Supp. See State v. Elkerson, — N.C. —, 285 S.E.2d 784 (1982).

Applied in State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981).

§ 15A-944. Arraignment in superior court — optional calendaring.

CASE NOTES

Quoted in State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981).

§ 15A-945. Waiver of arraignment.

CASE NOTES

Effect of Waiver on Day of Trial. — Where defendant waives arraignment on the day of trial, there is no need to submit a written waiver and this section is inapplicable. State v. Benfield, — N.C. App. —, 285 S.E.2d 299 (1982).

ARTICLE 52.

Motions Practice.

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

CASE NOTES

A motion for continuance is ordinarily, etc. —
A motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

Review of Action on Motion Involving Constitutional Issue. — When a motion for continuance raises a constitutional issue, trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

When Denial of Continuance Is Ground for New Trial. — Denial of a motion for a continuance, regardless of its nature, is grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced thereby. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

Motion Not Supported by Proof of Grounds Properly Denied. — Trial court did not err in refusing to grant a longer contin-

uance to afford defendant a reasonable opportunity to locate a material witness when defendant's oral motion therefor, made on the date set for trial, was not supported by some form of detailed proof indicating sufficient grounds for further delay. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

Quoted in State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981).

Stated in State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981); State v. Benfield, — N.C. App. —, 285 S.E.2d 299 (1982).

§ 15A-954. Motion to dismiss — grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

Legal Periodicals. — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

This section affords no protection to one who has not yet been "accused." — An individual becomes "accused" of a crime for the purpose of Sixth Amendment analysis when he is either arrested or indicted for the crime. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

The speedy trial provision has no application until a putative defendant in some way becomes accused. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Period Covered by Speedy Trial Right. — The due process right to a speedy trial relates to the period of time between the date of the occurrence of the alleged offense, and the date when a defendant is "accused" of committing the alleged crime. A defendant becomes "accused" of the crime for this purpose when he is either arrested or indicted, whichever occurs first. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Burden of Proof of Denial of Speedy Trial. —

The burden is on the defendant who asserts the denial of his right to a speedy trial to show the delay was the result of the State's intentional and unnecessary postponement for its own convenience or advantage; and, at least in the absence of intentional governmental delay for the purpose of harassing or gaining advantage over defendant, the burden is on defendant to affirmatively demonstrate actual and substantial prejudice. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Prejudice Not Presumed by Long Delay. — Prejudice will not be presumed merely upon a showing of a long period of delay. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Test for Speedy Trial. —

A claim that a speedy trial has been denied must be subjected to a balancing test in which the court weighs the conduct of both the prosecution and the defendant. The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Failure to assert the right, etc. —

Although the failure to assert the right to a speedy trial has not been held to be a waiver of the right to a speedy trial, it does make it difficult for a defendant to prove that he was denied such a right. State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

Quoted in State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

Stated in State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981).

Cited in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. White, 54 N.C. App. 451, 283 S.E.2d 571 (1981).

§ 15A-958. Motion for a special venire from another county.

CASE NOTES

Discretion of Trial Judge. —

A motion for a special venire is a pretrial order, the granting or denial of which is within the trial court's sound discretion. State v.

Duvall, 50 N.C. App. 684, 275 S.E.2d 842, sentence vacated, — N.C. —, 284 S.E.2d 495 (1981).

As to error in granting State's motion for special venire after earlier order of another judge denying the same motion, in absence of a change of circumstances, see State v. Duvall, — N.C. —, 284 S.E.2d 495 (1981).

Article 53.

Motion to Suppress Evidence.

§ 15A-971. Definitions.

CASE NOTES

This article places the burden on the defendant of demonstrating that he has raised his motion to suppress according to its mandate. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

Cited in State v. Joyner, 54 N.C. App. 129, 282 S.E.2d 520 (1981).

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

CASE NOTES

Cited in State v. Johnson, — N.C. —, 285 S.E.2d 792 (1982).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

CASE NOTES

Suppression of Evidence under Subdivision (1). —

Evidence for which exclusion is required by either the United States or the North Carolina Constitutions is a specified ground for a motion to suppress under this section. State v. Joyner, 54 N.C. App. 129, 282 S.E.2d 520 (1981).

The use of the term "result," etc. —

In accord with 1981 Cum. Supp. See State v. Hunter, — N.C. —, 286 S.E.2d 535 (1982).

Defendant Must Have Possessory, etc. —

Defendant could not object to the admission of evidence taken as a result of searches conducted in and around an airplane where the record showed neither that defendant was present when the airplane was searched nor that he had any protected interest in the airplane. State v. Mettrick, 54 N.C. App. 1, 283 S.E.2d 139 (1981).

Incriminating Statements. —

In a prosecution for murder, defendant's incriminating in-custody statement was not inadmissible as the fruit of an original unlawful arrest or pursuant to this section where the statement was not the result of the original unlawful arrest but had its origin in and was the result of a subsequent lawful arrest for a murder to which the statement related. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, — U.S. —, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Stated in State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318 (1981); State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981); State v.

McNeill, 54 N.C. App. 454, 283 S.E.2d 565 (1981).

Cited in State v. Johnson, — N.C. —, 285 S.E.2d 792 (1982).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

CASE NOTES

Motion to suppress evidence must be made before trial unless (1) defendant did not have a reasonable opportunity to make the motion before trial; or (2) defendant is allowed to make the motion during the trial because he did not receive timely notice of the State's intention to use such evidence; or (3) defendant is allowed to make the motion during the trial after a pretrial determination and denial of the motion and a later showing that additional facts pertinent to the motion have been discovered by defendant which he could not have reasonably discovered before pretrial denial of the motion. State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981).

When there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence. State v. Hunter, — N.C. —, 286 S.E.2d 535 (1982).

"Additional Pertinent Facts". — In a robbery prosecution in which defendant testified at a hearing on a motion to suppress his confession that he was under the influence of drugs and was drowsy at the time he confessed, an officer testified defendant was alert when he confessed, and the trial judge found that defendant was not under the influence of drugs when he made his confession, the trial court did not err in refusing to conduct a new suppression hearing because of newly discovered evidence when one of the robbery victims testified at trial that he saw defendant at the police station and he appeared sleepy, since such testimony only corroborated evidence already before the court and was not an "additional pertinent fact" within the meaning of subsection (c) of this section. State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

Applied in State v. Cass, — N.C. App. —, 285 S.E.2d 337 (1982).

Stated in State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318 (1981); State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981).

Cited in State v. Williams, 303 N.C. 142, 277 S.E.2d 434 (1981); State v. Joyner, 54 N.C. App. 129, 282 S.E.2d 520 (1981); State v. Johnson, — N.C. —, 285 S.E.2d 792 (1982).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

Legal Periodicals. — For survey of 1980 criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

When Disclosure of Informant's Identity Required. — Ordinarily, a defendant is not necessarily entitled to elicit the name of a confidential informant. But when the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause, disclosure is required. State v. Cherry, — N.C. App. —, 286 S.E.2d 368 (1982).

Applied in State v. Reddick, — N.C. App. —, 286 S.E.2d 654 (1982).

Stated in State v. Caldwell, 53 N.C. App. 1, 279 S.E.2d 852 (1981).

Cited in State v. Hodges, 51 N.C. App. 229, 275 S.E.2d 533 (1981).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

Legal Periodicals. — For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

CASE NOTES

Subsection (c) Procedure Prerequisite to Appeal. — The language of subsection (c) of this section making orders of the superior court granting motions to suppress evidence appealable to the appellate division prior to trial "upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case," constitutes a statutory prerequisite which must be met in order for the State to have the right to appeal, prior to trial, an order granting a motion to suppress. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

When Subsection (c) Certificate Must Be Filed. — The certificate envisioned by subsection (c) of this section is timely filed if it is filed prior to the certification of the record on appeal to the appellate division. The State is not required to pursue its right of appeal by submitting to the trial judge the certificate required by subsection (c) within the 10-day time period the case remains viable for appeal under § 15A-1448(a)(1). State v. Turner, — N.C. —, 289 S.E.2d 368 (1982).

Section 15A-1448(a)(1) and subsection (c) of this section need not be construed together to require that the prosecutor's certificate also be filed within 10 days of judgment. State v. Lay, — N.C. App. —, 290 S.E.2d 405 (1982).

This Article not only requires, etc. — Subsection (c) of this section not only requires the State to raise its right to appeal according to the statutory mandate, but also places the burden on the State to demonstrate that it had done so. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

Notice of Intention to Appeal Required. —

In accord with 1st paragraph of 1981 Cum. Supp. See State v. Peck, 54 N.C. App. 302, 283 S.E.2d 383 (1981).

The defendant must notify the district attorney and the trial court of his intention to appeal the denial of the suppression motion at the sentencing hearing. State v. Walden, 52 N.C. App. 125, 278 S.E.2d 265 (1981).

Applied in State v. McDonald, — N.C. App. —, 285 S.E.2d 282 (1982); State v. Mack, — N.C. App. —, 290 S.E.2d 741 (1982).

Stated in State v. Cooper, 52 N.C. App. 349, 278 S.E.2d 532 (1981); State v. Murrell, 54 N.C. App. 342, 283 S.E.2d 173 (1981).

Cited in State v. Conard, 54 N.C. App. 243, 282 S.E.2d 501 (1981); State v. Cooper, — N.C. —, 286 S.E.2d 102 (1982); State v. Mavrogianis, — N.C. App. —, 291 S.E.2d 163 (1982).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

CASE NOTES

The test for capacity to stand trial, etc. — As set out in this section, the test of a defendant's mental capacity to stand trial is whether by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Question of Capacity in Trial Judge's Discretion. —

When the trial judge determines the question of a defendant's capacity without a jury the court's findings of fact, if supported by the evidence, are conclusive on appeal. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

As Is Necessity for Formal Inquiry. — Ordinarily, it is within the trial court's discretion to determine whether circumstances brought to its attention require a formal inquiry as to whether a defendant has sufficient mental capacity to plead to the indictment and to conduct a rational defense. State v. McGee, — N.C. App. —, 289 S.E.2d 616 (1982).

Burden of Persuasion. — Defendant had the burden of persuasion on his motion under this section. State v. Jacobs, 51 N.C. App. 324, 276 S.E.2d 482 (1981).

Cited in State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

CASE NOTES

Applicability of Physician — Patient Privilege. —

A psychiatrist appointed by the court for a sanity examination of the defendant is a witness for the court, not the prosecution, and the statements made by the defendant to the psychiatrist are not privileged under the doctor-patient relationship. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

The state may not consume an unreasonable amount of time in conducting mental and physical examinations and filing reports thereon. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

And the legislature intended to declare that 60 days or less is a reasonable time to conduct this kind of mental examination. It has said that "in no event" may more time be consumed. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Better practice requires the trial court to make findings of fact in its order on a motion suggesting incapacity to proceed under this section. State v. Jacobs, 51 N.C. App. 324, 276 S.E.2d 482 (1981).

Effect of Hospital Stay on Speedy Trial Right. — Where a defendant was held in a hospital for examination a mere seven days longer than this section permits, the practice did not result in a violation of the Speedy Trial Act. State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981).

Cited in State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

OPINIONS OF ATTORNEY GENERAL

Examination by Physician Is Required. —
The correct citation to the opinion of the Attorney General cited under this catchline in the 1981 Cumulative Supplement is 48 N.C.A.G. 53.

ARTICLE 57.

Pleas.

§ 15A-1011. Pleas in district and superior courts; waiver of appearance.

Legal Periodicals. — For an article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

§ 15A-1012. Aid of counsel; time for deliberation.

Legal Periodicals. — For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

Legal Periodicals. —
For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Restitution to Law Enforcement Agencies. — North Carolina statutes authorize the imposition of a condition upon parole eligibility of restitution to victims of crime who have suffered economic loss as a result of that crime, but law enforcement agencies are not within the class of such victims. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

Where, following guilty pleas to drug offenses pursuant to a plea bargain, the trial court ordered as a condition of parole that defendants reimburse the Bureau of Investigation Drug Division for the expenses it had incurred in investigating the charges and obtaining the proof, imposition of the condition without having advised defendants of it before accep-

tance of their pleas made their pleas both involuntary and unintelligent, since the condition was illegal under state law and quite unanticipated in connection with the plea bargains, and since it clearly was a special limitation on parole eligibility. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

Legal Periodicals. — For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Right to Continuance Absolute. — By adding the fourth sentence of subsection (b), the legislature has clearly granted to the defendant an absolute right to a continuance upon rejection of a proposed plea agreement at arraignment. State v. Tyndall, — N.C. App. —, 284 S.E.2d 575 (1981).

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1052. Grant of immunity in court proceedings.

CASE NOTES

Subsection (c) of this section contains a mandatory "scrutiny" instruction, etc. —

In accord with 1981 Cum. Supp. See State v. Pollock, — N.C. App. —, 289 S.E.2d 588 (1982).

When "Scrutiny" Instruction Required. — The statutory "scrutiny" instruction is required, absent a special request by the defendant, only when a witness testifies under immunity. Thus, where defendant makes no special request for a "scrutiny" instruction, and his witness receives no grant of immunity but merely has some of the charges against him dismissed, subsection (c) does not apply. State v. Pollock, — N.C. App. —, 289 S.E.2d 588 (1982).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

Mistrial Is Matter of Court's Discretion. —

In accord with 1st paragraph in 1981 Cum. Supp. See State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535, petition for discretionary review denied, — N.C. —, 287 S.E.2d 127 (1981).

It is within the court's discretion to decide whether substantial and irreparable prejudice to the defendant's case has occurred, and the court's decision will not be disturbed on appeal absent a showing of gross abuse of that discretion. State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981).

The problem of exposure of jurors to news media reports, etc. — Mistrial Not Required. —

Trial court did not err by denying the defense's motion for a mistrial where two jurors saw, but did not read, a newspaper article discussing the case before them. State v. Keyes, — N.C. App. —, 286 S.E.2d 861 (1982).

Applied in State v. Loren, 302 N.C. 607, 276 S.E.2d 365 (1981).

Quoted in State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

Stated in State v. Cherry, — N.C. App. —, 286 S.E.2d 368 (1982).

§ 15A-1063. Mistrial for impossibility of proceeding.

CASE NOTES

Discretion of Trial Judge. — The granting or denial of a motion for a mistrial is a matter within the sound discretion of the trial judge. State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

§ 15A-1064. Mistrial; finding of facts required.

CASE NOTES

Failure to Make Findings. — Where the mistrial has been granted at defendant's request, there can be no prejudice to defendant in the failure to make findings as required by this section. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, — N.C. —, 281 S.E.2d 390 (1981).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

CASE NOTES

Cited in State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

The function of a challenge for cause is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise. The purpose of challenge should be to guarantee not only freedom from any bias against the accused, but also from any prejudice against his prosecution. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Section Provides Basis for Making Challenge. — This section does not mandate automatic disqualification of a juror who states he has "sort of" an opinion regarding defendant's guilt or innocence. It provides the basis for making a challenge for cause, and the voir dire examination serves to ascertain whether that cause in fact exists. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Who May Challenge for Cause. — This section expressly overrules older case law that allowed challenge for cause only by the party against whom the opinion was formed or expressed. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Subsection (6) is a codification of the case law which requires that a juror be excused when he is, in the trial judge's opinion, unable to render a fair and impartial verdict because of preconceived opinions as to defendant's guilt or innocence. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Which interpretation is consistent with subsection (9), which permits a challenge to be made on the grounds that a juror for any other cause is unable to render a fair and impartial verdict. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Merely Having Heard Case Discussed, etc. —

To demand dismissal of every prospective juror who had prior knowledge of a case because he kept himself informed of current affairs arguably would require our courts to exclude from service those best qualified to hear and deal with evidence and to understand instructions upon the law. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

A juror's answers need not be completely unequivocal or unambiguous for the judge to make his determination that a juror will base his findings solely upon evidence presented at trial. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Applied in State v. Elkerson, — N.C. —, 285 S.E.2d 784 (1982).

Cited in State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31 (1981).

§ 15A-1213. Informing prospective jurors of case.

CASE NOTES

Purpose.

In accord with 1st paragraph in 1981 Cum. Supp. See State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981); State v. Elkerson, — N.C. —, 285 S.E.2d 784 (1982); State v. Leggett, — N.C. —, 287 S.E.2d 832 (1982).

Summary of Indictment. — Trial court, as directed by this section, may refer to and summarize an indictment when explaining to the jury the circumstances under which defendant is being tried. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

Asking Defense Counsel about Affirmative Defenses. — In a criminal prosecution, there was no merit to the defendant's contention that the trial judge erred by asking defense counsel in the presence of the jury whether there were any affirmative defenses of which counsel wished the judge to inform the jury, since the trial judge merely insured that defendant exercised his opportunity to bring forward any affirmative defense he might have. State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269, cert. denied, 303 N.C. 182, 280 S.E.2d 454 (1981).

The trial judge did not improperly refer, etc. —

The trial judge did not violate this section or § 15A-1221(a)(2) by advising the prospective jurors that defendant had been accused in a bill of indictment returned by a grand jury alleging that he broke and entered a certain building and that when he did so he had the intent to commit larceny. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

Where the trial court merely drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried, the trial court did not commit error. State v. Leggett, — N.C. —, 287 S.E.2d 832 (1982).

§ 15A-1214. Selection of jurors; procedure.

CASE NOTES

Person has no right to be indicted or tried by a jury of his own race or even to have a representative of his own race on the jury; he does have the constitutional right to be tried by

a jury from which members of his own race have not been systematically and arbitrarily excluded. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

Reopening Examination after Impanelment. —

In accord with 1981 Cum. Supp. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

The decision whether to reopen examination of a juror previously accepted by both the State and defendant and to excuse such juror either peremptorily or for cause is a matter within the sound discretion of the trial judge. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Selection of jury where voir dire began with only 11 members of the jury venire held harmless error where defendant exercised only two of the peremptory challenges available to him. State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

Applied in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981); State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

Cited in State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842 (1981).

§ 15A-1215. Alternate jurors.

CASE NOTES

There is no abuse of discretion in replacing a juror with an alternate juror upon an explained absence of the original juror. State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

§ 15A-1216. Impaneling jury.

CASE NOTES

Applied in State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981).

§ 15A-1217. Number of peremptory challenges.

CASE NOTES

Selection of jury where voir dire began with only 11 members of the jury venire held harmless error where defendant exercised only two of the peremptory challenges available to him. State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

Cited in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31 (1981).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.

CASE NOTES

This section does not prevent the judge from making references to the bill of indictment during remarks or the charge to the jurors; the section proscribes the reading of the indictment to the prospective jurors or the jury. State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

The trial judge did not improperly refer, etc. —

Where the trial court merely drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried, the trial court did not commit error. State v. Leggett, — N.C. —, 287 S.E.2d 832 (1982).

Quoted in State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

Applied in State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

Cited in State v. Keyes, — N.C. App. —, 286 S.E.2d 861 (1982).

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

But questioning by the trial judge, etc.—

Trial judge may properly question witnesses in order to clarify and promote a proper understanding of the testimony; however, such questions constitute prejudicial error if by their tenor, frequency, or persistence the trial judge expresses an opinion. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

The trial judge is not bound, etc. —

It is not error for court to fail to summarize evidence brought out on cross-examination for defendant where it is not of an exculpatory nature which goes to the establishment of a defense. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Remarks in Admitting or Excluding Evidence. — It has been held that a remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. State v. Lednum, 51 N.C. App. 387, 276 S.E.2d 920, cert. denied, 303 N.C. 317, 281 S.E.2d 656 (1981).

Judge may always properly exclude inadmissible evidence; he is prohibited, however, by this section from doing so in a manner which intimates any judicial favoritism. State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

Rulings on Repetitive Questions. — Absent a showing of manifest abuse, a trial judge's allowance or disallowance of alleged repetitive questions is within his discretion, and his duty to control the conduct and course of a trial. State v. Lednum, 51 N.C. App. 387, 276 S.E.2d 920, cert. denied, 303 N.C. 317, 281 S.E.2d 656 (1981).

Restriction of Improper Questioning by Counsel. — Scope and manner of examination of witnesses are matters which are ordinarily governed by the trial judge, who may take appropriate measures to restrict improper questioning by counsel. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

Indicating Roles Attorneys Play in Criminal Prosecution. — Where the court's comments indicate the roles attorneys play in a criminal prosecution, such comments are not improper expressions of opinion as to the merits of either party's case. State v. Hudson, 54 N.C. App. 437, 283 S.E.2d 561 (1981).

Mere fact that judge spends more time summarizing evidence for the State does not amount to an expression of opinion. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Applied in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Hawkins, 302 N.C. 364, 275 S.E.2d 172 (1981); State v. Bizzell, 53 N.C. App. 450, 281 S.E.2d 57 (1981).

Stated in State v. Norwood, 303 N.C. 473, 279 S.E.2d 550 (1981).

Cited in State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981); State v. Hurst, — N.C. —, 285 S.E.2d 808 (1982); State v. Burgess, — N.C. App. —, 285 S.E.2d 868 (1982); State v. Little, — N.C. App. —, 290 S.E.2d 393 (1982).

§ 15A-1223. Disqualification of judge.

CASE NOTES

Disposition by Trial Judge of Recusal Motion. — A trial judge should either recuse himself or refer a recusal motion to another judge if there is sufficient force in the allegations contained in defendant's motion to proceed to find facts, or if a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner. State v. Poole, — N.C. —, 289 S.E.2d 335 (1982).

§ 15A-1226. Rebuttal evidence; additional evidence.

CASE NOTES

There is no constitutional right to have one's case reopened; the decision to reopen a case and hear further evidence is within the trial court's discretion. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

§ 15A-1227. Motion for dismissal.

CASE NOTES

Court Limited to Determination, etc. — In considering a motion to dismiss, it is the duty of the court to ascertain if there is substantial evidence of each essential element of the offense charged. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Sufficiency of Evidence Test Same, etc. — The test of the sufficiency of evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

"Substantial Evidence" Test. — Defendants' motion must be denied if the State has offered substantial evidence against defendant of every essential element of the crime charged. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Substantial evidence is, etc. — In accord with 1981 Cum. Supp. See State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Evidence Must Be Considered in Most Favorable, etc. — In accord with 1981 Cum. Supp. See State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981); State v. Gray, — N.C. App. —, 289 S.E.2d 894 (1982).

In passing upon a motion to dismiss pursuant to this section, all of the evidence admitted, whether competent or incompetent, is viewed in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

In ruling upon defendants' motion to dismiss, trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

All Evidence Favorable to State, etc. — Only evidence favorable to the State is considered in a motion to dismiss, and contradictions and discrepancies in the evidence are for the jury. State v. Gray, — N.C. App. —, 289 S.E.2d 894 (1982).

Applied in State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981).

Stated in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

Cited in State v. Owen, 51 N.C. App. 429, 276 S.E.2d 478 (1981); State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981).

§ 15A-1230. Limitations on argument to the jury.

CASE NOTES

Discretion of Trial Judge. — The control of the argument of the district attorney and counsel must be left largely to the discretion of the trial judge, and his rulings thereon will not be disturbed in the absence of gross abuse of discretion. State v. Woods, — N.C. App. —, 287 S.E.2d 431 (1982).

When Impropriety Should Be Brought to Court's Attention. — Ordinarily, an impropriety in counsel's jury argument should be brought to the attention of the trial court before the case is submitted to the jury, in order that the impropriety might be corrected; this rule does not apply, however, when the impropriety is so gross that it cannot be corrected. State v. Woods, — N.C. App. —, 287 S.E.2d 431 (1982).

Cited in State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

§ 15A-1231. Jury instructions.

CASE NOTES

Quoted in State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

Cited in State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

CASE NOTES

I. IN GENERAL.

Applied in State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); State v. Wright, 304 N.C. 349, — S.E.2d — (1981); State v. Bishop, — N.C. App. —, 284 S.E.2d 720 (1981); State v. Thompson, — N.C. App. —, 291 S.E.2d 266 (1982); State v. Robertson, — N.C. App. —, 291 S.E.2d 302 (1982).

Quoted in State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981).

Stated in State v. Oliver, 52 N.C. App. 483, 279 S.E.2d 19 (1981); State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

Cited in State v. Charles, 53 N.C. App. 567, 281 S.E.2d 438 (1981); State v. Rhodes, 54 N.C. App. 193, 282 S.E.2d 809 (1981); State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981); State v. Murray, — N.C. App. —, 284 S.E.2d 525 (1981); State v. Cass, — N.C. App. —, 285 S.E.2d 337 (1982); State v. Williams, — N.C. App. —, 287 S.E.2d 418 (1982); State v. Little, — N.C. App. —, 290 S.E.2d 393 (1982).

II. OPINION OF JUDGE.

A. General Consideration.

Exclusion of Evidence so as to Intimate Favoritism Prohibited. — Judge may always properly exclude inadmissible evidence; he is prohibited, however, by this section from doing so in a manner which intimates any judicial favoritism. State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

The charge of the court must be read as a whole, etc. —

In accord with 12th paragraph in original. See State v. Poole, — N.C. —, 289 S.E.2d 335 (1982).

Taking More Time in Stating State's Contentions. —

Prejudicial error is committed when a trial judge gives an exhaustive and detailed array of the State's contentions and evidence but deals with the contentions and evidence of the defendant in only a brief and summary fashion; but a trial judge is not required to consume an equal amount of time in stating the contentions and evidence of each party to a case. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

B. Explanation Required.

1. In General.

Rule Stated. —

It is for the jury and not the court to determine the credibility of the evidence. It is for the judge to declare and explain the law arising on the evidence. State v. Jones, 52 N.C. App. 606, 279 S.E.2d 9 (1981).

Caution as to Consideration of Prior Inconsistent Testimony. — In a prosecution for assault with a deadly weapon inflicting serious injury, trial judge did not abuse his discretion in failing to give a limiting instruction immediately before a witness's prior inconsistent statement was read to the jury where he cautioned the jury in his charge that the statement was to be considered not as substantive evidence, but only in weighing the credibility of the witness's testimony. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

2. Statement of Evidence.

In General. —

In accord with 4th paragraph in original. See State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

Recapitulation Unnecessary. —

In accord with 8th paragraph in 1981 Cum. Supp. See State v. Adcox, 303 N.C. 133, 277 S.E.2d 398 (1981).

Trial judge is not required to recapitulate all the evidence in his charge to the jury, but only that amount necessary to explain the application of the law to the evidence. State v. Harrelson, 54 N.C. App. 349, 283 S.E.2d 168 (1981).

Failure to Summarize Evidence of Defendant. —

This section does not require the trial judge to summarize evidence favorable to defendant where the evidence is not necessary to an explanation of the applicable law. State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

Evidence Reflecting on Credibility of Witness. — Absent a special request, the court is not required to summarize the evidence which merely reflects upon the credibility of a given witness. State v. Miller, 302 N.C. 572, 276 S.E.2d 417 (1981).

Effect of a "Slip of the Tongue". —

A mere slip of the tongue by the judge while reading his instructions to the jury which is not called to the attention of the court at the time it is made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled thereby. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Contentions of Parties. —

It is not error for the trial judge to state the contentions of the parties provided that the contentions of each litigant are stated fairly and accurately. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

The trial judge must confine his summary of the evidence to the facts and avoid drawing conclusions based thereon. State v. Washington, — N.C. App. —, 291 S.E.2d 270 (1982).

3. Explanation of Law.

Included Offenses. —

The judge has a duty to declare and explain the law arising on all of the evidence, and this duty necessarily requires the judge to charge upon a lesser included offense, even absent a special request, when there is some evidence to support it. State v. Little, 51 N.C. App. 64, 275 S.E.2d 249 (1981).

Complete Instructions Not Necessary in Answering Specific Jury Question. — When the trial court has once instructed the jury in such manner as to declare and explain adequately the law arising on the evidence, there is no requirement that complete instructions be given again each time the jury returns to ask a specific question. In such instances, the trial court properly may answer the question asked without resorting to repetition of all of the instructions previously given. State v. Howard, — N.C. —, 290 S.E.2d 591 (1982).

C. Illustrative Cases.

Instruction as to Aiding and Abetting Assault on Defendant's Child. — In prosecution for aiding and abetting principal in assault on defendant's one-year-old child, trial court erred in instructing the jury that they could convict defendant if they found that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so, since the instruction allowed the jury to convict defendant if they found that she failed to exercise her parental duty to protect her child, while the indictment did not charge her with breach of her parental duty, but with assault. State v. Walden, 53 N.C. App. 196, 280 S.E.2d 505 (1981).

Instruction on Possibility of Mistrial. — In charging the jury upon the law and evidence pursuant to this section, and in instructing that a verdict must be unanimous, § 15A-1237(b), the trial judge is not required to anticipate that the jury may be unable to reach a verdict, much less to express such anticipated result by instructing that a mistrial would result if the jury could not reach a verdict. Such an instruction, if given before the jury began its deliberations, would in itself tend to coerce a verdict, increasing the risk of error. State v. McBryde, — N.C. App. —, 285 S.E.2d 866 (1982).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

Subsection (b) Inapplicable to Jury Instructions. — Subsection (b) applies to exhibits and writings received as evidence, not jury instructions. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Effect of Failure to Object. — Under this section a failure by the defendant to object to the jury's request, and the judge's permission, to take photographic exhibits into the jury room constitutes consent by implication. State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981).

In a criminal prosecution, the defendant waived objection to the action of the trial court in permitting the jury to take into the jury room an item which had been introduced into evidence by failing to enter an objection or otherwise indicate his lack of consent at the trial. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

Standard of Review on Appeal. — Violations of subsection (b), in allowing exhibits to go into the jury room over defendant's objection, are corrected by the appellate division only when they prejudice the defendants and such prejudice obtains only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises; the burden of showing such prejudice is upon the defendant. State v. Taylor, — N.C. App. —, 287 S.E.2d 129 (1982).

Quoted in State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981).

Cited in State v. Jones, 54 N.C. App. 482, 283 S.E.2d 546 (1981); State v. Poplin, — N.C. App. —, 289 S.E.2d 124 (1982).

§ 15A-1235. Length of deliberations; deadlocked jury.

Legal Periodicals. —

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

CASE NOTES

Discretion of Trial Judge. —

The granting or denial of a motion for a mistrial is a matter within the sound discretion of the trial judge. State v. Wall, — N.C. —, 286 S.E.2d 68 (1982).

Standards Applicable to Charges to Deadlocked Jury. —

In accord with 1981 Cum. Supp. See State v. Brown, — N.C. App. —, 289 S.E.2d 142 (1982).

Comment on Expense of Retrying Case. —

Where the jury is deadlocked, and this fact is known to the trial judge, the mention of inconvenience and additional expense may well be prejudicial and harmful to the defendant, and must be scrutinized with extraordinary care. State v. Mack, 53 N.C. App. 127, 280 S.E.2d 40 (1981).

It is error to instruct a deadlocked jury that its inability to agree will result in the inconvenience of having to retry the case. State v. Lipfird, 302 N.C. 391, 276 S.E.2d 161 (1981).

Quoted in State v. Berkley, — N.C. App. —, 287 S.E.2d 445 (1982).

Stated in State v. Hall, — N.C. —, 286 S.E.2d 552 (1982).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

CASE NOTES

Failure to Admonish Not Violation of Constitutional Right. — The failure of the trial judge to admonish the jury at an appropriate time in violation of this section does not

involve the violation of a constitutional right. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

Error Not Reversible Per Se. — Where defense counsel is concerned about the failure of the trial judge to admonish the jury, it is a simple matter for defense counsel to call to the attention of the judge such failure to admonish. Extending the reversible error per se rule to all violations of this chapter would result in many new trials for mere technical error, a result not intended by the legislature in light of the provisions of § 15A-1443. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

No Prejudicial Error Where Defendant Failed to Object. — Where defendant failed to object at the times he contended the court was remiss in its duty to instruct the jury on its behavior, and did not request further instructions, there was no prejudicial error in court's failure to give such instructions. State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

§ 15A-1237. Verdict.

CASE NOTES

Cited in State v. McBryde, — N.C. App. —, 285 S.E.2d 866 (1982).

§ 15A-1238. Polling the jury.

CASE NOTES

Waiver of Right To Poll. — Defense counsel waives his right to request a polling of the jury where he does not make his request prior to the jury's discharge. State v. Froneberger, — N.C. App. —, 285 S.E.2d 119 (1981).

§ 15A-1240. Impeachment of the verdict.

CASE NOTES

Effect of Section. — Generally, after the jury renders a verdict and has been discharged, the court will not receive the testimony of jurors to impeach their verdict. This section codified this general rule and provided exceptions. State v. Carter, — N.C. App. —, 284 S.E.2d 733 (1981).

Strict Construction. — As subsection (c) of this section is in derogation of the common law, it must be strictly construed. State v. Froneberger, — N.C. App. —, 285 S.E.2d 119 (1981).

Evidence of Juror's Second Thoughts. — Vague hearsay evidence given by defense counsel's secretary, concerning "second thoughts" of a juror, is not sufficient to allow the alleged juror or any other juror to impeach his or her verdict. State v. Froneberger, — N.C. App. —, 285 S.E.2d 119 (1981).

Stated in State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981).

§ 15A-1241. Record of proceedings.

CASE NOTES

Quoted in State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

Effect of Section. — This section sets forth the prerequisites necessary before a defendant may waive his right to counsel and elect to represent himself at trial. State v. Gerald, — N.C. —, 284 S.E.2d 312 (1981).

Issue under Section. — The issue is not whether defendant has the skill and training to represent himself adequately, but whether defendant is able to understand the consequences of waiving court appointed counsel and representing himself. State v. Gerald, — N.C. —, 284 S.E.2d 312 (1981).

Compliance with the dictates of this section, etc. —

In accord with 1981 Cum. Supp. See State v. Gerald, — N.C. —, 284 S.E.2d 312 (1981).

What Record Must Show. — Waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will. State v. Gerald, — N.C. —, 284 S.E.2d 312 (1981).

No Right to Appear Both In Propria Persona and by Counsel. — A party has the right to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

While defendant had the right to appear either in propria persona or by counsel, defendant had no Sixth Amendment right to serve as cocounsel with his court-appointed attorney. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Procedure upon Expression of Problem with Counsel. — When defendant expresses to the trial court that there is a problem with his counsel, the trial court should conduct an inquiry out of the presence of the jury to determine the nature of the problem, the extent of which should be as necessitated by the circumstances. If defendant clearly indicates a desire to have counsel removed and proceed pro se, then the trial judge should make further inquiry; he should advise defendant of his right to represent himself, and determine whether defendant understands the consequences of his decision and voluntarily and intelligently wishes to waive his rights. State v. Gerald, — N.C. —, 284 S.E.2d 312 (1981).

Although the better practice when a defendant indicates problems with his counsel is for the court to inquire whether defendant wishes to conduct his own defense, it is not reversible error for the court not to do so when there has been no intimation that defendant desires to represent himself. Each case must be considered on its own merits. State v. Gerald, — N.C. —, 284 S.E.2d 312 (1981).

Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Applied in State v. Simmons, — N.C. App. —, 286 S.E.2d 898 (1982).

§ 15A-1243. Standby counsel for defendant representing himself.

CASE NOTES

Applied in State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1332. Presentence reports.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

§ 15A-1334. The sentencing hearing.

CASE NOTES

Judge Need Not Ask if Defendant Wishes To Speak. — A clear distinction exists between Rule 32(a) of the Rules of Federal Criminal Procedure and subsection (b) of this section: The federal statute requires the district court affirmatively to afford a defendant an opportunity to speak before sentencing while subsection (b) of this section provides simply that a defendant "may make a statement in his own behalf." Had the legislature intended for this section to impose the same requirement as the federal statute, it would have plainly said so. While it may be the better practice for the trial court specifically to inquire if the defendant wishes to speak prior to sentencing, this section does not command this practice. State v. Poole, — N.C. —, 289 S.E.2d 335 (1982).

Opportunity Given Counsel to Speak on Defendant's Behalf Sufficient. — Trial court did not violate this section by sentencing defendant without first asking him if he wished to personally address the court, there having been sufficient compliance with the section where defendant's counsel was given the opportunity to speak in defendant's behalf. State v. Martin, 53 N.C. App. 297, 280 S.E.2d 775 (1981).

Scope of Inquiry. — At a sentencing hearing the court may inquire into such matters as age, character, education, environment, habits, mentality, propensities, and record of a defendant, and may also inquire into alleged acts of misconduct in prison. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981).

Defendant's escape pending his trial was clearly relevant information for the court to consider at sentencing hearing. State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§ 15A-1340.1. Applicability of Article 81A; life sentence.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

§ 15A-1340.4. Presumptive punishment for felony other than Class A or Class B felony; prior felony convictions; consideration of aggravating and mitigating factors; written findings.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

ARTICLE 82.

Probation.

§ 15A-1342. Incidents of probation.

CASE NOTES

Right to Object to Condition at Later Time. — This section means that a probationer is not required to object to a condition of probation at the time probation is imposed, but has the right to object "at a later time" to the condition. State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981).

Words "at a later time" refer to the revocation hearing. State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981).

This section does not mean that probationer has a perpetual right to challenge a condition of probation and exercise such right for the first time at the appellate level. State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981).

§ 15A-1343. Conditions of probation.

Legal Periodicals. —
For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

The legislature intended the "reasonably related" language of subdivision (b)(17) to serve as a check on the discretion of judges in devising conditions of probation. Where the judge elects to impose one of the conditions enumerated by this section, no such check is needed since the legislature has deemed all of these conditions "appropriate" to the rehabilitation of criminals and their assimilation into law-abiding society. State v. Parker, — N.C. App. —, 286 S.E.2d 366 (1982).

Determination of Appropriate Conditions. — In determining appropriate conditions of a suspended sentence, it is not necessary that there be evidence to satisfy the sentencing judge beyond a reasonable doubt of the correctness of these conditions. It is sufficient that the conditions be supported by the evidence. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

The North Carolina Bureau of Investigation is not a "victim of crime" within the meaning of subsection (d) of this section. It could qualify as such a victim if it suffered losses through embezzlement, but its expenses in investigating drug offenses are among its normal operating costs, restitution of which is specifically excluded by the statute. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

North Carolina statutes authorize the imposition of a condition upon parole eligibility of restitution to victims of crime who have suffered economic loss as a result of that crime, but law-enforcement agencies are not within the class of such victims. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

Where, following guilty pleas to drug offenses pursuant to a plea bargain, the trial court ordered as a condition of parole that defendants reimburse the Bureau of Investigation Drug Division for the expenses it had incurred in investigating the charges and obtaining the proof, imposition of the condition without having advised defendants of it before acceptance of their pleas made their pleas both involuntary and unintelligent, since the condition was illegal under state law and quite unanticipated in connection with the plea bargains, and since it clearly was a special limitation on parole eligibility. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

Applied in North Carolina Farm Bureau Mut. Ins. Co. v. Greer, 54 N.C. App. 170, 282 S.E.2d 553 (1981).

Quoted in State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981); State v. Wilburn, — N.C. App. —, 290 S.E.2d 782 (1982).

§ 15A-1344. Response to violations; alteration and revocation.

CASE NOTES

The court is not to state in its judgment that it considered alternatives to revoking defendant's probation. State v. Parker, — N.C. App. —, 286 S.E.2d 366 (1982).

§ 15A-1345. Arrest and hearing on probation violation.

CASE NOTES

Written Notice of Hearing. —
The defendant was given sufficient written notice of his probation revocation hearing as called for under subsection (e) of this section, where defendant was served with an arrest order which alleged that he failed to comply with the probation judgment in an earlier criminal conviction, and where the defendant signed a waiver of counsel form 10 days prior to the hearing which acknowledged that he had been informed of the charges against him. State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981).

Informing Defendant of Right to Remain Silent. — The court at a probation revocation hearing is not required to inform a defendant who is unrepresented by counsel of his constitutional right to remain silent at the hearing. State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981).

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation.

Legal Periodicals. —
For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Cited in State v. Bishop, — N.C. App. —, 284 S.E.2d 720 (1981).

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

ARTICLE 85.

Parole.

§ 15A-1371. Parole eligibility, consideration, and refusal.

CASE NOTES

Applied in State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

ARTICLE 85A.

Parole of Certain Convicted Felons.

§ 15A-1380.2. Reentry parole of felons.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

CASE NOTES

The proper procedure which provides defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is found in this Article. State v. Neeley, — N.C. App. —, 290 S.E.2d 727 (1982).

Stated in Creech v. Sparkman, 523 F. Supp. 1157 (E.D.N.C. 1981).

Cited in Quinerly v. Cherry, 527 F. Supp. 1059 (E.D.N.C. 1981).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

CASE NOTES

Disposition of post-trial motions, etc. — In accord with 1981 Cum. Supp. See State v. Batts, 303 N.C. 155, 277 S.E.2d 385 (1981).

Quoted in State v. Mack, — N.C. App. —, 290 S.E.2d 741 (1982).

Cited in State v. Fennell, 51 N.C. App. 460, 276 S.E.2d 499 (1981); State v. White, 54 N.C. App. 451, 283 S.E.2d 571 (1981); State v. Carter, — N.C. App. —, 284 S.E.2d 733 (1981); State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981); State v. Allen, — N.C. App. —, 291 S.E.2d 341 (1982).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

CASE NOTES

Applied in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

Quoted in State v. Mack, — N.C. App. —, 290 S.E.2d 741 (1982).

Stated in State v. Hurst, — N.C. —, 285 S.E.2d 808 (1982).

Cited in State v. Fennell, 51 N.C. App. 460, 276 S.E.2d 499 (1981).

§ 15A-1418. Motion for appropriate relief in the appellate division.

CASE NOTES

Applied in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

Quoted in State v. Hurst, — N.C. —, 285 S.E.2d 808 (1982).

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

Denial of Relief Where Claim Not Raised on Previous Appeal. — Where petitioner on previous appeal did not raise claim of mistaken identification, this section authorizes the denial of relief in a subsequent appeal barring not only state collateral review, but federal review as well. Quinerly v. Cherry, 527 F. Supp. 1059 (E.D.N.C. 1981).

Quoted in Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

Stated in Creech v. Sparkman, 523 F. Supp. 1157 (E.D.N.C. 1981).

§ 15A-1420. Motion for appropriate relief; procedure.

CASE NOTES

Cited in State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981); State v. Loye, — N.C. App. —, 289 S.E.2d 860 (1982).

§ 15A-1422. Review upon appeal.

CASE NOTES

Stated in State v. McCoy, 304 N.C. 363, — S.E.2d — (1981).

Cited in Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981).

ARTICLE 90.

Appeals for Magistrates and District Court Judges.

§ 15A-1432. Appeals by State from district court judge.

CASE NOTES

Appeal Treated as Petition for Mandamus. — State's attempted appeal of district court's action in setting aside guilty verdicts entered by it five months previously and entering verdicts of not guilty would be treated as a petition for a writ of mandamus pursuant to § 7A-32(c) and Rule 22, Rules of App. Proc. State v. Surles, — N.C. App. —, 284 S.E.2d 738 (1981).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1441. Correction of errors by appellate division.

CASE NOTES

Cited in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

§ 15A-1442. Grounds for correction of error by appellate division.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Instructions May Be Corrected, etc. — In accord with 1981 Cum. Supp. See State v. Mack, 53 N.C. App. 127, 280 S.E.2d 40 (1981).

Error in Allowing Exhibits to Go to Jury Room. — Violations of § 15A-1233(b), in allowing exhibits to go into the jury room over defendant's objection, are corrected by the appellate division only when they prejudice the defendants and such prejudice obtains only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises; the burden of showing such prejudice is upon the defendant. State v. Taylor, — N.C. App. —, 287 S.E.2d 129 (1982).

Guilty Plea Resulting from Ineffective Assistance of Counsel. — Where defendant alleges that ineffective assistance of counsel caused him to enter his guilty plea, an issue of constitutional rights arises, and the fact that defendant signed an agreement form does not bar his right to seek post-conviction relief. State v. Loye, — N.C. App. —, 289 S.E.2d 860 (1982).

Applied in State v. Jeffries, — N.C. App. —, 285 S.E.2d 307 (1982).

Stated in State v. Quilliams, — N.C. App. —, 285 S.E.2d 617 (1982).

Cited in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981); State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981); State v. Hageman, — N.C. App. —, 289 S.E.2d 89 (1982).

§ 15A-1443. Existence and showing of prejudice.

Legal Periodicals. — For survey of 1980 criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For a note discussing the ineffective assistance of counsel resulting from conflicts between a court-appointed counsel and an indigent defendant, see 18 Wake Forest L. Rev. 83 (1982).

CASE NOTES

Errors Affecting Constitutional Rights. —

General rule that an instruction that evidence is not to be considered, accompanied by withdrawal of that evidence, cures any error in its admission is inapplicable when the error admitting the evidence is of constitutional dimension; when the error committed deprives a defendant of a constitutional right, prejudice is presumed, and the burden is on the State to prove otherwise. State v. Silva, 304 N.C. 122, 282 S.E.2d 449 (1981).

Prejudice Presumed from Counsel's Inadequate Preparation Time. — Once the inadequacy of time for counsel to prepare is shown, prejudice from the denial of defendant's constitutional right to effective counsel is presumed under subsection (b) of this section, and the burden falls on the State to show beyond a reasonable doubt that the error was harmless. The State has not done so here. State v. Maher, — N.C. —, 290 S.E.2d 694 (1982).

In order to obtain a new trial it is incumbent on a defendant to not only show error but also to show that the error was so prejudicial that without the error it is likely that a different result would have been reached. State v. Loren, 302 N.C. 607, 276 S.E.2d 365 (1981).

To warrant a new trial, defendant must show that the ruling complained of was material and prejudicial to his rights and that a different result would have likely ensued. State v. Haynes, 54 N.C. App. 186, 282 S.E.2d 830 (1981).

Not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. Where evidence has been improperly admitted would not, if excluded, have changed the result of the trial, a new trial will not be granted. State v. Galloway, — N.C. —, 284 S.E.2d 509 (1981).

Mere technical error is not sufficient to require the granting of a new trial. The error must be so prejudicial as to affect the result. State v. Keyes, — N.C. App. —, 286 S.E.2d 861 (1982).

Limits of Error Per Se Rule. — Extending the reversible error per se rule to all violations of this chapter would result in many new trials for mere technical error, a result not intended by the legislature in light of the provisions of this section. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

A mere slip of the tongue by the judge while reading his instructions to the jury which is not called to the attention of the court at the time it is made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled thereby. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Admission of Improper Testimony Held Harmless Error. —

In a prosecution for breaking and entering, attempted rape and larceny, testimony by the victim that she had a breast removed because of cancer and that since being struck by defendant she had suffered with her back and had been diagnosed as having bone cancer was irrelevant, but the admission of such testimony was not so prejudicial that a different result would have ensued had such testimony not been admitted. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

Applied in State v. Miller, 302 N.C. 572, 276 S.E.2d 417 (1981); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); State v. Taylor, 304 N.C. 249, — S.E.2d — (1981); State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981); State v. Powell, 51 N.C. App. 224, 275 S.E.2d 528 (1981); State v. Herring, — N.C. App. —, 284 S.E.2d 764 (1981); State v. Jordan, — N.C. —, 287 S.E.2d 827 (1982); State v. Taylor, — N.C. App. —, 287 S.E.2d 129 (1982); State v. Woods, — N.C. App. —, 287 S.E.2d 431 (1982); State v. Harrison, — N.C. App. —, 289 S.E.2d 50 (1982); State v. Tate, — N.C. App. —, 291 S.E.2d 326 (1982).

Quoted in State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); State v. Conner, 53 N.C. App. 87, 280 S.E.2d 14 (1981).

Stated in State v. Mack, 53 N.C. App. 127, 280 S.E.2d 40 (1981); State v. Bizzell, 53 N.C. App. 450, 281 S.E.2d 57 (1981); State v. Jackson, — N.C. App. —, 289 S.E.2d 631 (1982); State v. Jarvis, — N.C. App. —, 290 S.E.2d 228 (1982).

Cited in State v. Sanders, 303 N.C. 608, 281 S.E.2d 7 (1981); State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981); State v. Martin, 52 N.C. App. 373, 278 S.E.2d 305 (1981); State v. Rose,

53 N.C. App. 608, 281 S.E.2d 404 (1981); State v. Shaw, 53 N.C. App. 772, 281 S.E.2d 702 (1981); State v. Kinard, 54 N.C. App. 443, 283 S.E.2d 540 (1981); State v. Cass, — N.C. App. —, 285 S.E.2d 337 (1982); State v. Quilliams, — N.C. App. —, 285 S.E.2d 617 (1982); State v. Brackett, — N.C. App. —, 285 S.E.2d 852 (1982); State v. Hageman, — N.C. App. —, 289 S.E.2d 89 (1982); State v. Loye, — N.C. App. —, 289 S.E.2d 860 (1982).

§ 15A-1444. When defendant may appeal; certiorari.

(a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

Editor's Note. — Subsection (a) of this section is set out to correct a typographical error in the first line of the subsection in the 1981 Cumulative Supplement.

Only Part of Section Set Out. — As the rest of the section was not affected by the error, only subsection (a) is set out.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Cited in State v. Fennell, 51 N.C. App. 460, 276 S.E.2d 499 (1981); Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981).

§ 15A-1445. Appeal by the State.

CASE NOTES

Right Is Statutory. —

As a general rule, the State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case in the absence of a statute clearly conferring that right. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

And May Not Be Enlarged by Court. —

In accord with original. See State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

Strict Construction. —

In accord with original. See State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981); State v. Elkerson, — N.C. —, 285 S.E.2d 784 (1982).

Appeal of Motions to Suppress Generally. — The language of subsection (c) of § 15A-979 making orders of the superior court granting motions to suppress evidence appealable to the appellate division prior to trial "upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case," constitutes a statutory prerequisite which must be met in order for the State to have the right to appeal, prior to trial, an order granting a motion to suppress. State v. Dobson, 51 N.C. App. 445, 276 S.E.2d 480 (1981).

No Right to Appeal from Dismissal on Merits. — State had no right to appeal from trial court's dismissal of criminal charges against defendant based on (1) defendant's motion to suppress the State's evidence because of entrapment and (2) insufficiency of the evidence, since the charges were dismissed on the merits and involved a determination of guilt or innocence, and further proceedings against defendant would be barred under principles of double jeopardy. State v. Murrell, 54 N.C. App. 342, 283 S.E.2d 173 (1981).

Refused To Submit Aggravating Circumstances to Jury. — The State has no right to appeal the trial judge's action in refusing to submit any aggravating circumstances to the jury at the sentencing phase of defendant's trial. If the State's right to appeal is to be enlarged, it must be done by the legislature. State v. Elkerson, — N.C. —, 285 S.E.2d 784 (1982).

Quoted in State v. Turner, — N.C. —, 289 S.E.2d 368 (1982).

Stated in State v. Turner, 54 N.C. App. 631, 284 S.E.2d 142 (1981).

Cited in State v. Huff, — N.C. App. —, 289 S.E.2d 604 (1982).

§ 15A-1446. Requisites for preserving the right to appellate review.

CASE NOTES

Raising Insufficiency of Indictment on Appeal. — Under subdivision (d)(4) of this section, failure of the indictment to state the essential elements of an alleged violation may be raised for the first time on appeal. State v. Froneberger, 53 N.C. App. 471, 281 S.E.2d 71 (1981).

Applied in State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981); State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981); State v. Parker, 54 N.C. App. 522, 284 S.E.2d 132 (1981).

Stated in State v. McBryde, — N.C. App. —, 285 S.E.2d 866 (1982).

Cited in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981); State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981); State v. Froneberger, — N.C. App. —, 285 S.E.2d 119 (1981).

§ 15A-1448. Procedures for taking appeal.

CASE NOTES

Section 15A-979(c) should not be read in conjunction with subdivision (a)(1) of this section. State v. Turner, — N.C. —, 289 S.E.2d 368 (1982).

Subdivision (a)(1) of this section and § 15A-979(c) need not be construed together to require that the prosecutor's certificate also be filed within 10 days of judgment. State v. Lay, — N.C. App. —, 290 S.E.2d 405 (1982).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

Legal Periodicals. —

For comment on proposals to balance interest of the defendant and State in the selection of capital juries, see 59 N.C.L. Rev. 767 (1981).

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

For comment clarifying the law of parties in North Carolina by punishing accessories before the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

CASE NOTES

Constitutionality. —

The statutory scheme for determining the sentence in a capital case under this section is not unconstitutional on its face. State v. Rook, 304 N.C. 201, — S.E.2d — (1981).

The death penalty statute is not unconstitutional on the ground that it constitutes cruel and unusual punishment, nor does the statute impermissibly extend the court's jurisdiction without a constitutional amend-

ment in violation of N.C. Const., Art. IV, § 12, as subsection (d) vests automatic review in the Supreme Court of North Carolina and provides standards and guidelines for review of the death sentence by the Supreme Court. State v. Williams, 304 N.C. 394, — S.E.2d — (1981).

This section is drafted and implemented so as to preclude the arbitrary and capricious imposition of the death penalty upon any segment of the State's population. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

A proportionality review which considers both the circumstances of the murder, the aggravating circumstances found by the jury and the mitigating circumstances submitted with those in other relevant cases satisfies constitutional requirements and adequately protects against arbitrary, capricious, excessive or disproportionate imposition of the death penalty. State v. Rook, 304 N.C. 201, — S.E.2d — (1981).

Subsection (d) is not unconstitutional as an impermissible expansion of the Supreme Court's jurisdiction. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

The aggravating circumstances listed in this section are not so vague as to violate due process or to allow a jury arbitrarily and capriciously to impose the death penalty. State v. Rook, 304 N.C. 201, — S.E.2d — (1981).

The aggravating circumstances of an "especially heinous, atrocious or cruel" murder set forth in subdivision (e)(9) of this section is not unconstitutionally vague when interpreted to permit the imposition of the death penalty based on such factor only in those situations where the evidence showed that the murder was committed in such a way as to amount to a conscienceless or pitiless crime which was unnecessarily torturous to the victim. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, — U.S. —, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, — U.S. —, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981).

This Article does not create a new offense or add new elements to the crime of first-degree murder; the statutes merely set forth sentencing standards to guide the jury's discretion to the end that the death penalty will not be imposed arbitrarily or capriciously. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

No Authority to Avoid Statutory Scheme, etc. —

The prosecution in a capital case has no power to withdraw from the jury's consideration any aggravating circumstance which is in fact supported by evidence adduced at the guilt or sentencing phase of the trial; furthermore, the State is without power to agree to a life sentence or to recommend such a sentence to the jury during the sentencing phase when the State has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Discretion of Jury. — Although the jury's sentencing discretion in a capital case is not totally eliminated, it is not unbridled as it must be exercised under the guidance of a carefully defined set of statutory criteria that allows the jury to take into account the nature of the crime and the character of the accused. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Through the exercise of guided discretion, juries in North Carolina are required to assess the appropriateness of imposing the death penalty upon a particular defendant for the commission of a particular crime. It is not the exercise of discretion but the exercise of unbridled discretion which is unconstitutional. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

By delineating various aggravating and mitigating circumstances, this section equips a jury with the tools it will require if it is to exercise the guided discretion which is constitutionally mandated. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Prerequisite to any jury decision imposing the death penalty the State must prove and the jury must find beyond a reasonable doubt at least one of the enumerated aggravating circumstances listed in subsection (e) of this section, and further, the jury must also find beyond a reasonable doubt: (1) the aggravating circumstances are "sufficiently substantial to call for the imposition of the death penalty"; and (2) the mitigating circumstances are "insufficient to outweigh the aggravating circumstances." State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

The proper order for the introduction of evidence of aggravating and mitigating circumstances is that the State first offer evidence of the statutory aggravating factors listed in subsection (e) of this section. Defendant then offers evidence of mitigating circumstances listed in subsection (f) of this section. Only then is the State entitled to offer evidence intended to rebut defendant's proffered mitigating circumstances. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

Indictment Need Not List Aggravating Circumstances. — There is no statutory or case law which requires an indictment in a death case to list the aggravating circumstances upon which the State will rely in seeking the death penalty. State v. Williams, 304 N.C. 394, — S.E.2d — (1981).

Notice of State Evidence in Support of Aggravating Circumstances. — Defendant is not entitled to notice of the evidence which the State intends to offer in support of and to prove aggravating circumstances under subsection (e) of this section. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

Where the defense counsel was afforded the opportunity, at a time prior to the sentencing hearing, to ascertain the evidence upon which the State would rely through an examination of the district attorney's entire file, the prosecution has satisfied fully the defendant's right to discover evidence under § 15A-903, however, the discovery procedure does not require the State to enumerate specifically the aggravating circumstances upon which it will rely in seeking the death penalty in the sentencing phase. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

State May Only Rely on Subsection (e) Circumstances. — The factors enumerated in this section are not elements of the offense but rather are guidelines defining the parameters of the jury's discretion in determining punishment. The only aggravating circumstances upon which the State may rely are enumerated in subsection (e) of this section. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

State Testimony Offered Solely to Refute Possible Mitigating Circumstances. — Admission of testimony offered by the State solely to refute mitigating circumstances upon which defendant might later rely was error; however, it was harmless beyond a reasonable doubt as (1) much of the testimony objected to by defendant, in addition to rebutting mitigating circumstances, also was competent as evidence of aggravating circumstances, and (2) a review of the evidence shows that the jury had before it a clear record of what must be described as defendant's unconscionable acts toward many of his victims. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

Additional Evidence in Support of Stipulations under Subdivision (e)(2). — Under subdivision (e)(2) of this section both sides are allowed to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

Aggravating Circumstances in Felony Murder Cases. —

When a criminal defendant is convicted of first-degree murder upon a theory of felony murder, it is error to submit the underlying felony to the jury at the punishment phase of trial as one of the aggravating circumstances defined by subdivision (e)(5) of this section. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Effect of Finding under Both Felony Murder and Premeditation Theories. — When a murder is committed during the commission of a felony enumerated by subdivision (e)(5) of this section and the defendant is convicted of first-degree murder on a theory of premeditation and deliberation, the other felony may properly be considered as an aggravating circumstance, and similarly, when a jury specifies that it finds a defendant guilty upon both theories and both are supported by the evidence, the underlying felony may properly be submitted as an aggravating circumstance. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Where a first-degree murder case was submitted to the jury upon both theories of premeditation and deliberation and felony murder and the jury did not specify the theory or theories upon which it relied in returning a guilty verdict, the underlying felony may not be considered as an aggravating circumstance in the penalty phase because it has merged with and become a part of the murder conviction as an essential element thereof. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Proof of Prior Felony Under Subdivision (e) (3). — The most appropriate way to show the "prior felony" aggravating circumstance would be to offer duly authenticated court records, and the testimony of the victims themselves should not ordinarily be offered unless such testimony is necessary to show that the crime for which the defendant was convicted involved the use or threat of violence to the person; however, if the defendant denies that he was the defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the State should be permitted to offer such evidence as it has to overcome defendant's denials. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Evidence of Prior Conviction in Another State. — Upon the conviction of first-degree murder, evidence that defendant was convicted for the crime of rape in Virginia in 1969 and was sentenced to 10 years in prison was admissible at the sentencing phase to support the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the persons." State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

When Subdivision (e)(3) Instruction Proper. —

When the State establishes that a defendant of a capital offense was convicted of a felony which involved the use or threat of violence to the person and the conduct upon which this conviction was based occurred prior to the event out of which the capital offense arose, the aggravating circumstance listed in subdivision (e) (3) of this section must be submitted to the

jury, and the State need not in fact show him to have acted violently in the previous felony rather than merely showing a previous felony involving violence. State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981).

When Subdivision (e)(4) Instruction Proper. —

In accord with 1981 Cum. Supp. See State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Before the trial court can instruct the jury on the aggravating circumstance in subdivision (e)(4), there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime. The mere fact of a death is not enough to invoke this factor. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

The isolated fact that a killing occurred during the commission of a felony is not sufficient to justify the submission of the aggravating circumstance set out in subdivision (e)(4) of this section. There must be evidence from which the jury could infer that at least one of the purposes which motivated the killing was defendant's desire to avoid or prevent a lawful arrest or effect an escape. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Defendant's statement that defendant wanted to leave store parking lot at a slow rate of speed so as not to attract attention, which statement by the defendant occurred after the killing, did not raise a reasonable inference that at the time of the killing defendant killed for the purpose of avoiding lawful arrest. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Subdivision (e) (9) Limited, etc. —

Subdivision (e) (9) may not be employed as a "catchall" provision which could be submitted when there is no evidence of other aggravating circumstances. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, — U.S. —, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, — U.S. —, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981).

Propriety of Instruction Under Subdivision (e) (9). —

In a first-degree murder case the trial court, during the sentencing phase of the trial, erred in instructing the jury to consider as an aggravating circumstance whether the murder was especially heinous, since the evidence tended to show that defendant, after riding around and drinking beer most of the evening, saw the victim and shot him three times from behind without any established motive and then fled; the victim lingered for 12 days and then died from the gunshot wounds; and this was heinous but not "especially heinous" within the meaning of that term as used in subdivision (e) (9) of this section. State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981).

In a prosecution for murder, the trial court should have submitted to the jury during the sentencing phase of a first-degree murder trial the aggravating circumstance as to whether the crime was "especially heinous, atrocious or cruel" where the evidence tended to show that the victim was stripped from the waist down before she was murdered; her hands were tied behind her back and her brassiere was tied around her neck; she was marched at knife point by her assailant into nearby woods where she was forced to lie on the ground; and she was beaten before she was murdered. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Test When Aggravating Circumstances Erroneously Submitted. —

The harmless error test should be applied when one of the aggravating circumstances listed in this section is erroneously submitted by the court and answered by the jury against the defendant. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Definition of Mitigating Circumstance. — A mitigating circumstance under this section is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than are other first-degree murders. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

What Evidence of Mitigating Circumstances to Be Considered. — Any aspect of defendant's character, record or circumstance of the particular offense which defendant offers as a mitigating circumstance should be considered by the sentencer. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Evidence irrelevant to mitigating factors may be properly excluded by the trial court. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Voluntary Intoxication Not Subsumed Under Subdivision (f) (2). — Voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a "mental or emotional disturbance" under subdivision (f) (2) of this section. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

But Properly Considered Under Subdivision (f) (6). — Voluntary intoxication, to the degree that it affects defendant's ability to understand and control his actions, is properly considered under the provision for impaired capacity, subdivision (f) (6) of this section. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Testimony on Religious, Ethical, etc., Perspectives of Capital Punishment. — The trial court did not err under subsection (f) of this section by excluding testimony by defense

witnesses on the religious, ethical, legal and public policy perspectives of capital punishment as it was totally irrelevant and of no probative value as mitigating evidence in the sentencing phase of defendant's trial. State v. Taylor, 304 N.C. 249, — S.E.2d — (1981).

Evidence of Character of Defendant — Use by Defendant. — In a prosecution for a capital offense the State may not in its case in chief offer evidence of a defendant's bad character; a defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in subsection (f) of this section. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Same — Use by State. — Although the State cannot in its case in chief offer evidence of a defendant's bad character as an aggravating circumstance in a capital case, the State can offer evidence of a defendant's bad character to rebut evidence of his good character presented by a defendant as a mitigating circumstance. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

No Appeal from Imposition of Life Sentence. — If a life sentence is imposed following conviction for a capital crime, double jeopardy considerations prohibit an appeal by the State or the ordering of a new sentencing hearing on defendant's appeal of his conviction even if the life sentence was the result of trial error favorable to defendant. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Purpose of Subsection (d). — Subsection (d) of this section serves as a check against the capricious or random imposition of the death penalty. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Subsection (d) of this section does not require records to be presented to the reviewing court indicating which mitigating factors, if any, the jury found during their deliberations. State v. Rook, 304 N.C. 201, — S.E.2d — (1981).

Scope of Review. — The review function of the Supreme Court under subsection (d) of this section should be employed only in those instances where both phases of the trial of a defendant in a capital case have been found to be without error. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, — U.S. —, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, — U.S. —, 120 S. Ct. 693, 70 L. Ed. 2d 655 (1981); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

In exercising its role in the statutory scheme, the Supreme Court must be sensitive not only to the mandate of the legislature but also to the constitutional dimensions of its review. State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, — U.S. —, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, — U.S. —, 120 S. Ct. 693, 70 L. Ed. 2d 655 (1981).

When Remand for New Sentencing Hearing Permitted. — If upon defendant's appeal the Supreme Court vacates a death sentence for trial error, it will remand for a new sentencing hearing only if there are aggravating circumstances which would not be constitutionally or legally proscribed at the new hearing. An aggravating circumstance would not be so proscribed at the new hearing if (1) there was evidence to support it at the hearing appealed from; (2) it was not submitted to the jury or, if submitted, the jury found it to have existed; and (3) there is no other legal impediment (such as the felony murder merger rule) to its use. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Showing of Aggravating Circumstances on Remand. — If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the State from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Applied in State v. Elkerson, — N.C. —, 285 S.E.2d 784 (1982).

Stated in State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Davis, — N.C. —, 290 S.E.2d 574 (1982).

Cited in State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Wilson, — N.C. —, 285 S.E.2d 804 (1982); State v. Brock, — N.C. —, 290 S.E.2d 566 (1982).

Chapter 17.

Habeas Corpus.

ARTICLE 1.

Constitutional Provisions.

§ 17-2. Habeas corpus not to be suspended.

CASE NOTES

In North Carolina, habeas corpus is an extremely limited remedy. In addition to being a proceeding which is collateral rather than direct, it is not a substitute for appeal. Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

Only Challenges to Jurisdiction Allowed. — Federal habeas corpus proceedings allow collateral review of all state proceedings where constitutional errors are alleged. On the other hand, only challenges to a court's jurisdiction may be raised in a habeas proceeding in North Carolina. Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

ARTICLE 2.

Application.

§ 17-4. When application denied.

CASE NOTES

In North Carolina, habeas corpus is an extremely limited remedy. In addition to being a proceeding which is collateral rather than direct, it is not a substitute for appeal. Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

Only Challenges to Jurisdiction Allowed. — Federal habeas corpus proceedings allow collateral review of all State proceedings where constitutional errors are alleged. On the other hand, only challenges to a court's jurisdiction may be raised in a habeas proceeding in North Carolina. Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

Sec.
17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.
17C-6. Powers of Commission.

§ 17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(a) There is hereby established the North Carolina Criminal Justice Education and Training Standards Commission, hereinafter called "the Commission," in the Department of Justice. The Commission shall be composed of 25 members as follows:

(1) Sheriffs. — Three sheriffs or other individuals serving in sheriffs' departments selected by the North Carolina Sheriffs' Association and one deputy sheriff selected by the North Carolina Law-Enforcement Officers' Association.

(2) Police Officers. — One police official selected by the North Carolina Association of Police Executives, one police chief selected by the North Carolina Association of Chiefs of Police, one police chief appointed by the Governor, and one police officer selected by the North Carolina Law-Enforcement Officers' Association.

(3) Departments. — The Attorney General of the State of North Carolina; the Secretary of the Department of Crime Control and Public Safety; the Secretary of the Department of Human Resources; and the Secretary of the Department of Correction.

(4) At-Large Groups. — One individual representing and appointed by each of the following organizations: one mayor selected by the League of Municipalities; one county commissioner selected by the North Carolina Association of County Commissioners; one law enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association; one criminal justice educator selected by the North Carolina Association of Criminal Justice Educators; one sworn law enforcement officer selected by the North State Law-Enforcement Officers' Association; and one district attorney selected by the North Carolina Association of District Attorneys.

(5) Citizens and Others. — The President of The University of North Carolina; the Director of the Institute of Government; the Director of Law-Enforcement Training of the Department of Community Colleges; and two citizens, one of whom shall be selected by the Governor and one of whom shall be selected by the Attorney General. The General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. Subsequent appointees by the General Assembly shall serve two-year terms.

(1981 (Reg. Sess., 1982), c. 1191, s. 31.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted "25 members" for "26 members" in the second sentence of the introductory paragraph of subsection (a) and in subdivision (5) of subsection (a) deleted "One trial court judge selected by the Chief Justice of the North Carolina Supreme Court; one senator selected by the Lieutenant Governor; one member of the House of Representatives selected by the Speaker of the House;" preceding "the President," and added the last four sentences.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 17C-6. Powers of Commission.

(a) In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17C-10:

(1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any criminal justice agency of information with respect to the employment, education, and training of its criminal justice officers, and (ii) the submission by any criminal justice training school of information with respect to its criminal justice training programs that are required by this Chapter;

(2) Establish minimum educational and training standards that must be met in order to qualify for entry level employment as a criminal justice officer in temporary or probationary status or in a permanent position;

(3) Certify, pursuant to the standards that it has established for the purpose, persons as qualified under the provisions of this Chapter to be employed at entry level as criminal justice officers;

(4) Establish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by this Chapter;

(5) Certify, pursuant to the standards that it has established for the purpose, criminal justice training schools and programs or courses of instruction that are required by this Chapter;

(6) Establish minimum standards and levels of education or equivalent experience for all criminal justice teachers who participate in programs or courses of instruction that are required by this Chapter;

(7) Certify, pursuant to the standards that it has established for the purpose, criminal justice teachers who participate in programs or courses of instruction that are required by this Chapter;

(8) Make such evaluations as may be necessary to determine if criminal justice agencies are complying with the provision of this Chapter;

(9) Adopt and amend bylaws, consistent with law, for its internal management and control;

(10) Enter into contracts incident to the administration of its authority pursuant to this Chapter.

(11) Establish minimum standards and levels of training for certification and periodic recertification of operators of and instructors for training programs in radio microwave and other electronic speed-measuring instruments.

(12) Certify and recertify, pursuant to the standards that it has established, operators and instructors for training programs for each approved type of radio microwave and other electronic speed-measuring instruments.

(13) In conjunction with the Secretary of Crime Control and Public Safety, approve use of specific models and types of radio microwave and other speed-measuring instruments and establish the procedures for operation of each approved instrument and standards for calibration and testing for accuracy of each approved instrument.

(d) The standards established by the Commission pursuant to G.S. 17C-6(a)(11) and G.S. 17C-6(a)(12) and by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6(a)(13) shall not be less stringent than standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration, National Bureau of Standards, or the Federal Communications Commission. (1971, c. 963, s. 6; 1975, c. 372, s. 2; 1979, c. 763, s. 1; 1979, 2nd Sess., c. 1184, ss. 1, 2.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1982, added subdivisions (11), (12) and (13) to subsection (a) and added subsection (d).

Only Part of Section Set Out. — As subsections (b) and (c) were not changed by the amendment, they are not set out.

Chapter 18B.

Regulation of Alcoholic Beverages.

Article 1.

General Provisions.

Sec.
18B-101. Definitions.
18B-103. Exemptions.
18B-111. Nontaxpaid alcoholic beverages.

Article 2.

State Administration.

18B-203. Powers and duties of the Commission.
18B-204. State warehouse.
18B-208. ABC Commission bonds and funds.

Article 4.

Transportation.

18B-402. Alcoholic beverages purchased out-of-state.
18B-403. Purchase-transportation permit.

Article 6.

Elections.

18B-602. Form of ballots.
18B-603. Effect of alcoholic beverage elections on issuance of permits.

Article 7.

Local ABC Boards.

18B-700. Appointment and organization of local ABC boards.
Sec.
18B-702. Financial operations of local boards.

Article 8.

Operation of ABC Stores.

18B-803. Store management.
18B-804. Alcoholic beverage pricing.

Article 9

Issuance of Permits.

18B-900. Qualifications for permit.

Article 10.

Retail Activity.

18B-1000. Definitions concerning establishments.
18B-1001. Kinds of ABC permits; places eligible.
18B-1005. Conduct on licensed premises.
18B-1006. Miscellaneous provisions on permits.
18B-1007. Additional requirements for mixed beverages permittees.

Article 11.

Commercial Activity.

18B-1112. Authorization of vendor representative permit.

Article 1.

General Provisions.

§ 18B-101. Definitions.

As used in this Chapter, unless the context requires otherwise:

(4) "Alcoholic beverage" means any beverage containing at least one-half of one percent (0.5%) alcohol by volume, including malt beverages, unfortified wine, fortified wine, spirituous liquor, and mixed beverages.

(5a) "Bailment surcharge" means the charge imposed on each case of liquor shipped from a Commission warehouse as provided in G.S. 18B-208. This bailment surcharge is in addition to the bailment charge imposed by G.S. 18B-804(b) (2).

(1981 (Reg. Sess., 1982), c. 1262, s. 2; c. 1285, s. 1.)

Effect of Amendments. — The first 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, deleted the former second sentence of subdivision (4), which read "Unless the context clearly requires otherwise, alcoholic beverage means taxpaid alcoholic beverage."

The second 1981 (Reg. Sess., 1982) amendment, effective Nov. 1, 1982, added subdivision (5a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (4) and (5a) are set out.

§ 18B-102. Manufacture, sale, etc., forbidden except as expressly authorized.

CASE NOTES

Company Not Liable for Torts of Intoxicated Employee Following Christmas Party. — Where company acted as social host providing employees with Christmas cheer and hospitality, and was not selling or distributing alcoholic beverages for pecuniary profit, but allowed employee to become intoxicated through the acts of other employees, the company was not liable under the North Carolina alcohol control statutes for personal injury and death caused by intoxicated employee. Chastain v. Litton Systems, 527 F. Supp. 527 (W.D.N.C. 1981). (Decided under former § 18A-3).

§ 18B-103. Exemptions.

The following activities shall be permitted:

(8) The possession and use of unfortified or fortified wine for sacramental purposes by any organized church or ordained minister;

(1981 (Reg. Sess., 1982), c. 1262, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, substituted a semicolon for a period at the end of subdivision (8).

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (8) are set out.

§ 18B-111. Nontaxpaid alcoholic beverages.

No person may possess, transport, or sell nontaxpaid alcoholic beverages except as authorized by the ABC law. (1981 (Reg. Sess., 1982), c. 1262, s. 4.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1262, s. 24, makes the act effective Oct. 1, 1982.

Article 2.

State Administration.

§ 18B-203. Powers and duties of the Commission.

(a) Powers. — The Commission shall have authority to:

(1) Administer the ABC laws;

(2) Provide for enforcement of the ABC laws, in conjunction with the ALE Division;

(3) Set the prices of alcoholic beverages sold in local ABC stores as provided in Article 8;

(4) Require reports and audits from local boards as provided in G.S. 18B-205;
(5) Determine what brands of alcoholic beverages may be sold in this State;
(6) Contract for State ABC warehousing, as provided in G.S. 18B-204;
(7) Dispose of damaged alcoholic beverages, as provided in G.S. 18B-806;
(8) Remove for cause any member or employee of a local board;
(9) Supervise or disapprove purchasing by any local board and inspect all records of purchases by local boards;
(10) Approve or disapprove rules adopted by any local board;
(11) Approve or disapprove the opening and location of ABC stores, as provided in Article 8;
(12) Issue ABC permits, and impose sanctions against permittees;
(13) Provide for the testing of alcoholic beverages, as provided in G.S. 18B-206;
(14) Fix the amount of bailment charges and bailment surcharges to be assessed on liquor shipped from a Commission warehouse;
(15) Collect bailment charges and bailment surcharges from local boards;
(16) Notwithstanding any law to the contrary, enter into contracts for design and construction of a warehouse or warehouses and supervise work and materials used in the construction, as provided in G.S. 18B-204.

(1981 (Reg. Sess., 1982), c. 1285, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Nov. 1, 1982, added subdivisions (14) through (16) of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 18B-204. State warehouse.

(a) Contracting for Private Warehouse. — The Commission shall provide for the receipt, storage, and distribution of spirituous liquor by one of the following methods:
(1) By negotiated contract with a privately owned warehouse;
(2) By negotiated contract with privately owned warehouses in several regions of the State. The Commission shall choose locations for the warehouses to promote efficient distribution of spirituous liquor to all local boards, to maintain control of that liquor, and to insure the Commission's supervision of warehousing procedures; or
(3) By the construction of a warehouse.

(1981 (Reg. Sess., 1982), c. 1285, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Nov. 1, 1982, deleted "or" at the end of subdivision (a)(1), added "or" at the end of subdivision (a)(2), and added subdivision (a)(3).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 18B-208. ABC Commission bonds and funds.

(a) Issuance of Bonds. — As a means of raising the funds needed from time to time in the design, acquisition, construction, equipping, maintenance and operation of a warehouse under G.S. 18B-204(a)(3), the Commission may, with the approval of the Governor after receiving the advice of the Advisory Budget Commission, at one time or from time to time issue negotiable revenue bonds of the Commission. The issuance of revenue bonds shall not directly or

indirectly or contingently obligate the State to levy or to pledge any form of taxation or to make any appropriation for their payment. Revenue bonds issued pursuant to this subsection shall be repaid from the bailment surcharge as provided in subsection (b). These bonds and the income from them are exempt from all taxation within the State.

(b) Special Fund. — A special fund in the office of the State Treasurer, the ABC Commission Fund, is created. On and after November 1, 1982, all moneys derived from the collection of bailment charges and bailment surcharges shall be deposited in the ABC Commission Fund for the use of the Commission. The ABC Commission Fund shall be subject to the provisions of the Executive Budget Act except that no unexpended surplus of this fund shall revert to the general fund. The Commission shall fix the level of the bailment surcharges at an amount calculated to cover operating expenses of the Commission and the retirement of bonds issued for construction of a Commission warehouse and offices. The Commission may impose a bailment surcharge only when revenue bonds issued under this section are outstanding.

All moneys credited to the ABC Commission Fund shall be used to carry out the intent and purposes of the ABC law in accordance with plans approved by the North Carolina ABC Commission, and all these funds are appropriated, reserved, set aside, and made available until expended for the administration of the ABC law. (1981 (Reg. Sess., 1982), c. 1285, s. 4.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1285, s. 7, makes this section effective Nov. 1, 1982.

Article 3.

Sale, Possession, and Consumption.

§ 18B-301. Possession and consumption of fortified wine and spirituous liquor.

CASE NOTES

Company Not Liable for Torts of Intoxicated Employee Following Christmas Party. — Where company acted as social host providing employees with Christmas cheer and hospitality, and was not selling or distributing alcoholic beverages for pecuniary profit, but allowed employee to become intoxicated through the acts of other employees, the company was not liable under the North Carolina alcohol control statutes for personal injury and death caused by intoxicated employee. Chastain v. Litton Systems, 527 F. Supp. 527 (W.D.N.C. 1981). (Decided under former § 18A-30).

Article 4.

Transportation.

§ 18B-402. Alcoholic beverages purchased out-of-state.

A person may bring into North Carolina alcoholic beverages purchased legally outside the jurisdiction of this State in the same amounts that may be legally transported within the State under G.S. 18B-400 or G.S. 18B-403, except that no more than four liters of spirituous liquor purchased outside this State may be brought into this State. (1923, c. 1, s. 25; C. S., s. 3411(y); 1937,

c. 49, ss. 14, 16; c. 411; 1967, c. 222, ss. 1, 7; c. 1256, s. 3; 1969, c. 598, ss. 2, 3; c. 1018; 1971, c. 872, s. 1; 1977, c. 176, s. 1; c. 586; 1979, c. 607, s. 1; 1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, added, at the end of the section, "or G.S. 18B-403, except that no more than four liters of spirituous liquor purchased outside this State may be brought into this State."

§ 18B-403. Purchase-transportation permit.

(a) Amounts. — With a purchase-transportation permit, a person may purchase and transport an amount of alcoholic beverages greater than the amount specified in G.S. 18B-303(a). A permit authorizes the holder to transport from the place of purchase to the destination within North Carolina indicated on the permit at one time the following amount of alcoholic beverages:

(1) A maximum of 100 liters of unfortified wine;

(2) A maximum of 40 liters of either fortified wine or spirituous liquor, or 40 liters of the two combined; or

(3) The amount of fortified wine or spirituous liquors specified on the purchase-transportation permit for a mixed beverage permittee.

(e) Restrictions on Permit. — A purchase may be made only from the store named on the permit. One copy of the permit shall be kept by the issuing person, one by the purchaser, and one by the store from which the purchase is made. The purchaser shall display his copy of the permit to any law-enforcement officer upon request. A permit for the purchase and transportation of spirituous liquor may be issued only by an authorized agent of the local board for the jurisdiction in which the purchase will be made.

(g) When a person holds a special occasion for which a permit under G.S. 18B-1001(8) or (9) is required, the purchase-transportation permit issued to him may provide for the storage at and transportation to and from the site of the special occasion, of fortified wine and spirituous liquor for a period of no more than 48 hours before and after the special occasion; but no more than 40 liters of either fortified wine, spirituous liquor, or a combination of the two may be transported at any one time. The Commission may adopt rules to govern issuance of these extended purchase-transportation permits. (1969, c. 617, s. 1; 1971, c. 872, s. 1; 1973, c. 94; c. 819, s. 1; 1975, ss. 1-4; 1977, c. 176, ss. 1, 2, 4; 1979, c. 19, ss. 3, 4; c. 286, s. 1; c. 445, ss. 1, 3; c. 1076, ss. 1, 2, 3; 1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, ss. 6-8.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, inserted "within North Carolina" in the second sentence of subsection (a), added the last sentence of subsection (e), and added subsection (g).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a), (e) and (g) are set out.

§ 18B-405. Transportation by permittee.

Editor's Note. — The reference at the end of this section to § 18B-1112 should be to § 18B-1115. The section originally enacted as § 18B-1112 was renumbered § 18B-1115 by Session Laws 1981, c. 747, s. 63.

ARTICLE 6.

Elections.

§ 18B-600. Places eligible to hold alcoholic beverage elections.

Local Modification. — Town of Seven Springs: 1981 (Reg. Sess., 1982), c. 1142.

§ 18B-602. Form of ballots.

(c) Subsequent Malt Beverage Elections. — A subsequent election in which a majority votes "AGAINST" malt beverage proposition (1) shall not affect the legality of sales that have previously been approved under proposition (2), (3), or (4). A subsequent election in which a majority votes "AGAINST" malt beverage proposition (2) or (3) shall not affect the legality of sales that have previously been approved under proposition (4).

(1981 (Reg. Sess., 1982), c. 1262, s. 9.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, inserted "or (3)" in the second sentence of subsection (c).

Only Part of Section Set Out. — As the rest of section was not changed by the amendment, only subsection (c) is set out.

§ 18B-603. Effect of alcoholic beverage elections on issuance of permits.

(c) ABC Store Elections. — If an ABC store election is held under G.S. 18B-602(g) and the establishment of ABC stores is approved, each of the following shall be authorized in the jurisdiction that held the election:

(1) The jurisdiction that held the election may establish and operate ABC stores in the manner described in Articles 7 and 8.

(2) The Commission may issue on-premises and off-premises fortified wine and unfortified wine permits to qualified persons and establishments in that jurisdiction, regardless of any unfortified wine election or any local act, except that neither on-premises nor off-premises unfortified wine permits may be issued in a jurisdiction if:

a. The jurisdiction approved ABC stores before January 1, 1982;

b. The jurisdiction held an unfortified wine election before January 1, 1982; and

c. In that unfortified wine election, the jurisdiction did not approve either on-premises or off-premises sales of unfortified wine.

(3) The Commission may issue brown-bagging permits for restaurants and hotels in the county in which the election was held, whether the election was held by the county or by a city or other jurisdiction within the county. Brown-bagging permits shall not be issued, however, for restaurants or hotels in any jurisdiction in which the sale of mixed beverages has been approved.

(f) Permits Not Dependent on Elections. — The Commission may issue the following kinds of permits without approval at an election:

(1) Special occasion permits;

(2) Limited special occasion permits;

(3) Brown-bagging permits for private clubs;

(4) Culinary permits, except as restricted by subdivision (d)(4);
(5) Special one-time permits issued under G.S. 18B-1002;
(6) All permits listed in G.S. 18B-1100.
(1981 (Reg. Sess., 1982), c. 1240.)

Editor's Note. — Subsection (f) is set out above to correct the reference in subdivision (f)(6) in the 1981 Cumulative Supplement to § 18B-1100(a). Subsection (b) and the designation (a) in § 18B-1100 were eliminated by Session Laws 1981, c. 747, s. 59.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the language "except that neither on-premises nor off-premises unfortified wine permits may be issued in a jurisdiction if:" at the end of the introductory paragraph in subdivision (c)(2) and added paragraphs a through c thereafter.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment or the error, only subsections (c) and (f) are set out.

ARTICLE 7.

Local ABC Boards.

§ 18B-700. Appointment and organization of local ABC boards.

(i) Bond. — Each local board member shall be bonded in an amount not less than five thousand dollars ($5,000), secured by a corporate surety, for the faithful performance of his duties. A public employees' blanket position bond in the required amount satisfies the requirements of this subsection. The bond shall be payable to the local board and shall be approved by the appointing authority for the local board. The appointing authority may exempt from this bond requirement any board member who does not handle board funds, and it may also increase the amount of the bond for any member who does handle board funds. (1981, c. 412, s. 2; c. 747, s. 50; 1981 (Reg. Sess., 1982), c. 1262, s. 10.)

Local Modification. — Cumberland: 1981 (Reg. Sess., 1982), c. 1251, s. 1; Wayne: 1981 (Reg. Sess., 1982), c. 1251, s. 2.

Effect of Amendments. —

The 1981 amendment (Reg. Sess., 1982) effective Oct. 1, 1982, substituted "Each local board member shall be bonded in an amount not less than five thousand dollars ($5,000)" for "Before taken office, a local board member shall deposit with the Commission a bond of five thousand dollars ($5,000)" in the first sentence of subsection (i), added the second sentence of subsection (i), and, in the present third sentence of subsection (i), substituted "local board and shall be approved by the appointing authority for the local board" for provisions requiring the bond to be payable to the State of North Carolina and to the city or county and approved by the Commission and by the authority appointing the local board member.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (i) is set out.

§ 18B-702. Financial operations of local boards.

(d) Deposits and Investments. — A local board may deposit moneys at interest in any bank or trust company in this State in the form of savings accounts or certificates of deposit. Investment deposits shall be secured as provided in G.S. 159-31(b) and the reports required by G.S. 159-33 shall be submitted. A local board may invest all or part of the cash balance of any fund as provided in G.S. 159-30(c) and (d), and may deposit any portion of those funds for investment with the State Treasurer in the same manner as State boards and commissions under G.S. 147-69.3.
(1981 (Reg. Sess., 1982), c. 1262, s. 11.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, inserted "and (d)" near the middle of the third sentence of subsection (d).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

Article 8.

Operation of ABC Stores.

§ 18B-803. Store management.

(b) Bonding of Manager. — Each store manager shall be bonded in an amount not less than five thousand dollars ($5,000), secured by a corporate surety, for the honest performance of his duties. A public employees' blanket position bond, honesty form, in the required amount satisfies the requirements of this subsection. The bond shall be payable to the local board and shall be approved by the appointing authority for the local board.

(c) Bonding of Other Employees. — A local board may require any of its other employees who handle funds to obtain bonds. The amount and form of those bonds shall be determined by the local board. (1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, s. 12.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, rewrote subsection (b) and, in subsection (c), deleted "board" preceding "funds" in the first sentence and "in manner prescribed in subsection (b)" at the end of that sentence and added the second sentence.

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

§ 18B-804. Alcoholic beverage pricing.

(b) Sale Price of Spirituous Liquor. — The sale price of spirituous liquor shall consist of the following components:

(1) The distiller's price;

(2) The freight and bailment charges of the State warehouse as determined by the Commission;

(3) A markup for local boards as determined by the Commission;

(4) The tax levied under G.S. 105-113.93, which shall be levied on the sum of subdivisions (1), (2), and (3);

(5) An additional markup for local boards equal to three and one-half percent (3 ½%) of the sum of subdivisions (1), (2), and (3);

(6) A bottle charge of one cent (1¢) on each bottle containing 50 milliliters or less and five cents (5¢) on each bottle containing more than 50 milliliters;

(6a) The bailment surcharge;

(7) A rounding adjustment, the formula of which may be determined by the Commission, so that the sale price will be divisible by five; and

(8) If the spirituous liquor is sold to a mixed beverage permittee for resale in mixed beverages, a charge of ten dollars ($10.00) on each four liters and a proportional sum on lesser quantities.

(1981 (Reg. Sess., 1982), c. 1285, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Nov. 1, 1982, added subdivision (6a) to subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 9.

Issuance of Permits.

§ 18B-900. Qualifications for permit.

(a) Requirements. — To be eligible to receive and to hold an ABC permit, a person shall:

(1) Be at least 21 years old, unless the person is a manager of a business selling only malt beverages and unfortified wine, in which case the person shall be at least 18 years old;

(2) Be a resident of North Carolina unless:

a. He is an officer, director or stockholder of a corporate applicant or permittee and is not a manager or otherwise responsible for the day-to-day operation of the business; or

b. He has executed a power of attorney designating a qualified resident of this State to serve as attorney in fact for the purposes of receiving service of process and managing the business for which permits are sought; or

c. He is applying for a nonresident malt beverage vendor permit, a nonresident wine vendor permit, or a vendor representative permit;

(3) Not have been convicted of a felony within three years, and, if convicted of a felony before then, shall have had his citizenship restored;

(4) Not have been convicted of an alcoholic beverage offense within two years;

(5) Not have been convicted of a misdemeanor controlled substance offense within two years; and

(6) Not have had an alcoholic beverage permit revoked within three years.

To avoid undue hardship, however, the Commission may decline to take action under G.S. 18B-104 against a permittee who is in violation of subdivisions (3), (4), or (5).

(c) Who Must Qualify; Exceptions. — For an ABC permit to be issued to and held for a business, each of the following persons associated with that business must qualify under subsection (a):

(1) The owner of a sole proprietorship;

(2) Each member of a firm, association or partnership;

(3) Each officer, director and owner of more than twenty-five percent (25%) of the stock of a corporation except that the requirement of subdivision (a) (1) does not apply to such an officer, director, or stockholder unless he is a manager or is otherwise responsible for the day-to-day operation of the business;

(4) The manager of an establishment operated by a corporation other than an establishment with only off-premises malt beverage, off-premises unfortified wine, or off-premises fortified wine permits;

(5) Any manager who has been empowered as attorney-in-fact for a nonresident individual or partnership.

(1981, (Reg. Sess., 1982), c. 1262, ss. 13, 14.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, added the last sentence of subsection (a) and added the exception clause to subdivision (3) of subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a) and (c) are set out.

ARTICLE 10.

Retail Activity.

§ 18B-1000. Definitions concerning establishments.

The following requirements and definitions shall apply to this Chapter:

(1a) Cooking School. — An establishment substantially engaged in the business of operating a school in which cooking techniques are taught for a fee.

(1981 (Reg. Sess., 1982), c. 1262, s. 15.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, added subdivision (1a).

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (1a) are set out.

§ 18B-1001. Kinds of ABC permits; places eligible.

When the issuance of the permit is lawful in the jurisdiction in which the premises is located, the Commission may issue the following kinds of permits:

(3) On-premises Unfortified Wine Permit. — An on-premises unfortified wine permit authorizes the retail sale of unfortified wine for consumption on the premises, either alone or mixed with other beverages, and the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises. The permit may be issued for any of the following:

a. Restaurants;
b. Hotels;
c. Eating establishments;
d. Private clubs;
e. Convention centers;
f. Cooking schools.

(5) On-premises Fortified Wine Permit. — An on-premises fortified wine permit authorizes the retail sale of fortified wine for consumption on the premises, either alone or mixed with other beverages, and the retail sale of fortified wine in the manufacturer's original container for consumption off the premises. The permit may be issued for any of the following:

a. Restaurants;
b. Hotels;
c. Private clubs.

(11) Culinary Permit. — A culinary permit authorizes a permittee to possess up to 12 liters of either fortified wine or spirituous liquor, or 12 liters of the two combined, in the kitchen of a business and to use those alcoholic beverages for culinary purposes. The permit may be issued for either of the following:

a. Restaurants;
b. Hotels;
c. Cooking schools.

A culinary permit may also be issued to a catering service to allow the possession of the amount of fortified wine and spirituous liquor stated above at the business location of that service and at the cooking site. The permit shall also authorize the caterer to transport those alcoholic beverages to and from the business location and the cooking site, and use them in cooking. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2,

3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, ss. 16, 17, 22.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, added paragraph f to subdivision (3) and paragraph c to subdivision (11) and, in the first sentence of subdivision (5), reversed the position of the phrases "for consumption on the premises," and "either alone or mixed with other beverages," and added "and the retail sale of fortified wine in the manufacturer's original container for consumption off the premises."

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only subdivisions (3), (5) and (11) are set out.

§ 18B-1005. Conduct on licensed premises.

(a) Certain Conduct. — It shall be unlawful for a permittee or his agent or employee to knowingly allow any of the following kinds of conduct to occur on his licensed premises:

(1) Any violation of this Chapter;
(2) Any fighting or other disorderly conduct that can be prevented without undue danger to the permittee, his employees or patrons;
(3) Any violation of the controlled substances, gambling, or prostitution statutes, or any other unlawful acts;
(4) Any conduct or entertainment by any person whose private parts are exposed or who is wearing transparent clothing that reveals the private parts;
(5) Any entertainment that includes or simulates sexual intercourse or any other sexual act; or
(6) Any other lewd or obscene entertainment or conduct, as defined by the rules of the Commission.

(1981 (Reg. Sess., 1982), c. 1262, ss. 18, 19.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, inserted "or his agent or employee" in the introductory paragraph of subsection (a) and substituted "this Chapter" for "the ABC laws" in subdivision (1) of subsection (a).

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

§ 18B-1006. Miscellaneous provisions on permits.

(g) Restrictions on Sales at Cooking Schools. — Retail sales of food or alcoholic beverages to be consumed on the premises of a cooking school are restricted to bona fide enrolled students of that school. Violation of this subsection is a ground for administrative action under G.S. 18B-104. (1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, s. 23.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, added subsection (g).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (g) is set out.

§ 18B-1007. Additional requirements for mixed beverages permittees.

(b) Handling Bottles. — It shall be unlawful for a mixed beverages permittee or his agent or employee to do any of the following:

(1) Store any other spirituous liquor with liquor possessed for resale in mixed beverages;
(2) Refill any spirituous liquor container having a mixed beverages tax stamp with any other alcoholic beverage, or add to the contents of such a container any other alcoholic beverage;
(3) Transfer from one container to another a mixed beverages tax stamp.
(1981 (Reg. Sess., 1982), c. 1262, s. 20.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, inserted "or his agent or employee" in the introductory paragraph in subsection (b).

Only Part of Section Set Out. — As subsections (a) and (c) were not changed by the amendment, they are not set out.

Article 11.

Commercial Activity.

§ 18B-1112. Authorization of vendor representative permit.

(a) Authorized Acts. — The holder of a vendor representative permit may represent an unfortified winery, fortified winery, limited winery, brewery, bottler, importer, nonresident malt beverage vendor, or nonresident wine vendor, either as an employee or an agent, to solicit orders for that commercial permittee's product. The vendor representative may sell, deliver, and ship alcoholic beverages in this State only to permittees to whom the commercial permittee he represents may sell, deliver, or ship.
(b) Number of Permits. — A vendor representative shall secure a separate permit for each commercial permittee he represents. A permit may not be issued without the approval of the commercial permittee. (1981, c. 747, s. 63; 1981 (Reg. Sess., 1982), c. 1262, s. 21.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, substituted "an unfortified winery, fortified winery, limited winery, brewery, bottler, importer, nonresident malt beverage vendor, or nonresident wine vendor," for "a nonresident malt beverage or wine vendor," in the first sentence of subsection (a), substituted "that commercial permittee's" for "the vendor's" near the end of that sentence, substituted "permittees to whom the commercial permittee he represents may sell, deliver, or ship" for "wholesalers, importers and bottlers" at the end of the second sentence of subsection (a), substituted "commercial permittee" for "nonresident malt beverage or unfortified wine vendor" in the first sentence and for "vendor" in the second sentence of subsection (b). The amendment also deleted "as" preceding "an agent" near the end of the first sentence of subsection (a).

Chapter 19.

Offenses against Public Morals.

ARTICLE 1.

Abatement of Nuisances.

§ 19-1. What are nuisances under this Chapter.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

§ 19-2.1. Action for abatement; injunction.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

CASE NOTES

Error to Find Defendant in Contempt for Acts Not Forbidden. — It is error to find defendant in contempt for removing a copy of a temporary restraining order and padlocks from premises described as a public nuisance where temporary restraining order does not specifically forbid defendant from doing those acts. State ex rel. Zimmerman v. Mason, 54 N.C. App. 155, 282 S.E.2d 518 (1981).

§ 19-4. Violation of injunction; punishment.

CASE NOTES

Constitutionality. — Since neither a fine nor imprisonment can be imposed upon a defendant in moral nuisance proceedings unless and until it has been judicially determined that he has sold or exhibited obscene matter, the "prior restraint" imposed by the moral nuisance statutes, if any, is neither more onerous nor more objectionable than a criminal sanction meted out after the fact of sale or exhibition and, therefore, is constitutionally permissible. Chateau X, Inc. v. State ex rel. Andrews, 302 N.C. 321, 275 S.E.2d 443 (1981).

Judicial Determination before Imposition of Punishment. — No penalty, whether it be a fine or imprisonment, can be imposed upon a defendant for distribution of obscene matter unless and until it has been judicially determined that he has sold or exhibited the obscene matter. Chateau X, Inc. v. State ex rel. Andrews, 302 N.C. 321, 275 S.E.2d 443 (1981).

Chapter 20.

Motor Vehicles.

Article 2.

Uniform Driver's License Act.

Sec.

20-7. Drivers' licenses; expiration; examination; fees.

20-11. Application of minors.

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Part 5. Issuance of Special Plates.

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20-81.3. Special personalized registration plates.

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20-81.6. Special plates for Class D citizens radio station operators.

20-81.7. Special plates for members of fire departments and rescue squads.

Part 6. Vehicles of Nonresidents of State, etc.

20-84. Vehicles owned by State, municipalities or orphanages, etc.; certain vehicles operated by local chapters of American National Red Cross.

Part 7. Title and Registration Fees.

20-87. Passenger vehicle registration fees.

Sec.

20-97. Taxes compensatory; no additional tax.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

20-118.1. Peace officer may weigh vehicle and require removal of excess load; refusal to permit weighing.

20-118.3. Vehicle or combination of vehicles operated without registration plate subject to civil penalty.

20-123. Trailers and towed vehicles.

Part 10. Operation of Vehicles and Rules of the Road.

20-161.2. Hearing procedures for towed vehicles.

Part 12. Sentencing; Penalties.

20-179.2. Alcohol and drug education traffic schools curriculum approved by Commission for Mental Health, Mental Retardation and Substance Abuse Services; responsibilities of the Department of Human Resources; fees.

Article 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

20-183.3. Inspection requirements.

20-183.7. Charges for inspections and certificates; safety equipment inspection station records.

Article 7.

Miscellaneous Provisions Relating to Motor Vehicles.

20-219.2. Removal of unauthorized vehicles from private lots.

Article 15.

Vehicle Mileage Act.

20-348. Private civil action.

ARTICLE 1.

Division of Motor Vehicles.

§ 20-4.01. Definitions.

CASE NOTES

Farm Tractor. —
The Motor Vehicles Act expressly defines a "farm tractor" as a "motor vehicle." Therefore, an instruction imparting to a farm tractor and trailer on a highway special hazard status per se and rendering a motorist who collides with a farm tractor and trailer on a highway negligence per se, regardless of the circumstances or the conduct of the tractor-trailer operator constituted prejudicial error. Davis v. Gamble, — N.C. App. —, 286 S.E.2d 629 (1982).

Quoted in State v. Ray, 54 N.C. App. 473, 283 S.E.2d 823 (1981); State v. Bost, — N.C. App. —, 286 S.E.2d 632 (1982).

ARTICLE 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

§ 20-4.18. Definitions.

Effect of Amendments. —
The 1981 amendment deleted "is a resident of or" preceding "holds" in subdivision (4). (This note was inadvertently omitted in the 1981 Cumulative Supplement. — Ed. note.)

ARTICLE 2.

Uniform Driver's License Act.

§ 20-7. Drivers' licenses; expiration; examination; fees.

(l) Any person who except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this Article may apply for a temporary learner's permit, and the Division shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a specified type or class of motor vehicle upon the highways for a period of 18 months. The fee for issuance of a temporary learner's permit shall be five dollars ($5.00). Any such learner's permit may be renewed, or a second learner's permit may be issued, for an additional period of 18 months. The permittee must, while operating a motor vehicle over the highways, be accompanied by a person who is licensed to operate the class or type of vehicle being operated and who is seated in the seat beside the permittee.

The fee for the issuance of a renewal or a second temporary learner's permit shall be five dollars ($5.00).

(1981 (Reg. Sess., 1982), c. 1257, s. 1.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment, substituted "five dollars ($5.00)" for "four dollars ($4.00)" in the second sentence of the first paragraph of subsection (l) and "five dollars ($5.00)" for "seven dollars ($7.00)" in the second paragraph of subsection (l).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (l) is set out.

§ 20-11. Application of minors.

(b) The Division may grant an application for a limited learner's permit of any minor under the age of 16, who otherwise meets the requirements of licensing under this section, when such application is signed by both the applicant and his or her parent or guardian or some other responsible adult with whom the applicant resides and is approved by the Division of Motor Vehicles. The limited learner's permit shall entitle the applicant, while having the permit in his immediate possession, to drive a motor vehicle of the specified type or class upon the highways while accompanied by a parent, guardian, or other person approved by the Division, who is licensed under this Chapter to operate a motor vehicle (of the type or class being operated by the permittee) and who is actually occupying a seat beside the driver. The limited learner's permit shall be valid for a period of 18 months and the fee for issuance of a limited learner's permit shall be five dollars ($5.00). Provided, however, a limited learner's permit as herein provided shall be issued only to those applicants who have reached the age of 15 years. In the event a minor who has been issued a limited learner's permit under this subsection operates a motor vehicle in violation of any provision herein, the permit shall be canceled.

Provided a driver who holds a learner's permit only shall not be deemed a male operator under age 25 for the purpose of determining the insurance premium rate for persons insured under automobile property damage and bodily injury liability insurance policies.

(1981 (Reg. Sess., 1982), c. 1257, s. 2.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, substituted "a period of 18 months and the fee for issuance of a limited learner's permit shall be five dollars ($5.00)" for "six months or until the applicant attains the age of 16, whichever period is greater," in the third sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 20-16. Authority of Division to suspend license.

(e) The Division may conduct driver improvement clinics for the benefit of those who have been convicted of one or more violations of this Chapter. Each driver attending a driver improvement clinic shall pay a fee of twenty-five dollars ($25.00). (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2; 1953, c. 450; 1955, c. 1152, s. 15; c. 1187, ss. 9-12; 1957, c. 499, s. 1; 1959, c. 1242, ss. 1-2; 1961, c. 460, ss. 1, 2(a); 1963, c. 1115; 1965, c. 130; 1967, c. 16; 1971, c. 234, ss. 1, 2; c. 793, ss. 1, 2; c. 1198, ss. 1, 2; 1973, c. 17, ss. 1, 2; 1975, c. 716, s. 5; 1977, c. 902, s. 1; 1979, c. 36; c. 667, ss. 18, 41; 1981, c. 412, s. 4; c. 747, ss. 33, 66; 1981 (Reg. Sess., 1982), c. 1256.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, added subsection (e).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test.

CASE NOTES

Duty of Trial Court. — "Willful refusal" to take a breathalyzer test is a necessary requirement under this section and the trial court has the duty of judicially determining this question.

Sermons v. Peters, 51 N.C. App. 147, 275 S.E.2d 218, cert. denied, 302 N.C. 630, 280 S.E.2d 441 (1981).

Notice of Rights Need Not Precede, etc. — Where the defendant by his voluntary and overt actions makes it clear that he will not voluntarily submit to the breathalyzer test, it is not necessary for the State to present evidence that the defendant was advised of his right to refuse to take the breathalyzer test before evidence of that refusal may be used against him at a trial for driving under the influence, as is allowed pursuant to § 20-139.1. State v. Simmons, 51 N.C. App. 440, 276 S.E.2d 765 (1981).

Testimony of Arresting Officer. — It is settled law that the arresting officer may testify as to a refusal to take the breathalyzer test at a trial for driving under the influence. State v. Simmons, 51 N.C. App. 440, 276 S.E.2d 765 (1981).

§ 20-28. Unlawful to drive while license suspended or revoked.

OPINIONS OF ATTORNEY GENERAL

Minimum Punishment Mandatory. — The minimum punishment of imprisonment for one year under subsection (b) of this section is mandatory. See opinion of Attorney General to Honorable Samuel L. Osborne, District Court Judge, Twenty-third Judicial District, 50 N.C.A.G. 88 (1981).

And May Not Be Suspended. — The minimum punishment of imprisonment for one year under subsection (b) of this section may not be suspended. See opinion of Attorney General to Honorable Samuel L. Osborne, District Court Judge, Twenty-third Judicial District, 50 N.C.A.G. 88 (1981).

ARTICLE 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card.

(d) A special identification card issued under this section shall automatically expire on the birth date of the holder in the fourth year following the year of issuance. The fee for the issuance or reissuance of a special identification card shall be five dollars ($5.00); provided that a special identification card may be issued without fee to a resident of North Carolina who is legally blind or has attained the age of 70 years.

(f) The Division of Motor Vehicles shall maintain a record of all recipients of a special identification card. The Division may promulgate any rules and regulations it deems necessary for the effective implementation of the provisions of this section.

(1981 (Reg. Sess., 1982), c. 1257, s. 3.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, substituted "issued under this section shall automatically expire on the birth date of the holder in the fourth year following the year of issuance" for "shall not expire but may be reissued" in the first sentence of subsection (d) and "five dollars ($5.00)" for "three dollars ($3.00)" in the second sentence of subsection (d), substituted "a record of all" for "information pertaining to the" in the first sentence of subsection (f) and deleted "and such indices as deemed appropriate, but such information shall not be required to be computerized" at the end of that sentence.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (d) and (f) are set out.

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-51. Exempt from registration.

The following shall be exempt from the requirement of registration and certificate of title:

(6) Any trailer or semitrailer attached to and drawn by a properly licensed motor vehicle when used by a farmer, his tenant, agent, or employee in transporting unginned cotton, peanuts, soybeans, corn, hay, tobacco, silage, cucumbers, potatoes, fertilizers or chemicals purchased or owned by such farmer or tenant for personal use in implementing husbandry or irrigation pipes and equipment owned by such farmer or tenant from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, and when not operated on a for-hire basis. The term "transporting" as used herein shall include the actual hauling of said products and all unloaded travel in connection therewith.

(1981 (Reg. Sess., 1982), c. 1286.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "potatoes," near the middle of the first sentence of subdivision (6).

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (6) are set out.

§ 20-52.1. Manufacturer's certificate of transfer of new motor vehicle.

CASE NOTES

Section Not Replaced by U.C.C. — Although § 25-2-401 provides that the provisions of the Uniform Commercial Code apply to the rights and liabilities of parties to a sales transaction "irrespective of title to the goods," the motor vehicle certificate of title statutes, including this section, still have vitality and are not implicitly replaced by the adoption of the Uniform Commercial Code. American Clipper Corp. v. Howerton, 51 N.C. App. 539, 277 S.E.2d 136 (1981).

§ 20-57. Division to issue certificate of title and registration card.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1079 (1981).

§ 20-58. Perfection by indication of security interest on certificate of title.

CASE NOTES

Cited in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981).

§ 20-66. Renewal of registration; semipermanent plates issued; renewal sticker annually; fees.

(b) For the registration period beginning January 1, 1975, the Division, upon proper application for renewal of registration for private passenger motor vehicles, shall issue a new registration plate and registration card. For the registration period beginning January 1, 1976, and all subsequent registration periods, the Division, upon application for renewal of registration, shall, in lieu of a new registration plate, issue one or more stickers, tabs or other suitable devices denoting the registration period for which issued; provided that for the registration periods beginning January 1, 1978, and thereafter, the Division may, as it deems advisable in the discretion of the Commissioner, issue new registration plates together with such stickers, tabs or other devices; provided further, the provisions of this subsection shall not apply to special issue plates, including but not limited to official plates, legislator plates, civil air patrol plates and national guard plates.

(1981 (Reg. Sess., 1982), c. 1258, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted references to horseless carriage plates, personalized registered plates, amateur radio operator plates and handicapped person plates from the second proviso in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

CASE NOTES

Applied in Jones v. Allred, 52 N.C. App. 38, 278 S.E.2d 521 (1981).

Quoted in Duffer v. Royal Dodge, Inc., 51 N.C. App. 129, 275 S.E.2d 206 (1981).

Stated in Cranford v. Helms, 53 N.C. App. 337, 280 S.E.2d 756 (1981).

Part 5. Issuance of Special Plates.

§ 20-79.1. Use of temporary registration plates or markers by purchasers of motor vehicles in lieu of dealers' plates.

CASE NOTES

Applied in State v. Gray, — N.C. App. —, 286 S.E.2d 357 (1982).

§ 20-81.1. Special plates for amateur radio operators.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official amateur radio license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 60 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) If the amateur radio license of a person holding a special plate issued pursuant to this section shall be canceled or rescinded by the Federal Communications Commission, such person shall immediately return the special plates to the Division of Motor Vehicles and receive a regular plate at no charge.

(d) Repealed by Session Laws 1981 (Regular Session 1982), c. 1258, s. 4.

(1981 (Reg. Sess., 1982), c. 1258, ss. 2-4.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment substituted "60 days" for "90 days" in the second sentence of subsection (b), and, in subsection (c), deleted the former first two sentences, relating to annual replacement of special registration plates, added "and receive a regular plate at no charge" at the end of the subsection. The amendment also repealed subsection (d), relating to issuance of plates for the year 1975.

Only Part of Section Set Out. — As subsections (a) and (e) were not changed by the amendment, they are not set out.

§ 20-81.2. Special plates for historic vehicles.

Notwithstanding any other provisions of this Chapter, special license plates shall be issued upon application with respect to any motor vehicle of the age of 35 years or more from the date of manufacture. Such license plates shall be of the same colors as the regular license plates and shall be issued in a separate numerical series. On the plate there shall be printed the words "Antique Auto," the license plate serial number, the words "North Carolina" or the letters "N.C." In lieu of other registration fees, the annual license registration fee for such vehicle shall be six dollars ($6.00). All other provisions of this Chapter not inconsistent herewith shall be applicable to such motor vehicles.

Notwithstanding any other provisions of this Chapter, a special permanent license plate shall be issued upon application of the owner of any motor vehicle of the age of 50 years or older from the date of manufacture. On the plate there shall be printed the words "Horseless Carriage" in addition to the other requisites established by the Commissioner of Motor Vehicles. The sole fee for the issuance of this permanent license plate shall be fifteen dollars ($15.00). All other provisions of this Chapter not inconsistent herewith shall be applicable to such motor vehicles.

The Commissioner of Motor Vehicles is hereby authorized to make such rules as, in his discretion, may seem necessary with respect to applications for special plates, time for making applications and other matters necessary for the efficient administration of this section. (1955, c. 1339; 1969, c. 600, s. 2; 1977, c. 572, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1258, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted "and the appropriate calendar year" at the end of the third sentence of the first paragraph.

§ 20-81.3. Special personalized registration plates.

(f) In the event a personalized registration plate is lost, stolen or mutilated, the owner may not obtain another such plate bearing the same letter, letters or numerals until the next registration year. He may, upon proper application and payment of a fee of nine dollars ($9.00), obtain a plate of the regular series. Provided, further, that a special personalized registration plate revoked for violation of the motor vehicle laws shall not be reissued, but in lieu thereof a plate of the regular series will be issued upon payment of the appropriate fee for the new registration plate. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5; c. 1262, s. 86; 1975, c. 716, s. 5; 1977, c. 464, s. 3; c. 771, s. 4; 1979, c. 126, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1258, s. 6.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "nine dollars ($9.00)" for "five dollars ($5.00)" in the second sentence of subsection (f).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (f) is set out.

§ 20-81.4. Free registration plates to disabled veterans and former prisoners of war.

(a) From and after January 1, 1970, the North Carolina Division of Motor Vehicles shall provide and issue free of charge to each disabled veteran in this State registration and registration plates and/or validation stickers for either one automobile or one pickup truck, where a pickup truck is the disabled veteran's only mode of transportation and is not used for hire, a disabled veteran being, for the purpose of this section, a veteran of World War I, World War II or Korean service or Vietnam service, having served in the military, naval, marines or air services of the United States, who is a resident of North Carolina and who is entitled to compensation under the laws administered by the Veterans Administration and who is rated as one hundred percent (100%) service-connected disabled or has suffered one or more of the following due to disability incurred in or aggravated by active military, naval, marine or air service of the United States during one or more conflicts:

(1) Loss or permanent loss of use of one or both feet;

(2) Loss or permanent loss of use of one or both hands;

(3) Permanent impairment of vision of both eyes of the following status: Central visual acuity of 20/200 or less in the better eye, with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field has contracted to such an extent that the widest diameter of visual field subtends an angular distance no greater than 20 degrees in the better eye.

(c1) The registration plate and/or validation stickers provided for by this section for ex-prisoners of war shall be issued free of charge and only upon proof as may be required by the Division of Motor Vehicles as to ex-prisoners of war's status and proof of financial responsibility as required by the motor vehicle laws of North Carolina.

(d) The registration plate and/or validation stickers provided for by this section once issued shall be subject to all laws and policies that govern and control registration plates in North Carolina and such plate shall be canceled for violation of same. (1969, c. 461; 1975, cc. 221, 584; c. 716, s. 5; 1977, c. 227; 1979, 2nd Sess., c. 1191; 1981 (Reg. Sess., 1982), c. 1258, ss. 7-9.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "and/or validation stickers" following "registration and registration plates" in the introductory paragraph of subsection (a), and in subsections (c1) and (d) inserted "and/or valida-

tion stickers" following "The registration plate."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a), (c1), and (d) are set out.

§ 20-81.6. Special plates for Class D citizens radio station operators.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official Class D citizens radio station license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 60 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) If the Class D citizens radio station license of a person holding a special plate issued pursuant to this section shall be canceled or rescinded by the Federal Communications Commission, such person shall immediately return the special plates to the Division of Motor Vehicles and receive a regular plate at no charge.

(d) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1258, s. 12.

(1981 (Reg. Sess., 1982), c. 1258, ss. 10-12.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment substituted "60 days" for "90 days" in subsection (b), in subsection (c) deleted the former first two sentences, relating to annual replacement of special registration plates, added "and receive a regular plate at no charge" at the end of subsection (c), and deleted subsection (d), relating to issuance of plates for the year 1975.

Only Part of Section Set Out. — As subsections (a) and (e) were not changed by the amendment, they are not set out.

§ 20-81.7. Special plates for members of fire departments and rescue squads.

(c) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1258, s. 13.

(1977, c. 773; 1981 (Reg. Sess., 1982), c. 1258, s. 13.)

Effect of Amendment. — The 1981 (Reg. Sess., 1982), amendment deleted subsection (c), relating to the effective date and the issuance of plates for the year 1978, and requiring plates issued under this section to be replaced annually.

Only Part of Section Set Out. — As the other subsections were not changed by the amendment, they are not set out.

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-84. Vehicles owned by State, municipalities or orphanages, etc.; certain vehicles operated by local chapters of American National Red Cross.

The Division upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the State or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage or civil air patrol, or incorporated emergency rescue squad, or incorporated REACT ("Radio Emergency Association of Citizen Teams") Team, shall collect three dollars and fifty cents ($3.50) for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the State or any department thereof, or by any

county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the State or some department thereof or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church-owned bus used exclusively for transporting children and parents to Sunday school and church services and for no other purpose.

In lieu of the annual three dollars and fifty cents ($3.50) registration provided for in this section, the Division may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The permanent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. For the permanent registration and issuance of permanent registration plates provided for in this paragraph, the Division shall collect a fee of three dollars and fifty cents ($3.50) for each vehicle so registered and licensed.

The provisions of this section are hereby made applicable to vehicles owned by a rural fire department, agency or association.

The Division of Motor Vehicles shall issue to the North Carolina Tuberculosis Association, Incorporated, or any local chapter or association of said corporation, for a fee of three dollars and fifty cents ($3.50) for each plate a permanent registration plate which need not be thereafter renewed for each motor vehicle in the form of a mobile X-ray unit which is owned by said North Carolina Tuberculosis Association, Incorporated, or any local chapter or local association thereof and operated exclusively in this State for the purpose of diagnosis, treatment and discovery of tuberculosis. The initial three dollars and fifty cents ($3.50) fee required by this section and for this purpose shall be in full payment of the permanent registration plates issued for such vehicle operated as a mobile X-ray unit, and such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to replacement vehicles to be used for the purposes above described and for which the plates were originally issued.

The Division of Motor Vehicles shall issue to the American National Red Cross, upon application of any local chapter thereof and payment of a fee of three dollars and fifty cents ($3.50) for each plate, a permanent registration plate, which need not be thereafter renewed, for all disaster vans, bloodmobiles, handivans, and such sedans and station wagons as are used for emergency or disaster work, and operated by a local chapter in this State in the business of the American National Red Cross. Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used for the purposes above described and for which the plates were originally issued. In the event of transfer of ownership to any other person, firm or corporation, or transfer or reassignment of any vehicle bearing such registration plate to any chapter or association of the American National Red Cross in any other state, territory or country, the registration plate assigned to such vehicle shall be surrendered to the Division of Motor Vehicles.

In lieu of all other registration requirements, the Commissioner shall each year assign to the State Highway Patrol, upon payment of three dollars and fifty cents ($3.50) per registration plate, a sufficient number of regular registration plates of the same letter prefix and in numerical sequence beginning with number 100 to meet the requirements of the State Highway Patrol for use on Division vehicles assigned to the State Highway Patrol. The commander of the Patrol shall, when such plates are assigned, issue to each member of the State Highway Patrol a registration plate for use upon the Division vehicle

assigned to him pursuant to G.S. 20-190 and assign a registration plate to each Division service vehicle operated by the Patrol. An index of such assignments of registration plates shall be kept at each State Highway Patrol radio station and a copy thereof shall be furnished to the registration division of the Division. Information as to the individual assignments of such registration plates shall be made available to the public upon request to the same extent and in the same manner as regular registration information. The commander, when necessary, may reassign registration plates provided that such reassignment shall be made to appear upon the index required herein within 20 days after such reassignment.

The Division of Motor Vehicles shall upon appropriate certification of financial responsibility issue to sheltered workshops recognized or approved by the Division of Vocational Rehabilitation Services of the Department of Human Resources upon application and payment of a fee of three dollars and fifty cents ($3.50) for each plate, a permanent registration plate for vehicles registered to and operated by such sheltered workshops. The initial three dollars and fifty cents ($3.50) fee required by this section and for this purpose shall be in full payment of the permanent registration plate issued for such vehicle operated by a sheltered workshop and such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used by the sheltered workshop designated on the registration card.

On and after January 1, 1972, permanent registration plates used on all vehicles owned by the State of North Carolina or a department thereof shall be of a distinctive color and design which shall be readily distinguishable from all other permanent registration plates issued pursuant to this section or G.S. 20-84.1. For the purpose of carrying out the intent of this paragraph, all vehicles owned by the State of North Carolina or a department thereof in operation as of October 1, 1971, and bearing a permanent registration shall be reregistered during the months of October, November and December, 1971, and upon reregistration, registration plates issued for such vehicles shall be of a distinctive color and design as provided for hereinabove. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 1951, c. 388; 1953, c. 1264; 1955, cc. 368, 382; 1967, c. 284; 1969, c. 800; 1971, c. 460, s. 1; 1975, c. 548; c. 716, s. 5; 1977, c. 370, s. 1; 1979, c. 801, s. 9; 1981 (Reg. Sess., 1982), c. 1159.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "or incorporated REACT ('Radio Emergency Association of Citizen Teams') Team" in the first sentence.

Part 7. Title and Registration Fees.

§ 20-87. Passenger vehicle registration fees.

There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(7) Manufacturers and Motor Vehicle Dealers. — Manufacturers and dealers in motor vehicles, trailers and semitrailers for license and for one set of dealer's plates for each place of business licensed under Article 12 of Chapter 20 of the General Statutes shall pay the sum of thirty-five dollars ($35.00), and for each additional set of dealer's plates the sum of three dollars ($3.00).

(1981 (Reg. Sess., 1982), c. 1255.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Oct. 1, 1982, substituted "three dollars ($3.00)" for "one dollar ($1.00)" at the end of subdivision (7).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (7) are set out.

§ 20-97. Taxes compensatory; no additional tax.

(a) All taxes levied under the provisions of this Article are intended as compensatory taxes for the use and privileges of the public highways of this State, and shall be paid by the Commissioner to the State Treasurer, to be credited by him to the State Highway Fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina, except that cities and towns, other than the City of Brevard, the City of Charlotte, the City of Greenville, the City of Hendersonville, the City of Raleigh, the Town of Battleboro, the Town of Bridgeton, the Town of Cape Carteret, the Town of Chadbourn, the Town of Fairmont, the Town of Farmville, the Town of Fountain, the Town of Jameston, the Town of Kenansville, the Town of Magnolia, the Town of Mount Olive, the Town of Parkton, the Town of Plymouth, the Town of Raeford, the Town of Rose Hill, the Town of Stoneville, the Town of Wallace, and the Town of Williamston and all incorporated cities and towns in the counties of Buncombe, Cumberland, Dare, Davidson, Granville, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than one dollar ($1.00) per year upon any such vehicle resident therein, the City of Concord in Cabarrus County may levy not more than three dollars ($3.00) per year upon any such vehicle resident therein, the City of Henderson, the City of Roanoke Rapids, the Town of Bethal, the Town of Elizabethtown, the Town of Enfield, the Town of Garner, the Town of Jackson, the Town of Mebane, the Town of Weldon, the Town of Wendell, and the Town of Zebulon, may levy not more than three dollars ($3.00) per year upon any such vehicle resident therein, and the City of Brevard, the City of Charlotte, the City of Greenville, the City of Hendersonville, the City of Raleigh, the Town of Battleboro, the Town of Bridgeton, the Town of Cape Carteret, the Town of Chadbourn, the Town of Fairmont, the Town of Farmville, the Town of Fountain, the Town of Jameston, the Town of Kenansville, the Town of Magnolia, the Town of Mount Olive, the Town of Parkton, the Town of Plymouth, the Town of Raeford, the Town of Rose Hill, the Town of Stoneville, the Town of Wallace, and the Town of Williamston and all incorporated cities and towns in the counties of Buncombe, Cumberland, Dare, Davidson, Granville, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than five dollars ($5.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the amounts hereinabove provided for, a sum not to exceed fifteen dollars ($15.00) per year upon each vehicle operated in such city or town as a taxicab.

(a1) Notwithstanding the limitations in subsection (a) of this section, the Town of Franklinton may levy not more than two dollars ($2.00) per year upon any motor vehicle resident therein and may levy a sum of fifteen dollars ($15.00) per year on each motor vehicle operated in the town as a taxicab.

(1981 (Reg. Sess., 1982), cc. 1202, 1250.)

Cross References. — As to authority of cities to impose motor vehicle license taxes, and to waive such taxes for certain persons, see § 160A-213.

Effect of Amendments. — Session Laws 1981, c. 315, inserted the provisions as to the Town of Kenansville, the Town of Magnolia, the Town of Rose Hill, and the

Town of Wallace in subsection (a). (This note is set out to correct an omission in the 1981 Cumulative Supplement. — Ed. note.)

The first 1981 (Reg. Sess., 1982) amendment added subsection (a1).

The second 1981 (Reg. Sess., 1982) amendment inserted the references to the City of Raleigh in subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsections (a) and (a1) are set out.

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-109.1. Surrender of titles to salvage vehicles.

CASE NOTES

Intent of this section is to see that insurance companies who obtain salvage vehicles as a result of paying a total loss claim, repair them, and then sell them surrender their evidence of title to the State, so that the reissued certificate of title might reflect that the vehicle has been previously wrecked. Allen v. American Security Ins. Co., 53 N.C. App. 239, 280 S.E.2d 471 (1981).

This section appears to be directed only toward insurance companies who obtain salvage vehicles as a result of paying a total loss claim, repair them, and then sell them. Allen v. American Security Ins. Co., 53 N.C. App. 239, 280 S.E.2d 471 (1981).

Constructive and Actual Total Loss Distinguished. — A vehicle is considered a constructive total loss any time repair becomes economically impractical; hence, under this definition a constructive total loss is something quite different from an actual total loss, which is generally defined as occurring when the cost of repairs exceeds the fair market value of the vehicle prior to the collision. Allen v. American Security Ins. Co., 53 N.C. App. 239, 280 S.E.2d 471 (1981).

Total loss referred to in this section must be an actual total loss, since only if the insurance company pays the full precollision value of a vehicle can the vehicle's owner be expected to give up his rights in the vehicle, including his right to the proceeds from salvage of the vehicle. Allen v. American Security Ins. Co., 53 N.C. App. 239, 280 S.E.2d 471 (1981).

Section Inapplicable Where Constructive Total Loss Claim Paid. — As it is unlikely that the legislature intended to force the owner of a wrecked vehicle to give up title and possession of his vehicle for less than its reasonable precollision value, this section applies only to the payment of an actual total loss claim, and thus is inapplicable to the case where a substantially lower constructive total loss claim was paid. Allen v. American Security Ins. Co., 53 N.C. App. 239, 280 S.E.2d 471 (1981).

§ 20-111. Violations of registration provisions.

CASE NOTES

Applied in State v. Gray, — N.C. App. —, 286 S.E.2d 357 (1982).

§ 20-114.1. Willful failure to obey traffic officer; firemen as traffic officers.

CASE NOTES

Cited in Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load; refusal to permit weighing.

Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of North Carolina Department of Transportation portable or stationary scales, and may require that such vehicle be driven to the nearest North Carolina Department of Transportation stationary scales or stationary scales approved by the North Carolina Department of Agriculture in the event such scales are within five miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this Article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive said vehicle upon the scales provided for weighing for the purpose of being weighed, shall be guilty of a misdemeanor. No vehicle more than two miles from a North Carolina Department of Transportation stationary scales may be required to be driven to such scales unless the peace officer knows or reasonably suspects the vehicle has driven so as to avoid being weighed at the scales. (1927, c. 148, s. 37; 1949, c. 1207, s. 3; 1951, c. 1013, s. 4; 1979, c. 436, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1259, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "or stationary scales approved by the North Carolina Department of Agriculture" near the end of the first sentence.

§ 20-118.3. Vehicle or combination of vehicles operated without registration plate subject to civil penalty.

Any vehicle or combination of vehicles being operated upon the highway of this State either by a resident or nonresident without having been issued therefor a registration plate by the appropriate jurisdiction shall be subject to a civil penalty equal to the North Carolina annual fee for the gross weight of the vehicle and in addition thereto the license fee applicable for the remainder of the current registration year, provided a nonresident shall pay the North Carolina license fee or furnish satisfactory proof of payment of required registration fee to its base jurisdiction. The civil penalties provided for in this section shall not be enforceable through criminal sanctions and the provisions of G.S. 20-176 shall not apply to this section. (1981 (Reg. Sess., 1982), c. 1259, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1259, s. 3, makes this section effective Oct. 1, 1982.

§ 20-123. Trailers and towed vehicles.

(a) No motor vehicle shall be driven upon any highway drawing or having attached thereto more than one trailer or semitrailer: Provided that this provision shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers: Provided that this provision shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveaway service when no more than two saddle mounts are used and provided further that equipment used in said combination is approved by the safety regulations of the Interstate Commerce Commission and the safety regulations of the North Carolina Division of Motor Vehicles and the Department of Transportation. Nothing herein shall prohibit the towing of farm trailers not exceeding three in number nor exceeding a total length of 50 feet during the period from one-half hour before sunrise until one-half hour after sunset provided that a red flag at least 12 inches square shall be prominently displayed on the last vehicle. The towing of farm trailers and equipment as herein permitted shall not be applicable to interstate or federal numbered highways.

(1981 (Reg. Sess., 1982), c. 1195.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote the second sentence of subsection (a), which formerly referred to the towing of farm trailers and equipment in single tandem not exceeding a length of 40 feet.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 20-124. Brakes.

CASE NOTES

Cited in Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283 (1981).

§ 20-125.1. Directional signals.

CASE NOTES

Cited in Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283 (1981).

§ 20-129. Required lighting equipment of vehicles.

CASE NOTES

"Headlamp." — Although subsection (c) of this section and § 20-131(a) do not contain a specific definition of a "headlamp," the legislature's use of the term "headlamp" indicates that not just any light source possessing the requisite brightness will suffice. Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981).

The legislature intended that a "headlamp" within the contemplation of subsection (c) of this section and § 20-131 should be one that was specifically designed and constructed for use as a headlamp, and a five-cell flashlight

attached to a motorcycle falls short of the headlamp requirement. Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981).

Cited in Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283 (1981).

§ 20-129.1. Additional lighting equipment required on certain vehicles.

CASE NOTES

Cited in Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283 (1981).

§ 20-131. Requirements as to headlamps and auxiliary driving lamps.

CASE NOTES

Legislative Intent that Headlamps Be of Certain Type. —

The legislature intended that a "headlamp" within the contemplation of § 20-129(c) and this section should be one that was specifically designed and constructed for use as a headlamp, and a five-cell flashlight attached to a motorcycle falls short of the headlamp requirement. Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981).

Although § 20-129(c) and subsection (a) of this section do not contain a specific definition of a "headlamp," the legislature's use of the term "headlamp" indicates that not just any light source possessing the requisite brightness will suffice. Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981).

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of alcoholic beverages.

CASE NOTES

I. GENERAL CONSIDERATION.

Elements of Offenses. —

In accord with 1st paragraph in original. See State v. Ray, 54 N.C. App. 473, 283 S.E.2d 823 (1981).

Conviction for violation of subsection (b) of this section requires the State to prove three things beyond a reasonable doubt: (1) that the defendant operated a motor vehicle, (2) upon a public way, (3) when the amount of alcohol in his blood is 0.10 percent or more. State v. Donald, 51 N.C. App. 238, 275 S.E.2d 531 (1981).

Section 20-140(c) Not Lesser Included Offense of Subsection (b). — The offense of reckless driving under § 20-140(c) is not a lesser included offense of operating a vehicle upon a highway when the amount of alcohol in the driver's blood is 10 percent or more, a violation of subsection (b) of this section. State v. Donald, 51 N.C. App. 238, 275 S.E.2d 531 (1981).

The reference within § 20-140(c), that the offense of reckless driving is a lesser included offense of driving under the influence of intoxicating liquor, refers to subsection (a) of this section (driving under the influence) and not to subsection (b) (0.10 offense). This conclusion is supported by subsection (b) which also states that the offense therein is a lesser included offense of driving under the influence, an obvious reference to subsection (a). Therefore, the offense of reckless driving under § 20-140(c) is not a lesser included offense of

subsection (b). State v. Donald, 51 N.C. App. 238, 275 S.E.2d 531 (1981).

Quoted in State v. Bishop, — N.C. App. —, 284 S.E.2d 720 (1981).

Stated in State v. Mack, 53 N.C. App. 127, 280 S.E.2d 40 (1981).

Cited in State v. Luckey, 54 N.C. App. 178, 282 S.E.2d 490 (1981); State v. Cooper, — N.C. —, 286 S.E.2d 102 (1982).

§ 20-139.1. Result of a chemical analysis admissible in evidence; presumption.

CASE NOTES

III. USE OF EVIDENCE.

Evidence Concerning Defendant's Right to Refuse Test. — Where the defendant by his voluntary and overt actions makes it clear that he will not voluntarily submit to the breathalyzer test, it is not necessary for the State to present evidence that the defendant was advised of his right to refuse to take the breathalyzer test before evidence of that refusal may be used against him at a trial for driving under the influence, as is allowed pursuant to this section. State v. Simmons, 51 N.C. App. 440, 276 S.E.2d 765 (1981).

Arresting Officer May Testify as to Refusal. — It is settled law that the arresting officer may testify as to a refusal to take the breathalyzer test at a trial for driving under the influence. State v. Simmons, 51 N.C. App. 440, 276 S.E.2d 765 (1981).

State is not required to produce an expert witness to testify concerning a breathalyzer test; admissibility of such testimony is governed by the rules set forth in State v. Powell, 279 N.C. 608, 184 S.E.2d 243 (1971). State v. Luckey, 54 N.C. App. 178, 282 S.E.2d 490 (1981).

§ 20-140. Reckless driving.

Editor's Note. — Session Laws 1981, c. 412, s. 4, and c. 747, s. 66, should be added to the historical citation of this act as it appears in the 1981 Cumulative Supplement.

Effect of Amendments. —

The following should be substituted for the 1981 amendment notes in the 1981 Cumulative Supplement:

Session Laws 1981, c. 412, s. 4, as amended by Session Laws 1981, c. 747, s. 66, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" in subsection (c).

Session Laws 1981, c. 466, s. 7, effective October 1, 1981, substituted "established pursuant to G.S. 20-179.2 within 90 days" for "within 75 days" near the end of the introductory portion of the first sentence of subsection (e). Session Laws 1981, c. 466, s. 8, provides: "This act shall become effective October 1, 1981, and shall apply to persons assigned to Alcohol and Drug Education Traffic Schools on and after that date."

CASE NOTES

I. GENERAL CONSIDERATION.

Elements of Offenses. — Subsection (c) of this section requires the State in reckless driving cases to prove (1) that defendant operated a motor vehicle, (2) upon a public way, (3) after consuming such quantity of intoxicating liquor, (4) as directly and visibly affected his operation of the vehicle. State v. Donald, 51 N.C. App. 238, 275 S.E.2d 531 (1981).

By pleading guilty to reckless driving, defendant admits he was operating a car in a criminally negligent and unreasonable manner and in doing so exposed those travelling on the road, as well as those situated adjacent to it, to unnecessary danger. Wyatt v. Gilmore, — N.C. App. —, 290 S.E.2d 790 (1982).

A violation of this section may subject, etc. —

In accord with 2nd paragraph in original. See Rhyne v. O'Brien, 54 N.C. App. 621, 284 S.E.2d 122 (1981).

Subsection (c) Not Lesser Included Offense of § 20-138(b). — The offense of reckless driving under subsection (c) of this section is not a lesser included offense of operating a vehicle upon a highway when the amount of alcohol in the driver's blood is 10 percent or more, a

violation of § 20-138(b). State v. Donald, 51 N.C. App. 238, 275 S.E.2d 531 (1981).

The reference within subsection (c), that the offense of reckless driving is a lesser included offense of driving under the influence of intoxicating liquor, refers to § 20-138(a) (driving under the influence) and not to § 20-138(b) (0.10 offense). This conclusion is supported by § 20-138(b) which also states that the offense therein is a lesser included offense of driving under the influence, an obvious reference to § 20-138(a). Therefore, the offense of reckless driving under subsection (c) is not a lesser included offense of § 20-138(b). State v. Donald, 51 N.C. App. 238, 275 S.E.2d 531 (1981).

§ 20-141. Speed restrictions.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981); State v. Flaherty, — N.C. App. —, 284 S.E.2d 565 (1981); White v. Greer, — N.C. App. —, 285 S.E.2d 848 (1982).

VI. NEGLIGENCE.

Violation as Constituting Negligence. — In accord with 7th paragraph in original. See Page v. Tao, — N.C. App. —, 289 S.E.2d 910 (1982).

Unreasonableness Question for Jury. — Since this section does not fix a speed which makes its violation negligence as a matter of law, whether plaintiff's speed was unreasonably slow and whether traffic was impeded are questions of fact to be resolved by a jury. Page v. Tao, — N.C. App. —, 289 S.E.2d 910 (1982).

OPINIONS OF ATTORNEY GENERAL

Section 20-141(m) Does Create a Criminal Offense, etc. —

The correct citation to the opinion of the Attorney General cited under this catchline in the 1981 Cumulative Supplement is 48 N.C.A.G. 138.

§ 20-141.4. Death by vehicle.

CASE NOTES

Jurisdiction. — In a prosecution on separate bills of indictment for failing to stop automobile at the scene of an accident in which an individual was killed (§ 20-166(a)) and death by vehicle, where the two offenses were based on the same act or transaction, the superior court had jurisdiction of the misdemeanor offense of death by vehicle. State v. Fearing, — N.C. —, 284 S.E.2d 487 (1981).

Amendment of Allegations of Motor Vehicle Violation. — Although the death by vehicle statute contemplates that some violation of a motor vehicle statute or ordinance be specified in a warrant charging death by vehicle, it is not essential that the motor vehicle violation alleged in the warrant as originally issued be the same as the motor vehicle violation alleged in the warrant as considered by the jury where the substituted motor vehicle violation is substantially similar to that originally alleged. State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981).

In a trial de novo in the superior court upon a warrant alleging death by vehicle, the trial court did not err in allowing the State to amend the warrant at the close of the State's evidence by striking an allegation of "following too closely" and adding an allegation of "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)," since the nature of the offense with which the defendant was charged, death by vehicle, was not changed by the amendment. State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981).

Prosecution after Conviction under § 20-158 Double Jeopardy. — Where defendant entered a plea of guilty to a charge of failing to yield the right-of-way in violation of § 20-158 which arose out of an automobile accident and a passenger thereafter died from

injuries received in the accident, the trial of defendant on a charge of death by vehicle under this section "in that he did unlawfully and willfully fail to yield the right-of-way . . . in violation of General Statute 20-158" would place defendant in jeopardy for a second time on the charge of failure to yield the right-of-way in violation of the Fifth Amendment to the U.S. Constitution. State v. Griffin, 51 N.C. App. 564, 277 S.E.2d 77 (1981).

§ 20-145. When speed limit not applicable.

CASE NOTES

Police Responding to Notice of Pursuit. — The language of this section is broad enough to include not only police in direct or immediate pursuit of law violators or suspected violators, but also police who receive notice of the pursuit and respond by proceeding to the scene for the purpose of assisting in the chase or apprehension. State v. Flaherty, — N.C. App. —, 284 S.E.2d 565 (1981).

Burden of Proof. — It would be a fair allocation of the burden of proof to require a defendant to prove that he comes within the exceptions recognized by this section. State v. Flaherty, — N.C. App. —, 284 S.E.2d 565 (1981).

§ 20-146. Drive on right side of highway; exceptions.

CASE NOTES

The doctrine of sudden emergency overrides the mandatory standards of subdivision (a)(2) of this section. Harris v. Guyton, 54 N.C. App. 434, 283 S.E.2d 538 (1981).

§ 20-146.1. Operation of motorcycles.

CASE NOTES

Applied in Burrow v. Jones, 51 N.C. App. 549, 277 S.E.2d 97 (1981).

§ 20-149. Overtaking a vehicle.

CASE NOTES

Quoted in Davis v. Gamble, — N.C. App. —, 286 S.E.2d 629 (1982).

§ 20-150. Limitations on privilege of overtaking and passing.

CASE NOTES

Negligence Per Se. —
A violation of this section is negligence per se if injury proximately results therefrom. Duncan v. Ayers, — N.C. App. —, 284 S.E.2d 561 (1981).

§ 20-150.1. When passing on the right is permitted.

CASE NOTES

Cited in Duncan v. Ayers, — N.C. App. —, 284 S.E.2d 561 (1981).

§ 20-152. Following too closely.

CASE NOTES

Cited in State v. Clements, 51 N.C. App. 113, 275 S.E.2d 222 (1981).

§ 20-154. Signals on starting, stopping or turning.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Davis v. Gamble, — N.C. App. —, 286 S.E.2d 629 (1982).

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Violation to Be Considered, etc. — In accord with 3rd paragraph in original. See Spruill v. Summerlin, 51 N.C. App. 452, 276 S.E.2d 736 (1981).

§ 20-156. Exceptions to the right-of-way rule.

CASE NOTES

Duty of Driver Entering Highway, etc. — In accord with 2nd paragraph in original. See Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981).

In accord with 5th paragraph in original. See Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981).

Effect of Traffic Lights, etc. — In accord with original. See State v. Flaherty, — N.C. App. —, 284 S.E.2d 565 (1981).

Cited in Williams v. Bethany Volunteer Fire Dep't, — N.C. App. —, 290 S.E.2d 794 (1982).

§ 20-157. Approach of police, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near police, fire department, or rescue squad vehicle or ambulance.

CASE NOTES

Cited in Williams v. Bethany Volunteer Fire Dep't, — N.C. App. —, 290 S.E.2d 794 (1982).

§ 20-158. Vehicle control signs and signals.

CASE NOTES

I. GENERAL CONSIDERATION.

This section does not require a specific intent. State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

Subsequent Prosecution under § 20-141.4 Double Jeopardy. — Where defendant entered a plea of guilty to a charge of failing to yield the right-of-way in violation of this section which arose out of an automobile accident and a passenger thereafter died from injuries received in the accident, the trial of defendant on a charge of death by vehicle under § 20-141.4 "in that he did unlawfully and willfully fail to yield the right-of-way . . . in violation of General Statute 20-158" would place defendant in jeopardy for a second time on the charge of failure to yield the right-of-way in violation of the Fifth Amendment to the U.S. Constitution. State v. Griffin, 51 N.C. App. 564, 277 S.E.2d 77 (1981).

Stated in Young v. Denning, 54 N.C. App. 361, 283 S.E.2d 164 (1981); Smith v. Stocks, 54 N.C. App. 393, 283 S.E.2d 819 (1981).

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

CASE NOTES

I. GENERAL CONSIDERATION.

The word "park," etc. —

In many cases the courts of this State have interpreted the terms "park" or "leave standing" as used in subsection (a) of this section as meaning something more than a mere temporary stop on the road for a necessary purpose. Williams v. Jones, 53 N.C. App. 171, 280 S.E.2d 474 (1981).

Word "impossible" in subsection (a) of this section does not mean physical, absolute impossibility but means not reasonably practical under the circumstances. Williams v. Jones, 53 N.C. App. 171, 280 S.E.2d 474 (1981).

Whether stop, though temporary, was for a necessary purpose is a factor to be considered in determining a violation of this section. Williams v. Jones, 53 N.C. App. 171, 280 S.E.2d 474 (1981).

III. NEGLIGENCE AND PROXIMATE CAUSE.

Violation of this section, etc. —

In accord with 1st paragraph in original. See Furr v. Pinoca Volunteer Fire Dep't, 53 N.C. App. 458, 281 S.E.2d 174 (1981).

Proximate Cause Is Jury Question. —

Where violation of this section, which is negligence per se, is admitted or established by the evidence, it is ordinarily a question for the jury to determine whether such negligence is a proximate cause of injury which resulted in damages. Furr v. Pinoca Volunteer Fire Dep't, 53 N.C. App. 458, 281 S.E.2d 174 (1981).

Burden of proving violation. — Burden is on plaintiff to prove that defendant violated this section, while if defendant is to escape the consequences of this violation, defendant has the burden of bringing himself within provision that "it is impossible to avoid stopping." Williams v. Jones, 53 N.C. App. 171, 280 S.E.2d 474 (1981).

Instructions on Burden of Proof. — In an action to recover damages suffered by plaintiff when his vehicle collided with that of defendant, trial court should have instructed the jury that plaintiff had the burden of proving that defendant violated subsection (a) of this section by parking or leaving his vehicle standing on the paved portion of the highway when he had the opportunity to park the vehicle on the shoulder of the highway, and that the burden was on defendant to prove that he was excused from such parking because it was not reasonably practical under the circumstances to avoid stopping on the paved portion of the highway;

failure to so charge was error prejudicial to plaintiff. Williams v. Jones, 53 N.C. App. 171, 280 S.E.2d 474 (1981).

Sudden Emergency Instruction Required. — In action to recover damages sustained in an automobile accident, trial court erred in failing to charge on the doctrine of sudden emergency, as requested by plaintiff, where evidence tended to show that plaintiff saw defendant's vehicle in his traffic lane when he was four car lengths away; plaintiff did not pull onto the left lane because he was afraid that he would be hit by a tractor trailer behind him in that lane; plaintiff probably could have pulled to the right but he would have been on a narrow grassy area and a guardrail was there; the entire shoulder was only 10 feet wide; and there was fog in the area at the time of the collision. Williams v. Jones, 53 N.C. App. 171, 280 S.E.2d 474 (1981).

§ 20-161.2. Hearing procedures for towed vehicles.

(a) Whenever any vehicle is removed, towed, or stored pursuant to the provisions of this Chapter, Chapter 115C, Chapter 115D, Chapter 116 or Chapter 143 of the General Statutes, or any rule adopted pursuant thereto, the person authorizing the removal, towing, or storage of such vehicle shall be deemed a legal possessor within the meaning of G.S. 44A-2(d).

(b) Upon written request of the registered owner, lienholder, or person entitled to claim possession of any vehicle removed, towed, or stored, the magistrate in the county where the vehicle was removed, towed, or stored shall, as soon as practical, but in no event more than 24 hours from the request, conduct a hearing to determine whether probable cause existed for the removal, towing, or storage of the vehicle. Said request shall be made in a format approved by the Administrative Office of the Courts. An affidavit setting forth the reasons for and circumstances surrounding the removal, towing, or storage shall be admissible as evidence for the person authorizing the removal, towing, or storage of the vehicle, but shall not preclude the admission of testimony from or on behalf of the said person or other witnesses. The claimant shall be given an opportunity to present evidence. Following the hearing, the magistrate shall determine, from the evidence admitted, whether probable cause existed for the removal, towing, or storage of the vehicle. If the magistrate finds no probable cause existed, he shall issue an order so finding and directing the immediate release of the vehicle to the claimant. Notwithstanding any other provision of law, no person, firm, or corporation, who removes, tows, or stores a vehicle pursuant to this section may assert a mechanics lien for said removal, towing, or storage charges following a finding, by the magistrate pursuant to this section, of no probable cause for the removal, towing, or storage thereof. If the magistrate finds that probable cause existed for the initial removal, towing, or storage of the vehicle, the person actually removing, towing, or storing the vehicle shall have a mechanics lien against the vehicle for the removal, towing, or storage charges pursuant to Chapter 44A. If the claimant does not desire a hearing or if the magistrate finds probable cause following hearing, the claimant may obtain possession of the vehicle by:

(1) Payment of the removal, towing, or storage fees; or

(2) Posting bond in the amount of the removal, towing, or storage fees. Said bond shall be conditioned upon the filing, of an action as set forth below for the determination of the lawfulness of the removal, towing, or storage, and conditioned upon the return of the vehicle to the jurisdiction of the court at the time of trial. If no action is filed within 30 days to contest the lawfulness of the removal, towing, or storage, the Clerk of Superior Court shall pay the bond to the person, firm or corporation that actually removed, towed or stored the vehicle.

(c) Any claimant who has posted bond pursuant to subsection (b) (2) above and who seeks to contest the payment or the amount of the removal, towing or storage fee must, within 30 days of said posting, file a small claim action in the county where the vehicle was removed, towed, or stored, for the amount of the

removal, towing, or storage fees and naming the person who authorized the removal, towing, or storage as a defendant, as well as the person, firm, or corporation who actually conducted the removal, towing, or storage. If, at trial, the court finds that the vehicle was lawfully removed, towed, or stored, it shall enter judgment against the party claiming the vehicle for the amount of the removal, towing, or storage fees. The court shall further order possession of the vehicle restored to the person, firm, or corporation who removed, towed, or stored the motor vehicle and further declare a valid and enforcible mechanics lien upon the vehicle in favor of said person, firm, or corporation, pursuant to Chapter 44A, for the amount of the removal, towing, or storage fees. If the court finds the removal, towing, or storage was in violation of law, it shall order the immediate release of the motor vehicle and any bond remitted to the claimant. Upon any claimant's failure to appear at trial, the court shall order the bond forfeited, and the proceeds to the person, firm, or corporation who actually removed, towed, or stored the vehicle. No law-enforcement officer, or other person authorized to enforce any of the provisions of this Chapter, Chapter 115C, Chapter 115D, Chapter 116 or Chapter 143, shall be held liable to any person, firm, or corporation who removes, tows, or stores a motor vehicle at the request or direction of the law-enforcement officer or other such person. Any appeal from the ruling of the court shall be as in all other small claim actions.

(d) The provisions of this section shall not abrogate any rights of the claimant or the person, firm or corporation who removes, tows or stores a motor vehicle against any party for claims arising out of the removal, towing or storage.

(e) Every agency whose law-enforcement officers act pursuant to this statute shall, by contract or regulations, provide compensation to the person, firm or corporation who actually removed, towed, or stored the vehicle if the court finds the removal, towing or storage was without probable cause. (1981 (Reg. Sess., 1982), c. 1239, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1239, s. 5, provides: "This act shall become effective August 1, 1982 and shall expire on July 1, 1983."

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

Legal Periodicals. — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

To support a verdict of guilty under subsection (a), etc. —

In prosecutions under subsection (a) the State must prove that the defendant knew (1) that he had been involved in an accident or collision, and (2) that a person was killed or physically injured in the collision. The knowledge required may be actual or may be implied. State v. Fearing, — N.C. —, 284 S.E.2d 487 (1981).

Cited in State v. Fearing, — N.C. —, 284 S.E.2d 479 (1981); State v. Duvall, — N.C. —, 284 S.E.2d 495 (1981); State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842 (1981); State v. Crabb, — N.C. App. —, 284 S.E.2d 690 (1981).

§ 20-166.1. Reports and investigations required in event of collision.

CASE NOTES

Cited in State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842 (1981).

Part 12. Sentencing; Penalties.

§ 20-179. Penalty for driving or operating vehicle while under the influence of alcoholic beverages, narcotic drugs, or other impairing drugs; limited driving permits for first offenders.

OPINIONS OF ATTORNEY GENERAL

Subdivision (b)(1) of this section prohibits the issuance of a limited driving privilege if the defendant has a prior conviction of §§ 20-138 or 20-139 within the preceding seven years. See opinion of Attorney General to Mr. James W. Copeland, Jr., Assistant District Attorney, Eighth Judicial District, 50 N.C.A.G. 89 (1981).

§ 20-179.2. Alcohol and drug education traffic schools curriculum approved by Commission for Mental Health, Mental Retardation and Substance Abuse Services; responsibilities of the Department of Human Resources; fees.

(a) The Commission for Mental Health, Mental Retardation and Substance Abuse Services shall establish standards and guidelines for the curriculum and operation of local alcohol and drug education traffic school programs. The Department shall oversee the development of a statewide system of schools and shall insure that schools are available in all localities of the State as soon as is practicable.

(1) A fee of one hundred dollars ($100.00) shall be paid by all persons enrolling in an Alcohol and Drug Education Traffic School program established pursuant to this section. That fee must be paid to an official designated for that purpose and at a time and place specified by the Area Mental Health, Mental Retardation and Substance Abuse Authority providing the course of instruction in which the person is enrolled, except that if the clerk of court in the county in which the person is convicted agrees to collect the fees, the clerk shall collect all fees for persons convicted in that county. The clerk shall pay the fees collected to the area mental health, mental retardation and substance abuse authority for the catchment area where the clerk is located regardless of the location where the defendant attends the Alcohol and Drug Education Traffic School and that authority shall distribute the funds in accordance with the rules and regulations of the Department. The fee must be paid in full within two weeks of the date the person is convicted and before he attends any classes, unless the court, upon

a showing of reasonable hardship, allows the person additional time to pay the fee or allows him to begin the course of instruction without paying the fee. If the person enrolling in the school demonstrates to the satisfaction of the court that ordered him to enroll in the school that he is unable to pay and his inability to pay is not willful, the court may excuse him from paying the fee.

(2) The Department of Human Resources shall have the authority to approve programs to be implemented by area mental health authorities. Area mental health authorities may subcontract for the delivery of Alcohol and Drug Education Traffic School program services. The Department shall have the authority to approve budgets and contracts with public and private governmental and nongovernmental bodies for the operation of such schools.

(3) Fees collected under this section and retained by Area Mental Health, Mental Retardation, and Substance Abuse Authorities shall be placed in a nonreverting fund. That fund must be used, as necessary, for the operation, evaluation and administration of Alcohol and Drug Education Traffic School programs; excess funds may only be used to fund other drug or alcohol programs. Area authorities shall remit five percent (5%) of each fee collected to the Department of Human Resources on a monthly basis. Fees received by the Department as required by this section may only be used in supporting, evaluating, and administering Alcohol and Drug Education Traffic Schools, and any excess funds will revert to the General Fund.

(4) All fees collected by the area mental health, mental retardation, and substance abuse authorities under the authority of this section may not be used in any manner to match other State funds or to be included in any computation for State formula-funded allocations.

Editor's Note. — Subsection (a) of this section is set out to include subdivision (a)(2), which was omitted through error in the 1981 Cumulative Supplement.

Only Part of Section Set Out. — As subsection (b) was not affected by the error, it is not set out.

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.

CASE NOTES

Cited in State v. Fearing, — N.C. —, 284 S.E.2d 487 (1981).

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

Legal Periodicals. — For comment on the warrantless "search within a search" of containers in motor vehicles, see 17 Wake Forest L. Rev. 425 (1981).

ARTICLE 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

§ 20-183.3. Inspection requirements.

(b) When required pursuant to G.S. 20-128.2, and as a condition for approval certificate issuance under subsection (a) of this section, exhaust emissions shall be inspected and shall comply with those standards established pursuant to G.S. 20-128.2 on gasoline-powered vehicles manufactured within the previous 12 years which shall exclude the current year model and, to this end, the Commissioner of Motor Vehicles is authorized to adopt and enforce such rules and regulations as may be necessary to carry out the intent and purpose of this section. Provided that motorcycles as defined in G.S. 20-4.01(22) and G.S. 20-4.01(27)d shall not be subject to the requirements of this subsection. (1965, c. 734, s. 1; 1969, c. 378, s. 2; 1971, c. 455, s. 2; c. 478, ss. 1, 2; 1979, 2nd Sess., c. 1180, s. 3; 1981 (Reg. Sess., 1982), c. 1261, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "exclude" for "include" in the first sentence of subsection (b) and added the second sentence of that subsection.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 20-183.7. Charges for inspections and certificates; safety equipment inspection station records.

(c) Fees collected for inspection certificates shall be paid to the Division of Motor Vehicles in accordance with its regulations and shall be periodically transferred as follows:

(1) The sixty cents (60¢) fee collected pursuant to subsection (a) shall be transferred to the Highway Fund.

(2) The fee of not less than sixty cents (60¢) nor more than two dollars ($2.00) collected pursuant to subsection (a1) shall be transferred as follows: the first thirty-five cents (35¢) to the Division of Environmental Management, and any excess up to one dollar and sixty-five cents ($1.65) to the Highway Fund.

(1981 (Reg. Sess., 1982), c. 1261, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "sixty cents (60¢)" for "thirty-five cents (35¢)" and "thirty-five cents (35¢)" for "sixty cents (60¢)" in subdivision (c)(2).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 4.

State Highway Patrol.

§ 20-187.2. Badges and service side arms of deceased or retiring members of State, city and county law-enforcement agencies; revolvers of active members.

OPINIONS OF ATTORNEY GENERAL

Badge to Be Given to Officers Retiring on Disability. — Subsection (a) of this section requires law enforcement agencies to give an officer retiring upon disability retirement, with less than 20 years creditable service or only with five years creditable service, the badge worn by the officer. See opinion of Attorney General to Mr. Robert F. Thomas, Jr., Police Attorney, City of Charlotte, 50 N.C.A.G. 77 (1981).

ARTICLE 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-219.2. Removal of unauthorized vehicles from private lots.

(c) This section shall apply only to the Counties of Craven, Dare, Forsyth, Gaston, Guilford, New Hanover, Orange, Robeson, Wake, Wilson and to the Cities of Durham, Charlotte and Fayetteville. (1969, cc. 173, 288; 1971, c. 986; 1973, c. 183; c. 981, s. 1; c. 1330, s. 36; 1975, c. 575; 1979, c. 380; 1979, 2nd Sess., c. 1119; 1981 (Reg. Sess., 1982), c. 1251, s. 3.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment substituted "Durham, Charlotte and Fayetteville" for "Durham and Charlotte" at the end of subsection (c).

Only Part of Section Set Out. — As subsections (a) and (b) were not changed by the amendment, they are not set out.

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.21. "Motor vehicle liability policy" defined.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1060 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in Love v. Moore, — N.C. —, 291 S.E.2d 141 (1982).

Stated in Love v. Moore, 54 N.C. App. 406, 283 S.E.2d 801 (1981).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-288. Application for license; information required and considered; expiration of license; supplemental license; bond.

CASE NOTES

Constitutionality. — Subsection (e) is not unconstitutional in that it unreasonably restricts plaintiff's right to engage in his occupation of manufacturing trailers, since the complexities surrounding the sale, dealer servicing, warranties, financing, titling and registration of motor vehicles makes their distribution a business which easily could be conducted so as to become a medium of fraud and dishonesty; where a business easily can be conducted so as to become a medium of fraud and dishonesty, the State's power to regulate such a business includes the right to require a bond or security for the faithful performance of the obligations incident to the business; and the regulation complained of in this case is based upon reasonable grounds, is not arbitrary, and is therefore a proper exercise of the State's police power. Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283, appeal dismissed, 303 N.C. 543, 281 S.E.2d 391 (1981).

The exemption of manufacturers and dealers of trailers of less than 4,000 pounds empty weight from the bonding requirement of this section does not deny equal protection of the law, since, under North Carolina law, trailers weighing less than 4,000 pounds are exempt from brake requirements, directional signals, lighting requirements, and clearance lamps; smaller trailers cost less, are of simpler construction, and involve warranty problems of less magnitude; and the difference in treatment between trailers over 4,000 pounds and trailers less than 4,000 pounds therefore has a reasonable basis in relation to the purpose of the statute in question. Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283, appeal dismissed, 303 N.C. 543, 281 S.E.2d 391 (1981).

§ 20-301. Powers of Commissioner.

CASE NOTES

Quoted in Sandhill Motors, Inc. v. American Motors Sales Corp., 667 F.2d 1112 (4th Cir. 1981).

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

Legal Periodicals. — For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

CASE NOTES

Applied in Sandhill Motors, Inc. v. American Motors Sales Corp., 667 F.2d 1112 (4th Cir. 1981).

§ 20-305.3. Hearing notice.

CASE NOTES

Quoted in Sandhill Motors, Inc. v. American Motors Sales Corp., 667 F.2d 1112 (4th Cir. 1981).

ARTICLE 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-310. Grounds and procedure for cancellation or nonrenewal of a motor vehicle liability insurance policy; review by Commissioner of Insurance.

CASE NOTES

This section governs only termination of liability coverage; collision coverage is not governed by this section. Scott v. Allstate Ins. Co., — N.C. App. —, 291 S.E.2d 277 (1982).

ARTICLE 15.

Vehicle Mileage Act.

§ 20-340. Purpose.

CASE NOTES

Cited in Miller v. Triangle Volkswagen, Inc., — N.C. App. —, 286 S.E.2d 608 (1982).

§ 20-343. Unlawful change of mileage.

CASE NOTES

Effect of 1979 Amendment. — The 1979 amendment to this section is a procedural statute establishing a prima facie case upon the presentation of the required evidence; it does not alter the substantive law but is solely procedural, not affecting any vested rights of defendant. Duffer v. Royal Dodge, Inc., 51 N.C. App. 129, 275 S.E.2d 206 (1981).

§ 20-346. Lawful service, repair, or replacement of odometer.

CASE NOTES

Cited in Miller v. Triangle Volkswagen, Inc., — N.C. App. —, 286 S.E.2d 608 (1982).

§ 20-347. Disclosure requirements.

CASE NOTES

Applied in Duffer v. Royal Dodge, Inc., 51 N.C. App. 129, 275 S.E.2d 206 (1981).

§ 20-348. Private civil action.

(b) An action to enforce any liability created under subsection (a) of this section may be brought in any court of the trial division of the General Court of Justice of the State of North Carolina within four years from the date on which the liability arises. (1973, c. 679, s. 1; 1981 (Reg. Sess., 1982), c. 1280, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "four years" for "two years" in subsection (b).

Session Laws 1981 (Reg. Sess., 1982), c. 1280, s. 2, provides: "This act is effective upon ratification (June 22, 1982), and shall apply to every cause of action not already barred."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Chapter 22.

Contracts Requiring Writing.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.

CASE NOTES

I. IN GENERAL.

Applied in Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556 (1981); Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 54 N.C. App. 46, 283 S.E.2d 155 (1981).

§ 22-2. Contract for sale of land; leases.

CASE NOTES

I. IN GENERAL.

Applied in Wright v. Wright, — N.C. —, 289 S.E.2d 347 (1982).

Quoted in Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981).

Cited in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

What the Writing Must Contain. —

To qualify as a memorandum to take an oral lease out of the statute of frauds, the writing must, at the very least, show all of the essential elements of the agreement, and those elements set out in the writing must not contradict the terms of the oral lease sought to be proved. Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, aff'd and modified, 303 N.C. 675, 281 S.E.2d 43 (1981).

It is not necessary for all the provisions of a contract to be set out in a single instrument. The memorandum required by the statute is sufficient if the contract provisions can be determined from separate but related writings. The writings must disclose, at least with sufficient definiteness to be aided by parol, the terms of the contract, the names of the parties, and a description of the property. Fuller v. Southland Corp., — N.C. App. —, 290 S.E.2d 754 (1982).

Essentials of Lease. — The essentials of a lease which must be disclosed in the memorandum with sufficient definiteness to be aided by parol evidence are: (1) the parties' names (lessor and lessee), (2) a description of the realty demised, (3) a statement of the term of the lease, and (4) the rent or other consideration. Additionally a memorandum of lease must be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. Fuller v. Southland Corp., — N.C. App. —, 290 S.E.2d 754 (1982).

When Patent Ambiguity Exists. —

In accord with original. See Taefi v. Stevens, 53 N.C. App. 579, 281 S.E.2d 435, petition for discretionary review denied, — N.C. —, 285 S.E.2d 837 (1981).

Latent Ambiguity in Description. —

In accord with 2nd paragraph in 1981 Cum. Supp. See Taefi v. Stevens, 53 N.C. App. 579, 281 S.E.2d 435, petition for discretionary review denied, — N.C. —, 285 S.E.2d 837 (1981).

Parol Evidence of Parties' Intentions. — Where certain exhibits are found to be insufficiently related to one another by "internal reference" for consideration as a portion of a memorandum of lease under this section, they may be considered as parol evidence of the parties' intentions where the terms of the memorandum are ambiguous. Fuller v. Southland Corp., — N.C. App. —, 290 S.E.2d 754 (1982).

Evidence of Preliminary Negotiations or Understanding of Parties. — The legal effect of a final instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by proof of any

preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an allegation of fraud or mistake or unless the terms of the instrument itself are ambiguous and require explanation. Fuller v. Southland Corp., — N.C. App. —, 290 S.E.2d 754 (1982).

Chapter 24.

Interest.

Article 1.

General Provisions.

Sec.
24-1.1C. Manufactured home loans; variable interest rate loans authorized.

ARTICLE 1.

General Provisions.

§ 24-1. Legal rate is eight percent.

CASE NOTES

Cited in Gillespie v. DeWitt, 53 N.C. App. 252, 280 S.E.2d 736 (1981); Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

§ 24-1.1. Contract rates.

Editor's Note. — In the historical citation at the end of this section as set out in the 1981 Cumulative Supplement, "1981, c. 465, s. 1" should be substituted for "1981, c. 464, s. 1."

CASE NOTES

Applied in Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360 (1981).

§ 24-1.1C. Manufactured home loans; variable interest rate loans authorized.

(a) For the purposes of this section, the terms listed herein shall have the following meanings:

(1) "Lender" means a person regularly engaged in the business of selling or financing manufactured homes (i) who is an arranger of credit, or (ii) who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment) and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

(2) "Interest" means finance charge expressed as an annual percentage rate. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the borrower or imposed directly or indirectly by the lender as an incident to or a condition of the extension of credit.

(3) "Manufactured home" shall mean a mobile home, as defined in G.S. 143-145(7), which is used as a residence, whether or not the home is affixed to real property.

(4) "Manufactured home loan" shall include both the credit sale of a manufactured home and a direct loan used to finance the purchase of a manufactured home, in which the seller or lender is secured by:

a. A security interest which is the first lien on a manufactured home and any personal property sold therewith as part of the home,
b. A first or second mortgage or deed of trust on real estate, or
c. A combination of these financing methods.

(b) A manufactured home loan may provide for a fixed rate of interest payable in substantially equal successive installments over a fixed term, or a manufactured home loan may provide that the rate of interest may be adjusted at certain regular intervals. In this latter event, the manufactured home loan shall be subject to the following provisions:

(1) Adjustments in the interest rate charged must be based on changes in a specific index, as set forth in the loan agreement, with the index base being fixed by the value of the index on the first day of the month in which the loan agreement is dated. The index may be only:
a. The monthly average yield on United States Treasury securities adjusted to a constant maturity of five years; or
b. An index expressly approved by the Federal Home Loan Bank Board or by the Office of the Comptroller of the Currency, Department of the Treasury, for adjustable or variable interest rates on residential mortgage loans.

(2) Adjustments to the interest rate may not exceed one-half of one percent (½ of 1%) a year for any six-month period. If the stated regular interval for rate adjustments is a twelve-month period, or longer, rate adjustments may not exceed one percent (1%) a year.

(3) The rate of interest shall not increase or decrease during the six-month period beginning with the date of execution of the loan agreement, and at least six months shall elapse between changes.

(4) Adjustments (either up or down) to the rate of interest on each adjustment date shall, for the initial adjustment, be equal to the difference between the index value in effect on the first day of the second month preceding the adjustment date and the index value in effect on the first day of the month in which the loan is executed. For adjustments after the initial adjustment, adjustments shall be equal to the difference between the index value in effect on the first day of the second month preceding the adjustment date and the index value in effect on the first day of the second month preceding the date of the immediately preceding rate adjustment.

(5) Any increase in the rate of interest permitted by this section is optional with the lender. Decreases in the rate of interest are mandatory whenever the total decrease in the index value equals or exceeds one-fourth of one percentage point.

(5a) Any changes in the index which are not reflected in a rate adjustment may, by agreement of the parties, be carried over to subsequent rate adjustment periods, and, subject to the provisions of paragraph (b)(5) above, be implemented to the extent not offset by opposite movement in the index.

(6) By agreement of the parties, adjustments to the rate of interest may result in changes in the amount of regular installment payments due under the loan agreement, or in changes in the term of the loan agreement, or in a combination of such changes in amount and term.

(7) A lender shall allow a borrower to prepay in whole or in part at any time without a prepayment penalty.

(8) A lender may not charge any fees to, or assess any costs against, a borrower in connection with the processing of any rate adjustment, term adjustment or combination of rate and term adjustment.

(9) Before execution of a manufactured home loan agreement, the lender shall comply with all applicable requirements and disclosures pursuant to Part I of the Consumer Protection Act (Truth-In-Lending Act)

15 USC § 1601, et seq., as amended, and as implemented by Regulation Z promulgated by the Board of Governors of the Federal Reserve System. The required disclosures shall be made on the basis of the rate of interest in effect at the time the disclosure is made, assuming that each scheduled payment is made on the date it is due and in the scheduled amount. Such disclosures shall include the following information:

a. The circumstances under which the rate may increase;
b. Any limitations on the increase;
c. The effect of an increase; and
d. An example of the payment terms that would result from an increase.

(10) The lender shall send written notification of any rate adjustment, by first class mail, postage prepaid, at least one month before the date that the new rate of interest will take effect. The notification shall comply with all applicable requirements of Part I of the Consumer Protection Act (Truth-In-Lending Act) 15 USC § 1601, et seq., as amended, and as implemented by Regulation Z promulgated by the Board of Governors of the Federal Reserve System. Such notification shall include:

a. The current and new rates of interest;
b. The index value for the month during which the manufactured home loan agreement was executed or, for adjustments after the initial adjustment, the index value used for the immediately preceding rate adjustment, and the index value used to calculate the new change in the rate of interest; and
c. The amounts of new installment payments, if any, and the remaining maturity.

(c) The provisions of Chapter 25A, the Retail Installment Sales Act shall apply to a variable rate consumer credit sale of a manufactured home, provided that:

(1) A variable rate manufactured home loan shall be subject to Chapter 25A except for G.S. 25A-33(4);
(2) The provisions of this section shall control, where inconsistent with the provisions of Chapter 25A (G.S. 25-34 shall not be construed to limit variation in regular monthly payment amounts on loans under this section.); and
(3) Interest charges on variable rate manufactured home loans shall be computed and paid periodically as a percentage of the unpaid principal balance. This percentage may be computed for any period as the number of days actually elapsed, times the effective annual percentage rate, divided by 365; or this percentage may be computed monthly as the number of days elapsed based upon an assumption that every month has 30 days, times the effective annual percentage rate, divided by 360. In either case, scheduled monthly payments may assume a 30-day month. Payments may be applied first to accrued interest, then to principal. No default charge shall be assessed on loans under this section.
(4) Nothing in this section shall be construed to alter the federal preemption allowing unlimited interest rate ceilings as they apply to first mortgage loans. (1981, c. 970, s. 1; 1981 (Reg. Sess., 1982), c. 1196, ss. 1-5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subdivision (a)(2) inserted "by the borrower or imposed directly or indirectly" following "payable directly or indirectly" in the third sentence. In subsection (b), the amendment substituted "in effect on the first day of the second month" for "for the third calendar month" and "in effect on the first day

of the month in which the loan is executed" for "on the date of execution of the manufactured home loan" in the first sentence of subdivision (4), substituted "in effect on the first day of the second month" for "for the third month" in two places in the last sentence of subdivision (4) and added subdivision (5a). In subsection (c), the amendment substituted "a variable rate" for "the" preceding "consumer credit sale" in the introductory language and inserted "variable rate" preceding "manufactured home" in subdivision (1) and, in subdivision (3), inserted "variable rate" preceding "manufactured home loans" in the first sentence, divided the former second sentence into the present second and third sentences, in the present second sentence substituted "may be computed for any period" for "shall be computed" and added the language beginning "or this percentage may be computed," and in the present third sentence inserted "In either case," at the beginning thereof.

§ 24-2. Penalty for usury; corporate bonds may be sold below par.

CASE NOTES

I. GENERAL CONSIDERATION.

Forbearance of Debt, etc. —

In accord with 1st paragraph in original. See Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360, aff'd, 304 N.C. 191, 283 S.E.2d 101 (1981).

Forbearance Defined. — For the purpose of applying the law of usury to a given transaction in order to determine its applicability, the term "forbearance" means the contractual obligation of a lender or creditor to refrain for a given period of time from requiring the borrower or debtor to repay the loan or debt which is then due and payable. Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360, aff'd, 304 N.C. 191, 283 S.E.2d 101 (1981).

That Is, Intentional Charging of More, etc. —

In accord with original. See Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360, aff'd, 304 N.C. 191, 283 S.E.2d 101 (1981).

II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

A. General Doctrine.

Form of Transaction Cannot Conceal, etc. —

When there is an allegation that the usury laws have been violated by a particular act or course of conduct, the courts of North Carolina will not hesitate to look beneath the formality of the activity to determine whether such an incident is, in fact, usurious. Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360, aff'd, 304 N.C. 191, 283 S.E.2d 101 (1981).

B. Specific Instances.

A bona fide credit sale, etc. —

If there is a bona fide purchase of property as opposed to a subterfuge to conceal a loan at a usurious rate, then the usury laws have no application whatsoever, even though the sale is made at an exorbitant price. The reason for the recognition of the time-price doctrine is manifest: The usury laws are directed at the extraction of more than the legal rate of interest for the use of money, and a purchaser can refrain from paying the price asked by the seller if he so chooses. Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360, aff'd, 304 N.C. 191, 283 S.E.2d 101 (1981).

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

Editor's Note. — The catchline to this section as set out above corrects an error in the 1981 Cumulative Supplement.

CASE NOTES

Applied in Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897 (1981); Gillespie v. DeWitt, 53 N.C. App. 252, 280 S.E.2d 736 (1981).

Stated in Lalanne v. Lalanne, 52 N.C. App. 558, 279 S.E.2d 25 (1981).

Chapter 25.

Uniform Commercial Code.

Article 1.

General Provisions.

PART 1.

Short Title, Construction, Application and Subject Matter of the Act.

§ 25-1-101. Short title.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1076 (1981).

CASE NOTES

Cited in American Clipper Corp. v. Howerton, 51 N.C. App. 539, 277 S.E.2d 136 (1981); Gillespie v. DeWitt, 53 N.C. App. 252, 280 S.E.2d 736 (1981).

§ 25-1-103. Supplementary general principles of law applicable.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

PART 2.

General Definitions and Principles of Interpretation.

§ 25-1-201. General definitions.

CASE NOTES

"Signed". —
The correct citation to the case cited under this catchline in the 1981 Cumulative Supplement is 36 N.C. App. 401, 245 S.E.2d 510, cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

§ 25-1-203. Obligation of good faith.

Legal Periodicals. — For discussion of the limitations on the obligation of good faith, see 4 Duke Law J. 619 (1981).

§ 25-1-207. Performance or acceptance under reservation of rights.

Legal Periodicals. — For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1076 (1981).

ARTICLE 2.

Sales.

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-103. Definitions and index of definitions.

CASE NOTES

Cited in Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

§ 25-2-104. Definitions: "Merchant"; "between merchants"; "financing agency."

CASE NOTES

Whether a person is a merchant is a question of law. Cudahy Foods Co. v. Holloway, — N.C. App. —, 286 S.E.2d 606 (1982).

Focus in Determining Who Is Merchant. — The mere fact that one is "in business" does not, without more, give rise to the conclusive presumption that by his occupation, the businessman holds himself out as having knowledge peculiar to the practices involved in the transaction. The focus remains on the occupation or type of business as it relates to the subject matter of the transaction. Cudahy Foods Co. v. Holloway, — N.C. App. —, 286 S.E.2d 606 (1982).

Isolated Purchase Unrelated to Buyer's Business. — The familiarity with trade customs test is not so broad as to extend to the isolated purchase of a type of goods unrelated and unnecessary to the business or occupation of the buyer. Cudahy Foods Co. v. Holloway, — N.C. App. —, 286 S.E.2d 606 (1982).

Stated in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

Cited in Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

§ 25-2-105. Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit."

CASE NOTES

The term "goods" includes an automobile within the meaning of this section. Gillespie v. American Motors Corp., 51 N.C. App. 535, 277 S.E.2d 100 (1981).

But Not Real Estate. — Real estate does not fall under the definition of "goods." Cudahy Foods Co. v. Holloway, — N.C. App. —, 286 S.E.2d 606 (1982).

Stated in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

§ 25-2-106. Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation."

CASE NOTES

Stated in Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

PART 2.

Form, Formation and Readjustment of Contract.

§ 25-2-201. Formal requirements; statute of frauds.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

CASE NOTES

This section applies only to executory contracts and not to executed contracts. Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 54 N.C. App. 46, 283 S.E.2d 155 (1981).

The purpose of subsection (2) of this section is to rectify an abuse that had developed in the law of commerce. The custom arose among business people of confirming oral contracts by sending a letter of confirmation. This letter was binding as a memorandum on the sender, but not on the recipient, because he had not signed it. The abuse was that the recipient, not being bound, could perform or not, according to his whim and the market, whereas the seller had to perform. Cudahy Foods Co. v. Holloway, — N.C. App. —, 286 S.E.2d 606 (1982).

Cited in Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981); Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

§ 25-2-207. Additional terms in acceptance or confirmation.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

§ 25-2-208. Course of performance or practical construction.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

§ 25-2-209. Modification, rescission and waiver.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

PART 3.

General Obligation and Construction of Contract.

§ 25-2-302. Unconscionable contract or clause.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

§ 25-2-313. Express warranties by affirmation, promise, description, sample.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

CASE NOTES

Question of Fact. — Whether the parties to the transaction have created an express warranty is a question of fact. Pake v. Byrd, — N.C. App. —, 286 S.E.2d 588 (1982).

Central Issue. — The single most important decision to make is whether the seller's statements were so regarded by the buyer as part of his reason for purchasing the goods. Pake v. Byrd, — N.C. App. —, 286 S.E.2d 588 (1982).

The seller's warranty is not his personal guarantee concerning the continuous and future operation of the goods which he has sold. Pake v. Byrd, — N.C. App. —, 286 S.E.2d 588 (1982).

Neither Formal Words Nor Intent Necessary. — Neither the formal words of an express warranty nor the seller's intent to afford such a warranty is necessary to fulfill the requirements of this section. Pake v. Byrd, — N.C. App. —, 286 S.E.2d 588 (1982).

Effect of Examination by Buyer. — An examination by the buyer of goods does not necessarily discharge the seller from an express warranty if the defect was one which could not be located by the buyer. Pake v. Byrd, — N.C. App. —, 286 S.E.2d 588 (1982).

Secondhand goods may have an express warranty attached to them, and the warranty provisions are applied without regard to whether the seller is a manufacturer, merchant, or farmer. Pake v. Byrd, — N.C. App. —, 286 S.E.2d 588 (1982).

Under the following circumstances, defendants expressly warranted that, at the time of the sale, a used tractor was in good condition and free from major mechanical defects: (1) Defendants had superior knowledge of the subject matter; (2) the circumstances were such that the plaintiff, as a reasonable man, was entitled to rely on the defendants' statements; and (3) the statements were a part of the basis of the bargain. Pake v. Byrd, — N.C. App. —, 286 S.E.2d 588 (1982).

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1084 (1981).

CASE NOTES

What Plaintiff Must Show. —
To present a prima facie case of breach of implied warranty under this section plaintiff must produce any evidence more than a scintilla (1) that an implied warranty covered the goods in question, (2) that the seller breached the warranty in that the goods were not merchantable at the time of sale, and (3) that the breach proximately caused the injury and loss sustained by plaintiff. Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

§ 25-2-315. Implied warranty: Fitness for particular purpose.

CASE NOTES

Stated in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981); Arrington v. Brad Ragan, Inc., — N.C. App. —, 289 S.E.2d 122 (1982).

§ 25-2-316. Exclusion or modification of warranties.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1084 (1981).

CASE NOTES

Applied in Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981).
Cited in Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

§ 25-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.

Legal Periodicals. —
The correct citation to the note referred to in the 1981 Cumulative Supplement is 13 Wake Forest L. Rev. 522.

PART 4.

TITLE, CREDITORS AND GOOD FAITH PURCHASES.

§ 25-2-401. Passing of title; reservation for security; limited application of this section.

CASE NOTES

Transfer of Ownership of Motor Vehicle. —

Although this section provides that the provisions of the Uniform Commercial Code apply to the rights and liabilities of parties to a sales transaction "irrespective of title to the goods," the motor vehicle certificate of title statutes, including § 20-52.1, still have vitality and are not implicitly replaced by the adoption of the Uniform Commercial Code. American Clipper Corp. v. Howerton, 51 N.C. App. 539, 277 S.E.2d 136 (1981).

PART 5.

PERFORMANCE.

§ 25-2-504. Shipment by seller.

CASE NOTES

"Prompt Notice" Generally. — The requirement of prompt notification by the seller, as used in this section, must be construed as taking into consideration the need of a buyer to be informed of the shipment in sufficient time for him to take action to protect himself from the risk of damage to or loss of the goods while in transit. Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981).

Relationship Between Prompt Notice and Risk of Loss. — Seller's failure to notify the buyer of shipment of wine from Germany until after the sailing of the ship and the ensuing loss, was not "prompt notice" within the meaning of this section, and therefore, the risk of loss did not pass to the buyer upon the delivery of the wine to the carrier pursuant to the provisions of § 25-2-509(1)(a). Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981).

§ 25-2-509. Risk of loss in the absence of breach.

CASE NOTES

Buyer Must Have Reasonable Opportunity to Guard Against Risks. — Where the buyer, upon shipment by seller, assumes the perils involved in carriage, he must have a reasonable opportunity to guard against these risks by independent arrangements with the carrier. Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981).

Relationship Between Prompt Notice and Risk of Loss. — Seller's failure to notify the buyer of shipment of wine from Germany until after the sailing of the ship and the ensuing loss, was not "prompt notice" within the meaning of § 25-2-504, and therefore, the risk of loss did not pass to the buyer upon the delivery of the wine to the carrier pursuant to the provisions of subdivision (1)(a) of this section. Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981).

PART 6.

BREACH, REPUDIATION AND EXCUSE.

§ 25-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

CASE NOTES

Cited in Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

§ 25-2-608. Revocation of acceptance in whole or in part.

CASE NOTES

Acceptance of goods without discovery of nonconformities must be judged in the light of whether such acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances. Wright v. O'Neal Motors, Inc., — N.C. App. —, 291 S.E.2d 165 (1982).

Significant nonavailability of goods may relate to the question of substantial impairment of value. Wright v. O'Neal Motors, Inc., — N.C. App. —, 291 S.E.2d 165 (1982).

Stated in Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981).

§ 25-2-610. Anticipatory repudiation.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

§ 25-2-612. "Installment contract"; breach.

CASE NOTES

Cited in Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 304 N.C. 174, 282 S.E.2d 426 (1981).

§ 25-2-614. Substituted performance.

Legal Periodicals. — For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

§ 25-2-615. Excuse by failure of presupposed conditions.

Legal Periodicals. —
For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

PART 7.

REMEDIES.

§ 25-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

Legal Periodicals. — For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

CASE NOTES

Stated in Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981).

§ 25-2-712. "Cover"; buyer's procurement of substitute goods.

CASE NOTES

Damages Not Barred by Failure to Cover. — In a breach of contract action in which plaintiff contended that he justifiably revoked his acceptance of a latches order from defendant after he had paid part of the purchase price and that he properly "covered" by procuring substitute latches for those ordered by defendant, the trial court erred in charging the jury that they would have to find that there had been a justifiable revocation and "cover" to award damages to plaintiff, since damages for "cover" are damages to which plaintiff would be entitled in addition to so much of the purchase price as he had paid if the jury should find that plaintiff "covered" after properly revoking its acceptance. Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981).

§ 25-2-714. Buyer's damages for breach in regard to accepted goods.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1084 (1981).

CASE NOTES

Under this section, the general measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 290 S.E.2d 710 (1982).

§ 25-2-719. Contractual modification or limitation of remedy.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1084 (1981).

§ 25-2-725. Statute of limitations in contracts for sale.

CASE NOTES

Applied in Gillespie v. American Motors Corp., 51 N.C. App. 535, 277 S.E.2d 100 (1981).

ARTICLE 3.

Commercial Paper.

PART 1.

SHORT TITLE, FORM AND INTERPRETATION.

§ 25-3-104. Form of negotiable instruments; "draft"; "check"; "certificate of deposit"; "note."

CASE NOTES

Agreement Establishing Only Ceiling on Liability. — An agreement signed by defendant which guaranteed the payment of "any and all indebtedness, liabilities and obligations of every nature and kind of said debtor to the extent of $30,000" was not a negotiable instrument since it did not contain an unconditional promise to pay a sum certain but only established a ceiling on the amount of the guarantor's liability. Gillespie v. DeWitt, 53 N.C. App. 252, 280 S.E.2d 736, petition for discretionary review denied, — N.C. —, 285 S.E.2d 832 (1981).

§ 25-3-106. Sum certain.

Legal Periodicals. — For note on contractual allocation of attorneys' fees as costs of litigation, see 17 Wake Forest L. Rev. 457 (1981).

§ 25-3-108. Payable on demand.

CASE NOTES

A loan made on oral terms before the parties agree as to the time and manner of repayment is payable within a reasonable time rather than on demand, and the plaintiff has the burden of showing that a reasonable time for repayment has expired. Helms v. Prikopa, 51 N.C. App. 50, 275 S.E.2d 516 (1981).

PART 3.

RIGHTS OF A HOLDER.

§ 25-3-302. Holder in due course.

CASE NOTES

Cited in First Citizens Bank & Trust Co. v. Holland, 51 N.C. App. 529, 277 S.E.2d 108 (1981).

§ 25-3-305. Rights of a holder in due course.

CASE NOTES

Quoted in Northwestern Bank v. Moretz, — N.C. App. —, 289 S.E.2d 614 (1982).

Cited in First Citizens Bank & Trust Co. v. Holland, 51 N.C. App. 529, 277 S.E.2d 108 (1981).

§ 25-3-306. Rights of one not holder in due course.

CASE NOTES

Stated in Northwestern Bank v. Moretz, — N.C. App. —, 289 S.E.2d 614 (1982).

PART 4.

LIABILITY OF PARTIES.

§ 25-3-401. Signature.

Legal Periodicals. — For note discussing direct drawer suits against collecting parties for loss arising from unauthorized checks, see 17 Wake Forest L. Rev. 844 (1981).

§ 25-3-406. Negligence contributing to alteration or unauthorized signature.

Legal Periodicals. — For note discussing direct drawer suits against collecting parties for loss arising from unauthorized checks, see 17 Wake Forest L. Rev. 844 (1981).

§ 25-3-415. Contract of accommodation party.

CASE NOTES

Applied in Lowe v. Peeler, 51 N.C. App. 557, 277 S.E.2d 102 (1981).

§ 25-3-418. Finality of payment or acceptance.

Legal Periodicals. — For note discussing direct drawer suits against collecting parties for loss arising from unauthorized checks, see 17 Wake Forest L. Rev. 844 (1981).

PART 8.

MISCELLANEOUS.

§ 25-3-802. Effect of instrument on obligation for which it is given.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1076 (1981).

ARTICLE 4.

Bank Deposits and Collections.

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

§ 25-4-105. "Depositary bank"; "intermediary bank"; "collecting bank"; "payor bank"; "presenting bank"; "remitting bank."

Legal Periodicals. — For note discussing direct drawer suits against collecting parties for loss arising from unauthorized checks, see 17 Wake Forest L. Rev. 844 (1981).

PART 4.

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.

§ 25-4-401. When bank may charge customer's account.

Legal Periodicals. — For note discussing direct drawer suits against collecting parties for loss arising from unauthorized checks, see 17 Wake Forest L. Rev. 844 (1981).

§ 25-4-406. Customer's duty to discover and report unauthorized signature or alteration.

Legal Periodicals. — For note discussing direct drawer suits against collecting parties for loss arising from unauthorized checks, see 17 Wake Forest L. Rev. 844 (1981).

ARTICLE 5.

Letters of Credit.

§ 25-5-101. Short title.

CASE NOTES

Applied in Sunset Inv., Ltd. v. Sargent, 52 N.C. App. 284, 278 S.E.2d 558 (1981).

§ 25-5-102. Definitions and index of definitions.

CASE NOTES

Credits Separate from Underlying Contracts. — Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts. Sunset Inv., Ltd. v. Sargent, 52 N.C. App. 284, 278 S.E.2d 558, cert. denied, 303 N.C. 550, 281 S.E.2d 401 (1981).

The basic aspect of the successful use of letters of credit lies in recognizing at the threshold that every letter of credit involves separate and distinct contracts; and that the contract between the issuing bank and the beneficiary to pay money to the beneficiary upon demand (and documentation if called for) must be kept chaste — independent of the underlying contract between the purchaser of the letter and the beneficiary. Sunset Inv., Ltd. v. Sargent, 52 N.C. App. 284, 278 S.E.2d 558, cert. denied, 303 N.C. 550, 281 S.E.2d 401 (1981).

§ 25-5-114. Issuer's duty and privilege to honor; rights to reimbursement.

CASE NOTES

Quoted in Sunset Inv., Ltd. v. Sargent, 52 N.C. App. 284, 278 S.E.2d 558 (1981).

Article 7.

Warehouse Receipts, Bills of Lading and Other Documents of Title.

PART 1.

General.

§ 25-7-101. Short title.

Cross References. — As to application or nonapplication of this Article to self-service storage facilities, see § 44A-40, subdivision (7).

PART 2.

Warehouse Receipts: Special Provisions.

§ 25-7-210. Enforcement of warehouseman's lien.

OPINIONS OF ATTORNEY GENERAL

A Warehouseman with Liens, etc. — The correct citation to the opinion of the Attorney General cited under this catchline in the 1981 Cumulative Supplement is 48 N.C.A.G. 111.

Article 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

PART 1.

Short Title, Applicability and Definitions.

§ 25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory."

CASE NOTES

Quoted in Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

PART 3.

RIGHTS OF THIRD PARTIES; PERFECTED AND UNPERFECTED SECURITY INTERESTS; RULES OF PRIORITY.

§ 25-9-301. Persons who take priority over unperfected security interests; rights of "lien creditor."

CASE NOTES

Cited in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981).

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.

CASE NOTES

Cited in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981).

§ 25-9-307. Protection of buyers of goods.

CASE NOTES

Cited in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981).

PART 4.

FILING.

§ 25-9-406. Release of collateral; duties of filing officer; fees.

CASE NOTES

Notice to Debtor Not Required. — This section does not require notice to the debtors by the creditor of any action taken pursuant to the section. Southern Disct. Co. v. Ivey, 13 B.R. 27 (W.D.N.C. 1981).

PART 5.

DEFAULT.

§ 25-9-502. Collection rights of secured party.

CASE NOTES

Burden on Secured Party Seeking Deficiency Judgment. —

In accord with 1981 Cum. Supp. See Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

§ 25-9-503. Secured party's right to take possession after default.

CASE NOTES

Applied in Wood v. Provident Fin. Co., 13 B.R. 245 (E.D.N.C. 1981).

Quoted in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

§ 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.

CASE NOTES

Creditor Must Prove That Disposition, etc.—

In accord with 1981 Cum. Supp. See Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

Notice to Debtor. — Where, prior to the filing by debtor of a voluntary petition in bankruptcy, creditor with a nonpossessory, nonpurchase money security interest in debtor's household goods repossessed and sold the collateral at private sale, the creditor was required under subsection (3) of this section to send written notice to the debtor, and failure to do so made creditor liable to debtor under subsection (1) of § 25-9-507. Wood v. Provident Fin. Co., 13 B.R. 245 (E.D.N.C. 1981).

Effect of Failure to Give Notice of Sale. — Lack of notice raises a presumption that the collateral was worth at least the amount of the debt. This is not a conclusive presumption, however, and may be overcome by the creditor by proving that the collateral was sold at market value, and that the market value was less than the amount of the debt. Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

A creditor's failure to give the debtor notice of the sale of collateral does not bar the creditor from obtaining a deficiency judgment against the debtor, provided that the creditor can prove that the sale resulted in the collateral's bringing its market value. Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

A creditor's failure to give the required notice does not absolutely bar a deficiency judgment. Rather, the debt will be credited with the amount that reasonably could have been obtained via a commercially reasonable sale of the collateral. Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

Quoted in Arden Equip. Co. v. Rhodes, — N.C. App. —, 285 S.E.2d 874 (1982).

§ 25-9-507. Secured party's liability for failure to comply with this part.

CASE NOTES

When Right to 10% of Principal Indebtedness Attaches. — Absolute right to recovery of 10 percent of the principal indebtedness only attaches when the collateral in question is consumer goods, rather than farm equipment. Church v. Mickler, — N.C. App. —, 287 S.E.2d 131 (1982).

Applied in Wood v. Provident Fin. Co., 13 B.R. 245 (E.D.N.C. 1981).

ARTICLE 10.

Effective Date and Repealer.

§ 25-10-101. Effective date.

CASE NOTES

Stated in Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

§ 25-10-102. Specific repealer; provision for transition.

CASE NOTES

Cited in Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

§ 25-10-103. General repealer.

CASE NOTES

Cited in Wells v. Barefoot, — N.C. App. —, 286 S.E.2d 625 (1982).

Chapter 25A.

Retail Installment Sales Act.

§ 25A-1. Scope of act.

CASE NOTES

Applied in Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 290 S.E.2d 710 (1982).

Chapter 26.

Suretyship.

§ 26-7. Surety, indorser, or guarantor may notify creditor to take action.

CASE NOTES

"Principal". — This section does not refer to the principal of the guaranty but rather it refers clearly to the principal debtor on the indebtedness or obligations underlying the guaranty. Gillespie v. DeWitt, 53 N.C. App. 252, 280 S.E.2d 736, petition for discretionary review denied, — N.C. —, 285 S.E.2d 832 (1981).

Chapter 28A.

Administration of Decedents' Estates.

Article 21.

Accounting.

Sec.
28A-21-2. Final accounts.

ARTICLE 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

CASE NOTES

The right, time, manner, etc. — Exclusive original jurisdiction to determine the validity of a dissent by a surviving spouse to a will of a deceased spouse lies with the clerk of superior court. Greene v. Lynch, 51 N.C. App. 665, 277 S.E.2d 454 (1981).

Action for Breach of Duties, Negligence, and Fraud in Administration of Estate. — In plaintiff's action to recover for breach of fiduciary duties, negligence, and fraud arising from administration of her husband's estate and a trust created under his will, dismissal for want of subject matter jurisdiction on the ground that the claims alleged should be brought initially before the clerk was improper, since the claims were "justiciable matters of a civil nature," original general jurisdiction over which was vested in the trial division, and though the claims arose from administration of an estate, their resolution was not a part of the administration, settlement, or distribution thereof so as to make jurisdiction properly exercisable initially by the clerk; moreover, inclusion by plaintiff in her complaint of matters of which should have been brought initially before the clerk did not require dismissal for want of subject matter jurisdiction of the entire action. Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

CASE NOTES

No conflict of interest is created by mere fact that executor also occupies status of creditor. Tyson v. North Carolina Nat'l Bank, 53 N.C. App. 189, 280 S.E.2d 478 (1981).

Cited in Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

Stated in Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

§ 28A-9-4. Appeal; stay effected.

CASE NOTES

Stated in Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

ARTICLE 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-10. Liability of personal representative.

CASE NOTES

Quoted in Tyson v. North Carolina Nat'l Bank, — N.C. —, 286 S.E.2d 561 (1982).

ARTICLE 14.

Notice to Creditors.

§ 28A-14-1. Advertisement for claims.

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Cited in Carethers v. Blair, 53 N.C. App. 233, 280 S.E.2d 467 (1981).

Date Named in Notice. — The paragraph under this catchline in the 1981 Cumulative Supplement should be deleted. It construes the section as it stood before the 1977 amendment. — Ed. note.

§ 28A-14-3. Personal notice to creditors.

CASE NOTES

Cited in Carethers v. Blair, 53 N.C. App. 233, 280 S.E.2d 467 (1981).

ARTICLE 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

CASE NOTES

Automobile Liability Policies as Assets. — Automobile liability policies are not expressly excluded by any statute from being included as an asset in an estate; they are therefore resources available for the satisfaction of claims against the estate arising from decedent's ownership and operation of an automobile while he was alive. Carethers v. Blair, 53 N.C. App. 233, 280 S.E.2d 467 (1981).

ARTICLE 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

CASE NOTES

The heirs should be given the opportunity to resist and prevent the land from being applied to the payment of a debt which they allege was wrongfully obtained. Holcomb v. Hemric, — N.C. App. —, 289 S.E.2d 620 (1982).

Special Proceeding before Clerk. — Although a proceeding to sell land under this section is a special proceeding before the clerk, if equities are involved over which the superior court acquires jurisdiction, it will determine the whole matter. Holcomb v. Hemric, — N.C. App. —, 289 S.E.2d 620 (1982).

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

Quoted in Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981).

Cited in Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

I. IN GENERAL.

No Liability on Social Host for Death Caused by Intoxicated Adult Guest. — Social host who gratuitously furnishes alcohol to an able-bodied adult is not liable for personal injuries and death inflicted on an innocent third party by that intoxicated adult. Chastain v. Litton Systems, 527 F. Supp. 527 (W.D.N.C. 1981).

Nor on Company Hosting Party for Employees. — Where company acted as social host providing employees with Christmas cheer and hospitality, and was not selling or distributing alcoholic beverages for pecuniary profit, but allowed employee to become intoxicated through the acts of other employees, the company was not liable under the North Carolina alcohol control statutes for personal injury and death caused by intoxicated employee. Chastain v. Litton Systems, 527 F. Supp. 527 (W.D.N.C. 1981).

III. PARTIES TO THE ACTION.

Action by Administrator of Child against Parents. —
The administrator of a deceased minor's estate may maintain an action on the dead child's behalf for wrongful death against the negligent parent-driver of the vehicle through this section and § 1-539.21 which abolished parent-child immunity in motor vehicle cases. Carver v. Carver, — N.C. App. —, 286 S.E.2d 799 (1982).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-3. Limitations on presentation of claims.

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Applied in Force v. Sanderson, — N.C. App. —, 289 S.E.2d 56 (1982).

Quoted in Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981).

Cited in Carethers v. Blair, 53 N.C. App. 233, 280 S.E.2d 467 (1981).

§ 28A-19-13. No preference within class.

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

§ 28A-19-15. Disputed claim may be referred.

CASE NOTES

Finding of Arbitrators as Judgment. — The finding of the arbitrators under this section is equivalent to a judgment, but may be impeached in any proceeding against the personal representative for fraud or collusion. Holcomb v. Hemric, — N.C. App. —, 289 S.E.2d 620 (1982).

§ 28A-19-16. Disputed claim not referred barred in three months.

CASE NOTES

Quoted in Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981).

Stated in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

§ 28A-19-18. When costs against representative allowed.

CASE NOTES

Stated in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

ARTICLE 21.

Accounting.

§ 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, the personal representative or collector must file his final account for settlement within one year of his qualification or within six months after his receipt of the State inheritance tax release, whichever is later. If the total fair market value of the decedent's property subject to inheritance or estate tax, both real and personal, including the value of transfers over which the decedent retained any interest as described in G.S. 105-2(3), as well as the taxable value of any gifts made within three years prior to the date of

death of the decedent, as also required by G.S. 105-2(3), is less than seventy-five thousand dollars ($75,000) and all of the beneficiaries belong to the class (A) as defined in G.S. 105-4(a), then the personal representative or collector shall certify in the final account filed with the clerk of superior court that no inheritance tax return was required to be filed with the Department of Revenue pursuant to G.S. 105-23. Such certification shall list the amount and value of all of the decedent's property, and with respect to real estate, its particular location within or outside the State, including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(3), or any property transferred within three years prior to the date of the decedent's death, and after being filed and accepted by the clerk of the superior court shall be prima facie evidence that such property is free of any State inheritance or State estate tax liability. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. With the approval of the clerk of superior court, such account may be filed voluntarily at any time. In all cases, the accounting shall be reviewed, audited and recorded by the clerk of superior court in the manner prescribed in G.S. 28A-21-1.

(1981 (Reg. Sess., 1982), c. 1221, s. 3.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on and after that date, inserted "fair market" near the beginning of the second sentence of subsection (a) and substituted "seventy-five thousand dollars ($75,000)" for "twenty thousand dollars ($20,000)" near the middle of that sentence.

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

Article 22.

Distribution.

§ 28A-22-9. Distribution to known but unlocated devisees or heirs.

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

Chapter 29.

Intestate Succession.

Article 1.

General Provisions.

§ 29-1. Short title.

CASE NOTES

Cited in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 29-2. Definitions.

Legal Periodicals. —
For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

Article 2.

Shares of Persons Who Take upon Intestacy.

§ 29-15. Shares of others than surviving spouse.

CASE NOTES

Cited in Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981); Herndon v. Robinson, — N.C. App. —, 291 S.E.2d 305 (1982).

Article 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

CASE NOTES

Quoted in Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

CASE NOTES

Constitutionality. — Subdivision (b)(1) is constitutional on its face. Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

Application of subdivision (b)(1) to decedent's estate was not unconstitutional on grounds that decedent was not represented by counsel when he was adjudged the father of plaintiff's illegitimate children. Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

Statute Does Not Violate Equal Protection, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Herndon v. Robinson, — N.C. App. —, 291 S.E.2d 305 (1982).

Right to Inherit Established upon Adjudication of Paternity. — Once plaintiffs satisfied the notice requirement of this section, and showed that decedent had been adjudged their father under §§ 49-1 through 49-9, their right to inherit was established as a matter of law; it did not depend upon a declaration in a court order or judgment. Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

Notice under Subsection (b) as Condition Precedent. — The requirement of subsection (b) that illegitimate children give written notice of their claims of inheritance to the personal representatives of their putative fathers' estates within six months after the first publication or posting of general notice to creditors is a condition precedent to an illegitimate child's right to receive a distribution from the estate of a father who meets the description in subdivisions (1) or (2) of subsection (b). Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

Form of Notice. — Subsection (b) does not specify any particular form the notice required of illegitimate children must take. Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

Plaintiffs' verified complaint seeking revocation of defendant's letters, which fully alleged the basis of their claim of entitlement to inherit from decedent and was received by defendant, as personal representative of the estate, within the statutory period for notice, satisfied the notice requirement of subsection (b) of this section. Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

The formalities of subdivision (b)(2) of this section serve a dual purpose. — As a method for establishing paternity, a written instrument acknowledging paternity, executed and filed with the clerk of superior court, assures the requisite degree of certainty. The formalities further assure that the decedent intended that the illegitimate child share in his estate, much in the same way that a father intentionally excludes legitimate children as beneficiaries under his will. Herndon v. Robinson, — N.C. App. —, 291 S.E.2d 305 (1982).

Documents Inadequate under Subdivision (b)(2). — Plaintiff's proof of numerous written documents, signed by his putative father, which clearly acknowledged paternity, did not rise to the dignity of constructive compliance with subdivision (b)(2) of this section, where the documents were offered for purposes other than to establish paternity as contemplated under subdivision (b)(2). Herndon v. Robinson, — N.C. App. —, 291 S.E.2d 305 (1982).

Action by Father Required to Include Illegitimate Child Estate. — Just as a father must act to exclude a legitimate child from sharing in his estate, he must also act to include an illegitimate child. The distinction is an important one. Herndon v. Robinson, — N.C. App. —, 291 S.E.2d 305 (1982).

ARTICLE 7.

Advancements.

§ 29-23. In general.

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

§ 30-1. Right of dissent.

Legal Periodicals. —

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For note on the right of surviving spouse to dissent from deceased spouse's will when survivor receives less than an intestate share of deceased's net estate, see 12 N.C. Cent. L.J. 511 (1981).

CASE NOTES

Election Required. — A surviving spouse must elect between taking under a will and dissenting from the will. The spouse cannot do both; the election of one precludes the other. Hill v. Smith, 51 N.C. App. 670, 277 S.E.2d 542, petition for discretionary review denied, 303 N.C. 543, 281 S.E.2d 392 (1981).

Clerk's Approval of Valuation Required. — To establish her entitlement to the right of dissent, the wife is required, pursuant to subsection (c) of this section, to obtain the clerk's approval of the value of the property passing to her under and outside her husband's will as of the date of his death. Greene v. Lynch, 51 N.C. App. 665, 277 S.E.2d 454 (1981).

§ 30-3. Effect of dissent.

Legal Periodicals. —

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

Chapter 31.

Wills.

Article 1.

Execution of Will.

§ 31-1. Who may make will.

CASE NOTES

Law in this State presumes that every person has sufficient mental capacity to make a valid will, and those persons contesting the will have the burden of proving that the testator lacked the required mental capacity. In re Will of Womack, 53 N.C. App. 221, 280 S.E.2d 494, petition for discretionary review denied, — N.C. —, 285 S.E.2d 837 (1981).

A person has sufficient testamentary capacity within the meaning of the law if he comprehends the natural objects of his bounty, understands the kind, nature, and extent of his property, knows the manner in which he desires his act to take effect, and realizes the effect his act will have upon his estate. In re Will of Womack, 53 N.C. App. 221, 280 S.E.2d 494, petition for discretionary review denied, — N.C. —, 285 S.E.2d 837 (1981).

Article 5.

Probate of Will.

§ 31-12. Executor may apply for probate.

CASE NOTES

The word "probate", etc. —
In accord with original. See In re Lamb, 303 N.C. 452, 279 S.E.2d 781 (1981).

§ 31-13. Executor failing, beneficiary may apply.

CASE NOTES

Presenting for Probate, etc. —
In accord with 1st paragraph in original. See In re Lamb, 303 N.C. 452, 279 S.E.2d 781 (1981).

§ 31-22. Certified copy of will proved in another state or country.

CASE NOTES

Cited in In re Lamb, 303 N.C. 452, 279 S.E.2d 781 (1981).

§ 31-27. Certified copy of will of nonresident recorded.

CASE NOTES

Quoted in In re Lamb, 303 N.C. 452, 279 S.E.2d 781 (1981).

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

This section permits a person, etc. — In accord with original. See In re Lamb, 303 N.C. 452, 279 S.E.2d 781 (1981).

Filing of Caveat as Ground for Modification of Will. — Mere fact that a caveat has been filed, standing alone, is not sufficient ground for modification of the dispositive provisions of a will; the outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict. Holt v. Holt, 304 N.C. 137, 282 S.E.2d 784 (1981).

ARTICLE 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.

CASE NOTES

Unrestricted Devise Passes Fee. — In accord with 3rd paragraph in original. See Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871, petition for discretionary review granted, 304 N.C. 192, 285 S.E.2d 95 (1981).

An unrestricted or indefinite devise of real property is regarded as a devise in fee simple. Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871, petition for discretionary review granted, 304 N.C. 192, 285 S.E.2d 95 (1981).

Rules of Construction — Intention of Testator. —

The cardinal principle to be followed when construing a will is to give effect to the general intent of the testator as that intent appears from a consideration of the entire instrument. Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871, petition for discretionary review granted, 304 N.C. 192, 285 S.E.2d 95 (1981).

Same — Consideration of Will as Whole. — The intent of the testator must be ascertained from a consideration of the will as a whole and not merely from consideration of specific items or phrases of the will in isolation. Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871, petition for discretionary review granted, 304 N.C. 192, 285 S.E.2d 95 (1981).

The presumption created by this section by its own terms may be overcome by a showing that the will plainly intended to convey an estate of less dignity. Adcock v. Perry, — N.C. —, 290 S.E.2d 608 (1982).

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

CASE NOTES

Cited in Adcock v. Perry, — N.C. —, 290 S.E.2d 608 (1982).

Chapter 31A.

Acts Barring Property Rights.

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

CASE NOTES

Cited in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

Chapter 32.

Fiduciaries.

Article 1.

Uniform Fiduciaries Act.

§ 32-9. Deposit in name of principal.

CASE NOTES

Applied in Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

Article 3.

Powers of Fiduciaries.

§ 32-27. Powers which may be incorporated by reference in trust instrument.

CASE NOTES

Cited in Tyson v. North Carolina Nat'l Bank, — N.C. —, 286 S.E.2d 561 (1982).

Chapter 33.

Guardian and Ward.

Article 1.

Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.

CASE NOTES

Quoted in Gaskins v. McCotter, 52 N.C. App. 322, 278 S.E.2d 302 (1981).

Article 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.

CASE NOTES

Cited in In re North Carolina Nat'l Bank, 52 N.C. App. 353, 278 S.E.2d 330 (1981).

Article 12.

Gifts of Securities and Money to Minors.

§ 33-68. Definitions.

Legal Periodicals. — For article on the use of inter vivos gift giving as an estate planning tool after the Tax Reform Act of 1976, see 59 N.C.L. Rev. 377 (1981).

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

§ 35-1.6. Legislative purpose.

CASE NOTES

Cited in In re Bidstrup, — N.C. App. —, 285 S.E.2d 304 (1982).

Part 4. Proceedings before Clerk.

§ 35-1.20. Appeals from clerk's orders.

CASE NOTES

Trial De Novo Relates Only to Adjudication of Incompetency. — While this section states that appeals to the superior court from orders of the clerk shall be de novo and thence to the Court of Appeals, this section must be read in pari materia with the remaining sections of the Article and when so read, the right of a trial de novo on appeal from the orders of the clerk relates only to the adjudication of incompetency. In re Bidstrup, — N.C. App. —, 285 S.E.2d 304 (1982).

Burden on Appeal. — For a litigant to succeed in reversing the decision of a clerk's appointment of a guardian on the grounds that the issuance of such judgment constituted an abuse of discretion, the litigant must show that the challenged action is manifestly unsupported by reason. In re Bidstrup, — N.C. App. —, 285 S.E.2d 304 (1982).

Part 5. Qualifications, Priorities, Duties, and Liabilities of Guardians.

§ 35-1.28. Qualifications of guardians.

CASE NOTES

Cited in In re Bidstrup, — N.C. App. —, 285 S.E.2d 304 (1982).

§ 35-1.29. Priorities for appointment.

CASE NOTES

Cited in In re Bidstrup, — N.C. App. —, 285 S.E.2d 304 (1982).

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Appointment of guardian.

CASE NOTES

Cited in Gaskins v. McCotter, 52 N.C. App. 322, 278 S.E.2d 302 (1981).

ARTICLE 3.

Sales of Estates.

§ 35-13. Spouse of incompetent husband or wife entitled to special proceeding for sale of property.

CASE NOTES

Cited in In re North Carolina Nat'l Bank, 52 N.C. App. 353, 278 S.E.2d 330 (1981).

ARTICLE 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

§ 35-36. Sterilization of mentally retarded in State institutions.

Legal Periodicals. — For an article discussing sterilization of retarded persons, see 60 N.C.L. Rev. 943 (1982).

§ 35-43. Hearing before the judge of district court.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

§ 35-44. Appeals.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

Chapter 36A.

Trusts and Trustees.

Article 4.

Charitable Trusts.

Sec.
36A-54. Charitable trusts tax exempt status.

Article 4A.

Charitable Remainder Trusts Administration Act.

36A-59.1. Short title.
36A-59.2. General rule.
36A-59.3. Definitions.
Sec.
36A-59.4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unitrusts.
36A-59.5. Administrative provisions applicable to charitable remainder annuity trusts only.
36A-59.6. Administrative provisions applicable to charitable remainder unitrusts only.
36A-59.7. Interpretation.

Article 4.

Charitable Trusts.

§ 36A-54. Charitable trusts tax exempt status.

(a1) Notwithstanding any provisions in the laws of this State or in the governing instrument to the contrary, unless otherwise decreed by a court of competent jurisdiction except as provided in subsection (b), the governing instrument of each trust that is a nonexempt charitable trust described in section 4947(a) (1) of the Code shall be deemed to contain the following provisions:

(1) The trust shall be operated exclusively for charitable, educational, religious and scientific purposes within the meaning of section 501(c)(3) and section 170(c)(2) of the Code.

(2) Upon any dissolution, winding up, or liquidation of the trust, its assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Code, or shall be distributed to the federal government, or a state or local government for a public purpose.

(b) The trustee of any trust described in subsections (a) or (a1) may, (i) without judicial proceedings, amend such trust to expressly exclude the application of subsections (a) or (a1) by executing a written amendment to the trust and filing a duplicate original of such amendment with the Attorney General of the State of North Carolina, and upon filing of such amendment, subsections (a) or (a1) shall not apply to such trust, or (ii) institute an action in the superior court of North Carolina seeking reformation of the trust instrument pursuant to the authority set forth in G.S. 36A-53.

(1981 (Reg. Sess., 1982), c. 1210, ss. 1-3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, added subsection (a1) and substituted "subsections (a) or (a1)" for "subsection (a)" in three places in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a1) and (b) are set out.

ARTICLE 4A.

Charitable Remainder Trusts Administration Act.

§ 36A-59.1. Short title.

This Article shall be known as the Charitable Remainder Trusts Administration Act. (1981 (Reg. Sess., 1982), c. 1252, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1252, s. 2, provides: "This act is effective upon ratification [June 18, 1982] and applies to all charitable remainder annuity trusts and all charitable remainder unitrusts that would not qualify for the deduction pursuant to section 2055 or section 2522 of the Code in the absence of this Article that are in existence on that date or are established after that date. For trusts in existence on that date, this act relates back to the date of creation of the trust."

§ 36A-59.2. General rule.

Notwithstanding any provisions in the laws of this State or in the governing instruments to the contrary, any charitable remainder annuity trust and any charitable remainder unitrust that cannot qualify for a deduction for federal tax purposes under section 2055 or section 2522 of the Code in the absence of this Article shall be administered in accordance with this Article. (1981 (Reg. Sess., 1982), c. 1252, s. 1.)

§ 36A-59.3. Definitions.

The following definitions apply to this Article unless the context clearly requires otherwise:

(1) "Charitable remainder trust" means a trust that provides for a specified distribution at least annually for either life or a term of years to one or more beneficiaries, at least one of which is not a charity, (hereinafter referred to as "beneficiaries") with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity. For purposes of this Article, only a charitable remainder annuity trust or a charitable remainder unitrust is considered a charitable remainder trust.

(2) "Charitable remainder annuity trust" means a charitable remainder trust:

a. From which a sum certain (which is not less than five percent (5%) of the initial net fair market value of all property placed in trust) is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals;

b. From which no amount other than the payments described in a above may be paid to and/or for the use of anyone other than an organization that is or was described in section 170(c) of the Code; and

c. Following the termination of the payments described in a above, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Code or is to be retained by the trust for such a use.

(3) "Charitable remainder unitrust" means a charitable remainder trust:

a. From which a fixed percentage (which is not less than five percent (5%)) of the net fair market value of its assets, valued annually, is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals;

b. From which no amount other than the payments described in a above may be paid to or for the use of anyone other than an organization that is or was an organization described in section 170(c) of the Code; and

c. Following the termination of the payments described in a above, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Code, or is to be retained by the trust for such a use.

Notwithstanding the provisions of a and b above, the trust instrument may provide that the trustee shall pay to the income beneficiary for any year (i) the amount of the trust income if that amount is less than the amount required to be distributed under a above, and (ii) any amount of the trust income that exceeds the amount required to be distributed under a above to the extent that (by reason of a) the aggregate of the amounts paid in prior years is less than the aggregate of the required amounts.

(4) "Code" means the Internal Revenue Code of 1954 as amended. (1981 (Reg. Sess., 1982), c. 1252, s. 1.)

§ 36A-59.4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unitrusts.

(a) Creation of Remainder Interests in Charity. — Upon the termination of the noncharitable interests, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiary or beneficiaries, to the designated charity or charities, or shall hold the property in trust for the designated charity or charities in accordance with the terms of the trust document.

(b) Selection of Alternate Charitable Beneficiary if Remaindermen do not Qualify Under Section 170(c) of the Code at Time of Distribution. — If the designated charity is not an organization described in section 170(c) of the Code at the time when any principal or income of the trust is to be distributed to it, the trustee shall distribute the principal or income to one or more organizations then described in section 170(c) of the Code selected in accordance with the terms of the trust instrument. If the trust instrument does not provide for a method of selecting alternate charitable beneficiaries that are then qualified under section 170(c) of the Code, the trustee shall, in his sole discretion, select alternate trust beneficiaries that are qualified under section 170(c) of the Code.

(c) Prohibitions Governing Trustees. — Except for payment of the annuity amount or the unitrust amount to the beneficiaries, whichever is applicable the trustee is prohibited from engaging in any act of self-dealing as defined in section 4941(d) of the Code, retaining any excess business holdings as defined in section 4943(c) of the Code that would subject the trust to tax under section 4943 of the Code, making any investments that would subject the trust to tax under section 4944 of the Code, and making any taxable expenditures as defined in section 4945(d) of the Code. The trustee shall make distributions at such time and in such manner as not to subject the trust to tax under section 4942 of the Code.

(d) Distribution to Charity During Term of Noncharitable Interests and Distributions in Kind. — If the governing instrument of the trust provides for distribution to charity during the term of the noncharitable interests, the trustee may pay to the designated charity the amounts specified in the governing instrument that exceed the annuity amount or the unitrust amount payable to any of the beneficiaries for the taxable year of the trust in which the income is earned. If the governing instrument of the trust provides for distribution to charity in kind, the adjusted basis for federal income tax purposes of any trust property the trustee distributes in kind to charity during the term of the noncharitable interests must be fairly representative of the adjusted basis for such purposes of all trust property available for distribution on the date of distribution.

(e) Investment Restrictions on Trustee. — Nothing in the trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

(f) Distribution From Trust Used to Administer an Estate to Charitable Remainder Trust. — If the governing instrument of a revocable inter vivos trust provides that the revocable inter vivos trust will be used partially to administer the estate of the grantor or for some other purpose, and further provides the assets will then be distributed to another trust that is a charitable remainder trust, upon the death of the grantor, or upon the occurrence of any event that causes the trust to become irrevocable, the trust shall become irrevocable and the trustee of this trust shall perform any remaining duties or obligations provided for in the trust instrument and then transfer the property specified in the governing instrument to the trustee of the charitable remainder trust to be held, administered and distributed in the manner and according to the terms and conditions provided by the charitable remainder trust. (1981 (Reg. Sess., 1982), c. 1252, s. 1.)

§ 36A-59.5. Administrative provisions applicable to charitable remainder annuity trusts only.

(a) Creation of Annuity Amount for Period of Years or Life. — The trustee shall pay the annuity amount designated in the trust instrument to the beneficiaries named in the trust instrument during their lives (or if the governing instrument so provides, for a period of 20 years or less) in each taxable year of the trust. The annuity amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The annuity amount shall be paid from income, and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal.

The total amount payable at least annually to a person or persons named in the trust document, at least one of which is not an organization described in section 170(c) of the Code, may not be less than five percent (5%) of the initial net fair market value of the property placed in trust as finally determined for federal tax purposes, except as provided in subsection (g).

(b) Computation of Annuity Amount in Short and Final Taxable Years. — For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the annuity amount on a daily basis.

(c) Prohibition of Additional Contributions. — No additional contributions shall be made to the trust after the initial contribution.

(d) Deferral of Annuity Amount during Period of Administration or Settlement. — When property passes to the trust at the death of the grantor, the obligation to pay the annuity amount commences with the date of death of

the grantor, but payment of the annuity amount may be deferred from the date of the grantor's death to the end of the taxable year in which complete funding of the trust occurs. Payment of the annuity amount so deferred, plus interest computed at six percent (6%) a year, compounded annually, shall be made within a reasonable time after the close of the taxable year in which complete funding occurs.

(e) Dollar Amount Annuity May Be Stated as Fraction or Percentage. — If the governing instrument of the trust states the amount of the annuity as a fraction or a percentage, the trustee shall pay to the beneficiaries in each taxable year of the trust during their lives an annuity amount equal to a percentage (that percentage being stipulated in the governing instrument of the trust and, in any event, being five percent (5%) or greater) of the initial net fair market value of the assets constituting the trust. In determining this amount, assets shall be valued at their values as finally determined for federal tax purposes. If the fiduciary incorrectly determines the initial net fair market value of the assets constituting the trust, then, within a reasonable period after a final determination, the trustee shall pay to the beneficiaries in the case of an undervaluation or shall receive from the beneficiaries in the case of an overvaluation an amount equal to the difference between the annuity amount properly payable and the annuity amount actually paid.

(f) Annuity Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. — If the governing instrument of the trust provides that the annuity trust amount may be allocated among a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee shall pay the annuity amount, which is defined in the governing instrument of the trust, in each taxable year of the trust to the member or members of the class of noncharitable beneficiaries in such amount and proportions as the trustee in its absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the entire annuity amount to one member of this class or may apportion it among the various members in such manner as the trustee shall from time to time deem advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Code. If the class provided for in the governing instrument is open, then the distribution shall be for a period of years not to exceed 20, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire annuity amount for each taxable year annually and may not delay payment of the annuity amount.

(g) Reduction of Annuity Amount if Part of Corpus is Paid to Charity at Expiration of Term of Years or on Death of Recipient. — If the governing instrument of the trust provides for the reduction of the annuity amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries, the trustee shall, in each taxable year of the trust, pay a total annuity amount of at least five percent (5%) of the initial net fair market value of the assets placed in trust. Upon the expiration of the term of years or the death of a beneficiary, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter, the trustee shall pay, annually or in more frequent installments, to the survivors for their lives, an annuity amount that in each taxable year of the trust, bears the same ratio to five percent (5%) of the initial net fair market value of the trust assets as the net fair market value of the trust assets valued as of the date of distribution, less the amount or percentage of trust assets

distributed to the charity, bears to the net fair market value of the trust assets as of the date of distribution.

(h) Termination of Annuity Amount on Payment Date Preceding Termination of Noncharitable Interest. — If the governing instrument of the trust provides that payment of the annuity amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee shall pay to the noncharitable beneficiary during the term of the noncharitable interest the annuity amount, defined in the trust document, in each taxable year of the trust. The obligation of the trustee to pay the annuity amount shall terminate with the payment preceding the death of the noncharitable beneficiary or other event that terminates the noncharitable interest.

(i) Retention of Testamentary Power to Revoke Noncharitable Interest. — If the governing instrument of the trust provides that the grantor of the trust shall retain the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Code, then the trustee shall pay to the grantor during his life the annuity amount, as defined in the governing instrument of the trust, and, upon the death of the grantor, if the noncharitable beneficiary survives the grantor the trustee shall pay to the noncharitable beneficiary during his life the annuity amount equal to the amount paid to the grantor. The grantor shall have the power, exercisable only by his will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the grantor and noncharitable beneficiary or (ii) the death of the grantor if he effectively exercised his testamentary power to revoke and terminate the interest of the noncharitable beneficiary, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the grantor or noncharitable beneficiary, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust shall be effective. (1981 (Reg. Sess., 1982), c. 1252, s. 1.)

§ 36A-59.6. Administrative provisions applicable to charitable remainder unitrusts only.

(a) Creation of Unitrust Amount for a Period of Years or Life. — The trustee shall pay to the beneficiaries named in the trust investment in each taxable year of the trust during their lives, or, if the governing instrument so provides, for a period not exceeding 20 years, a unitrust amount equal to a fixed percentage, as stated in the governing instrument of the trust, of the net fair market value of the trust assets valued annually on the date or by the method designated in the governing instrument of the trust or, if no date or method is specified, on the date or by the method selected by the trustee in his discretion, so long as the same valuation date or dates or valuation methods are used each year. The unitrust amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The unitrust amount shall be paid from income, and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal.

The fixed percentage to be paid at least annually to all beneficiaries cannot be less than five percent (5%).

(b) Unitrust Amount Expressed as the Lesser of Income or a Fixed Percentage. — If the governing instrument of the trust provides that the trustee shall pay, instead of a regular unitrust amount (the fixed percentage

of the net fair market value of the trust assets, determined annually), the amount of trust income for the taxable year to the extent that this amount is not greater than the amount required to be distributed as a regular unitrust amount for that taxable year and/or the amount of the trust income for the taxable year that exceeds the regular unitrust amount for that taxable year to the extent that the aggregate of the amounts paid in prior years is less than the aggregate of the regular unitrust amount for those prior years, then the trustee shall pay to the beneficiaries in each taxable year of the trust during their lives, or for a period not exceeding 20 years if the trust agreement so provides, an amount equal to the lesser of (i) the trust income for the taxable year, as defined in section 643(b) of the Code and the regulations thereunder, and (ii) the percentage, as stated in the governing instrument, of the net fair market value of the trust assets valued as of the taxable year decreased as elsewhere provided if the taxable year is a short taxable year or is the taxable year in which the noncharitable interest terminates by death or otherwise, and increased as elsewhere provided if additional contributions are made in the taxable year.

If the governing instrument of the trust so provides and if the trust income for any taxable year exceeds the amount determined under (ii) above, the payment to beneficiaries shall also include the excess income to the extent that the aggregate of the amounts paid to beneficiaries in prior years is less than the percentage of the aggregate net fair market value of the trust assets, which percentage is defined in the governing instrument of the trust, for these years. Payments to beneficiaries shall be made annually or in more frequent equal or unequal installments if the governing instrument so provides. Any income of the trust in excess of such payments shall be added to principal.

(c) Adjustment for Incorrect Valuation. — If the fiduciary incorrectly determines the net fair market value of the trust assets for any taxable year, the trustee shall, within a reasonable period after the final determination of the correct value, pay to the beneficiaries in the case of an undervaluation or receive from the beneficiaries in the case of an overvaluation an amount equal to the difference between the unitrust amount properly payable and the unitrust amount actually paid.

(d) Computation of Unitrust Amount in Short and Final Taxable Years. — For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the unitrust amount on a daily basis. If a trust provides for a valuation date other than the first day of the taxable year, and the valuation date does not occur in a taxable year of the trust because the taxable year is either a short taxable year or is the taxable year in which the noncharitable interests terminate, the trust assets shall be valued as of the last day of the short taxable year or the day on which the noncharitable interests terminate, as appropriate.

(e) Additional Contributions. — If the governing instrument does not prohibit additional contributions and additional contributions are made to the trust after the initial contribution in the trust, the unitrust amount for the taxable year in which the additional contributions are made shall be a fixed percentage, as stated in the governing instrument of the trust, of the sum of (i) the net fair market value of trust assets, excluding the additional contributions and any income from or appreciation of these contributions and (ii) that proportion of the value of the additional contributions excluded under (i) which the number of days in the period beginning with the date of contribution and ending with the earlier of the last day of the taxable year or the day the noncharitable beneficiary's interest terminated bears to the number of days in the period beginning on the first day of the taxable year and ending with the earlier of the last day in the taxable year or the day the noncharitable beneficiary's interest terminated. If no valuation date occurs after the contributions are made, the assets so added shall be valued as of the time of contribution.

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. — When property passes to the trust at the death of the grantor, the obligation to pay the unitrust amount commences with the date of the grantor's death, but payment of the unitrust amount may be deferred from the date of the grantor's death to the end of the taxable year of the trust in which complete funding of the trust occurs. Within a reasonable time after the occurrence of this event, the trustee shall pay the amount determined under the method described in Treasury Regulation section 1.664-1(a)(5)(ii) less the sum of any amounts previously distributed, including interest paid on the amounts distributed computed at six percent (6%) a year, compounded annually, from the date of distribution to the occurrence of this event.

(g) Unitrust Amount May Be Allocated among Class of Noncharitable Beneficiaries in Discretion of Trustee. — If the governing instrument of the trust provides that the unitrust amount may be allocated to a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee shall pay, in each taxable year of the trust, the unitrust amount to the member or members of the class of noncharitable beneficiaries in such amounts and proportions as the trustee in its absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the unitrust amount to any one member of the class or may apportion it among the various members in such manner as the trustee shall from time to time deem advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Code. If the class provided for in the governing instrument is open, the distribution shall be for a period not exceeding 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire unitrust amount for each taxable year annually and may not delay payment of the unitrust amount.

(h) Reduction of Unitrust Amount if Part of Corpus is Paid to Charity at Expiration of Term of Years or on Death of a Recipient. — If the governing instrument of the trust provides for the reduction of the unitrust amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries the trustee shall, in each taxable year of the trust, pay the total unitrust amount equal to a percentage of the net fair market value of the trust assets valued annually, which shall not be less than five percent (5%). Upon expiration of the term of years or the death of a recipient, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay to the survivors for their lives a unitrust amount in each taxable year of the trust equal to at least five percent (5%) (the actual percentage being defined in the trust instrument) of the net fair market value of the remaining trust assets valued annually.

(i) Termination of Unitrust Amount on Payment Date Preceding Termination of Noncharitable Interests. — If the governing instrument of the trust provides that payment of the unitrust amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee shall pay the unitrust amount to the noncharitable beneficiary in each taxable year of the trust during the term of the noncharitable interest. The obligation of the trustee to pay the unitrust amount terminates with the payment preceding the termination of the noncharitable interest by death or otherwise. The five percent (5%) requirement provided in subsection (a) shall be met until the termination of all payments of the unitrust amount.

(j) Retention of Testamentary Power to Revoke Noncharitable Interest. — If the governing instrument of the trust provides that the grantor of the trust shall retain the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170 (c) of the Code, then the trustee shall pay the unitrust amount to the grantor during his life and, upon the death of the grantor, shall pay the unitrust amount to the noncharitable beneficiary during his life provided the noncharitable beneficiary survives the grantor. The grantor shall have the power, exercisable only by his will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the grantor and the noncharitable beneficiary or (ii) the death of the grantor if he effectively exercised his testamentary power to revoke and terminate the interest of the noncharitable beneficiary, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiaries, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust shall be effective. (1981 (Reg. Sess., 1982), c. 1252, s. 1.)

§ 36A-59.7. Interpretation.

This Article shall be interpreted and construed to effectuate its general purpose to cause all charitable remainder annuity trusts and all charitable remainder unitrusts to be administered in accordance with the provisions of section 2055 and section 2522 of the Code and the regulations thereunder. (1981 (Reg. Sess., 1982), c. 1252, s. 1.)

Chapter 38.

Boundaries.

§ 38-3. Procedure.

CASE NOTES

Questions of Law and Fact. — Where the true boundary is, is a question of fact for the jury; what the boundary is, is a question of law for the court. Combs v. Woodie, 53 N.C. App. 789, 281 S.E.2d 705 (1981).

Surveyor may not give his opinion as to where the boundary is. Combs v. Woodie, 53 N.C. App. 789, 281 S.E.2d 705 (1981).

Duty of Jury to Locate Boundary. — In a processioning proceeding, it is the duty of the jury to locate the boundary; petitioner has the burden of proof, and if he fails to carry that burden, the jury, in the absence of agreement that one or the other is the true line, need not fix the boundary according to respondent's contentions, but may locate the line wherever the jury feels the evidence requires. Combs v. Woodie, 53 N.C. App. 789, 281 S.E.2d 705 (1981).

Chapter 39.

Conveyances.

Article 2.

Conveyances by Husband and Wife.

Sec.
39-13.6. Control of real property held in tenancy by the entirety.

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

Legal Periodicals. — For comment on resulting trusts in entireties property when the wife furnishes purchase money, see 17 Wake Forest L. Rev. 415 (1981).

§ 39-13.6. Control of real property held in tenancy by the entirety.

(a) A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse. This section shall not be construed to require the spouse's joinder where a different provision is made under G.S. 39-13, G.S. 39-13.3, G.S. 39-13.4, or G.S. 52-10.

(b) A conveyance of real property, or any interest therein, to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:

(1) A named man "and wife," or

(2) A named woman "and husband," or

(3) Two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married;

unless a contrary intention is expressed in the conveyance.

(c) This section shall apply to all conveyances on and after January 1, 1983. For income tax purposes effective for taxable years beginning on and after January 1, 1983, the income from property held in tenancy by the entirety shall be reportable ½ (one-half) by each spouse regardless of when the conveyance of the property was made. (1981 (Reg. Sess., 1982), c. 1245, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1245, s. 2, makes the act effective Jan. 1, 1983.

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 39-16. Conveyance with intent to defraud purchasers void.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 39-18. Marriage settlements void as to existing creditors.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 39-19. Purchasers for value and without notice protected.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 39-20. Bona fide purchaser of mortgaged property not affected by illegal consideration of note secured.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 39-21. Bona fide purchaser of fraudulently conveyed property treated as creditor.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

§ 39-22. Persons aiding debtor to remove to defraud creditors liable for debts.

Legal Periodicals. — For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

Chapter 40A.

Eminent Domain.

Article 3.

Condemnation by Public Condemnors.

Sec.
40A-40. Notice of action.

Article 3.

Condemnation by Public Condemnors.

§ 40A-40. Notice of action.

Not less than 30 days prior to the filing of a complaint under the provisions of G.S. 40A-41, a public condemnor listed in G.S. 40A-3(b) or (c) shall provide notice to each owner (whose name and address can be ascertained by reasonable diligence) of its intent to institute an action to condemn property. (The notice shall be sent to each owner by certified mail, return receipt requested. The providing of notice shall be complete upon deposit of the notice enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. Notice by publication is not required. Notice to an owner whose name and/or address cannot be ascertained by reasonable diligence is not required in any manner.)

The notice shall contain a general description of the property to be taken and of the amount estimated by the condemnor to be just compensation for the property to be condemned. The notice shall also state the purpose for which the property is being condemned and the date condemnor intends to file the complaint. (1981, c. 919, s. 1; 1981 (Reg. Sess., 1982), c. 1243, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment divided the section into paragraphs, making the former second and third sentences of the section the present second paragraph and adding the second through fifth sentences of the present first paragraph. The amendment inserted "(whose name and address can be ascertained by reasonable diligence)" in the first sentence of the present first paragraph and substituted "to file the complaint" for "to take possession of the property" at the end of the second sentence of the present second paragraph.

Article 4.

Just Compensation.

§ 40A-64. Compensation for taking.

CASE NOTES

Evidence of Comparable Sales of Farmland. — Where farmland is condemned as an easement, it is not error to exclude evidence of comparable sales nearby if there is a large difference in the size of the tracts, despite little difference in zoning and water availability. Duke Power Co. v. Smith, 54 N.C. App. 214, 282 S.E.2d 564 (1981).

Market Value as of Date of Trial Held Proper Under Circumstances. — Where petition to condemn plaintiff's land was filed in 1975, but the parties were unable to agree upon

a purchase price, and during the years of litigation the owners received no payment, nor did interest accrue on the value of the property assessed by the commissioners in 1976, the market value of the property would be determined as of the date of trial rather than the usual valuation date of the date of the petition. Greensboro-High Point Airport Auth. v. Irvin, 54 N.C. App. 355, 283 S.E.2d 171 (1981).

Chapter 41.

Estates.

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Cited in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

§ 41-2.5. Tenancy by the entirety in mobile homes.

CASE NOTES

Stated in In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981).

§ 41-4. Limitations on failure of issue.

Legal Periodicals. —
For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

§ 41-10. Titles quieted.

CASE NOTES

Cited in Simmons v. United States, 53 N.C. App. 216, 280 S.E.2d 463 (1981).

§ 41-11. Sale, lease or mortgage in case of remainders.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in Cheshire v. Carolina Power & Light Co., 54 N.C. App. 467, 283 S.E.2d 810 (1981).

Chapter 42.

Landlord and Tenant.

Article 6.

Tenant Security Deposit Act.

Sec.
42-55. Remedies.

Article 1.

General Provisions.

§ 42-3. Term forfeited for nonpayment of rent.

Legal Periodicals. —

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

CASE NOTES

Necessity of Demand for Rent. —

Demand is a necessary prerequisite to forfeiture for nonpayment of rent. Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

What Constitutes "Demand". — To constitute a "demand" under this section, a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent, is necessary. Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

The demand must be made with sufficient authority to place the lessee on notice that the lessor intends to exercise his or her statutory right to forfeiture for nonpayment of rent. Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

When Forfeiture Effective. — A forfeiture under this section for failure to pay rent is not effective until the expiration of 10 days after a demand is made on the lessee for all past due rent. Snipes v. Snipes, — N.C. App. —, 286 S.E.2d 591 (1982).

§ 42-14. Notice to quit in certain tenancies.

CASE NOTES

Stated in Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981).

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

CASE NOTES

I. IN GENERAL.

A person who deals with the tenant is charged with notice of the landlord's rights under this section. Rivenbark v. Moore, — N.C. App. —, 291, S.E.2d 293 (1982).

Applied in Sugg v. Parrish, 51 N.C. App. 630, 277 S.E.2d 557, cert. denied, 303 N.C. 550, 281 S.E.2d 401 (1981).

II. LIEN OF LESSOR.

The lien under this section is acquired automatically by virtue of the landlord's status, and no writing or recordation is required in order to establish the lien. Rivenbark v. Moore, — N.C. App. —, 291 S.E.2d 293 (1982).

The landlord can expressly or impliedly waive the lien or by his acts and conduct be estopped from asserting the lien. Rivenbark v. Moore, — N.C. App. —, 291 S.E.2d 293 (1982).

ARTICLE 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

Legal Periodicals. — For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

Legal Periodicals. —

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

CASE NOTES

I. APPLICATION AND SCOPE.

Cited in Swann v. Gastonia Hous. Auth., 675 F.2d 1342 (4th Cir. 1982).

III. BREACH OF PROVISION OF LEASE.

Jury Decides Whether Landlord Waived Renewal Provisions. — Whether a landlord has waived provisions in the lease agreement regarding the manner of renewal of the lease for another term is a question of fact to be decided by the jury, as is the application of the doctrine of estoppel. Wachovia Bank & Trust Co. v. Rubish, 50 N.C. App. 662, 275 S.E.2d 494, petition for discretionary review granted, 303 N.C. 183, 280 S.E.2d 459 (1981).

§ 42-33. Rent and costs tendered by tenant.

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

§ 42-34. Undertaking on appeal and order staying execution.

Legal Periodicals. —
For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

ARTICLE 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

Legal Periodicals. — For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

ARTICLE 5.

Residential Rental Agreements.

§ 42-38. Application.

Legal Periodicals. —
For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

CASE NOTES

Quoted in Lenz v. Ridgewood Assocs., — N.C. App. —, 284 S.E.2d 702 (1981).
Cited in Simmons v. C.W. Myers Trading Post, Inc., — N.C. App. —, 290 S.E.2d 710 (1982).

§ 42-40. Definitions.

CASE NOTES

Quoted in Lenz v. Ridgewood Assocs., — N.C. App. —, 284 S.E.2d 702 (1981).

§ 42-42. Landlord to provide fit premises.

CASE NOTES

Nature of Landlord's Duty. — The duty owed by a landlord is not the duty to warn of unsafe conditions, but rather the duty to correct unsafe conditions. Allen v. Equity & Investors Mgt. Corp., — N.C. App. —, 289 S.E.2d 623 (1982).

Violation of Subdivision (a)(3) Duty as Evidence of Negligence. — A residential landlord in North Carolina owes his tenant a statutory duty of exercising ordinary or reasonable care to maintain common areas of the leased premises in a safe condition and violation of that duty is evidence of negligence. O'Neal v. Kellett, — N.C. App. —, 284 S.E.2d 707 (1981).

Since the duty to keep the common areas in a safe condition implies the duty to make reasonable inspection and correct an unsafe condition which a reasonable inspection might reveal, such a breach of duty would constitute actionable negligence on defendants' part and would support a verdict for plaintiff. Lenz v. Ridgewood Assocs., — N.C. App. —, 284 S.E.2d 702 (1981).

§ 42-44. General remedies and limitations.

CASE NOTES

Effect of Subsection (d). — By providing that a violation does not constitute negligence per se, the General Assembly left intact established common-law standards of ordinary and reasonable care in such cases, the violation of such a statute being only evidence of negligence. Lenz v. Ridgewood Assocs., — N.C. App. —, 284 S.E.2d 702 (1981).

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

Legal Periodicals. —

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

§ 42-55. Remedies.

If the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, the court may,

in its discretion, allow a reasonable attorney's fee to the duly licensed attorney representing the prevailing party, such attorney's fee to be taxed as part of the cost of court. (1977, c. 914, s. 1.)

Editor's Note. — This section is set out to correct errors in the 1981 Cumulative Supplement.

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Sec.
44A-2. Persons entitled to lien on personal property.

Article 3.

Model Payment and Performance Bond.

44A-35 to 44A-39. [Reserved.]

Article 4.

Self-Service Storage Facilities.

44A-40. Definitions.
44A-41. Self-service storage facility owner entitled to lien.
44A-42. When self-service storage facility lien arises and terminates.
44A-43. Enforcement of self-service storage facility lien.
44A-44. Right of redemption; good faith purchaser's right; disposition of proceeds; lienor's liability.
44A-45. Article is supplemental to lien created by contract.
44A-46. Application.

Article 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

CASE NOTES

Cited in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981).

§ 44A-2. Persons entitled to lien on personal property.

(e1) This Article shall not apply to liens created by storage of personal property at a self-service storage facility.

(1981 (Reg. Sess., 1982), c. 1275, s. 2.)

Effect of Amendment. —

The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, added subsection (e1).

Session Laws 1981 (Reg. Sess., 1982), c. 1275, s. 3, provides: "This act shall apply only to rental agreements, as defined in section 1 of this act [§ 44A-40 et seq.], that are entered into, extended, or renewed on or after the effective date of this act."

Legal Periodicals. —

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

CASE NOTES

Attempts to Avoid Security Interest by Sale Pursuant to Statutory Lien. — Where the purchaser of personal property which is subject to a valid, enforceable, perfected security interest buys in the collateral at a foreclosure sale conducted pursuant to this chapter to satisfy an account for repairs which the purchaser has failed to pay for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest; rather, the security property or collateral remains subject to the security interest, and if the indebtedness for payment of which the collateral was pledged remains in default, the right to possession continues to be with the holder of the security interest. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

§ 44A-3. When lien arises and terminates.

CASE NOTES

Quoted in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981).

§ 44A-4. Enforcement of lien.

OPINIONS OF ATTORNEY GENERAL

Warehouseman With Liens, etc. — The correct citation to the opinion of the Attorney General cited under this catchline in the 1981 Cumulative Supplement is 48 N.C.A.G. 111.

§ 44A-6. Title of purchaser.

CASE NOTES

Attempts to Avoid Security Interest by Sale Pursuant to Statutory Lien. — Where the purchaser of personal property which is subject to a valid, enforceable, perfected security interest buys in the collateral at a foreclosure sale conducted pursuant to this chapter to satisfy an account for repairs which the purchaser has failed to pay for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest; rather, the security property or collateral remains subject to the security interest, and if the indebtedness for payment of which the collateral was pledged remains in default, the right to possession continues to be with the holder of the security interest. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens on Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

CASE NOTES

Quoted in Con Co., Inc. v. Wilson Acres Apts., Ltd., — N.C. App. —, 289 S.E.2d 633 (1982).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-17. Definitions.

CASE NOTES

Quoted in Con. Co., Inc. v. Wilson Acres Apts., Ltd., — N.C. App. —, 289 S.E.2d 633 (1982).

§ 44A-18. Grant of lien; subrogation; perfection.

CASE NOTES

Subcontractor's Right Not Affected by Prime's Waiver. — The waiver of the right to establish a lien by the prime contractor does not affect plaintiff's right to perfect a lien as a subcontractor under this section. Con Co., Inc. v. Wilson Acres Apts., Ltd., — N.C. App. —, 289 S.E.2d 633 (1982).

§ 44A-20. Duties and liability of obligor.

CASE NOTES

Effect of Filing Claim before Service of Notice. — The fact that the lien claim is filed under this section before the notice was actually served does not make a difference. Con Co., Inc. v. Wilson Acres Apts., Ltd., — N.C. App. —, 289 S.E.2d 633 (1982).

§ 44A-23. Contractor's lien; subrogation rights of subcontractor.

CASE NOTES

Subcontractor Bound by Defenses against Contractor. — If a subcontractor attempts to perfect a lien by subrogation, he is bound by any defenses available against the contractor. Con Co., Inc. v. Wilson Acres Apts., Ltd., — N.C. App. —, 289 S.E.2d 633 (1982).

ARTICLE 3.

Model Payment and Performance Bond.

§ 44A-34. Construction of Article.

Editor's Note. — In this section as set out in the 1981 Cumulative Supplement, "public bodies of public buildings" should read "public bodies or public buildings."

§§ 44A-35 to 44A-39: Reserved for future codification purposes.

ARTICLE 4.

Self-Service Storage Facilities.

§ 44A-40. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Last known address" means that address provided by the occupant in the latest rental agreement or the address provided by the occupant in a subsequent written notice of a change of address.

(2) "Lienor" means any person entitled to a lien under this Article.

(3) "Occupant" means a person, his sublessee, successor, or assign, entitled to the use of the storage space at a self-service storage facility under a rental agreement, to the exclusion of others.

(4) "Owner" means the owner, operator, lessor, or sublessor of a self-service storage facility, his agent, or any other person authorized by him to manage the facility or to receive rent from an occupant under a rental agreement.

(5) "Personal property" means movable property not affixed to land and includes, but is not limited to, goods, merchandise, and household items.

(6) "Rental agreement" means any agreement or lease, written or oral, that establishes or modifies the terms, conditions, rules or any other provisions concerning the use and occupancy of a self-service storage facility.

(7) "Self-service storage facility" means any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such for the purpose of storing and removing personal property. No occupant shall use a self-service storage facility for residential purposes. A self-service storage facility is not subject to the provisions of Article 7 of General Statutes Chapter 25. Provided, however, if an owner issues any warehouse receipt, bill of lading, or other document of title for the personal property stored, the owner and the occupant are subject to the provisions of Article 7 of General Statutes Chapter 25 and the provisions of this Article do not apply. (1981, (Reg. Sess., 1982), c. 1275, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1275, s. 4, makes the act effective Sept. 1, 1982.

Session Laws 1981 (Reg. Sess., 1982), c. 1275, s. 3, provides: "This act shall apply only to rental agreements, as defined in section 1 of this act [§ 44A-40 et seq.], that are entered into, extended, or renewed on or after the effective date of this act."

§ 44A-41. Self-service storage facility owner entitled to lien.

The owner of a self-service storage facility has a lien upon all personal property stored at the facility for rent, expenses necessary for the preservation of the personal property, and expenses reasonably incurred in the sale or other disposition of the personal property pursuant to this Article. This lien shall not have priority over any security interest which is perfected at the time the occupant stores the property at the self-service storage facility. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-42. When self-service storage facility lien arises and terminates.

The lien conferred under this Article arises only when the owner acquires possession of the property stored in the self-service storage facility; and it shall terminate when the owner relinquishes possession of the property upon which the lien might be claimed, or when the occupant or any other person having a security or other interest in the property tenders prior to sale the amount of the rent, plus the expenses incurred by the owner for the preservation of the property. The reacquisition of possession of the property stored in the self-service storage facility, which was relinquished, shall not reinstate the lien. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-43. Enforcement of self-service storage facility lien.

(a) If the rent and other charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 15 days following the maturity of the obligation to pay rent, the owner may enforce the lien by a public sale or other disposition of the property as provided in this section. The owner may bring an action to collect rent and other charges in any court of competent jurisdiction at any time following the maturity of the obligation to pay the rent.

The occupant or any other person having a security or other interest in the property stored in the self-service storage facility may bring an action to request the immediate possession of the property, at any time following the assertion of the lien by the owner. Before such possession is granted, the occupant or the person with a security or other interest in the property shall pay the amount of the lien asserted to the clerk of court in which the action is pending, or post a bond for double the amount. The clerk shall then issue an order to the owner to relinquish possession of the property to the occupant or other party.

(b) Notice and Hearing:

(1) If the property upon which the lien is claimed is a motor vehicle, the lienor, following the expiration of the 15-day period provided by subsection (a), shall give notice to the Division of Motor Vehicles that a lien is asserted and that a sale is proposed. The lienor shall remit to the Division a fee of two dollars ($2.00); and shall also furnish the Division with the last known address of the occupant. The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested to the person having legal title to the vehicle, if reasonably ascertainable, and to the occupant, if different, at his last known address. The notice shall:

a. State: (i) that a lien is being asserted against the specific vehicle by the lienor or owner of the self-service storage facility, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the vehicle in satisfaction of the lien;

b. Inform the person having legal title and the occupant of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place; and

c. State that the legal title holder and the occupant have a period of 10 days from the date of receipt of the notice in which to notify the Division of Motor Vehicles by registered or certified mail, return receipt requested, that a hearing is desired to contest the sale of the vehicle pursuant to the lien.

The person with legal title or the occupant must, within 10 days of receipt of the notice from the Division of Motor Vehicles, notify the Division of his desire to contest the sale of the vehicle pursuant to the lien, and that the Division should so notify lienor.

Failure of the person with legal title or the occupant to notify the Division that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the vehicle against which the lien is asserted. Upon such failure, the Division shall so notify the lienor; the lienor may proceed to enforce the lien by a public sale as provided by this section; and the Division shall transfer title to the property pursuant to such sale.

If the Division is notified within the 10-day period provided in this section that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

(2) If the property upon which the lien is claimed is other than a motor vehicle, the lienor following the expiration of the 15-day period provided by subsection (a) shall issue notice to the person having a security or other interest in the property, if reasonably ascertainable, and to the occupant, if different, at his last known address by registered or certified mail, return receipt requested. The notice shall:

a. State: (i) that a lien is being asserted against the specific property by the lienor, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the property in satisfaction of the lien;

b. Provide a brief and general description of the personal property subject to the lien. The description shall be reasonably adequate to permit the person notified to identify it, except that any container including, but not limited to, a trunk, valise, or box that is locked, fastened, sealed, or tied in a manner which deters immediate access to its contents may be described as such without describing its contents;

c. Inform the person with a security or other interest in the property and occupant, if different, of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place;

d. State that the person with a security or other interest in the property or the occupant, if different, has a period of 10 days from the date of receipt of the notice to notify the lienor by registered, or certified mail, return receipt requested, that a hearing is desired, and that if the legal title holder or occupant wishes to contest the sale of his property pursuant to the lien he should notify the lienor that a hearing is desired.

The person with a security or other interest in the property or the occupant must, within 10 days of receipt of the notice from the lienor, notify the lienor of his desire for a hearing, and state whether or not he wishes to contest the sale of the property pursuant to the lien.

Failure of the person with a security or other interest in the property, or the occupant to notify the lienor that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted. Upon such failure the lienor may proceed to enforce the lien by a public sale as provided by this section.

If the lienor is notified, within the 10-day period as provided by this section, that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Public Sale. —

(1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the occupant if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (d) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held; and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale.

(2) The sale must be held on a day other than Sunday and between the hours of 10:00 a.m. and 4:00 p.m.:

a. At the self-service storage facility or at the nearest suitable place to where the property is held or stored; or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(d) Notice of Sale. — The notice of sale shall include:

(1) The name and address of the lienor;

(2) A statement to the effect that various items of personal property are being sold pursuant to the assertion of a lien for rental at the self-service storage facility;

(3) The place, date, and time of the sale. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-44. Right of redemption; good faith purchaser's right; disposition of proceeds; lienor's liability.

(a) Before the sale authorized by G.S. 44A-43, or other disposition of the property, the occupant may pay the amount necessary to satisfy the lien plus the reasonable expenses incurred by the owner for the preservation of the property and thereby redeem the property. Upon receipt of such payment, the owner shall return the personal property to the occupant; and thereafter shall have no further claim against such personal property on account of the lien which was asserted.

(b) A purchaser in good faith, and without knowledge of any defect in the sale of the personal property sold to satisfy a lien provided for in this Article takes the property free of any rights of persons against whom the lien was valid.

(c) Proceeds of a sale under this section shall be applied as follows:

(1) Payment of reasonable expenses incurred in connection with the sale;

(2) Payment of the obligation secured by any security interest that was perfected at the time the occupant stored the property at the self-service storage facility;

(3) Payment of the obligation secured by the self-service storage facility lien;

(4) Any balance shall be paid to the occupant or other person lawfully entitled thereto; but if such person cannot be found, the balance shall be paid to the clerk of superior court of the county in which the sale took place, to be held by the clerk for the person entitled thereto.

(d) If the lienor fails to comply substantially with any of the provisions of this section, he shall be liable to the occupant or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with reasonable attorney's fees as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-45. Article is supplemental to lien created by contract.

Nothing in this Article shall be construed as in any manner impairing or affecting the right of parties to create liens by contract or agreement. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-46. Application.

All rental agreements entered into before September 1, 1982, and not extended or renewed after that date, and the rights and duties and interests flowing from them, shall remain valid, and may be enforced or terminated in accordance with their terms or as permitted by any other law of this State. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

Chapter 45.

Mortgages and Deeds of Trust.

ARTICLE 2A.

Sales under Power of Sale.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

Legal Periodicals. —
For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Evidence of legal defenses is admissible and proper for consideration in a hearing pursuant to this section where a lender used a deed of trust on residential real property which prohibited conveyance without his consent and provided for acceleration of extract enhanced interest upon conveyance of the security property. In re Bonder, — N.C. App. —, 285 S.E.2d 615 (1982).

A superior court judge is not authorized to invoke equity jurisdiction, etc. —
Judge of the superior court has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in this section. In re Helms, — N.C. App. —, 284 S.E.2d 553 (1981).

Equitable Defenses Asserted in Action under § 45-21.34. — Because the hearing under this section is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee. If respondents feel that they have equitable defenses to the foreclosure, they should be asserted in an action to enjoin the foreclosure sale under § 45-21.34. In re Helms, — N.C. App. —, 284 S.E.2d 553 (1981).

Issues To Be Determined on Appeal. —
Under this section, there are only four issues before the clerk at a foreclosure hearing: the existence of a valid debt of which the party seeking to foreclose is the holder, the existence of default, the trustee's right to foreclose, and the sufficiency of notice to the record owners of the hearing. The clerk's findings are appealable to the superior court within 10 days for a hearing de novo, but the court's authority is likewise limited. In re Helms, — N.C. App. —, 284 S.E.2d 553 (1981).

Stated in Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102 (1981).

Cited in DuBose v. Gastonia Mut. Sav. & Loan Ass'n, — N.C. App. —, 286 S.E.2d 617 (1982).

§ 45-21.21. Postponement of sale.

CASE NOTES

Persons Protected by Section. — This section provides procedural protections for a mortgagor, not for the purchaser of property who acts at his own risk and has no basis to assert a sale is invalid because it is postponed in a manner inconsistent with this section. Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102 (1981).

§ 45-21.27. Upset bid on real property; compliance bonds.

CASE NOTES

Cited in In re Burgess, — N.C. App. —, 291 S.E.2d 323 (1982).

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

CASE NOTES

Applied in In re Burgess, — N.C. App. —, 291 S.E.2d 323 (1982).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

CASE NOTES

Stated in In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981); Huff v. Trent Academy of Basic Educ., Inc., 53 N.C. App. 113, 280 S.E.2d 17 (1981).

§ 45-21.32. Special proceeding to determine ownership of surplus.

CASE NOTES

The superior court had no jurisdiction of a special proceeding under this section brought by judgment creditors to determine the ownership of surplus funds remaining after a foreclosure sale where the matter was simply put on the calendar for hearing in the superior court and there was no appeal from an order of the clerk by an aggrieved party. Journeys Int'l, Inc. v. Corbett, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

Stated in In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

Legal Periodicals. —
For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Proper Method for Invoking Equity Jurisdiction. —

Because the hearing under § 45-21.16 is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee. If respondents feel that they have equitable defenses to the foreclosure, they should be asserted in an action to enjoin the foreclosure sale under this section. In re Helms, — N.C. App. —, 284 S.E.2d 553 (1981).

Quoted in In re Burgess, — N.C. App. —, 291 S.E.2d 323 (1982).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

Legal Periodicals. —

For survey of 1980 civil procedure, see 59 N.C.L. Rev. 1053 (1981).

CASE NOTES

This section is not available as a defense to nonmortgagor defendants, etc. —

In an action to recover on a note for the purchase of land where the defendant-buyer did not hold a property interest in the land, there was no merit to defendants' contention that they were comakers under the note and as such were entitled to the protection against deficiency judgments provided by this section, since the protection of this section is limited to persons who hold a property interest in mortgaged property. American Foods, Inc. v. Goodson Farms, Inc., 50 N.C. App. 591, 275 S.E.2d 184, cert. denied and appeal dismissed, — N.C. —, 280 S.E.2d 459, aff'd, — N.C. —, 283 S.E.2d 517 (1981).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

Legal Periodicals. —

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Legislative Intent. —

In accord with 1st paragraph of the 1981 Cumulative Supplement. See Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

This section seeks to protect the purchaser of real property in those instances where the seller also financed the sale. In re Gulledge, 17 B.R. 311 (M.D.N.C. 1982).

Effect of Section. — This section limits the seller who finances the purchase of real property to those funds the seller obtains from a foreclosure upon the property. In re Gulledge, 17 B.R. 311 (M.D.N.C. 1982).

Applicability. — The objective of the anti-deficiency statute is threatened and this section is properly applicable where there is a wide variance between the purchase prices obtained by the claimant and the amounts obtained upon foreclosure of the properties. In re Gulledge, 17 B.R. 311 (M.D.N.C. 1982).

The objective of this anti-deficiency statute, to protect purchasers from the potentially oppressive tactics of vendors who finance the sale of real property, is not threatened where the subsequent purchase price of the property at least equaled that amount paid for the property. In re Gulledge, 17 B.R. 311 (M.D.N.C. 1982).

Evidence of Indebtedness Must Show, etc. — Generally, the failure to disclose the character of the instruments renders this section inapplicable. In re Gulledge, 17 B.R. 311 (M.D.N.C. 1982).

Recovery of Attorneys' Fees Not a Deficiency. — Where a provision for attorneys' fees in a promissory note given by defendant to plaintiffs and incorporated in the Deeds of

Trust is properly authorized by § 6-21.2, recovery of the fees does not represent a deficiency in violation of this section. Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Applied in American Foods, Inc. v. Goodson Farms, Inc., 50 N.C. App. 591, 275 S.E.2d 184 (1981); Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981).

Chapter 46.

Partition.

ARTICLE 1.

Partition of Real Property.

§ 46-3. Petition by cotenant or personal representative of cotenant.

CASE NOTES

I. IN GENERAL.

Stated in Bridgers v. Bridgers, — N.C. App. —, 289 S.E.2d 921 (1982).

§ 46-19. Confirmation and impeachment of report.

CASE NOTES

Stated in Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

CASE NOTES

Applied in Harris v. Harris, 51 N.C. App. 103, 275 S.E.2d 273 (1981).

Quoted in Bridgers v. Bridgers, — N.C. App. —, 289 S.E.2d 921 (1982).

§ 46-25. Sale of standing timber on partition; valuation of life estate.

CASE NOTES

This section changes the common law, etc. —

In accord with original. See Bridgers v. Bridgers, — N.C. App. —, 289 S.E.2d 921 (1982).

"Subject to Life Estate". — This section is not limited in application to only those tracts of land in which interests are subject to a life estate. When this section speaks of tenants in common "either in possession, or in remainder or reversion, subject to a life estate," the phrase "subject to a life estate" modifies only the words "remainder" and "reversion." Tenants in common who presently possess a tract of land

may also petition for a sale of timber. Bridgers v. Bridgers, — N.C. App. —, 289 S.E.2d 921 (1982).

Cotenants Need Not Have Same Type of Interest. — This section does not require all cotenants to have the same type interest in the land. A cotenant in remainder may petition for a sale of standing timber from land in which the other cotenant has a present possessory interest. Bridgers v. Bridgers, — N.C. App. —, 289 S.E.2d 921 (1982).

Showing of Impossibility of Land Partition Unnecessary. — Tenants in remainder are not required to show under this section that an equitable partition of land tracts is not possible before the court may authorize a sale of the timber apart from the realty. Bridgers v. Bridgers, — N.C. App. —, 289 S.E.2d 921 (1982).

§ 46-26. Sale of mineral interests on partition.

CASE NOTES

Quoted in Bridgers v. Bridgers, — N.C. App. —, 289 S.E.2d 921 (1982).

Chapter 47.

Probate and Registration.

ARTICLE 2.

Registration.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

CASE NOTES

I. IN GENERAL.

Purpose Is to Enable, etc. — Purpose of this section is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

IV. RIGHTS OF PERSONS PROTECTED.

This section does not protect all purchasers, but only innocent purchasers for value. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Status of Innocent Purchaser For Value Precluded by Actual Notice of Pending Litigation. — While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Purchaser Obtaining and Recording Deed After Service of Summons Not Protected. — A purchaser of real property who obtains and records deed thereto after being served with a summons in an action by a prior purchaser demanding conveyance of that property is not protected as a purchaser for value under the recordation statute. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Burden on Purchaser. — Where a purchaser claims protection under the registration laws, he has the burden of proving, by a preponderance of the evidence, that he is an innocent purchaser for value, i.e., that he paid valuable consideration and had no actual notice, or constructive notice by reason of lis pendens, of pending litigation affecting title to the property. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

V. NOTICE.

This section serves to provide constructive notice of claims to real property. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Sections 1-116, 1-118 and this section serve to provide record notice, upon the absence of which a prospective innocent purchaser may rely. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

ARTICLE 6.

Execution of Powers of Attorney.

§ 47-115.1. Appointment of attorney-in-fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.

CASE NOTES

Authority Presumed to Continue. — The authority granted by a power of attorney will be presumed to continue in the absence of anything showing a revocation of that authority. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Chapter 48.

Adoptions.

§ 48-9. When consent may be given by persons other than parents.

CASE NOTES

Standing of Foster Parents to Challenge Agency's Denial of Request to Adopt Child. — Since the welfare of the child is the controlling factor in an adoption proceeding, any agreement between foster parents and a department of social services concerning the adoption of a child who is placed in a home for foster care is subject to the court's independent judgment as to what is in the best interest of the child; consequently, in a child custody suit defendant department of social services could not seek to deprive plaintiffs, as foster parents, of standing to challenge the reasonableness of defendant's denial of plaintiffs' request to adopt the minor child placed in their home. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

§ 48-9.1. Additional effects of surrender and consent given to director of social services or to licensed child-placing agency; custody of child; disposition of certain unadoptable children.

CASE NOTES

This Section and § 50-13.1 Distinguished. — When the two statutes are construed together, it is apparent that § 50-13.1 was intended as a broad statute covering a myriad of situations in which custody disputes are involved, while this section is a narrow statute applicable only to custody of a minor child surrendered by its natural parents pursuant to § 48-9(a)(1). Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Subdivision (1) of this section was intended as an exception to the general grant of standing to contest custody set forth in § 50-13.1. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Retention of Custody by Agency Until Occurrence of Specified Event. — Under this section, the county department of social services or child placing agency to which a child has been surrendered by his parents retains legal custody of the child until the occurrence of one of the events specified therein, and legal custody never passes to any foster parent charged with the duty of caring for and supervising the child. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Action for Custody of Foster Child Governed by Section. — Action to obtain custody of a child placed in plaintiffs' home pursuant to a foster parent agreement was governed by this section and not by § 7A-289.33, as § 7A-289.33 sets forth the effects of a court order terminating the parental rights of a natural parent on grounds of abuse or neglect, and such a court order was not involved where the natural parents voluntarily released their parental rights and surrendered child for adoptive placement. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Standing of Foster Parents to Challenge Agency's Denial of Request to Adopt Child. — Since the welfare of the child is the controlling factor in an adoption proceeding, any agreement between foster parents and a department of social services concerning the adoption of a child who is placed in a home for foster care is subject to the court's independent judgment as to what is in the best interest of the child; consequently, in a child custody suit defendant department of social services could not seek to deprive plaintiffs, as foster parents, of standing to challenge the reasonableness of defendant's denial of plaintiffs' request to adopt the minor child placed in their home. Oxendine

v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

§ 48-12. Nature of proceeding; venue.

CASE NOTES

Transfer of Action to Superior Court. — Clerk of the superior court did not err in transferring plaintiffs' adoption action to the superior court where a number of factual issues arose in determining whether defendant department of social services unreasonably withheld its consent to allow plaintiffs to institute an adoption proceeding. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Cited in Davidson v. Gaston County Dep't of Social Servs., — N.C. App. —, 290 S.E.2d 399 (1982).

§ 48-23. Legal effect of final order.

CASE NOTES

Adoption Effects Complete Substitution of Families. —

Severance of legal ties with the child's natural family was not intended to be partial; rather, this section means that upon a final order of adoption the severance of legal ties with the child's natural family is total. The child acquires full status as a member of his adoptive family and in so doing is for all legal purposes removed from his natural bloodline. Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Right of Adopted Child to Take Under Will. —

Subdivision (3) of this section makes clear that the legislature intended a complete substitution of families and severance of the adopted child's legal ties with his natural parents, to embrace not only intestate succession but also property passing under deeds, grants, wills or other written instruments. Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Subdivision (3) does not abolish, etc. —

In accord with original. See Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Those Adopted Out of Family Not "Issue" Thereof. — In enacting this section the legislature contemplated that upon a final order of adoption a complete substitution of family would take place, with the adopted child becoming the child of his adoptive parents and a member of their family, and the legal relationship with the child's natural parents and family being by virtue of the adoption order completely severed; therefore, those adopted out of a family may not take as "issue" of that family under a deed granting a remainder to issue. Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

§ 48-26. Procedure for opening record for necessary information.

CASE NOTES

Applied in Davidson v. Gaston County Dep't of Social Servs., — N.C. App. —, 290 S.E.2d 399 (1982).

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

CASE NOTES

Cited in Estate of Lucas v. Jarrett, — N.C. App. —, 284 S.E.2d 711 (1981).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

CASE NOTES

Limitation on Prosecutions for Failure to Support Illegitimate Children Unconstitutional. — The three-year statute of limitations contained in § 49-4(1) for prosecutions under this section violates the Equal Protection Clause of the federal Constitution in that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children whereas there is no limitations period for the prosecution under § 14-322(d) of persons who willfully fail to support their legitimate children. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

Elements of Offense. —

In accord with 2nd paragraph in original. See State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981).

In a prosecution under this section, the State must prove two things: (1) that the defendant is indeed the parent of the child and (2) that defendant has intentionally neglected or refused to provide reasonable support for the child. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Prosecution of a parent for willful nonsupport under this section is a criminal proceeding. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

Violation of Statute Is Continuing Offense. —

A previous acquittal on a charge of willful nonsupport does not bar a subsequent prosecution because this section creates a continuing offense. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Willfulness Is Essential Element of Offense. —

In accord with 1st paragraph in original. See State v. McCoy, 304 N.C. 363, — S.E.2d — (1981).

Willfulness Not Presumed, etc. —

Where a father has failed to pay the child support the court ordered him to, he may not be held in contempt of court and imprisoned or punished in any way until a judicial determination has been made to decide whether he has failed willfully to comply; willfulness may not be presumed. State v. McCoy, 304 N.C. 362, — S.E.2d — (1981).

Section 49-14 Compared. — The issue of paternity is the entire thrust of the civil action under § 49-14, whereas the focus of the crime punishable by this section is the willful failure to pay support for an illegitimate child, not paternity, because this section does not make the mere begetting of a child a crime. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Effect of Proceedings under Section upon Subsequent Civil Proceedings, etc. —

A judgment of acquittal in a criminal prosecution under this section for willful failure to support two illegitimate children was not res judicata in a county's civil action under § 49-14 to establish defendant's paternity of the two children where the criminal judgment merely stated that defendant was found not guilty, the judgment did not disclose whether an acquittal was entered because the judge found that defendant was not the father of the children or because he did not believe defendant had

willfully failed to provide for their reasonable support, and there was thus no showing on the record that the issue of paternity had been previously adjudicated in defendant's favor. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Stated in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 49-4. When prosecution may be commenced.

CASE NOTES

Constitutionality. — The three-year statute of limitations contained in subdivision (1) of this section for prosecutions under § 49-2 violates the Equal Protection Clause of the federal Constitution in that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children whereas there is no limitations period for the prosecution under § 14-322(d) of persons who willfully fail to support their legitimate children. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

Stated in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

§ 49-7. Issues and orders.

CASE NOTES

Verdict in Bastardy Action. — This section requires the court to determine, in the affirmative, first whether or not the defendant is the parent before it proceeds to determine whether or not defendant has willfully failed to support his or her child. For this reason, the verdict in a bastardy action should ordinarily be rendered in a special form, upon the submission of separate written issues or interrogatories, or alternatively, if a general verdict is returned, it should be accompanied by appropriate findings of fact to clarify the precise effect of the judgment. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Appeal on Issue of Parentage, etc. — Even if defendant is found not guilty of willfully neglecting or refusing to support illegitimate child, he may nevertheless appeal an adverse finding and conclusion that he is the parent of such illegitimate child. State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981).

§ 49-8. Power of court to modify orders; suspend sentence, etc.

CASE NOTES

Stated in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

CASE NOTES

Requirement That Child's Surname Be Changed Invalid. — Valid purpose served by this section and § 49-13 of establishing the filial relationship between illegitimate children and their fathers is not enhanced, advanced, or served in any useful or justifiable way by the additional requirement that the child's surname be changed to that of the father; such a requirement denies the mother of an illegitimate child the equal protection of the laws, and because it requires arbitrary action on the part of an agency of the State, it denies such mothers a protected liberty interest without due process of law. Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

§ 49-11. Effects of legitimation.

CASE NOTES

Applied in Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

§ 49-12. Legitimation by subsequent marriage.

CASE NOTES

Cited in Herndon v. Robinson, — N.C. App. —, 291 S.E.2d 305 (1982).

§ 49-13. New birth certificate on legitimation.

CASE NOTES

Name change requirement of this section is invalid. Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

Valid purpose served by § 49-10 and this section of establishing the filial relationship between illegitimate children and their fathers is not enhanced, advanced, or served in any useful or justifiable way by the additional requirement that the child's surname be changed to that of the father; such a requirement denies the mother of an illegitimate child the equal protection of the laws, and because it requires arbitrary action on the part of an agency of the State, it denies such mothers a protected liberty interest without due process of law. Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

Legal Periodicals. —
For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

CASE NOTES

Due Process Protections. — Adjudication of paternity imposes on an individual duties and obligations of great significance, putting at risk for the accused father his liberty, his property and his family relationships; when these interests are threatened by the powers of the State, the federal and State Constitutions require that certain basic procedural due process protections be afforded so that the individual has a meaningful opportunity to be heard. Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

Appointment of Counsel for Indigent Defendants. — Given the interests involved in, and the implications of, a paternity proceeding, court-appointed counsel for the indigent defendant is essential to his having a meaningful opportunity to be heard; hence, due process and basic fundamental fairness demand that counsel be appointed in paternity suits instituted by the State. Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

Section 49-2 Compared. — The issue of paternity is the entire thrust of the civil action under this section, whereas the focus of the crime punishable by § 49-2 is the willful failure to pay support for an illegitimate child, not paternity, because that section does not make the mere begetting of a child a crime. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Actions to enforce the child's right to support under this section and § 49-15 are civil actions. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

The illegitimate child has no statutory right to parental support through criminal proceedings; rather, such child's right to parental support is enforced by an action under this section and § 49-15, which impose a support obligation on persons determined to be the parents of an illegitimate child. The function of a criminal prosecution of a parent who willfully fails to support his illegitimate child is not to compensate the illegitimate child, but to promote society's interest in preventing the parents of children from willfully leaving those children without parental support. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

Effect of Criminal Proceedings under § 49-2, etc. —

A judgment of acquittal in a criminal prosecution under § 49-2 for willful failure to support two illegitimate children was not res judicata in a county's civil action under this section to establish defendant's paternity of the two children where the criminal judgment merely stated that defendant was found not guilty, the judgment did not disclose whether an acquittal was entered because the judge found that defendant was not the father of the children or because he did not believe defendant had willfully failed to provide for their reasonable support, and there was thus no showing on the record that the issue of paternity had been previously adjudicated in defendant's favor. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Cited in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

§ 49-15. Custody and support of illegitimate children when paternity established.

Legal Periodicals. —
For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

CASE NOTES

Actions to enforce the child's right to support under this section and § 49-14 are civil actions. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

The illegitimate child has no statutory right to parental support through criminal proceedings; rather, such child's right to parental support is enforced by an action under this section and § 49-14 which impose a support obligation on persons determined to be the parents of an illegitimate child. The function of a criminal prosecution of a parent who willfully fails to support his illegitimate child is not to compensate the illegitimate child, but to promote society's interest in preventing the parents of children from willfully leaving those children without parental support. State v. Beasley, — N.C. App. —, 290 S.E.2d 730 (1982).

Applied in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

Chapter 50.

Divorce and Alimony.

§ 50-3. Venue; removal of action.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

Section Not Jurisdictional — Waiver. — In accord with 1st paragraph in original. See Smith v. Smith, — N.C. App. —, 290 S.E.2d 390 (1982).

§ 50-6. Divorce after separation of one year on application of either party.

CASE NOTES

Constitutionality. —

Abolition of defense of recrimination in a divorce action based on a year's separation does not deprive a spouse who was married before such abolition of a vested property right under the due process clause of the U.S. Const., 14th Amend. or the "law of the land clause" of N.C. Const., Art. 1, § 19. Sawyer v. Sawyer, 54 N.C. App. 141, 282 S.E.2d 527 (1981).

Abolition of defense of recrimination in a divorce action based on a year's separation does not deprive defendant husband of a vested property right as a tenant by the entirety without due process of law because it permits plaintiff wife to obtain a divorce from defendant and defeat defendant's right upon death of the wife to become the sole owner of property held by the parties as tenants by the entirety. Sawyer v. Sawyer, 54 N.C. App. 141, 282 S.E.2d 527 (1981).

Isolated or casual acts of sexual intercourse between separated spouses toll the statutory period required for divorce predicated on separation. Pitts v. Pitts, 54 N.C. App. 163, 282 S.E.2d 488 (1981).

Quoted in McCall v. Harris, — N.C. App. —, 285 S.E.2d 335 (1982).

§ 50-7. Grounds for divorce from bed and board.

CASE NOTES

Sleeping in Separate Bedroom Not Abandonment. — A husband who has neither left the marital home nor withheld support cannot be found to have abandoned his wife merely by electing to sleep in a separate bedroom. Oakley v. Oakley, 54 N.C. App. 161, 282 S.E.2d 589 (1981).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

CASE NOTES

Cited in Smith v. Smith, — N.C. App. —, 290 S.E.2d 390 (1982).

§ 50-9. Effect of answer of summons by defendant.

CASE NOTES

Cited in Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981).

§ 50-11. Effects of absolute divorce.

Legal Periodicals. —

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

CASE NOTES

Cited in McCall v. Harris, — N.C. App. —, 285 S.E.2d 335 (1982); Robinson v. Robinson, — N.C. App. —, 289 S.E.2d 612 (1982).

§ 50-13.1. Action or proceeding for custody of minor child.

CASE NOTES

Broad Application of Section. — Had the legislature intended this section to apply to only those custody disputes involved in a divorce or separation, it would have expressly so provided; therefore, mere fact that it is found in the Chapter of the General Statutes governing divorce and alimony is not sufficient to cause its application to be restricted to custody disputes involved in separation or divorce. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

This Section and § 48-9.1 Distinguished. — When the two sections are construed together, it is apparent that this section was intended as a broad statute, covering a myriad of situations in which custody disputes are involved, while § 48-9.1 is a narrow statute, applicable only to custody of a minor child surrendered by its natural parents pursuant to § 48-9(a)(1). Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Section 48-9.1(1) as Exception to Grant of Standing in this Section. — Section 48-9.1(1) was intended as an exception to the general grant of standing to contest custody set forth in this section. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

CASE NOTES

The welfare of the child, etc. —

In accord with 7th paragraph in original. See Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

In accord with 8th paragraph in original. See Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

The "paramount consideration" and "polar star" which have long governed and guided the discretion of the trial judges are the welfare and needs of the child, not the persons seeking his or her custody, and even parental love must yield to the promotion of those higher interests. In re Peal, — N.C. —, 290 S.E.2d 664 (1982).

Wishes of Child of Age of Discretion, etc. —

In accord with 1st paragraph in original. See Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

In making the weighty choice of awarding custody, the judge may properly consider the preference or wishes of a child of suitable age and discretion. In re Peal, — N.C. —, 290 S.E.2d 664 (1982).

Trial Court Must Make Findings of Fact. — To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child; the conclusion of law determinative of the custody is not, therefore, that the person gaining custody is a fit and proper person to have custody, but which party will best promote the interest and welfare of the child. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

But Trial Court Has Wide Discretion. —

In accord with 1st paragraph in original. See Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

In accord with 5th paragraph in original. See In re Peal, — N.C. —, 290 S.E.2d 664 (1982).

The trial judge is entrusted by this section with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties. In re Peal, — N.C. —, 290 S.E.2d 664 (1982).

Such Findings Are Conclusive, etc. —

The normal rule in regard to the custody of children is that where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal; the facts found must be adequate for the appellate court to determine that the judgment is substantiated by competent evidence, however. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Scope of Findings. — The trial judge is not required to find all the facts shown by the evidence, but only enough material facts to support the judgment. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Findings bearing on the party's fitness to have care, custody and control of the child and the findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Failure To Find Facts Requires Remand. — When the court fails to find facts so that the reviewing court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Award to One Parent after Both Found Fit. — When the court finds that both parties are fit and proper persons to have custody, and then adjudges that it is in the best interest of the child for the father to have custody, such holding will be upheld; but it must be supported by competent evidence. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

The fact that the mother's paramour had been living with mother and minor child since the parties' separation alone was insufficient to determine custody; the court must consider all the facts of the case and decide the issue in the best interests of the child. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Award of Custody to Father Held Proper. — Trial court did not err in concluding that it would be in the best interest of minor child for her custody to be placed with defendant father where, pursuant to separation agreement, plaintiff mother gave defendant custody of the child and agreed to assist with medical and dental bills on behalf of the child; the child had lived with defendant at all times since her birth and lived solely with defendant since the parties' separation; plaintiff rarely visited the child following the parties' separation; and plaintiff admitted that defendant had done a good job of looking after the child since their separation. Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981).

Award to Father on Finding of Changed Circumstances. — Trial judge did not abuse

his discretion by ruling that a material change in circumstances had occurred with the increased age of the younger child who had been awarded previously to the mother since the child indicated clearly his desire to stay with his father who also had custody of his elder brother. In re Peal, — N.C. —, 290 S.E.2d 664 (1982).

Applied in Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

§ 50-13.4. Action for support of minor child.

Legal Periodicals. —

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

CASE NOTES

Conduct of Parties May Be Considered. — This section clearly allows the trial court to consider other facts of the particular case in arriving at the amount of defendant's share of support in an action for reimbursement, and thus, while the defendant's ability to pay and his earning capacity are factors to be considered, they are not controlling. Therefore, the court may also consider the conduct of the parties and the equities of the case. Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, — U.S. —, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

Capacity to earn may be the basis, etc. — Under this section and § 50-13.7 a husband's ability to pay child support is normally determined by his actual income at the time the award is made or modified. If, however, there is a finding that the husband is deliberately depressing his income or otherwise acting in deliberate disregard of his obligation to provide reasonable support for his child, his capacity to earn may be made the basis of the award. Under these circumstances, his motion to reduce the amount of child support will be denied. Goodhouse v. DeFravio, — N.C. App. —, 290 S.E.2d 751 (1982).

Finding Where Award Based on Capacity to Earn. —

In accord with original. See Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, — U.S. —, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

To Support an Award of Payment, etc. —

In a child support action where the trial court failed to make findings as to the actual needs of the parties' minor child or the expenses of the parties, its order directing child support payments was erroneous. Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981).

Award Not Disturbed Unless Discretion Abused. —

Amount of support ordered for children is in the discretion of the trial court and will not be disturbed absent manifest abuse. Minges v. Minges, 53 N.C. App. 507, 281 S.E.2d 88 (1981).

Willfulness Required under Subdivision (f)(9). — The element of willfulness is required for a finding of civil contempt under subdivision (f)(9) of this section and § 5A-21. Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

Deductions from Payments Held Not Contempt. — A defendant is not in civil contempt of court by deducting from his child support payments made to plaintiff amounts representing voluntary expenditures for needs of the parties' children while they were visiting him. Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

Applied in In re Register, 303 N.C. 149, 277 S.E.2d 356 (1981).

Quoted in Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546 (1981).

Stated in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 50-13.5. Procedure in actions for custody or support of minor children.

CASE NOTES

Purpose of Subdivision (d)(1). — Subdivision (d)(1) of this section is designed to give the parties to a custody action adequate notice in order to insure a fair hearing. Clayton v.

Clayton, 54 N.C. App. 612, 284 S.E.2d 125 (1981).

And Issue of Custody and Support Remains in Fieri. —

Once a court in this State properly asserts jurisdiction to determine the rights of the parties to custody of a minor child, that court retains jurisdiction to modify its custody decree upon a showing of a substantial change of circumstances. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Custody Decree of Another State, etc. —

When a court asserts jurisdiction to enforce a custody judgment of another state and no showing of a substantial change of circumstances is made, its jurisdiction terminates upon a final judgment awarding full faith and credit to the sister state's decree. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

But May Be Modified if Change, etc. —

When a court in this State asserts jurisdiction in a habeas corpus proceeding to enforce a custody decree of another state, the court retains jurisdiction to modify the sister state's decree upon a showing of a substantial change in circumstances since the date the foreign decree was entered. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

A temporary custody judgment is not entitled to full faith and credit and has no effect on defendant's ability to seek full faith and credit of a final custody judgment subsequently rendered in another state. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Nature of Inquiry as to Full Faith and Credit. — In a proceeding to determine whether a custody judgment is entitled to full faith and credit, the court's inquiry is first confined to whether the judgment sought to be enforced was a final judgment rendered by a court with competent jurisdiction. If the court determines that the foreign judgment was final and rendered by a court with proper jurisdiction, then the judgment is entitled to full faith and credit and the court never reaches the merits of the custody action unless one of the parties asserts that the judgment should be modified due to a substantial change in circumstances. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Findings Required Where Severe Restrictions, etc. —

When severe restrictions are placed on the right of visitation, this section requires the trial judge to make findings of fact supported by competent evidence which warrant the restrictions. Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

Stated in Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

Award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and defray the necessary expenses thereof. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Entitlement to Representation Not Limited to Trial Level. — There is nothing in our statutory or case law to suggest that a dependent spouse in this State is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Findings of Fact Must Support Order. — To support an award of attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent. Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, petition for discretionary review denied, — N.C. —, 285 S.E.2d 831 (1981).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

This section provides the procedural mechanism permitting modification. Goodhouse v. DeFravio, — N.C. App. —, 290 S.E.2d 751 (1982).

Imposition of Earnings Capacity Rule. — Under § 50-13.4 and this section, a husband's ability to pay child support is normally determined by his actual income at the time the award is made or modified. If, however, there is a finding that the husband is deliberately depressing his income or otherwise acting in deliberate disregard of his obligation to provide reasonable support for his child, his capacity to earn may be made the basis of the award. Under these circumstances, his motion to reduce the amount of child support will be denied. Goodhouse v. DeFravio, — N.C. App. —, 290 S.E.2d 751 (1982).

Burden of Showing, etc. —

In accord with 4th paragraph in 1981 Cum. Supp. See Barnes v. Barnes, — N.C. App. —, 286 S.E.2d 586 (1982).

Modification where Consent Judgment in Divorce Action Determined Custody. — Where custody was awarded by court order by the adoption of a consent judgment relative to child custody by the court in its findings of fact and conclusions of law, custody being awarded to defendant as part of the divorce judgment, not merely by agreement of the parties, any subsequent modification must be made in accordance with subsection (a) of this section. Barnes v. Barnes, — N.C. App. —, 286 S.E.2d 586 (1982).

Applied in In re Register, 303 N.C. 149, 277 S.E.2d 356 (1981); Harris v. Harris, — N.C. App. —, 286 S.E.2d 859 (1982).

Cited in Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981).

§ 50-16.1. Definitions.

Legal Periodicals. —

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Intent as to Lump Sum Awards. — The legislature clearly intended to include lump sum awards as well as periodic support in the statutory definition of alimony. McCall v. Harris, — N.C. App. —, 285 S.E.2d 335 (1982).

"Dependent Spouse." —

In accord with 3rd paragraph in 1981 Cum. Supp. See Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981).

"Maintenance and Support", etc. —

In accord with 1981 Cum. Supp. See Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981).

Father is not entitled to an accounting from mother for sums paid for child support pursuant to consent judgment. Glenn v. Glenn, 53 N.C. App. 515, 281 S.E.2d 83, petition for discretionary review denied, — N.C. —, 285 S.E.2d 832 (1981).

Quoted in Mims v. Mims, — N.C. —, 286 S.E.2d 779 (1982).

Stated in Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Cited in Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551 (1981); Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981); Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981); Barr v. Barr, — N.C. App. —, 284 S.E.2d 762 (1981); Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

§ 50-16.2. Grounds for alimony.

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Effect of Consent Judgment on Dependency Requirement. — A finding of dependency is not required where judgments ordering payment of alimony are entered by consent. Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551, appeal dismissed and petition for discretionary review denied, 303 N.C. 543, 281 S.E.2d 660 (1981).

Applied in Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981).

Stated in Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981); Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981).

Cited in Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981); Barr v. Barr, — N.C. App. —, 284 S.E.2d 762 (1981); Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

§ 50-16.3. Grounds for alimony pendente lite.

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Prerequisites for Determination of Award of Counsel Fees. —

In accord with 1st paragraph in original. See Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981).

§ 50-16.4. Counsel fees in actions for alimony.

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Elements to Be Considered. —

In accord with 2nd paragraph in original. See Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981).

Showing of Need Required. — In order for dependent spouse to be awarded counsel fees, she must show that she needs such counsel fees to enable her, as a litigant, to meet her husband on substantially even terms by making it possible for her to employ adequate counsel. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981).

Award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and defray the necessary expenses thereof. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Entitlement to Representation Not Limited to Trial Level. — There is nothing in our statutory or case law to suggest that a dependent spouse in this State is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Award of Counsel Fees Held Proper. — Where plaintiff testified that she had no income except rental from her property and temporary alimony, all of which was required for living expenses, it was not error for trial court to

award counsel fees to her in her action for permanent alimony. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981).

§ 50-16.5. Determination of amount of alimony.

Legal Periodicals. —
For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Section 50-16.9 Circumstances Refer to This Section. — The change of circumstances required by § 50-16.9 for modification of an alimony order refers to those circumstances listed in this section. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981); Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Discretion of Judge. —
In accord with 1st paragraph in original. See Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

In accord with 4th paragraph in 1981 Cum. Supp. See Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

Dependent Spouse of Wealthy Man Entitled to Live as Such. — When the evidence shows a substantial estate in the supporting spouse, and the dependent spouse is entitled to alimony, subsection (a) of this section requires the court to enter an order for alimony which will enable the dependent spouse to live as the wife of a man with such an estate is entitled to live. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981).

To base an award on capacity to earn, etc. —
Unless the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made. If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

Guidelines for determining whether a spouse is "dependent" or "supporting" must be based upon factual findings sufficiently specific to indicate that the trial judge properly considered the statutory factors and the rules which evolved from case law. Otherwise, an appellate court cannot review the amount of alimony awarded to determine whether the trial judge abused his discretion. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

A spouse cannot be reduced to poverty in order to comply with an alimony decree. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

Court may take into account that a dependent spouse has property, although its value may not be precisely known, in considering the estates of both parties. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981).

Evidence of Financial Status of Corporation Controlled by Supporting Spouse. — In an action seeking permanent alimony, evidence of the financial status of a corporation in which defendant supporting spouse owned more than 96% of the stock was relevant and competent in determining the size of his estate for the purpose of setting the amount of alimony to which plaintiff was entitled. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981).

Conclusions of Law. — This section requires a conclusion of law that "circumstances render necessary" a designated amount of alimony, while case law requires conclusions of law that the supporting spouse is able to pay the designated amount and that the amount is fair and just to all parties. Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

§ 50-16.6. When alimony not payable.

Legal Periodicals. —

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Cited in Crutchley v. Crutchley, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

Legal Periodicals. —

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Agreement of Parties Incorporated in Judgment, etc. —

Property settlement provisions of a separation agreement incorporated by a reference in a divorce decree are enforceable by contempt proceedings. Cobb v. Cobb, 54 N.C. App. 230, 282 S.E.2d 591 (1981).

Cited in Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite.

Legal Periodicals. — For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

I. IN GENERAL.

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Requirement that judge find facts is inapplicable where the parties agreed to arbitrate the issue of spousal support. Crutchley v. Crutchley, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

Stated in Quick v. Quick, — N.C. —, 290 S.E.2d 653 (1982).

§ 50-16.9. Modification of order.

Legal Periodicals. —

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Relevant Circumstances Listed in § 50-16.5. — The change of circumstances required by this section for modification of an alimony order refers to those circumstances listed in § 50-16.5. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981); Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

To determine whether a change of circumstances under this section has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under § 50-16.5. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Any Considerable Change in Health or Financial Condition, etc. — As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Modification of Consent Judgment. —

In accord with 1st paragraph in 1981 Cum. Supp. See Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981).

In determining whether a provision in a consent judgment is for alimony alone and thus severable from the remaining provisions and terminable upon the wife's remarriage, or whether the provision for alimony and the provisions for division of property constitute reciprocal consideration so that they are not separable and may not be changed without the consent of both parties, a consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties. Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551, appeal dismissed and petition for discretionary review denied, 303 N.C. 543, 281 S.E.2d 660 (1981).

Consent Order Purporting To Waive Applicability of Section. — In accord with this section, a consent order containing a proviso purporting to waive applicability of this section may be modified unless defendant can show that it was an integral part of property settlement. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

By enacting this section, the legislature has clearly expressed that it is the public policy of this state that consent orders to pay alimony are modifiable. In the usual case a proviso in an order purporting to waive applicability of this section would be contrary to this policy and, therefore, without force and effect. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Presumption of Separability of Property Division and Support Payments. — For purposes of determining whether a consent judgment may be modified under this section, there is a presumption that the provisions for property division and support payments are separable. The burden of proof rests on the party opposing modification to show that the provisions are not separable. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Alimony provisions are presumed separable from provisions for property settlement, and therefore modifiable, even when both appear in the same document. In the face of this presumption, a party opposing modification must establish by a preponderance of the evidence that the provision for alimony contained in consent judgment was intended by the parties to be only a part of their overall property settlement. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981).

Construction of Consent Judgments Generally. — If a consent judgment is clear and unambiguous and leaves no room for construction, its construction is a matter of law and must be as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms. Where ambiguities appear, however, the intentions of the parties must be determined from evidence of the facts and circumstances surrounding entry of the consent judgment. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981).

Where a consent judgment is ambiguous, the intentions of the parties must be determined from evidence of the facts and circumstances surrounding its entry, just as the intentions of the parties to an ambiguous written contract must be determined from the surrounding circumstances. Barr v. Barr, — N.C. App. —, 284 S.E.2d 762 (1981).

Where the intention of the parties regarding the reciprocity of agreements in a consent order is not evident from a reading thereof, evidence of the negotiations and contemporaneous property settlement agreements of the parties is admissible to clarify the uncertainty created when the nonmodification provision of the order appears to be void as a matter of law under this section. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Use of Term "Alimony" in Consent Judgment. — The fact that in consent judgment the payments are denominated "alimony" is far from conclusive on the issue. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981).

Even though denominated as such, provisions in a consent order for periodic support payments to a dependent spouse may not be alimony within the meaning of this section and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Even though denominated as such, support payment provisions may not be alimony, and thus modifiable, if those provisions and other provisions for a property division between the parties constitute a complete settlement of all property and marital rights between the parties. Furthermore, where those provisions constitute a reciprocal consideration, so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981); Barr v. Barr, — N.C. App. —, 284 S.E.2d 762 (1981).

In a consent judgment, the word "alimony" and the provision that plaintiff's support payments to defendant would continue "until the defendant remarries or dies," is evidence, albeit inconclusive, of the parties' intention to treat the support provisions as alimony. Barr v. Barr, — N.C. App. —, 284 S.E.2d 762 (1981).

Use of Term "Dependent Spouse," etc., in Consent Judgment. — Language in a consent judgment finding plaintiff to be a "dependent" spouse and defendant to be a "supporting" spouse are indicative of the payment and receipt of alimony and the absence of this language supports an interpretation that the payment provisions are not alimony. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981); Barr v. Barr, — N.C. App. —, 284 S.E.2d 762 (1981).

Effect of Absence of Finding of Dependency in Consent Judgment. — While a finding of dependency is not required where judgments ordering payment of alimony are entered by consent, the absence of such a finding is nevertheless a factor which the court could consider in interpreting an inherently ambiguous consent order. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981).

Language in the preamble to a consent judgment that "the parties had settled their differences" is subject to the interpretation that the agreement was considered a complete settlement by the parties. Barr v. Barr, — N.C. App. —, 284 S.E.2d 762 (1981).

Effect of Change in Income. — A modification should be founded upon a change in the overall circumstances of the parties. A change in income alone says nothing about the total circumstances of a party. The significant inquiry is how that change in income affects a supporting spouse's ability to pay or a dependent spouse's need for support. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981).

An increase in the dependent spouse's income would entitle the supporting spouse to petition for modification of the alimony order under this section. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981).

Showing Necessary to Obtain Attorney Fees. — To be entitled to attorney fees it must be shown that they were necessary to enable the dependent spouse to litigate on substantially even terms by making it possible for her to employ counsel. The dependent spouse must be unable to defray the necessary expenses of the litigation. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

Cited in Markham v. Markham, 53 N.C. App. 18, 279 S.E.2d 905 (1981).

§ 50-16.10. Alimony without action.

CASE NOTES

Sections 50-16.1 through 50-16.10 in Pari Materia. — The statutes codified as §§ 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, — N.C. —, 287 S.E.2d 840 (1982).

§ 50-20. Distribution by court of marital property upon divorce.

Legal Periodicals. — For comment on resulting trusts in entireties property when the wife furnishes purchase money, see 17 Wake Forest L. Rev. 415 (1981).

CASE NOTES

Legislative Intent. — With the enactment of this section the legislature indicated its view that the same rules should apply to both spouses in determining ownership of property. Mims v. Mims, — N.C. —, 286 S.E.2d 779 (1982).

Purpose. — This section is designed to divide property equitably, based upon the relative positions of the parties at the time of divorce, rather than on what they may have intended when the property was acquired. Mims v. Mims, — N.C. —, 286 S.E.2d 779 (1982).

This section's primary focus is to devise a procedure for equitably distributing "marital," as opposed to "separate," property upon dissolution of the marriage. Mims v. Mims, — N.C. —, 286 S.E.2d 779 (1982).

Effect of Title. — Where land or personalty is purchased with the "separate property" of either spouse, it remains the "separate property" of that spouse regardless of how the title is made. Mims v. Mims, — N.C. —, 286 S.E.2d 779 (1982).

The language in this section reading "shall be considered separate property regardless of whether the title is in the name of the husband or wife or both" must be understood in the context of the section's primary emphasis on the equitable distribution of "marital" property upon dissolution of the marriage by providing a simple way to distinguish "marital" from "separate" property. Mims v. Mims, — N.C. —, 286 S.E.2d 779 (1982).

Where this section is not applicable the rule is that where a spouse furnishing the consideration causes property to be conveyed to the other spouse, a presumption of gift arises, which is rebuttable by clear, cogent and convincing evidence. The extent of the gift is determined by the degree to which the title reflects an interest in the grantee disproportionate to the consideration supplied by the grantee. Mims v. Mims, — N.C. —, 286 S.E.2d 779 (1982).

§ 50-21. Procedures in actions for equitable distribution of property.

Legal Periodicals. — For comment on resulting trusts in entireties property when the wife furnishes purchase money, see 17 Wake Forest L. Rev. 415 (1981).

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

Intent. — The Uniform Child Custody Jurisdiction Act was intended to prevent forum shopping for the convenience of competing parents to the detriment of the real interest of the child. Holland v. Holland, — N.C. App. —, 286 S.E.2d 895 (1982).

Only by making recognition and enforcement mandatory can purposes of this Chapter be realized. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981).

Quoted in Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

§ 50A-2. Definitions.

CASE NOTES

Quoted in Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

§ 50A-3. Jurisdiction.

CASE NOTES

"Substantial Evidence." — To be able to enter a well-founded custody order, the trial court must look beyond the declarations of competing parents, seeking to find the real circumstances of the child's welfare. The "substantial" evidence required by this section, therefore, must be such as would enable the trial court to look to sources within the State that could address each of the statutory aspects of the child's interest, care, protection, training, and personal relationships. Holland v. Holland, — N.C. App. —, 286 S.E.2d 895 (1982).

The quality of evidence required under this section of the statute goes beyond the standard of more than a scintilla or any competent evidence. Holland v. Holland, — N.C. App. —, 286 S.E.2d 895 (1982).

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

When Petitions for Modification of Foreign Decree to Be Addressed to Foreign Court. — All petitions for modification of a custody decree under local law are to be addressed to the prior state if that state has sufficient contact with the case to satisfy this section. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Decree of Foreign Court Not in Compliance with Standards of This Section Void. — Where the record does not show that a foreign court assumed jurisdiction under the standards set forth in this section, its decree is null and void. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Quoted in Pope v. Jacobs, 51 N.C. App. 374, 276 S.E.2d 487 (1981); Nabors v. Farrell, 53 N.C. App. 345, 280 S.E.2d 763 (1981).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

When there are simultaneous proceedings in another state, this section must be complied with. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

When there is an action already pending in another state, trial court must answer threshold question of whether the other state was exercising jurisdiction substantially in conformity with this Chapter. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Jurisdiction of Foreign Court Not Obtained in Conformity with Chapter. — California court did not obtain jurisdiction over child custody proceeding substantially in conformity with this Chapter where North Carolina rather than California was the home state of the children; there was no evidence that the children had a "significant connection" with California or that there was available in California "substantial evidence" concerning the children's care; and there was significant evidence that defendant had on several occasions taken the children from North Carolina to California without plaintiff's consent. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Exercise of Jurisdiction Upheld. — Trial court did not err in exercising jurisdiction in a child custody proceeding on the ground that an identical action was pending in Virginia where judgment was entered by the Virginia court three weeks before the mother commenced an action in this State, and the mother, who was the losing party in the Virginia proceeding, showed that she had no interest in appealing the Virginia judgment when she filed her action in this State. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981).

Quoted in Nabors v. Farrell, 53 N.C. App. 345, 280 S.E.2d 763 (1981).

§ 50A-7. Inconvenient forum.

CASE NOTES

Quoted in Pope v. Jacobs, 51 N.C. App. 374, 276 S.E.2d 487 (1981); Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

§ 50A-8. Jurisdiction declined by reason of conduct.

CASE NOTES

Exercise of Jurisdiction Not Necessarily Precluded by Abduction of Child. — Court was not required by this section to decline jurisdiction of a proceeding to modify a Virginia child custody decree merely because the mother had abducted one of the children and brought her to this State if the court properly determined that it was in the best interest of the children that the court exercise jurisdiction despite the abduction; however, as the trial court's conclusion that it should exercise jurisdiction was unsupported by findings of fact, the case would be remanded for such findings. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981).

California court did not obtain jurisdiction over child custody proceeding substantially in conformity with this Chapter where North Carolina rather than California was the home state of the children; there was no evidence that the children had a "significant connection" with California or that there was available in California "substantial evidence" concerning the children's care; and there was significant evidence that defendant had on several occasions taken the children from North Carolina to California without plaintiff's consent. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Applied in Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Quoted in Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

§ 50A-12. Binding force and res judicata effect of custody decree.

CASE NOTES

Cited in Nabors v. Farrell, 53 N.C. App. 345, 280 S.E.2d 763 (1981).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

In order to modify a foreign child custody decree, trial court must detail a substantial change in circumstances affecting the welfare of the child, unless the court finds that the foreign decree was a disciplinary or punitive measure. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981).

Cited in Nabors v. Farrell, 53 N.C. App. 345, 280 S.E.2d 763 (1981).

§ 50A-14. Modification of custody decree of another state.

CASE NOTES

Quoted in Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Chapter 51.

Marriage.

Article 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

Legal Periodicals. —
For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

§ 51-2. Capacity to marry.

Legal Periodicals. — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Stated in Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-2. Capacity to contract.

Legal Periodicals. —
For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

§ 52-5. Torts between husband and wife.

Legal Periodicals. — For a comment on adverse marital testimony in criminal actions after the modification of the common-law rule by State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

Legal Periodicals. — For note discussing purchase money resulting trust doctrine in North Carolina, see 12 N.C. Cent. L.J. 526 (1981).

§ 52-10. Contracts between husband and wife generally; releases.

Legal Periodicals. —
For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

Cited in Wright v. Wright, — N.C. —, 289 S.E.2d 347 (1982).

§ 52-10.1. Separation agreements.

Legal Periodicals. —
For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-8.1. Remedies of a county furnishing support.

Legal Periodicals. — For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

§ 52A-10.1. Official to represent obligee; responding.

CASE NOTES

Statutory Appointment Not Empty Formality. — Statutory appointment of the "official who prosecutes criminal actions for the State" to represent the obligee in proceedings under this Chapter is not just an empty formality but is designed to guarantee to the complainant effective assistance of counsel in this State. Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981).

What constitutes proper representation of the obligee by attorney appointed under this section cannot be defined by rigid rules but must be determined by the circumstances and necessities of each case. Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981).

§ 52A-18. Evidence of husband and wife.

CASE NOTES

Quoted in Wake County ex rel. Manning v. Green, 53 N.C. App. 26, 279 S.E.2d 901 (1981).

Chapter 53.

Banks.

Article 6.

Powers and Duties.

§ 53-62. Establishment of branches; tellers' windows and off-premises customer-bank communications terminals.

CASE NOTES

Cited in NCNB Corp. v. United States, 651 F.2d 942 (4th Cir. 1981).

§ 53-66. Savings deposits.

CASE NOTES

Quoted in Rosenstein v. Mechanics & Farmers Bank, 51 N.C. App. 437, 276 S.E.2d 710 (1981).

Article 14.

Banks Acting in a Fiduciary Capacity.

§ 53-159. Banks may act as fiduciary.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

Chapter 54.

Cooperative Organizations.

SUBCHAPTER III. CREDIT UNIONS.

ARTICLE 14B.

Supervision and Regulation.

§ 54-109.10. Creation and supervision of Division.

CASE NOTES

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

ARTICLE 14D.

Membership.

§ 54-109.26. "Membership" defined.

CASE NOTES

To qualify as a common bond within the meaning of this section, which provides that all persons eligible for membership in a credit union must share one and the same common bond, the trait or factor must be common to all eligible membership, and its very nature must provide the assurance of stability. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

County, Municipal and State Employees. — Because county, municipal and State employees do not all engage in similar types of work with similar job descriptions, they do not share a common bond of similar occupation, since similarity in occupation means similarity in the actual work done rather than similarity in who is benefited and who pays; therefore, an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees could not be upheld on this basis. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

The class of persons eligible for membership in the State Employees' Credit Union under an amendment to the bylaws of the credit union permitting an expansion of the field of membership to include certain county and municipal employees did not possess the common bond of similar association or interest, and limitation of membership to governmental employees covered under a State administered retirement system did not provide a common bond of similar interest. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

Article 14L.

Taxation.

§ 54-109.99. Restriction of taxation.

CASE NOTES

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

Chapter 54B.

Savings and Loan Associations.

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54B-216. General reserve.

Article 1.

General Provisions.

§ 54B-4. Definitions and application of terms.

(b) As used in this Chapter, unless the context otherwise requires, the term:

(1) "Administrator" means the Administrator of the Savings and Loan Division.

(2) "Aggregate withdrawal value of withdrawable accounts" means the total value of all withdrawable accounts held by an association.

(3) "Application" means the completed package of the application to organize a State association, establish a branch office or conversion of structure of a savings and loan association which the Administrator considers in making his recommendation.

(4) "Associate" when used to indicate a relationship with any person, means (i) any corporation or organization (other than the applicant or a majority-owned subsidiary of the applicant) of which such person is

an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities, (ii) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (iii) that person's spouse, father, mother, children, brothers, sisters, and grandchildren; the father, mother, brothers, and sisters of that person's spouse; and the spouse of that person's child, brother or sister.

(5) "Association" includes a State association or a federal association unless limited by use of the words "State" or "federal."

(6) "Borrowers" means those who borrow funds from or in any other way become obligated on a loan to an association.

(7) "Branch office" means an office of an association other than its principal office which renders savings and loan services.

(8) "Capital stock" means securities which represent ownership of a stock association.

(9) "Certificate of approval" means a document signed by the Administrator informing the North Carolina Secretary of State that the Commission has approved the certificate of incorporation of a proposed association.

(10) "Certificate of authority to enter" means the document issued by the Administrator to permit a foreign association to conduct business in this State.

(11) "Certificate of incorporation or charter" means the document which represents the corporate existence of a State association.

(12) "Certified copy" means a copy of an original document or paper which has been signed by the person or persons who certify such document to be an exact copy of the original.

(13) "This Chapter" means Chapter 54B of the North Carolina General Statutes.

(14) "Commission" means the North Carolina Savings and Loan Commission of the Department of Commerce.

(15) "Conflict of interest" means a matter before the board of directors in which one or more of the directors, officers or employees has a direct or indirect financial interest in its outcome.

(16) "Conformed copies" means photocopies or carbon copies or other mechanical reproductions of an original document or paper.

(17) "Court of competent jurisdiction" means a court in North Carolina which is qualified to hear the case at hand.

(18) "Disinterested directors" means those directors who have absolutely no direct or indirect financial interest in the matter before them.

(19) "Dividends on stock" means the earnings of an association paid out to holders of capital stock in a stock association.

(20) "Dividends on withdrawable accounts" means the consideration paid by an association to a holder of a withdrawable account for the use of his money.

(21) "Division" means the Savings and Loan Division of the North Carolina Department of Commerce.

(22) "Entrance fee per withdrawable account" means the amount to be paid by each person, firm or corporation when he or it pledges to a proposed mutual association to deposit funds in a withdrawable account.

(23) "Examination and investigation" means a supervisory inspection of an association or proposed association which may include inspection of every relevant piece of information including subsidiary or affiliated businesses.

(24) "Federal association" means a corporation or association organized and operated under the provisions of federal law and regulation to conduct a savings and loan business.

(25) "Financial institution" means a person, firm or corporation engaged in the business of receiving, soliciting or accepting money or its equivalent on deposit and/or lending money or its equivalent.

(26) "Foreign association" means a corporation or association organized in another state to conduct a savings and loan business and is so like a State association that it may, after qualifying, be certified to conduct the savings and loan business in this State.

(27) "General reserve" means appropriated or restricted funds in the form of cash or investments to be used solely for the purpose of absorbing losses.

(28) "Guaranty association" means a mutual deposit guaranty association which is a corporation organized under this Chapter or its predecessor and operated under the provisions of Article 12 of this Chapter.

(29) "Immediate family" means one's spouse, father, mother, children, brothers, sisters, and grandchildren; and the father, mother, brothers, and sisters of one's spouse; and the spouse of one's child, brother or sister.

(30) "Initial pledges for withdrawable accounts" means those pledges of funds by persons who promise to a proposed mutual association to deposit such amount if and when such proposed association becomes established.

(31) "Insurance of withdrawable accounts" means insurance on an association's withdrawable accounts when the beneficiary is the holder of such insured account.

(32) "Liquidity fund" means that portion of the assets of an association which is required to be held in readily marketable form.

(33) "Members" means those persons who hold withdrawable accounts or are borrowers from a mutual association and are deemed the owners of the association.

(34) "Minimum amount of consideration" means the amount of money a stock association shall be required to have received on the sale of its stock, before it shall commence business.

(35) "Minimum amount on deposit in withdrawable accounts" means the amount of money which a mutual association must have on hand prior to its commencement of business.

(36) "Mutual association" means all mutual savings and loan associations owned by members of the association, and organized under the provisions of this Chapter or its predecessor for the primary purpose of promoting thrift and home financing.

(37) "Net withdrawal value of withdrawable accounts" means the aggregate of the withdrawal value of an association's withdrawable accounts less the amount of any pledged withdrawable account which serves as security for a loan.

(38) "Net worth" means an association's total assets less total liabilities.

(39) "Original incorporators" means the organizers of a State association responsible for the business of a proposed association from the filing of the application to the Commission's final decision on such application.

(40) "Plan of conversion" means a detailed outline of the procedure of the conversion of an association from one to another regulatory authority or from one to another form of ownership.

(41) "Principal office" means the office which houses the headquarters of an association.

(42) "Proposed association" means an entity in organizational procedures prior to the Commission's final decision on its charter application.
(43) "Registered agent" means the person named in the certificate of incorporation upon whom service of legal process shall be deemed binding upon the association.
(44) "Rules and regulations" means those regulatory procedures and guidelines issued by the Administrator and approved by the Commission.
(45) "Service corporation" means a corporation operating under the provision of Article 8 of this Chapter which engages in activities determined by the Administrator by rules and regulations to be incidental to the conduct of a savings and loan business as provided in this Chapter or activities which further or facilitate the corporate purposes of an association, or which furnishes services to an association or subsidiaries of an association, the voting stock of which is owned directly or indirectly by one or more associations.
(46) "Specific reserve account" means an account held by an association as a loss reserve for coverage on specific loans and investments.
(47) "This State" means the State of North Carolina.
(48) "State association" means a corporation or association organized under this Chapter or its predecessor and operated under the provisions of this Chapter to conduct the savings and loan business; or a corporation organized under the provisions of the predecessors to this Chapter and operated under the provisions of this Chapter; or a corporation organized under the provisions of federal law and so converted as to be operated under the provisions of this Chapter.
(49) "Stock association" means any corporation or company owned by holders of capital stock and organized under the provisions of this Chapter for the primary purpose of promoting thrift and home financing.
(50) "Subscriptions" means the promise to purchase capital stock in a stock association and payment of a portion of the selling price.
(51) "Total assets" means the aggregate amount of assets of any and every kind held by an association.
(52) "Voluntary dissolution" means the dissolution and liquidation of an association initiated by its ownership.
(53) "Withdrawable accounts" means accounts in which a customer or member places funds with an association which may be withdrawn by the account holder.
(54) "Withdrawable application" means the request in writing by a withdrawable account holder to withdraw part or all of his balance. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, rewrote subdivision (b)(27), which formerly read: " 'General reserve account' means the account from which an association shall meet its losses."

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

ARTICLE 2.

Incorporation and Organization.

§ 54B-10. Certificate of incorporation.

Editor's Note. — The reference to § 54B-8 at the end of subsection (c) of this section should be to § 54B-9.

§ 54B-20. Amendments to certificate of incorporation.

(a) Any addition, alteration or amendment to the certificate of incorporation of any State association shall be made at any annual or special meeting of such association, held in accordance with the provisions of G.S. 54B-106 and G.S. 54B-107, by a majority of votes or shares cast by members or stockholders present in person or by proxy at such meeting. Any such addition, alteration or amendment shall be signed, submitted to the Administrator for his approval or rejection, and if approved, then certified and recorded as provided in G.S. 54B-14 for certificates of incorporation.

(b) Notwithstanding the provisions of subsection (a) of this section, any State association may change its registered office or its registered agent or both in accordance with the provisions of G.S. 55-14. A copy of the statement or certificate certified by the Secretary of State shall be filed in the office of the Administrator. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, designated the original section as subsection (a) and added subsection (b). In present subsection (a), the amendment substituted "votes or shares cast by members or stockholders" for "total votes which members of a mutual association are eligible and entitled to cast, all by a majority of the total votes which stockholders of a stock association are eligible and entitled to cast," deleted "represented" near the end of the first sentence and substituted "as provided in G.S. 54B-14" for "as provided for in G.S. 54B-9 and 54B-10."

§ 54B-22. Branch offices.

(a) Any State association may apply to the Administrator for permission to establish a branch office. The application shall be in such form as may be prescribed by the Administrator and shall be accompanied by the proper branch application fee. Branch applications shall be approved or denied by the Administrator within 120 days of filing.

(b) The Administrator shall approve a branch application when all of the following criteria are met:

(1) The applicant has gross assets of at least ten million dollars ($10,000,000);

(2) The applicant has evidenced financial responsibility;

(3) The applicant has a net worth equal to or exceeding the amount required by the insurer of the applicant's withdrawable accounts;

(4) The applicant has an acceptable internal control system. Such a system would include certain basic internal control requirements essential to the protection of assets and the promotion of operational efficiency regardless of the size of the applicant. Some of the factors which require extensive internal control requirements such as the use of the controller or internal auditor and more distinctive placement responsibilities include the applicant's size, number of personnel and history of and anticipated plans for expansion.

(d) Not more than 10 days following the filing of the branch application with the Administrator, the applicant shall cause a notice to be published in a newspaper of general circulation in the area to be served by the proposed branch office. Such notice shall contain:

(1) A statement that the branch application has been filed with the Administrator;

(2) The proposed address of the branch office, including city or town and street; and

(3) A statement that any interested or affected party may file a written statement with the Administrator, within 30 days of the date of the publication of the notice, protesting the establishment of the proposed branch office and requesting a hearing before the Administrator on the application;

(e) Any interested or affected party may file a written statement with the Administrator within 30 days of the date of initial publication of the branch application notice, protesting the establishment of the proposed branch office and requesting a hearing before the Administrator on the application. If a hearing is held on the branch application, the Administrator shall only receive information and hear testimony from the applicant and from any interested or affected party which is relevant to the branch application and the operation of the proposed branch office. The Administrator shall issue his final decision on the branch application within 30 days following the hearing. Such final decision shall be in accordance with the applicable provisions of Chapter 150A of the General Statutes;

(f) If a hearing is not held on the branch application, the Administrator shall issue his final decision within 120 days of the filing of the application. Such final decision shall be in accordance with the applicable provisions of Chapter 150A of the General Statutes;

(g) to (i) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1238, s. 3.

(1981 (Reg. Sess., 1982), c. 1238, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, so changed this section that a detailed comparison is not here practical.

Only Part of Section Set Out. — As subsections (c) and (j) were not changed by the amendment, they are not set out.

ARTICLE 3.

Fundamental Changes.

§ 54B-30. Conversion from State to federal association.

Any State savings and loan association, stock or mutual, organized and operated under the provisions of this Chapter, may convert into a federal savings and loan association in accordance with the provisions of the laws and regulations of the United States and with the same force and effect as though originally incorporated under such laws, and the procedure to effect such conversion shall be as follows:

(2) A meeting of the members or stockholders shall be held upon not less than 15 days' notice to each member or stockholder. Notice can be made either by mailing such to each member or stockholder, postage prepaid, to the last known address or by the board of directors causing to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting. It shall be

regarded as sufficient notice of the purpose of the meeting if the notice contains the following statement: "The purpose of this meeting is to consider the conversion of this State-chartered association into a federally chartered association, pursuant to the laws of the United States." An appropriate officer of the association shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.

(3) At the meeting of the members or stockholders of such association, such members or stockholders may by affirmative vote of a majority of votes or shares present, in person or by proxy, resolve to convert said association to a federal savings and loan association. A copy of the minutes of the meeting of the members or stockholders certified by an appropriate officer of the association shall be filed in the office of the Administrator within 10 days after such meeting. The said certified copy when so filed shall be prima facie evidence of the holding and the action of the meeting.

(1981 (Reg. Sess., 1982), c. 1238, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subdivision (2), substituted "15 days' notice" for "30 days' written notice" in the first sentence, deleted "served personally or mailed to the last known address of such member or stockholder, postage prepaid" at the end of that sentence and rewrote the second sentence, which formerly read: "The notice shall contain a statement of the time, place and purpose for which such meeting is called." In subdivision (3), the amendment substituted "votes or shares present" for "shares or votes eligible to be cast by members or stockholders."

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory paragraph and subdivisions (2) and (3) are set out.

§ 54B-31. Conversion from federal to State association.

Any federal savings and loan association, stock or mutual, organized and existing under the laws and regulations of the United States and duly authorized to operate and actually operating in North Carolina may convert into a State savings and loan association operating under the provisions of this Chapter, with the same force and effect as though originally incorporated under the provisions of this Chapter, by complying with the rules and regulations of the federal regulatory authority, and also by following the procedure as set forth in this section:

(2) A meeting of the members or stockholders shall be held upon not less than 15 days' notice to each member or stockholder. Notice can be made either by mailing such to each member or stockholder, postage prepaid, to the last known address or by the board of directors causing to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting. It shall be regarded as sufficient notice of the purpose of the meeting if the call contains the following statement: "The purpose of this meeting is to consider the conversion of this federally chartered association to a State-chartered savings and loan association, pursuant to the provisions of the laws of the State of North Carolina." An appropriate officer of the association shall made proof by affidavit at such meeting of the due service of the notice or call for said meeting.

(3) At the meeting of the members or stockholders of such association, such members or stockholders may by affirmative vote of a majority of votes or shares present, in person or by proxy, resolve to convert said association to a State association. A copy of the minutes of the meeting of the members or stockholders, certified by an appropriate officer of

the association, shall be filed with the Administrator within 10 days after the meeting, accompanied by a conversion fee. The certified copy when so filed shall be prima facie evidence of the holding of and the action taken at the meeting.

(1981 (Reg. Sess., 1982), c. 1238, s. 6.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subdivision (2), substituted "15 days' notice" for "30 days' written notice" in the first sentence and rewrote the second sentence, which formerly read: "The notice shall contain a statement of the time, place and purpose for which such meeting is called." In subdivision (3), the amendment substituted "such" for "the" preceding "association" and preceding "members" near the beginning of the first sentence, substituted "votes or shares present" for "those votes eligible to be cast by members or stockholders" and substituted "said" for "the" preceding "association to a State" near the end of the first sentence.

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory paragraph and subdivisions (2) and (3) are set out.

§ 54B-32. Simultaneous charter and ownership conversion.

(c) The provisions of this section shall not apply to any simultaneous charter and ownership conversion accomplished in conjunction with a merger under the provisions of G.S. 54B-39. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 9.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, added subsection (c).

Only Part of Section Set Out. — As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 54B-33. Conversion of mutual to stock association.

(g) Notwithstanding the provisions of this section, any State mutual association maintaining FSLIC insurance of accounts coverage may convert from mutual to stock form of ownership by complying with the requirements for conversion from mutual to stock form of ownership imposed by the rules and regulations of the Federal Home Loan Bank Board as set forth in the Federal Register, Vol. 44, No. 62, Thursday, March 29, 1979, entitled "Part 563b Conversion From Mutual to Stock Form" as amended from time to time and other applicable rules and regulations effective as of the date of ratification. Any such conversion shall have full force and effect as if such conversion were conducted pursuant to this section and the rules and regulations promulgated by the Administrator pursuant to subsection (f) of this section. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 7.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, added subsection (g).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (g) is set out.

§ 54B-35. Merger of like savings and loan associations.

Any two or more mutual associations or any two or more stock associations organized and operating, may merge or consolidate into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

(2) Such merger agreement together with copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective associations shall be submitted to the

Administrator, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the members or stockholders of each of the associations proposing to merge will be benefited thereby, he shall, in writing, approve same. If he deems that the proposed merger will not be in the interest of all members or stockholders of the associations so merging, he shall, in writing, disapprove the same. If he approves the merger agreement, then same shall be submitted, within 45 days after notice of such associations of such approval, to the members or stockholders of each of such association, as provided in the next subdivision. Such disapproval may be appealed by the association to the Commission.

(3) A special meeting of the members or stockholders of each of said associations shall be held separately upon written notice to each member or stockholder of not less than 20 days, specifying the time, place, and purpose for which such meeting is called and such notice shall be served personally or sent by mail, postage prepaid, to each member or stockholder at the last known address of such member or stockholder appearing upon the books of the association. Due notice may also be given of the time, place and object of such meeting by publication at least once a week for four successive weeks in one or more newspapers published in the county or counties wherein each such association has its principal or a branch office (and if there is no newspaper published in the county then in a newspaper published in an adjoining county). The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

(4) At separate meetings of the members or stockholders of the respective associations, such members or stockholders may adopt, by an affirmative vote of a majority of the votes or shares present, in person or by proxy, a resolution to merge into a single association upon the terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the Administrator. Upon the adoption of the resolution, a copy of the minutes of the proceedings of the meetings of the members or stockholders of the respective associations, certified by the president or vice-president and secretary or assistant secretary of the merging associations, shall be filed in the office of the Administrator, within 10 days after such meetings. Within 15 days after the receipt of a certified copy of the minutes of said meetings the Administrator shall either approve or disapprove the proceedings for compliance with this section. If the proceedings are approved by him he shall so endorse the certified copy of the minutes of his office, and shall issue a certificate of his approval of the merger and send same to each of the associations. The certificate shall be filed and recorded in the office of the Secretary of State and in the office of the register of deeds of the county or counties in this State in which the respective associations so merged shall have their original certificates of incorporation recorded; provided, that the only fees that shall be collected in connection with the merger of said associations shall be filing and recording fees. When such certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members or stockholders of the associations so merging, and the same shall thence be taken and deemed to be the act of merger of such constituent savings and loan

associations under the laws of this State, and such record or certified copy thereof shall be evidence of the agreement and act of merger of said savings and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. If the Administrator shall disapprove the proceedings he shall mark the certified copies of the meetings in his office as disapproved and notify the associations to that effect. Such disapproval may be appealed by the association to the Commission.

(6) Notwithstanding any other provision of this section, the Administrator may waive any or all of the foregoing requirements upon finding that such waiver would be in the best interest of the members or stockholders of the merging associations. (1981, c. 282, s. 3; c. 670, s. 1; 1981 (Reg. Sess., 1982), c. 1238, s. 8.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, deleted "State" preceding "mutual" and preceding "stock" near the beginning of the introductory paragraph, substituted "45" for "30" in the next-to-last sentence of subdivision (2) and "20" for "30" near the middle of the first sentence in subdivision (3), rewrote the first sentence of subdivision (4), deleted the former second sentence of subdivision (4), relating to soliciting special proxies, and added subdivision (6).

In amending subdivision (2), the 1981 (Reg. Sess., 1982) amendment referred to "the last sentence" of the subdivision. The next-to-last sentence was plainly intended, and the amendment has been given effect in the section as set out above.

Only Part of Section Set Out. — As subdivisions (1) and (5) were not changed by the amendment, they are not set out.

§ 54B-39. Merger of federal with State associations.

(a) Any two or more associations, when one or more is a State association and one or more is a federal association operating in North Carolina, may merge to form one association under either a State or federal charter.

(b) The Administrator shall promulgate rules and regulations to facilitate the merger of federal and State associations. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 10.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, rewrote this section, eliminating the former second sentence, including subdivisions numbered (1) and (2), of subsection (a), relating to the procedure to effect a merger when the result is to be a federal association, and former subsection (b), containing subdivisions numbered (1) and (2), relating to the procedure to effect a merger when the result is to be a State association, and enacting former subsection (c) as present subsection (b). In present subsection (a), the amendment deleted "savings" preceding "associations" and "when" preceding "one or more is a federal association", and in present subsection (b), the amendment substituted "shall" for "may" and "federal and State associations" for "State and federal savings and loan associations."

§ 54B-44. Supervisory mergers, consolidations, conversions, and combination mergers and conversions.

(a) Notwithstanding any other provision of this Chapter, in order to protect the public, including members, depositors and stockholders of a State association, the Administrator, upon making a finding that a State association is unable to operate in a safe and sound manner, may authorize or require a short form merger, consolidation, conversion, or combination merger and conversion

of the State association as to which the finding is made. The resulting association may be a mutual association or a stock association.

(b) The Administrator shall promulgate rules and regulations to govern supervisory mergers, consolidations, conversions, and combination mergers and conversions authorized by this section. (1981, c. 670, s. 2; 1981 (Reg. Sess., 1982), c. 1238, s. 11.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subsection (a), substituted "stockholders" for "shareholders" near the beginning of the first sentence, substituted "authorize or require a short form merger, consolidation, conversion, or combination merger and conversion of the State association as to which the finding is made" for "authorize a short form conversion, if the finding is made with regard to a mutual association, or a merger or consolidation of the State association as to which the finding was made, with any other State association" at the end of the first sentence and added the second sentence. In subsection (b), the amendment substituted "consolidations, conversions, and combination mergers and conversions" for "consolidations and conversions."

Article 5.

Corporate Administration.

§ 54B-102. Employment policies.

Employment policies appropriate for the transaction of the business of a State association may be set forth in the bylaws or established by resolution of the board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 22.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, rewrote this section to the extent that a detailed comparison is not here practical.

Article 6.

Withdrawable Accounts.

§ 54B-121. Creation of withdrawable accounts.

(c) An association may establish as many classes of withdrawable accounts as may be provided for in its certificate of incorporation or bylaws, subject to such regulations and limitations as the Administrator may prescribe.

(1) At least one class of withdrawable accounts shall be established by which the holder, upon notice to the association, shall be able to withdraw the entire balance of such account without any penalty. The required period of notice, not to exceed 30 days, shall be determined by the board of directors of each association.

(2) For any additional classes of withdrawable accounts that may be established, the board may require a fixed minimum amount of money and a fixed minimum term, at the end of which, the account holder, without any notice on his part, shall be entitled to payment of the final balance of the funds in such account. Such minimum amount and minimum term and the rate of dividends on withdrawable accounts shall be agreed upon prior to the transfer to the association of any funds by the account holder and shall be evidenced by an executed contract.

a. An association may impose a penalty upon the holder of such account to be assessed at the time of any withdrawal from the

account prior to the date of termination of the minimum term for which the account holder contracted.

b. An association may require that the holder of such an account provide the association with not less than 30 days' notice of an intended withdrawal prior to the date of the termination of the account contract.

c. When the date of termination of such an account is passed and the account is mature and payable, all payments thereon by the holder and all dividends on withdrawable account credits thereto by the association shall cease. However, if the holder shall notify the association, prior to the termination date of the account, that he wishes to extend the life of the account, the association shall renew the account and continue to accept payments and/or make dividends on withdrawable account credits or cancel the account as provided under the original contract.

d. Unless the association receives notification within the proper time period and renews the account, then upon the date of termination, it shall either pay to the holder of the account the final value thereof, or mail a notice to the holder at his last address as it appears on the records of the association to the effect that he is entitled to receive payment for the account.

e. If the association does not make payment to the holder of the account upon the date of termination and instead mails a notice to him as provided in paragraph d above, then until such time as the holder is paid, the account shall earn dividends on withdrawable accounts at a rate not less than the rate which the association is paying on its account or accounts established under subdivision (1) above, unless provided otherwise by the account contract.

f. Whenever an association has funds in an amount insufficient to make immediate payment upon the date of termination of an account, or upon an application for withdrawal, the maturity shall be paid in accordance with the provisions of G.S. 54B-124. Whenever such a situation arises, dividends on withdrawable accounts shall be credited to the account at a rate not less than the rate provided for in the account contract. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 12.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, deleted the former last sentence of the first paragraph of subdivision (c)(2), which read: "Associations shall mail to each natural person account holder, notification of the date of maturity of accounts at least 10 days prior to maturity."

Only Part of Section Set Out. — As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 54B-122. Additional requirements.

Withdrawable accounts shall be:

(3) Evidenced by an executed contract setting forth any special terms and provisions applicable to the account and the conditions upon which withdrawal may be made. The form of such contract shall be subject to the prior approval of the Administrator and shall be held by the association as part of its records pertaining to the account. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 13.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted the former last sentence of subdivision (3), which read: "The association shall issue to the holder of the account either an account book or certificate as evidence of ownership of the account."

Only Part of Section Set Out. — As the rest of the section was not changed by the amend-

ment, only the introductory language and subdivision (3) are set out.

§§ 54B-137 to 54B-146: Reserved for future codification purposes.

ARTICLE 6A.

Fee for Returned Checks.

§ 54B-147. Collection of processing fee for returned checks.

Notwithstanding any other provision of law, a processing fee, not to exceed ten dollars ($10.00), may be charged and collected by any association for checks (including negotiable orders of withdrawals drafts) on which payment has been refused by the payor depository institution because of insufficient funds or because the drawer did not have an account at that depository institution. An association may also collect said fee for checks drawn on that association with respect to an account with insufficient funds. (1981 (Reg. Sess., 1982), c. 1238, s. 14.)

§§ 54B-148, 54B-149: Reserved for future codification purposes.

ARTICLE 7.

Loans.

§ 54B-160. Participation in loans.

An association may invest in a participating interest in loans of a type which the association would be authorized to originate. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 15.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, deleted, at the end of the section, a proviso reading "provided, that the other participants are instrumentalities of or corporations owned solely or in part by the United States or this State, or are State associations, or are federal associations, or are service corporations of State or federal associations."

§ 54B-161. Sale of loans.

An association may sell any loan, including any participating interest in a loan. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 16.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, deleted "without recourse" preceding "and loan" and substituted "in a loan" for "therein" at the end of the present section and deleted the former second sentence of the section, which read: "Loans may be assigned or pledged with recourse to any Federal Home Loan Bank or any mutual deposit guaranty association of which the association is a member or to any bank as a requirement of borrowing."

§ 54B-162. Power to borrow money.

An association, in its certificate of incorporation or in its bylaws, may authorize the board of directors to borrow money and the board of directors may by resolution adopted by a vote of at least two thirds of the entire board duly recorded in the minutes may authorize the officers of the association to borrow money for the association on such terms and conditions as it may deem proper. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 17.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted "provided, that the total amount of money borrowed shall at no time exceed fifty percent (50%) of the gross assets of the association" at the end of the present single sentence of the section and deleted the former second sentence of the section, which authorized an association to borrow without limit from agencies or instrumentalities of the United States or the State or from mutual deposit guaranty associations.

ARTICLE 8.

Other Investments.

§ 54B-186. Deposits in other associations.

A State association may invest in withdrawable accounts of any association as approved by the board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 18.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, substituted "any association as approved by the board of directors" for "any State association, or of any federal association having its principal office within this State, up to an amount equal to the amount of insurance coverage on such association's withdrawal accounts by either the Federal Savings and Loan Insurance Corporation or by a mutual deposit guaranty association organized or operated pursuant to Article 12 of this Chapter."

§ 54B-193. Loans on sufficient collateral; other investments.

(a) A State association may invest in loans secured by any collateral deemed sufficient by the board of directors to properly secure loans; however, if the collateral consists of stock or equity securities of any kind, the stock or securities must be listed on a national stock exchange or regularly quoted and offered for trade on an over-the-counter market.

(b) Subject to such limitations as the Administrator may prescribe by regulation, a State association may invest in any investment deemed appropriate by its board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 19.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, designated the original section as subsection (a) and added subsection (b).

§ 54B-194. Service corporations.

(b) No State association may make any investment in service corporations if its aggregate investment would exceed ten percent (10%) of its total assets. (1981 (Reg. Sess., 1982), c. 1238, s. 20.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, substituted "ten percent (10%)" for "five percent (5%)" in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Article 9.

Liquidity Fund.

§ 54B-210. Components of liquidity fund.

Every State association shall at all times have on hand and unpledged, cash, investments in obligations of the United States government, or the government of the State of North Carolina, or stock in the Federal Home Loan Bank, or deposits in any mutual deposit guaranty association organized or operated pursuant to Article 12 of this Chapter, or bonds issued by the Federal Home Loan Bank,or Government National Mortgage Association pass-through certificates, or Federal Home Loan Mortgage Corporation pass-through certificates, or funds on deposit in a federal reserve bank or in other bank or banks as may have been approved by a majority of the entire board of directors, in an amount set by the Commission equal to at least four percent (4%) of the net withdrawal value of the association's withdrawable account, or two hundred fifty thousand dollars ($250,000), whichever is greater, as the liquidity fund and held to assure the liquidity of such association. Such investments and funds on deposit shall be readily marketable and shall not exceed a term of five years. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 21.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, inserted "or Government National Mortgage Association pass-through certificates, or Federal Home Loan Mortgage Corporation pass-through certificates," near the middle of the first sentence.

Article 10.

General Reserve.

§ 54B-216. General reserve.

(a) Every State association shall establish and maintain a general reserve for the sole purpose of covering losses. The general reserve shall be established and maintained separately from any specific loss reserves established and maintained at the election of the association or pursuant to rules and regulations prescribed by the Commission.

(b) The general reserve shall be maintained at a level set by the Commission based on assets. In setting the level for the general reserve, the Commission shall evaluate the risk attributable to various types of assets and shall establish percentages for each type of asset based on its level of risk.

(c) In the case of newly chartered stock associations, the permanent capital reserve required by G.S. 54B-12(b)(2) shall be deemed a constituent part of and not supplementary to the general reserve required by this section. Therefore, a minimum of five hundred thousand dollars ($500,000) shall be the required level of the general reserve of a stock association until a greater level is required pursuant to this section and rules and regulations promulgated thereto.

(d) Notwithstanding the provision of this section, any State association which has insurance of withdrawable accounts with the Federal Savings and Loan Insurance Corporation and which meets the statutory reserve require-

ment of the Federal Savings and Loan Insurance Corporation need not comply with the general reserve requirement of this section.

(e) The failure of a State association to maintain the required level of general reserve set by the Commission or the statutory reserve requirement of the Federal Savings and Loan Insurance Corporation may be grounds for supervisory action by the Administrator.

(f) The Commission shall adopt rules and regulations for the implementation of this section. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, so changed this section that a detailed comparison is not here practical.

Chapter 55.

Business Corporation Act.

Article 6.

Shareholders.

Sec.
55-73. Shareholders' agreements.

ARTICLE 1.

General Provisions.

§ 55-2. Definitions.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

ARTICLE 4.

Powers and Management.

§ 55-24. Board of directors.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1086 (1981).

§ 55-36. Execution of corporate instruments; authority and proof.

CASE NOTES

Section Remedial. — Subsection (e) of this section clearly shows the section's remedial nature. George E. Shepard, Jr., Inc. v. Kim, Inc., 52 N.C. App. 700, 279 S.E.2d 858 (1981).

This section protects innocent parties from later assertions by corporations that their contracts were not authorized by the corporation's board of directors. George E. Shepard, Jr., Inc. v. Kim, Inc., 52 N.C. App. 700, 279 S.E.2d 858 (1981).

Thus, ordinary agency rules suspended. — In contracts between corporations and innocent third parties, this section suspends the ordinary agency rules requiring proof of authority. George E. Shepard, Jr., Inc. v. Kim, Inc., 52 N.C. App. 700, 279 S.E.2d 858 (1981).

§ 55-37. Books and records.

CASE NOTES

Stated in Stone v. Martin, — N.C. App. —, 289 S.E.2d 898 (1982).

§ 55-38. Examination and production of books, records and information.

CASE NOTES

Stated in Stone v. Martin, — N.C. App. —, 289 S.E.2d 898 (1982).

ARTICLE 6.

Shareholders.

§ 55-61. Meetings of shareholders.

Legal Periodicals. — For comment on the proxy system in the corporate electoral process, see 60 N.C.L. Rev. 145 (1981).

§ 55-71. Proceeding to determine validity of election or appointment of directors or officers.

CASE NOTES

Section Designed to Maintain Status Quo. — This section is remedial in nature and it is designed to maintain the status quo while the disputes regarding an election are resolved. Foreman v. Bell, — N.C. App. —, 289 S.E.2d 567 (1982).

This section pertains only to corporate elections. It does not apply to the selection of persons who hold and vote stock for others. Foreman v. Bell, — N.C. App. —, 289 S.E.2d 567 (1982).

Section Does Not Apply to Prospective Election Meetings.—

In accord with 1981 Cum. Supp. See Foreman v. Bell, — N.C. App. —, 289 S.E.2d 567 (1982).

Summary Procedure Permitted. — This section allows a summary procedure to be held, without the benefit of service of process, whenever there is a dispute surrounding the election of corporate officers or directors. Foreman v. Bell, — N.C. App. —, 289 S.E.2d 567 (1982).

§ 55-73. Shareholders' agreements.

(a) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in the exercise of any voting rights of shares held by the parties, including any vote with respect to directors, such shares shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with any procedure (including arbitration) specified in the agreement. Such agreement shall be valid and enforceable as between the parties thereto for a period not to exceed 10 years from the date of its execution; and in an action by a shareholder who is a party to such an agreement a court of competent jurisdiction may enjoin another

party or parties to the agreement from voting his or their shares in violation thereof, or, if the corporation is made a party to the action, may set aside an election of directors or other action resulting from the voting of shares in violation of the agreement, and may grant such other or further relief as may appear appropriate under the circumstances for the enforcement of the agreement. Such agreement may be extended or renewed in like manner as a voting trust may be extended or renewed as provided by G.S. 55-72(e). Nothing herein shall impair the privilege of the corporation to treat the shareholders of record as entitled to vote the shares standing in their names, as provided in G.S. 55-59 nor impair the power of a court to determine voting rights as provided in G.S. 55-71.

(1981 (Reg. Sess., 1982), c. 1163.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "G.S. 55-72(e)" for "G.S. 55-72(d)" in the next-to-last sentence of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Article 8.

Fundamental Changes.

§ 55-112. Sale, lease, exchange and mortgage of assets.

CASE NOTES

Failure to Conform to Subsection (c). — Failure to conform to the mandates of this section constitutes a breach of a director's fiduciary duty as well as a breach of the majority stockholders' duty to the minority. Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 907 (1981).

Article 9.

Dissolution and Liquidation.

§ 55-127. Procedure in liquidation of corporation by court.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

Chapter 55A.

Nonprofit Corporation Act.

ARTICLE 3.

Formation, Name and Registered Office.

§ 55A-14. Bylaws.

CASE NOTES

Cited in Snug Harbor Property Owners Ass'n v. Curran, — N.C. App. —, 284 S.E.2d 752 (1981).

Chapter 58.

Insurance.

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

Article 26.
Nature of Policies.

Sec.
58-251.4. Policies to cover newborn infants.

SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 2.

Commissioner of Insurance.

§ 58-4. Department established.

Legal Periodicals. — For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

§ 58-9.6. Extent of review under § 58-9.4.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 54 N.C. App. 601, 284 S.E.2d 339 (1981).

ARTICLE 3.

General Regulations for Insurance.

§ 58-30.2. Group plans other than life, annuity or accident and health.

CASE NOTES

Cited in First Nat'l Bank v. Nationwide Ins. Co., 303 N.C. 203, 278 S.E.2d 507 (1981).

§ 58-30.4. Revised classifications and rates.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

§ 58-31. Stipulations as to jurisdiction and limitation of actions.

CASE NOTES

Applied in F & D Co. v. Aetna Ins. Co., 53 N.C. App. 92, 280 S.E.2d 34 (1981); F & D Co. v. Aetna Ins. Co., — N.C. —, 287 S.E.2d 867 (1982).

§ 58-53.3. Tax deducted from premium; reports filed.

CASE NOTES

Stated in State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 303 N.C. 287, 278 S.E.2d 248 (1981).

ARTICLE 3A.

Unfair Trade Practices.

§ 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.

CASE NOTES

Applied in Smith v. King, 52 N.C. App. 158, 277 S.E.2d 875 (1981).

ARTICLE 4.

Insurance Premiums Financing.

§ 58-60. Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value.

CASE NOTES

Applied in Graves v. ABC Roofing Co., — N.C. App. —, 284 S.E.2d 718 (1981).

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 12B.

North Carolina Rate Bureau.

§ 58-124.17. North Carolina Rate Bureau created.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).
For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 844 (1981).

§ 58-124.19. Method of rate making; factors considered.

CASE NOTES

"Inadequate" and "Excessive" Rates. — In enacting the provisions of subdivision (1) the legislative intent was that the term "inadequate" operates to protect the interest of insurance companies in achieving rate levels which are sufficient for them to earn a reasonable profit, while the term "excessive" operates to protect the interest of consumers in being offered rates which will not enable insurance companies to earn unreasonable profits. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 54 N.C. App. 601, 284 S.E.2d 339 (1981).

Rates are made prospectively, not retroactively, therefore, the entire procedure of ratemaking contemplates a looking to the future. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

Ratemaking and Surcharge Assessment Compared. — Ratemaking is a prospective process while surcharge assessments involve recoupment for losses already incurred. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-124.20. Filing rates, plans with Commissioner; public inspection of filings.

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 844 (1981).

Cited in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-124.21. Disapproval; hearing, order; adjustment of premium, review of filing.

CASE NOTES

Effect of Withdrawal of Voluntary Filing. — The rate bureau may withdraw a voluntary filing for dwelling fire and extended coverage rates after the Commissioner of Insurance sets

the filing for a public hearing, and an order entered by the Commissioner of Insurance after such withdrawal disapproving the fire insurance filing and approving a decrease in extended coverage rates was null and void. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 820 (1981).

Cited in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-124.22. Appeal of Commissioner's order.

CASE NOTES

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-124.26. Cap on motor vehicle insurance rate increases.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

CASE NOTES

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 52 N.C. App. 79, 277 S.E.2d 844 (1981).

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

ARTICLE 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.10. Uniform Insurers Liquidation Act; definitions.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.12. Conduct of delinquency proceedings against insurers not domiciled in this State.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.15. Priority of certain claims.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.25. Date rights fixed on liquidation.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

ARTICLE 17B.

Postassessment Insurance Guaranty Association.

§ 58-155.42. Purpose of Article.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.43. Scope.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.46. Creation of the Association.

CASE NOTES

Stated in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.48. Powers and duties of the Association.

CASE NOTES

Stated in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.51. Effect of paid claims.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-155.60. Use of deposits made by insolvent insurer.

CASE NOTES

Retroactive Application. —
In accord with 1981 Cum. Supp. See State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

However, Claimants against the Deposit, etc. —
In accord with 1981 Cum. Supp. See State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

Use of Deposits for Association's Expenses. — While the Guaranty Association has the initial right to use deposit funds to cover operating expenses incident to the insolvent insurer, all deposit funds must be paid to claimants pro rata as provided by § 58-185, and if all claimants are satisfied either directly by the Guaranty Association or by the Commissioner of Insurance (if the claim is under $100.00) and deposit funds remain, then and only then are such funds to be permanently credited to the Guaranty Association for its expenses. State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

ARTICLE 17C.

Life and Accident and Health Insurance Guaranty Association.

§ 58-155.65. Title.

CASE NOTES

Cited in Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n, — U.S. —, 102 S. Ct. 1357, — L. Ed. 2d — (1982).

§ 58-155.72. Powers and duties of the Association.

CASE NOTES

Applied in Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n, — U.S. —, 102 S. Ct. 1357, — L. Ed. 2d — (1982).

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 18B.

Fair Access to Insurance Requirements.

§ 58-173.28. Recoupment by insurers.

CASE NOTES

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

ARTICLE 18C.

North Carolina Health Care Liability Reinsurance Exchange.

§ 58-173.34. Declarations and purpose of the Article.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

ARTICLE 19.

Fire Insurance Policies.

§ 58-176. Fire insurance contract; standard policy provisions.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in F & D Co. v. Aetna Ins. Co., — N.C. —, 287 S.E.2d 867 (1982).

§ 58-180.1. Policy issued to husband or wife on joint property.

Legal Periodicals. —
For a note on innocent spouse's right to recover after husband's arson, see 17 Wake Forest L. Rev. 1022 (1981).

ARTICLE 20.

Deposits and Bonds by Insurance Companies.

§ 58-182. Amount of deposits required of foreign or alien fire and/or marine insurance companies.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981); Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n, — U.S. —, 102 S. Ct. 1357, — L. Ed. 2d — (1982).

§ 58-182.1. Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.2. Minimum deposit required upon admission.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.3. Type of deposits.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.5. Power of attorney.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-182.6. Securities held by Treasurer; faith of State pledged therefor; nontaxable.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-183. Right of company to receive interest on deposits.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-184. Sale of deposits for payment of liabilities.

CASE NOTES

Quoted in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-185. Lien of policyholders; action to enforce.

CASE NOTES

Retroactive Application of § 58-155.60.— In accord with 1981 Cum. Supp. See State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

However, Claimants Against the Deposit, etc.—

In accord with 1981 Cum. Supp. See State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

All deposit funds under § 58-155.60 must be paid to claimants pro rata as provided by this section, and if all claimants are satisfied either directly by the Guaranty Association or by the Commissioner of Insurance (if the claim is under $100.00) and deposit funds remain, then and only then are such funds to be permanently credited to the Guaranty Association for its expenses. State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

§ 58-188.1. Deposits held in trust by Commissioner or Treasurer.

CASE NOTES

Cited in State ex rel. Ingram v. Reserve Ins. Co., 303 N.C. 623, 281 S.E.2d 16 (1981).

SUBCHAPTER IV. LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-195.2. Credit life insurance defined.

CASE NOTES

Quoted in Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

§ 58-210. "Group life insurance" defined.

CASE NOTES

Stated in First Nat'l Bank v. Nationwide Ins. Co., 303 N.C. 203, 278 S.E.2d 507 (1981).

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-248.26. Definitions.

Legal Periodicals.—
For note discussing changes in automobile rate regulation and the role of the Insurance Commissioner in North Carolina, see 17 Wake Forest L. Rev. 822 (1981).

CASE NOTES

Cited in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-248.31. General obligations of insurers.

CASE NOTES

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-248.32. General obligations of agents.

CASE NOTES

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

§ 58-248.33. The Facility; functions; administration.

CASE NOTES

Recoupment Surcharges. — The legislature's concern that the Facility operate on a no profit-no loss basis, together with the statutory cap on rates indicates that the legislature intended recoupment surcharges to be separate and apart from rates. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), (decided prior to 1981 amendment to § 58-248.34(e)).

Surcharges on automobile liability insurance coverages ceded to the North Carolina Reinsurance Facility to recoup past facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" do not constitute rates and no filing with or approval by the Commissioner of Insurance is required by law with respect to the surcharges. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), (decided prior to 1981 amendment to § 58-248.34(e)).

§ 58-248.34. Plan of operation.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Recoupment Surcharges. — The legislature's concern that the Facility operate on a no profit-no loss basis, together with the statutory cap on rates indicates that the legislature intended recoupment surcharges to be separate and apart from rates. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), (decided prior to 1981 amendment to subsection (e)).

Surcharges on automobile liability insurance coverages ceded to the North Carolina Reinsurance Facility to recoup past facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" do not constitute rates and no filing with or approval by the Commissioner of Insurance is required by law with respect to the surcharges. State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981), (decided prior to 1981 amendment to subsection (e)).

§ 58-248.40. Termination of North Carolina Automobile Insurance Plan.

CASE NOTES

Cited in State ex rel. Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 275 S.E.2d 399 (1981).

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-251.1. Accident and health policy provisions.

CASE NOTES

Quoted in F & D Co. v. Aetna Ins. Co., — N.C. —, 287 S.E.2d 867 (1982).

§ 58-251.4. Policies to cover newborn infants.

Every policy of insurance and every hospital service or medical service plan as defined in Chapter 57 of the General Statutes (regardless of whether any of such policies or plans shall be defined as individual, family, group, blanket, franchise, industrial or otherwise) which provides benefits on account of any sickness, illness, or disability of any minor child or which provides benefits on account of any medical treatment or service authorized or permitted to be furnished by a hospital under the laws of this State to any minor child shall provide such benefits for such occurrences beginning with the moment of birth of such child if such birth occurs while said policy or subscriber contract with such a plan is in force.

Benefits in such insurance policies or plans shall be the same for congenital defects or anomalies as are provided for most sicknesses or illnesses suffered by minor children which are covered by said policies or plans. Benefits for congenital defects or anomalies shall specifically include, but not be limited to, all necessary treatment and care needed by individuals born with cleft lip or cleft palate.

No policy or plan subscriber contract shall be approved by the Commissioner of Insurance pursuant to the provisions of this Article or the provisions of Chapter 57 of the General Statutes that does not comply with the provisions of this section.

The provisions of this section shall apply both to insurers governed by the provisions of Chapter 58 of the General Statutes and to corporations governed by the provisions of Chapter 57 of the General Statutes. (1973, c. 345, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1349.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, added the second sentence of the second paragraph.

§ 58-254.8. Credit accident and health insurance.

CASE NOTES

One Type of Insurance Defined. — The phrase "against death or personal injury by accident" and the phrase "against sickness, ailment or bodily injury" are conjunctive and together define one type of insurance. Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

The legislature intended to provide for uniformity of coverage by requiring that all policies of "credit accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

In an action to recover on a policy of credit life and disability insurance issued by defendant where defendant alleged that no charge was made for life insurance but only for disability insurance and therefore that the death of plaintiff's decedent was not the event against which the policy insured, the trial court properly entered judgment for plaintiff, since all policies of "credit, accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

SUBCHAPTER VIII. CREDIT LIFE INSURANCE AND CREDIT ACCIDENT AND HEALTH INSURANCE.

ARTICLE 32.

Regulation of Credit Life Insurance, Credit Accident and Health Insurance and Credit Property Insurance.

§ 58-341. Application of Article.

CASE NOTES

Applied in Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

§ 58-342. Definitions.

CASE NOTES

All Policies Cover Death or Personal Injury by Accident. — The legislature intended to provide for uniformity of coverage by requiring that all policies of "credit accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

In an action to recover on a policy of credit life and disability insurance issued by defendant where defendant alleged that no charge was made for life insurance but only for disability insurance and therefore that the death of plaintiff's decedent was not the event against which the policy insured, the trial court properly entered judgment for plaintiff, since all policies of "credit, accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

§ 58-343. Forms of insurance which are authorized.

CASE NOTES

Applied in Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

Chapter 59.

Partnership.

Article 1.

Uniform Limited Partnership Act.

§ 59-7. Limited partner not liable to creditors.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1081 (1981).

§ 59-10. Rights of a limited partner.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1081 (1981).

Article 2.

Uniform Partnership Act.

Part 2. Nature of a Partnership.

§ 59-38. Partnership property.

CASE NOTES

Cited in Simmons v. Quick Stop Food Mart, Inc., — N.C. App. —, 286 S.E.2d 807 (1982).

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-40. Conveyance of real property of the partnership.

CASE NOTES

Stated in Simmons v. Quick Stop Food Mart, Inc., — N.C. App. —, 286 S.E.2d 807 (1982).

§ 59-42. Partnership charged with knowledge of or notice to partner.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1081 (1981).

Part 6. Dissolution and Winding Up.

§ 59-60. Partnership not terminated by dissolution.

CASE NOTES

Lease Continues as Partnership Affair. — Where legal title to the property remains in a dissolved partnership, a lease under which one party is named tenant continues as a partnership affair. The partnership affairs thereby are incomplete, and the partnership, though dissolved, has not yet "terminated." Simmons v. Quick Stop Food Mart, Inc., — N.C. App. —, 286 S.E.2d 807 (1982).

Chapter 62.

Public Utilities.

Article 1.

General Provisions.

Sec.

62-3. Definitions.

Article 3.

Powers and Duties of Utilities Commission.

62-52. Interruption of service.

Sec.

62-53 to 62-59. [Reserved.]

Article 7.

Rates of Public Utilities.

62-133. How rates fixed.

62-133.2. Fuel charge adjustments for electric utilities.

62-134. Change of rates; notice; suspension and investigation.

Article 1.

General Provisions.

§ 62-2. Declaration of policy.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982); State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-3. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation.

2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 10 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 10 residential building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more build-

ing lots, without regard to the number of actual customers connected;

3. Transporting persons or property by street, suburban or interurban bus or railways for the public for compensation;
4. Transporting persons or property by railways or motor vehicles, or any other form of transportation or express service for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;
5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;
6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, electric or telephone membership corporation or nonprofit water membership or consumer-owned corporations financed by the Farmers Home Administration, the United States Department of Housing and Urban Development, or any similar or successor federal financing agency, provided, that (i) any such financing administration, department or agency exercise substantial control over and regulation of any such corporation's rates and terms and conditions of service, and (ii) the members or consumer-owners of any such corporation, pursuant to the corporation's articles of incorporation and bylaws, shall elect the governing board of the corporation; or any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in

furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

g. The term "public utility" shall not include a hotel or motel which imposes charges to guests for local or long-distance telephone calls when such calls are completed through the use of local access lines or long-distance message telecommunications service (MTS) of a public utility, and the applicable charges for telephone calls are displayed in each guest room.

(1981 (Reg. Sess., 1982), c. 1186, s. 2.)

Effect of amendments.

The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, added paragraph g to subdivision (23).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (23) are set out.

CASE NOTES

A common carrier of petroleum products which commits a part of its equipment to dedicated use should not be regarded as a matter of law as a contract carrier since common carriers participating in the dedicated rate arrangement are also rendering service to the public generally and are providing service impartially to all persons requesting such service. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Applied in State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Article 3.

Powers and Duties of Utilities Commission.

§ 62-32. Supervisory powers; rates and service.

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 62-51. To inspect books and records of corporations affiliated with public utilities.

CASE NOTES

Broad Authority to Inspect. — Within its proper rate-making authority, the Commission is expressly authorized to inspect the books and records of affiliated companies and to investigate contracts and practices between the petitioning utility and its affiliated companies including parent corporations and subsidiaries of parent corporations. The authority of the Commission to inspect books and records and to make investigations into transactions between affiliates, as conferred by this section, is quite broad. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Stated in State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981).

§ 62-52. Interruption of service.

The Utilities Commission may adopt appropriate rules and regulations which would allow public utilities to temporarily interrupt service when a structure is moved by the owner of such structure (or by a licensed mover authorized and acting on behalf of the owner) over or along public roads or streets and there are public utility facilities in place which would impede the movement of such structure. Such rules and regulations shall require:

(1) The owner to demonstrate that the public health and safety of the utility's customers and that of the general public will not be affected by the interruption of such service,

(2) That the inconvenience to said customers and the general public can be fully anticipated and reduced to a minimum,

(3) The utility cooperate with the owner in furnishing information relative to (1) and (2), and

(4) An initial application fee be paid the utility toward its cost to be incurred in investigating and planning.

Should the owner and the public utility be unable to agree on a practical procedure and/or the direction to follow in overcoming the impeding facilities in order that the public health and safety of the utility's customers and that of the general public will not be affected, then and in such event the owner may petition the Utilities Commission to require the utility to temporarily interrupt its service to its customers by disconnecting the impeding facilities, provided the owner can demonstrate to the satisfaction of the Commission that the public health and safety of the utility's customers and that of the general public will not be affected by such interruption of service and that the public utility was unreasonable in the procedure, direction and cost proposed to the owner to overcome the impeding facility.

In any event, the owner of said structure shall reimburse the utility its full cost involved in such disconnection and reconnection including but not limited to planning, engineering, notification and administrative costs, labor, material and equipment. Should the impeding facility be overcome other than by disconnection, the owner shall nevertheless reimburse the utility its full cost related thereto. (1981 (Reg. Sess., 1982), c. 1186, s. 1.)

§§ 62-53 to 62-59: Reserved for future codification purposes.

Article 4.

Procedure before the Commission.

§ 62-75. Burden of proof.

CASE NOTES

Burden of Proving Discrimination and Preference. — The burden of proving that the dedicated service rate is discriminatory and preferential lies with protestants, the complaining parties. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

§ 62-79. Final orders and decisions; findings; service; compliance.

CASE NOTES

Findings under § 62-133(d). — The "other material facts of record" considered by the Commission under § 62-133(d) in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

The Commission is required to set forth factors it considers in fixing reasonable and just rates which are not enumerated in § 62-133. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

Reasons for Rejecting Uncontradicted Opinion Testimony. — The Commission is not, as a matter of law, required to set forth in its order its reasons for rejecting uncontradicted opinion testimony; however, it is the better practice for the Commission to do so. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

Article 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-94. Record on appeal; extent of review.

CASE NOTES

I. GENERAL CONSIDERATION.

Judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria of this section which circumscribe judicial review. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Limitation on Authority to Review. —

In accord with 2nd paragraph in original. See State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

The court's power to affirm or remand is not specifically circumscribed by this section. However, the power of the court to reverse or modify and, a fortiori, to declare null and void, is substantially circumscribed. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

Determination by Commission Is Prima Facie, etc. —

In accord with 4th paragraph in original. See State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

And Burden Is on Appellant, etc. —

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

Commission's Findings are Conclusive, etc. —

In accord with 4th paragraph in 1981 Cum. Supp. See State ex rel. Utilities Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981).

When Order Will Be Affirmed. — The rate order of the Commission will be affirmed if upon consideration of the whole record the

appellate court finds that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-96. Appeal to Supreme Court.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

ARTICLE 6A.

Radio Common Carriers.

§ 62-119. Powers of Commission generally; definitions.

CASE NOTES

Quoted in State ex rel. Utilities Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981).

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

CASE NOTES

Authority to Test Reasonableness of Affiliated Company Expenses. — The Commission has the authority and the right at all times to test the reasonableness of expenses paid to affiliated companies (or allocated by them) and to cause the petitioning utility to offer affirmative evidence of their reasonableness or risk their disapproval. The Commission has the obligation to test the reasonableness of such expenses whenever they are properly challenged. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Although it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Test of Reasonableness of Affiliated Company Expenses. — Reasonableness may be tested on the basis of (1) the cost of the same services on the open market, (2) the cost similar utilities pay to their service companies, or (3) the reasonableness of the expenses incurred by the affiliated company in generating the service. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Affirmative Evidence of Reasonableness of Affiliated Company Expenses. — The Commission must always determine that expenses paid to affiliated companies are rea-

sonable and the burden of persuasion on that issue always rests with the utility. The Commission, of course, has the right to test the reasonableness of such expenses. If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Stated in State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981).

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-131. Rates must be just and reasonable; service efficient.

CASE NOTES

Authority to Test Reasonableness of Affiliated Company Expenses. — The Commission has the authority and the right at all times to test the reasonableness of expenses paid to affiliated companies (or allocated by them) and to cause the petitioning utility to offer affirmative evidence of their reasonableness or risk their disapproval. The Commission has the obligation to test the reasonableness of such expenses whenever they are properly challenged. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Although it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Test of Reasonableness of Affiliated Company Expenses. — Reasonableness may be tested on the basis of (1) the cost of the same services on the open market, (2) the cost similar utilities pay to their service companies, or (3) the reasonableness of the expenses incurred by the affiliated company in generating the service. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Affirmative Evidence of Reasonableness of Affiliated Company Expenses. — The Commission must always determine that expenses paid to affiliated companies are reasonable and the burden of persuasion on that issue always rests with the utility. The Commission, of course, has the right to test the reasonableness of such expenses. If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence. State ex rel. Utilities Comm'n v. Intervenor Residents, — N.C. —, 286 S.E.2d 770 (1982).

Cited in State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981); State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-133. How rates fixed.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in

progress after the effective date of this subsection may be included, to the extent the Commission considers such inclusion in the public interest and necessary to the financial stability of the utility in question, subject to the provisions of subparagraph (b)(5) of this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to complete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate based upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1).

(1981 (Reg. Sess., 1982), c. 1197, s. 6.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment substituted "may be included, to the extent the Commission consider such inclusion in the public interest and necessary to the financial stability of the utility in question," for "shall be included" in the second sentence of subdivision (b)(1).

Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 5, provides: "The North Carolina Utility Review Committee shall, upon public notice and hearing with all interested parties allowed to participate and testify, investigate the present and future need and justification for inclusion in the rate base of public utilities construction work in progress, as now provided for in G.S. 62-133(b)(1), and report its findings and recommendations to the Governor and the General Assembly in the 1983 Session."

Only Part of Section Set Out. — As the other subsections were not changed by the amendment, only subsection (b) is set out.

I. GENERAL CONSIDERATION.

Legislative Intent. — By the adoption of this section, the legislature intended to establish an overall scheme for fixing rates, and this section must be interpreted in its entirety in order to comply with the legislative intent. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

Subdivision (b)(3) shall be read in conjunction with subsection (c) of this section, as must subdivision (b)(1) of this section. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

Applied in State ex rel. Utilities Comm'n v. Duke Power Co., 51 N.C. App. 698, 277 S.E.2d 444 (1981).

Quoted in State ex rel. Utilities Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981).

II. UTILITIES COMMISSION.

When the record, considered as a whole, etc. —

Under this section the determination of what constitutes a fair rate of return requires the exercise of a subjective judgment by the Commission and its decision may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

III. FIXING OF RATES.

B. Rate Base — Value of Investments, Property, etc.

The Commission may reduce a utility's rate base by increasing its accumulated depreciation account as an offset to a pro forma adjustment by the utility in the same amount to depreciation expense. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

D. Rate of Return.

Commission to Determine Fair Rate, etc. —

In accord with original. See State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

The Commission may reject the uncontradicted testimony of a utility's expert witnesses as to the fair rate of return on the utility's common equity, and while the better practice is for the Commission to state its reasons for doing so in its order establishing a lower rate of return, it is not required to do so as a matter of law. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

IV. TEST PERIOD.

The basic, underlying theory, etc. —

In accord with original. See State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

Subdivision (b)(3) and subsection (c) of this section, taken together, allow the Commission to make pro forma adjustments to revenue and expenses to reflect what their effect would have been had those future conditions prevailed throughout, or at the end of, the test period or to adjust for abnormalities and changes in conditions. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

V. OTHER FACTS.

A. In General.

The plain meaning of subsection (d) of this section is that, after considering all other factors, considerations and adjustments specifically set forth in the various sections of the statute, the Commission must consider "all other material facts of record" which ought to be taken into consideration in setting rates which are reasonable and just. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

"Other facts" which the Commission, etc. —

The Commission is required to set forth factors it considers in fixing reasonable and just rates which are not enumerated in this section. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

The "other material facts of record" considered by the Commission under subsection (d) in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are. State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-133.1. Small water and sewer utility rates.

CASE NOTES

Components of Expenses Must Be Examined. — For rates to be reasonable, the figures from which they are derived must be reasonable. To uphold its statutory duty to establish reasonable rates then, the Commission must examine each of the components going to make up a utility's expenses for reasonableness. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

§ 62-133.2. Fuel charge adjustments for electric utilities.

(a) The Commission may allow electric utilities to charge a uniform increment or decrement as a rider to their rates for changes in the cost of fuel and the fuel component of purchased power used in providing their North Carolina customers with electricity from the cost of fuel and the fuel component of purchased power established in their previous general rate case.

(b) For each electric utility engaged in the generation and production of electric power by fossil or nuclear fuels, the Commission shall hold a hearing within 12 months of the last general rate case order and determine whether an increment or decrement rider is required to reflect actual changes in the cost of fuel and the fuel cost component of purchased power over or under base rates established in the last preceding general rate case. Additional hearings shall be held on an annual basis but only one hearing for each such electric utility may be held within 12 months of the last general rate case.

(c) Each electric utility shall submit to the Commission for the hearing verified annualized information and data in such form and detail as the Commission may require, for an historic 12-month test period, relating to:

(1) Purchased cost of fuel used in each generating facility owned in whole or in part by the utility.
(2) Fuel procurement practices and fuel inventories for each facility.
(3) Burned cost of fuel used in each generating facility.
(4) Plant capacity factor for each generating facility.
(5) Plant availability factor for each generating plant.
(6) Generation mix by types of fuel used.
(7) Sources and fuel cost component of purchased power used.
(8) Recipients of and revenues received for power sales and times of power sales.
(9) Test period kilowatt hour sales for the utility's total system and on the total system separated for North Carolina jurisdictional sales.

(d) The Commission shall provide for notice of a public hearing with reasonable and adequate time for investigation and for all intervenors to prepare for hearing. At the hearing the Commission shall receive evidence from the utility, the public staff, and any intervenor desiring to submit evidence, and from the public generally. In reaching its decision, the Commission shall consider all evidence required under subsection (c) of this section. The Commission may also consider, but is not bound by, the fuel costs incurred by the utility and the actual recovery under the rate in effect during the test period as well as any and all other competent evidence that may assist the Commission in reaching its decision including changes in the price of fuel consumed and changes in price of the fuel in the fuel component of purchased power occurring within a reasonable time (as determined by the Commission) after the test period is closed. The burden of proof as to the correctness and reasonableness of the charge shall be on the utility. The Commission shall allow only that portion, if any, of a requested fuel adjustment that is based on adjusted and reasonable fuel expenses prudently incurred under efficient management and economic operations. To the extent that the Commission determines that an increment or decrement to the rates of the utility due to changes in the cost of fuel and the fuel cost component of purchased power over or under base fuel costs established in the preceding general rate case is just and reasonable, the Commission shall order that the increment or decrement become effective for all sales of electricity and remain in effect until changed in a subsequent general rate case or annual proceeding under this section.

(e) If the Commission has not issued an order pursuant to this section within 120 days of a utility's submission of annual data under subsection (c) of this section, the utility may place the requested fuel adjustment into effect. If the change in rate is finally determined to be excessive, the utility shall make

refund of any excess plus interest to its customers in a manner ordered by the Commission.

(f) Nothing in this section shall relieve the Commission from its duty to consider the reasonableness of fuel expenses in a general rate case and to set rates reflecting reasonable fuel expenses pursuant to G.S. 62-133. (1981 (Reg. Sess., 1982), c. 1197, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 4, provides: "The Utilities Commission shall, upon public notice and hearing with all interested parties allowed to participate and testify, investigate the present and future need and justification for electric utility fuel charge adjustments as provided for in this act and report its findings and recommendations to the Governor and the Utility Review Committee of the General Assembly on or before the convening date of the 1983 General Assembly, Second Session 1984; or if there is no 1984 Session, to the 1985 General Assembly on or before its convening date."

§ 62-134. Change of rates; notice; suspension and investigation.

(e) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1197, s. 2. (1981 (Reg. Sess., 1982), c. 1197, s. 2.)

Cross References. — As to fuel charge adjustments for electric utilities, see § 62-133.2.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment repealed subsection (e), relating to increase in rates and charges based solely upon the increased cost of fuel needs in the generation or production of electric power.

Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 3, provides: "All rates and charges under G.S. 62-134(e) shall terminate not later than December 1, 1982. In general rate cases now pending, the Commission shall not use fuel costs or costs of purchased power established in a proceeding pursuant to G.S. 62-134(e), but shall determine the just and reasonable amount of the costs pursuant to G.S. 62-133(b)(3)." The act was ratified June 17, 1982 and made effective upon ratification.

Session Laws 1981 (Reg. Sess., 1982), c. 1197, s. 4, provides: "The Utilities Commission shall, upon public notice and hearing with all interested parties allowed to participate and testify, investigate the present and future need and justification for electric utility fuel charge adjustments as provided for in this act and report its findings and recommendations to the Governor and the Utility Review Committee of the General Assembly on or before the convening date of the 1983 General Assembly, Second Session 1984; or if there is no 1984 Session, to the 1985 General Assembly on or before its convening date."

Only Part of Section Set Out. — As the other subsections were not changed by the amendment, they are not set out.

Legal Periodicals. —

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.

CASE NOTES

Refunds to Customers. — The wording of this section clearly requires that refunds be made to the customers who paid the charges, and that these refunds be contingent upon

practicability. State ex rel. Utilities Comm'n v. Public Serv. Co., — N.C. App. —, 289 S.E.2d 82 (1982).

Cited in State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

§ 62-137. Scope of rate case.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., — N.C. —, 287 S.E.2d 786 (1982).

§ 62-140. Discrimination prohibited.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

Provided Differences in Service or Conditions Are Substantial. —

In accord with original. See State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Factors which constitute "substantial differences in service or conditions" and, therefore, justify a rate differential include (1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

The question under subsection (a), etc. —

The question of law with respect to public utility rate differentials is not whether the differential is merely discriminatory or preferential but is whether the differential is an unreasonable or unjust discrimination. State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

§ 62-153. Contracts of public utilities with certain companies and for services.

CASE NOTES

The purpose of this section is merely to assure that executory contracts between affiliates be just and reasonable on their face. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

This section was clearly enacted for the purpose of discovering contracts between affiliated corporations which were "unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility." State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

The statutory scheme is directed at prior approval. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

Standard of Approval. — The consideration of the Commission under this section is whether the contracts are just and reasonable. If they are, and are not efforts to divert or

conceal profits, they are to be approved. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

Expenses incurred under unreasonable contracts would have to be disregarded in computing a utility's expenses. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

Consideration in Ratemaking of Expenses Pursuant to Unfiled Contracts. — This section does not prohibit the Utilities Commission from considering fees owed to affiliated corporations under unfiled contracts as expenses of the public utility for purposes of ratemaking so long as the Commission does determine in the ratemaking procedure that the agreements between the utility and the affiliated corporations are just and reasonable and it does not appear that their purpose is to conceal or divert profits from the public utility to an affiliate. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

This section does not prohibit the Utilities Commission from considering charges to a public utility for services rendered by affiliated corporations pursuant to contracts not filed with and approved by the Utilities Commission as expenses of the utility for purposes of ratemaking so long as the Commission determines in the ratemaking procedure that the agreements between the utility and affiliated corporations are just and reasonable and it does not appear that their purpose is to conceal or divert profits from the utility to an affiliate. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

Basis for Determining Reasonableness of Affiliate's Charges. — The Utilities Commission must determine the reasonableness of charges to a public utility by an affiliated corporation on the basis of either (1) the cost of the same services on the open market; (2) the cost similar utilities pay to their service companies; or (3) the reasonableness of the expenses incurred by the affiliated corporation in generating its services. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

Examination of Books and Records of Affiliated Companies. — An examination by the Utilities Commission of the books and records of companies affiliated with a regulated utility is necessary in a rate case only if there is no evidence of what the utility would have had to pay nonaffiliated companies for the same services or of what similar utilities pay their service companies for similar services. State ex rel. Utilities Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, — N.C. —, 286 S.E.2d 770 (1982).

ARTICLE 12.

Motor Carriers.

§ 62-259. Additional declaration of policy for motor carriers.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

Stated in State ex rel. Utilities Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Chapter 63.

Aeronautics.

Article 1.

Municipal Airports.

§ 63-2. Cities and towns authorized to establish airports.

CASE NOTES

Cited in Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

§ 63-5. Airport declared public purpose; eminent domain.

CASE NOTES

Flights over Private Land as Taking. — Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

A compensable taking of a flight or aviation easement does not occur until overflights constitute a material interference with the use and enjoyment of property, such that there is substantial diminution in fair market value. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

Inverse Condemnation Action for Frequent Overflights. — Failure to condemn directly under this section for damage to property caused by frequent overflights allows plaintiffs, if they wish compensation for the diminution in value of their properties, the sole alternative of an action for inverse condemnation. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

Judgments in Aviation Easement Cases. — Because the interest taken vests in the governmental entity, judgments in aviation easement cases should describe the easement acquired in terms of (1) frequency of flight, (2) permissible altitude, (3) type of aircraft, and (4) duration. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

Chapter 65.

Cemeteries.

Article 7A.

Funeral and Burial Trust Funds.

Sec.

65-36.2. Deposit of trust funds.

65-36.3. Refund of deposit.

Article 9.

North Carolina Cemetery Act.

Sec.

65-53. Powers.

Article 7A.

Funeral and Burial Trust Funds.

§ 65-36.2. Deposit of trust funds.

(a) All payments of money made to any person, partnership, association or corporation upon any agreement or contract, or any series or combination of agreements or contracts, but not including the furnishing of cemetery lots, crypts, niches, mausoleums, grave markers or monuments, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, are held to be trust funds. The person, partnership, association or corporation receiving the payments is declared to be a trustee thereof, and shall deposit all payments in a financial institution. All of the interest, dividends, increases or accretions of whatever nature earned by the funds deposited in a trust account shall remain with the principal of such account and become a part thereof, subject to all of the regulations concerning the principal of said fund herein contained. The trust fund itself shall be solely liable for all taxes on said fund and its interest, dividends, increases and accretions. The trustee may establish an individual trust for each contract or a common trust fund for all contracts. The trust accounts shall be carried in the name of the person, partnership, association or corporation to whom preneed payments are made, but accounting records shall be maintained showing the amounts deposited and invested, and interest, dividends, increases and accretions earned thereon, with respect to each purchaser's contract.

(1981 (Reg. Sess., 1982), c. 1336, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the last two sentences of subsection (a). Session Laws 1981 (Reg. Sess., 1982), c. 1336, s. 3, provides: "This act is effective upon ratification [June 23, 1982] and applies to contracts entered into on and after that date."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 65-36.3. Refund of deposit.

Within 30 days of receipt of a written demand for refund by any person, partnership or corporation who has paid funds for a preneed funeral service, the financial institution with which such funds have been deposited shall refund to such person, partnership or corporation the entire amount paid together with all interest, dividends, increases or accretions earned on such fund.

After making refund to the person, partnership or corporation pursuant to the provisions of the preceding paragraph and giving notice to the trustee of

such payment, the financial institution shall be relieved from further liability to the trustee. The provisions of this section do not apply if the preneed contract provides that it is irrevocable. (1969, c. 187, s. 3; 1981 (Reg. Sess., 1982), c. 1336, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the second sentence of the second paragraph. Session Laws 1981 (Reg. Sess., 1982), c. 1336, s. 3, provides: "This act is effective upon ratification [June 23, 1982] and applies to contracts entered into on and after that date."

ARTICLE 9.

North Carolina Cemetery Act.

§ 65-53. Powers.

In addition to other powers conferred by this Article, the Cemetery Commission shall have the following powers and duties:

(1) The administrator shall be appointed by the Governor upon recommendation of the Cemetery Commission. The compensation of the administrator and such other personnel as is necessary to operate the Commission is subject to the provisions of Chapter 126 of the General Statutes of North Carolina.

(1981 (Reg. Sess., 1982), c. 1153.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote the second sentence of subdivision (1), which formerly read: "The Cemetery Commission shall set the compensation of the administrator and such other personnel as are necessary to operate the Commission."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (1) are set out.

Chapter 66.

Commerce and Business.

ARTICLE 19.

Business Opportunity Sales.

§ 66-94. Definition.

Legal Periodicals. — For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

§ 66-100. Remedies.

CASE NOTES

Cited in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

ARTICLE 20.

Loan Brokers.

§ 66-111. Remedies.

CASE NOTES

Cited in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

ARTICLE 21.

Prepaid Entertainment Contracts.

§ 66-125. Remedies.

CASE NOTES

Cited in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

Chapter 68.

Fences and Stock Law.

ARTICLE 3.

Livestock Law.

§ 68-16. Allowing livestock to run at large forbidden.

CASE NOTES

Cited in Rhoads v. Bryant, — N.C. App. —, 289 S.E.2d 637 (1982).

Chapter 69.

Fire Protection.

ARTICLE 3A.

Rural Fire Protection Districts.

§ 69-25.11. Changes in area of district.

OPINIONS OF ATTORNEY GENERAL

Property completely separated from the existing fire district is not "adjoining territory" within the meaning of the statute. See opinion of Attorney General to Mr. Paul S. Messick, Jr., Chatham County Attorney, 50 N.C.A.G. 74 (1981).

Meaning of "Owner" and "Majority of Owners". — The legislative intent was to include nonresident property owners, and the word "owner" should be construed to mean "resident and nonresident owners" of the territory to be included. "Majority of the owners" refers to persons and entities owning real estate in the territory. See opinion of Attorney General to Mr. Paul S. Messick, Jr., Chatham County Attorney, 50 N.C.A.G. 74 (1981).

Chapter 72.

Inns, Hotels and Restaurants.

Article 1.

Innkeepers.

Sec.
72-7. Admittance of dogs to bedrooms.

Article 1.

Innkeepers.

§ 72-7. Admittance of dogs to bedrooms.

Except as provided in Chapter 168 of the General Statutes, it is unlawful for any innkeeper or guest owning, keeping, or who has in his care a dog or dogs, to permit such a dog or dogs admittance to any bedroom or rooms used for sleeping purposes in any inn or hotel.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall pay a fine not to exceed fifty dollars ($50.00) or be imprisoned not more than 30 days. (1927, c. 67; 1981 (Reg. Sess., 1982), c. 1177, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "Except as provided in Chapter 168 of the General Statutes, it is unlawful" for "It shall be unlawful" at the beginning of the first paragraph.

Chapter 74C.

Private Protective Services Act.

Sec.

74C-5. Powers of the Board.

§ 74C-5. Powers of the Board.

In addition to the powers conferred upon the Board elsewhere in this Chapter, the Board shall have the power to:

(2) Determine minimum qualifications, establish and require written or oral examinations, and establish minimum education, experience, and training standards for applicants and licensees under this Chapter;

(1981 (Reg. Sess., 1982), c. 1359, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted a comma and "establish and require written or oral examinations," following "qualifications" in subdivision (2).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (2) are set out.

Chapter 75.

Monopolies, Trusts and Consumer Protection.

ARTICLE 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

Legal Periodicals. —
For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

CASE NOTES

II. WHAT COMBINATIONS AND CONTRACTS ILLEGAL.

Refusal of legal directory publisher to publish attorney's "professional card" and failure of ABA and North Carolina State Bar to prevent publisher from refusing to do so held not in violation of this section and § 75-1.1. See Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For a note concerning intent under North Carolina's Unfair or Deceptive Acts or Practices Statute, see 18 Wake Forest L. Rev. 134 (1982).

CASE NOTES

I. GENERAL CONSIDERATION.

Legislative Intent. —
In accord with 2nd paragraph in original. See Buie v. Daniel Int'l Corp., — N.C. App. —, 289 S.E.2d 118 (1982).

A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981).

"Unfairness" is broader than and includes the concept of "deception". Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981).

A trade practice is deceptive if it has the capacity or tendency to deceive. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

To succeed under this section, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception; plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981).

But proof of actual deception is not required. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

Factors Determining Unfairness or Deception. — Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

In determining whether a violation of this

section has occurred, the question of whether the defendant acted in bad faith is not pertinent, and the character of the plaintiff, whether public or private, should not alter the scope of the remedy. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

Applied in Abernathy v. Ralph Squires Realty Co., — N.C. App. —, 285 S.E.2d 325 (1982); Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269 (4th Cir. 1982).

Quoted in Taylor v. Hayes, 302 N.C. 627, 276 S.E.2d 369 (1981).

Stated in Gower v. Strout Realty, Inc., — N.C. App. —, 289 S.E.2d 880 (1982).

II. SCOPE OF SECTION.

The rental of commercial property is trade or commerce within the meaning of this section. Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, aff'd and modified, 303 N.C. 675, 281 S.E.2d 43 (1981).

Padlocking Premises upon Failure to Pay Rent. — The practices of defendant landlord in padlocking premises when tenants failed to pay rent did not constitute unfair trade practices under this section. Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

Employer-Employee Relationships. — Unlike buyer-seller relationships, the employer-employee relationships do not fall within the intended scope of this section. Buie v. Daniel Int'l Corp., — N.C. App. —, 289 S.E.2d 118 (1982).

Agreement to Prevent Performance of Contract to Purchase Condominium. — Plaintiff's complaint stated a claim for relief against defendant bank and defendant mortgage lender for civil conspiracy and treble damages under the unfair trade practices statute where it alleged that plaintiffs contracted with defendant bank to purchase a condominium; pursuant to the terms of the contract, plaintiffs applied for a loan to defendant lender to finance the purchase of the condominium; defendant bank thereafter determined it did not want to perform the contract and made an agreement with defendant lender by which defendant lender would not make a loan to plaintiffs to finance the purchase and would not notify plaintiffs of the loan refusal until it was too late for plaintiffs to secure alternate financing; and defendant lender, in furtherance of this agreement, refused to make the loan, not because of a legitimate business reason, but in order to prevent plaintiffs from performing their part of the contract. Pedwell v. First Union Nat'l Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981).

Refusal of legal directory publisher to publish attorney's "professional card" and failure of ABA and North Carolina State Bar to prevent publisher from refusing to do so held not in violation of § 75-1 and this section. Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981).

III. PLEADING AND PRACTICE.

And Court Determines Whether Practice Violates Section. —

In accord with 1st paragraph in original. See Whitman v. Forbes, — N.C. App. —, 286 S.E.2d 889 (1982).

§ 75-4. Contracts to be in writing.

Cited in Sandhill Motors, Inc. v. American Motors Sales Corp., 667 F.2d 1112 (4th Cir. 1981).

§ 75-5. Particular acts prohibited.

Legal Periodicals. —

For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

§ 75-8. Continuous violations separate offenses.

Legal Periodicals. —

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

§ 75-9. Duty of Attorney General to investigate.

Legal Periodicals. —
For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

§ 75-10. Power to compel examination.

Legal Periodicals. —
For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

§ 75-14. Action to obtain mandatory order.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Proof of Actual Injury. — Public enforcement through the Attorney General is similar to Section 5 of the Federal Trade Commission Act, whose purpose is to vindicate public interest rather than to redress individual grievances. Under the federal act, it is not necessary to show actual injury has resulted, but merely that the act or practice complained of adversely affects the public interest, and similarly, there is no suggestion in the North Carolina statutory scheme that the Attorney General would be required to prove such actual injury. State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981).

§ 75-15.2. Civil penalty.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

CASE NOTES

Quoted in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

§ 75-16. Civil action by person injured; treble damages.

Legal Periodicals. —
For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

For a note suggesting that intent is not required to award treble damages for a violation of North Carolina's Unfair or Deceptive Acts or Practices Statute, see 18 Wake Forest L. Rev. 134 (1982).

CASE NOTES

Legislative Intent. —
In enacting this section and § 75-16.1, the legislature intended to establish an effective private cause of action for aggrieved consumers in this State. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

Section Remedial as Well as Punitive. — This section is partially punitive in nature in that it clearly serves as a deterrent to future violations; but it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

Applied in Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Smith v. King, 52 N.C. App. 158, 277 S.E.2d 875 (1981).

Cited in Taylor v. Hayes, 302 N.C. 627, 276 S.E.2d 369 (1981); Old Dominion Distribs., Inc. v. Bissette, — N.C. App. —, 287 S.E.2d 409 (1982).

§ 75-16.1. Attorney fee.

Legal Periodicals. —
For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

CASE NOTES

Legislative Intent. — In enacting § 75-16 and this section, the legislature intended to establish an effective private cause of action for aggrieved consumers in this State. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

§ 75-16.2. Limitation of actions.

Legal Periodicals. —
For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

CASE NOTES

Article Inapplicable to Case of Mistaken Identity. — For a claimant to claim protection under this Article, he must have had at least some connection with the underlying debt or alleged debt. Because of the presence of the term "incurred" in subdivision (1), the words "alleged debt" could not include an instance in which a debt collector mistakenly identified the person who owed it money or allegedly owed it money. The legislature chose not to use the words "allegedly incurred". Thus, the language of the Article does not evidence an intent by the legislature to provide protection for persons mistakenly thought to have been the one who incurred an obligation. They must rely on common-law remedies. Fisher v. Eastern Air Lines, 517 F. Supp. 672 (M.D.N.C. 1981).

Applied in Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

§ 75-54. Deceptive representation.

CASE NOTES

Padlocking Notice Did Not Simulate Legal Process. — A padlocking notice posted by defendant landlord on the doors of tenants who were late paying their rent did not simulate legal process in violation of this section, since the notice in question contained no signatures, no seal, no mention of an official or of a court, no date, and no reference to an amount due. Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

Sec.

75A-3. Wildlife Resources Commission to administer Chapter; Motorboat Committee; funds for administration.

Article 1.

Boating Safety Act.

§ 75A-3. Wildlife Resources Commission to administer Chapter; Motorboat Committee; funds for administration.

(c) All moneys collected pursuant to the numbering provisions of this Chapter and pursuant to G.S. 105-446.2 shall be deposited in the State treasury and credited to a special fund known as the Wildlife Resources Fund and provided by G.S. 143-250. The said moneys shall be made available to the Wildlife Resources Commission, subject to the Executive Budget Act and the Personnel Act, for the administration and enforcement of this Article, for activities relating to boating and water safety including education and waterway marking and improvement, and for boating access area acquisition, development and maintenance all in accordance with plans approved by the Wildlife Resources Commission. Such funds are hereby appropriated, reserved, set aside, and made available to the Wildlife Resources Commission until expended for the purpose set forth in this Article. (1959, c. 1064, s. 3; 1961, c. 644; 1963, c. 1003; 1981 (Reg. Sess., 1982), c. 1182, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 75A-9. Muffling devices.

Local Modification. — Catawba, Iredell, Lincoln, and Mecklenburg (Lakes Norman, Wylie and Mountain Island only): 1981 (Reg. Sess., 1982), c. 1266.

§ 75A-10.1. Family purpose doctrine applicable.

CASE NOTES

Cited in Moore v. Crumpton, — N.C. App. —, 285 S.E.2d 842 (1982).

Chapter 76.

Navigation.

Article 6.

Morehead City Navigation and Pilotage Commission.

Sec.

76-59 to 76-73. [Repealed.]

ARTICLE 6.

Morehead City Navigation and Pilotage Commission.

Cross References. — For present provisions relating to the Morehead City Navigation and Pilotage Commission, see Articles 4 through 6 of Chapter 76A.

§§ 76-59 to 76-73: Repealed by Session Laws 1981, (Regular Session, 1982), c. 1176, s. 2, effective July 1, 1982.

Chapter 76A.

Navigation and Pilotage Commissions.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

Article 3.

Commission Funds.

Sec.

76A-26 to 76A-30. [Reserved.]

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

Article 4.

General Provisions.

76A-31. Morehead City Navigation and Pilotage Commission.
76A-32. Membership.
76A-33. Term.
76A-34. Quorum.
Sec.
76A-35. Duties and authority.
76A-36. Classes of licenses.
76A-37 to 76A-41. [Reserved.]

Article 5.

Pilots.

76A-42. Apprentices.
76A-43. Pilotage association.
76A-44. Number of pilots.
76A-45. Pilot retirement.
76A-46. Compulsory use of pilots.
76A-47. Pilotage rates.
76A-48. Vessels not liable for pilotage.
76A-49 to 76A-53. [Reserved.]

Article 6.

Commission Funds.

76A-54. Expenses of the Commission.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 3.

Commission Funds.

§§ 76A-26 to 76A-30: Reserved for future codification purposes.

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 4.

General Provisions.

§ 76A-31. Morehead City Navigation and Pilotage Commission.

In consideration of the requirement for the safe and expeditious movement of waterborne commerce on the navigable waters of the State, it is deemed necessary to establish the Morehead City Navigation and Pilotage Commission, herein called Commission. The Commission shall have the exclusive power to license and regulate pilots familiar with the waters of Morehead City Harbor and Beaufort Bar, referred to herein as regulated area, to best guide vessels within those waters and to exercise authority over navigation in Morehead City Harbor and Beaufort Bar and to and from the sea buoy of the port. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1176, s. 3, makes this Article effective July 1, 1982.

§ 76A-32. Membership.

The Commission shall consist of three voting members, all appointed by the Governor. The president of the Morehead City Pilots' Association shall serve as an ex officio nonvoting member. All of the three members appointed by the Governor, shall be from Carteret County. One additional nonvoting ex officio member shall represent the maritime interests and shall be designated by the Governor. The Governor shall designate a voting member to serve at his pleasure as chairman. With the exception of the ex officio members, licensed pilots and members of their immediate families shall not be allowed to serve on the Commission. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-33. Term.

It shall be the duty of the Governor to make initial appointments to the Commission on July 1, 1982. One of the initial appointees shall serve an initial three-year term. One shall serve an initial two-year term and one for an initial one-year term. Thereafter, all appointments shall be for a three-year term. The representatives of the maritime interest shall be appointed for a one-year initial term and three-year terms thereafter. Any vacancy in the membership appointed by the Governor shall be filled by the Governor. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-34. Quorum.

A simple majority of voting members of the Commission shall constitute a quorum and may act in all cases. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-35. Duties and authority.

(a) Rules and Regulations, Pilotage. — The Commission shall make and establish such rules and regulations as necessary and desirable respecting the qualifications, arrangements and station of pilots and for the control of navigation within Morehead Harbor and from and to Beaufort Bar and the sea buoy. In the development of such rules and regulations, the Commission should request the advice of the U. S. Coast Guard, the U. S. Corps of Engineers, the Pilots' Association, other maritime interests and any other party that the Commission might deem beneficial.

(b) Examination and Licensing. — The Commission may examine such persons who hold a federal pilot's license and who have complied with an apprentice course approved by the Commission as may offer themselves to be a pilot on the regulated area. The examination shall consist of, but not be limited to: a personal interview before the Commission; contact by the Commission with personal references; and a physical examination by a licensed physician based on a standard established by the Commission. Licenses shall be granted for a one-year period.

(c) License Renewal. — Each license shall be renewed annually provided during the preceding year the holder thereof shall have complied with the provisions of this Subchapter and the reasonable rules and regulations as prescribed by the Commission under authority hereof. The Commission may for special considerations validate a license for less than a one-year period. Each license renewal submittal shall be accompanied with a physical examiantion comparable to the standards set in G.S. 76A-35(b).

(d) Fine, License Suspension and Cancellation. — The Commission shall have the power to fine or call in and suspend or cancel the license of any pilot found to be derelict of duty, in violation of the reasonable rules and regulations as set out by the Commission or for other just cause. Grounds for suspension or cancellation shall include but not be limited to: citation by the Coast Guard and/or Commission for careless or neglectful duty resulting in damage to property or personal harm; absence, neglect of duty, absence from duty for a period longer than four weeks without written submission to and written approval from the Commission Chairman; other violations of regulations or in actions found by the Commission to be unduly disruptive of the pilotage and service and/or harmful to person or property.

(e) Pilots to Give Bond. — The Commission shall require of each pilot prior to granting his commission a bond with surety acceptable to the Commission in an amount not to exceed ten thousand dollars ($10,000). Every bond taken of a pilot shall be filed with and preserved by the Commission in trust for every person, firm or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm or corporation so injured may severally bring suit for the damage by each one sustained.

(f) Jurisdiction Over Disputes as to Pilotage or Navigation. — Disputes between pilots or over matters related to navigation in the regulated area may be voluntarily appealed by one of the pilots to the Commission for resolution or so presented to the Commission by any interested party for resolution. If a resolution is not reached or the Commission decision is unacceptable to either party, normal legal recourse is available to resolve the dispute. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-36. Classes of licenses.

The Commission shall have general authority to issue three classes of licenses:

(1) Limited. — A license to pilot vessels whose draft does not exceed 25 feet combined with a maximum length to be fixed by Commission rules. Limited licenses may be issued to those who pass requirements established by statute and by the Commission to entitle such person to a limited license.

(2) Full. — A license to pilot any vessel. Full license shall be issued to all holders of a limited license who have in the opinion of the Commission satisfactorily served at least one year under a limited license. Additionally, the Commission may issue a full license to anyone who in the Commission's judgments has sufficient credentials as established under G.S. 76A-35(b) to perform the pilotage task associated with a full icense.

(3) Apprentice. — A license to engage in a program, approved by the Commission, as apprentice pilot under the terms of G.S. 76A-42. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§§ 76A-37 to 76A-41: Reserved for future codification purposes.

ARTICLE 5.

Pilots.

§ 76A-42. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 nor more than 35 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. That upon application of any person already partially qualified by prior experience, the Commission may waive the 35 maximum age limit and may vary the time requirements for the time period of such apprenticeship. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1176, s. 3, makes this Article effective July 1, 1982.

§ 76A-43. Pilotage association.

In consideration that a mutual association for pilots has been formed, is operational and is expedient for effective management, the Commission shall recognize such a proper pilot association formed for the smooth business transactions in the provision of services. However, the Commission may prescribe such reasonable rules and regulations for the governance of such associations in its direct relationship with the Commission as it deems necessary. Any licensed pilot refusing to become a member of such association shall be subject to suspension or have his license revoked, at the discretion of the Commission. (1981, (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-44. Number of pilots.

The Commission shall govern the number of pilots necessary to maintain an efficient pilotage service. Present active pilots shall continue to serve with the Commission's power of reduction to be effective only in the case of natural attrition except as provided in G.S. 76A-45. Docking masters shall not be deemed pilots for this section or any other section in this Subchapter. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-45. Pilot retirement.

The Commission shall have and is hereby given authority in its discretion and under such reasonable rules and regulations as it may prescribe to retire from active service any pilot who shall become physically or mentally unfit to perform a pilot's duties. Provided, however, that no pilot shall be retired, except with his consent for physical or mental disability unless and until such pilots shall have first been examined by the public health officer or county physician of his respective county of residence and such public health officer or physician shall have certified to the board the fact of such physical or mental disability. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-46. Compulsory use of pilots.

Every foreign vessel and every United States vessel sailing under register, including such vessels towing or being towed when underway or docking in the regulated area, either incoming or outgoing, and over 60 gross tons, shall employ and utilize a State licensed pilot. Any master of a vessel violating this section by failing to use a State licensed pilot shall be guilty of a misdemeanor except as provided for in G.S. 76A-54 and upon conviction, the master shall be fined, imprisoned, or both within the discretion of the courts. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-47. Pilotage rates.

The Commission shall set charges for pilotage services on a published tariff basis to be reviewed and revised annually as necessary. The initial publication of rates shall be those now in effect and subsequent revisions shall be preceded by public notice at least 30 days prior to publication. The rates may be based on the method chosen by the Commission and may be varied on a geographic or other basis which the Commission deems appropriate. In establishing pilotages' rates, the Commission shall consider, but not be limited to, factors such as vessels' lengths, tonnage, vessels' drafts, general design of vessels, distances for which pilotage services are to be provided, nature of waters to be traversed and the rates for comparable pilotage services in other ports. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-48. Vessels not liable for pilotage.

Any vessel, for reasons of safety, coming in from sea for harborage without assistance of a pilot, the wind and weather being such that such pilot assistance or service could not have been reasonably and safely given, shall not be liable for pilotage inward from sea. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§§ 76A-49 to 76A-53: Reserved for future codification purposes.

Article 6.

Commission Funds.

§ 76A-54. Expenses of the Commission.

The pilots' association shall pay to the Commission, according to rules prescribed by the Commission, a percentage of all pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars ($3,000) at the end of the fiscal year shall be returned to the pilots' association on a prorated basis determined and distributed by the Commission. That the Commission in carrying out its duties may incur necessary legal and auditing expenses and expenses for its travel and investigations which in addition to the one hundred dollar ($100.00) per meeting fee and other

allowances allowed by law shall be paid from the foregoing funds. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1176, s. 3, makes this Article effective July 1, 1982.

Chapter 78A.

North Carolina Securities Act.

Article 3.

Exemptions.

Sec.

78A-17. Exempt transactions.

ARTICLE 3.

Exemptions.

§ 78A-17. Exempt transactions.

The following transactions are exempted from G.S. 78A-24 and 78A-49(d):

(9) a. Any transaction pursuant to an offer directed by the offeror to not more than 25 persons (other than those designated in subdivision (8)) in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if the seller reasonably believes that all the buyers in this State are purchasing for investment; provided, however, the Administrator may by rule or order as to any security or transaction, withdraw or further condition this exemption or establish a fee for any filing required up to a maximum of one hundred fifty dollars ($150.00) to recover costs; or

b. Any transaction that is exempted from the provisions of section 5 of the Securities Act of 1933 by virtue of any rule, or rules, promulgated, either before or after April 1, 1975, by the Securities and Exchange Commission under section 4(2) of such act; however, the Administrator may, by rule or order as to any security or transaction, withdraw or further condition this exemption or establish a fee for any filing required up to a maximum of one hundred fifty dollars ($150.00) to recover costs;

(1981 (Reg. Sess., 1982), c. 1263, ss. 1, 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added "or establish a fee for any filing required up to a maximum of one hundred fifty dollars ($150.00) to recover costs" at the end of subdivisions (9)a and (9)b.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (9) are set out.

Chapter 78B.
Tender Offer Disclosure Act.

§ 78B-1. Title.

CASE NOTES

Legislative Purpose. — This Chapter was passed in an attempt to supplement the federal regulation of tender offers and to remedy the perceived inadequacies in that legislation. Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock. Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-2. Definitions.

CASE NOTES

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock. Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

"Tender Offer" Requires Communication to Shareholders. — There is no "tender offer" under this Chapter until an offer or invitation to purchase is communicated to shareholders. Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

And, open market transactions involve no such offer or invitation and no such communication to shareholders as is contemplated by this Chapter. Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-3. Mandatory provisions of and limitations on tender offers.

CASE NOTES

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the

normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock. Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-4. Disclosure.

CASE NOTES

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock. Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-6. Civil liabilities.

CASE NOTES

Stated in Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-7. Injunctions.

CASE NOTES

Cited in Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-8. Criminal penalties.

CASE NOTES

Cited in Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-11. Severability.

CASE NOTES

Applied in Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981).

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-4.1. Limited practice of out-of-state attorneys.

CASE NOTES

When Court's Discretionary Power Invoked. — Unless and until an application under this section meets the requirements of the statute, the court's discretionary power is not invoked. Holley v. Burroughs Wellcome Co., — N.C. App. —, 289 S.E.2d 393 (1982).

Sufficiency of Declaration under Subdivision (1). — A declaration by an applicant that he is a member in good standing of the Bar of another state and is duly licensed and admitted to practice in that state is sufficient to meet the requirements of subdivision (1) of this section. Holley v. Burroughs Wellcome Co., — N.C. App. —, 289 S.E.2d 393 (1982).

Statement of North Carolina Counsel Insufficient under Subdivision (2). — The requirement under subdivision (2) of this section cannot be met by substituting the statement of North Carolina counsel and the statement must be signed by the client. Holley v. Burroughs Wellcome Co., — N.C. App. —, 289 S.E.2d 393 (1982).

Applied in Pope v. Jacobs, 51 N.C. App. 374, 276 S.E.2d 487 (1981).

Article 3.

Arguments.

§ 84-14. Court's control of argument.

Legal Periodicals. —

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Counsel May Argue Both Law and Fact. —

The general rule is that counsel may argue all the evidence to the jury, as well as any reasonable inferences to be drawn from it. Property Shop, Inc. v. Mountain City Inv. Co., — N.C. App. —, 290 S.E.2d 222 (1982).

Reading Portions of Final Pleadings. — The defense counsel may read portions of the final pleadings in his argument to the jury at the discretion of the trial judge. Gillespie v. Draughn, 54 N.C. App. 413, 283 S.E.2d 548 (1981).

Applied in State v. Erby, — N.C. App. —, 289 S.E.2d 86 (1982).

Cited in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

ARTICLE 4.

North Carolina State Bar.

§ 84-21. Organization of council; publication of rules, regulations and bylaws.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 84-23. Powers of council.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

§ 84-24. Admission to practice.

CASE NOTES

The constitutional power to establish the qualifications for admission to the bar rests in the Legislature, which may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. Bowens v. Board of Law Exmrs., — N.C. App. —, 291 S.E.2d 170 (1982).

The determination of proficiency is a ministerial function, not a matter of managing public affairs. The Board of Law Examiners is, therefore, not required to make important policy choices which might just as easily be made by the elected representatives in the Legislature, but merely to compile and administer examinations. Form, grading and logistics only are left to the board, which does no violence to constitutional principle. Bowens v. Board of Law Exmrs., — N.C. App. —, 291 S.E.2d 170 (1982).

§ 84-28. Discipline and disbarment.

CASE NOTES

The practice of law is a property right requiring due process of law before it may be impaired. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827, 281 S.E.2d 652 (1981), modified and aff'd, — N.C. —, 286 S.E.2d 89 (1982).

But Due Process Does Not Require Trial by Jury. — Defendant was not deprived of due process of law by virtue of the elimination by the 1975 amendment to this section of the right to trial by jury in attorney disciplinary matters; due process does not require that a jury trial be afforded an attorney for disciplinary or disbarment procedures and the procedural safeguards provided by the 1975 amendments were sufficient to satisfy due process requirements. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

The doctrine of ex post facto laws does not apply to attorney disciplinary proceedings. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, — N.C. —, 286 S.E.2d 89 (1982).

Application of the procedures included in the 1975 amendment to this section did not constitute an unconstitutional ex post facto applica-

tion of the law. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Effect of Section. — This section only establishes procedures by which an attorney may be disciplined in the event that he violates the standards of professional conduct. Without some wrongful action on the part of an attorney, this section in no way interferes with an attorney's right to practice law. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, — N.C. —, 286 S.E.2d 89 (1982).

While the practice of law is a property right requiring due process of law before it may be impaired, the 1975 amendment to this section in no way interfered with or impaired defendant's right to practice law. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Effective Date of 1975 Amendment. — The legislature intended the 1975 amendment to this section, S.L. 1975, ch. 582, s. 5, to apply to disciplinary hearings commenced on or after 1 July 1975, the effective date. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Civil Action. —

Disciplinary proceedings against attorneys in North Carolina are civil proceedings, not criminal. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827, 281 S.E.2d 652 (1981), modified and aff'd, — N.C. —, 286 S.E.2d 89 (1982).

Appeals from Decisions of State Bar Disciplinary Hearing Commission. — Article 4 of Chapter 150A (§ 150A-43 et seq.) is the controlling judicial review statute for appeals from decisions of the State Bar Disciplinary Hearing Commission. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Test on Appeal. — Due process does not require the "clear, cogent and convincing" test in determining whether plaintiff satisfied its burden of proof rather than the "greater weight of the evidence" rule. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Power of Reviewing Court to Change Discipline. — Subsection (h) of this section does not give a reviewing court the authority to modify or change the discipline properly imposed by the commission. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

§ 84-28.1. Disciplinary hearing commission.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Chapter 87.

Contractors.

Article 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

CASE NOTES

The principal characteristic of a general contractor, as opposed to a subcontractor or mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Building for Another on Builder's Land. — In an action seeking specific performance or money damages under a building contract, the trial court's conclusions that the defendants were unlicensed general contractors who had contracted to construct a dwelling for plaintiffs for a price in excess of $30,000 supported its judgment that defendants were barred from affirmatively asserting their claims under the contract, and there was no merit to defendants' contention that they should not be so barred because they contracted to build the dwelling on their own property, since a builder, who is unable or unwilling to obtain a general contractor's license from the State of North Carolina, should not be allowed to thwart the plain intent of this section by the artifice of contracting to build a residence for another on the builder's land. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Unlicensed Person May Not Recover, etc. — An unlicensed person who, in disregard of this section, contracts with another to construct a building for the cost of $30,000 or more, may not affirmatively enforce the contract or recover for his services and materials supplied under the theory of quantum meruit or unjust enrichment. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

But May Assert Claim, etc. —

The unlicensed general contractor may enforce his contract defensively, as a set-off, to claims asserted against him. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Applied in R.B. Brunemann & Sons v. Duke Univ., 533 F. Supp. 365 (M.D.N.C. 1982); Key v. Floyd, — N.C. App. —, 285 S.E.2d 864 (1982).

Chapter 89C.

Engineering and Land Surveying.

§ 89C-3. Definitions.

CASE NOTES

Stated in In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

§ 89C-16. Certificates of registration; effect; seals.

CASE NOTES

Quoted in In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

§ 89C-22. Disciplinary action — charges; procedure.

CASE NOTES

Cited in In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

Chapter 90.

Medicine and Allied Occupations.

Article 4.

Pharmacy.

Sec. Part 1. Practice of Pharmacy.

90-53 to 90-75. [Recodified.]

Part 1A. Drug Product Selection.

90-76.1 to 90-76.5. [Recodified.]
90-76.6. [Repealed.]

Part 2. Dealing in Specific Drugs Regulated.

90-77 to 90-80.1. [Repealed.]
90-85.1. [Repealed.]

Article 4A.

North Carolina Pharmacy Practice Act.

90-85.2. Legislative findings.
90-85.3. Definitions.
90-85.4. North Carolina Pharmaceutical Association.
90-85.5. Objective of Pharmaceutical Association.
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90-85.8. Organization.
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90-85.18. Approval of continuing education programs.
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90-85.21. Pharmacy permit.
90-85.22. Devices; registration.
90-85.23. License and permit to be displayed.
90-85.24. Fees collectible by Board.
90-85.25. Disaster reports.
90-85.26. Prescription orders preserved.
90-85.27. Definitions.
90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.
90-85.29. Prescription label.
90-85.30. Prescription record.
90-85.31. Prescriber and pharmacist liability not extended.
90-85.32. Filling and refilling regulations.
90-85.33. Unit dose medication systems.
90-85.34. Unique pharmacy practice.
90-85.35. Availability of patient records.
90-85.36. Availability of pharmacy records.
90-85.37. Embargo.
90-85.38. Disciplinary authority.
90-85.39. Injunctive authority.
90-85.40. Violations.

Article 18B.

Physical Therapy.

90-270.25. Board of Examiners.

Article 20.

Nursing Home Administrator Act.

90-276. Definitions.
90-278. Qualifications for licensure.
90-280. Fees; display of license; duplicate license; inactive list.
90-285. Functions and duties of the Board.

Article 1.

Practice of Medicine.

§ 90-2. Board of Examiners.

CASE NOTES

Quoted in Mebane v. Board of Medical Exmrs., — N.C. App. —, 286 S.E.2d 112 (1982).

§ 90-13. When license without examination allowed.

CASE NOTES

Authority to Issue Conditional Temporary License. — Although this section does not specifically refer to the issuance of temporary licenses, its language is broad enough to grant authority to the Board to issue temporary licenses with limited duration upon such conditions as it deems advisable. Mebane v. Board of Medical Exmrs., — N.C. App. —, 286 S.E.2d 112 (1982).

Refusal to Issue Permanent License after Failure to Meet Condition. — A physician who was issued a temporary license to practice in this State, her further practice being conditioned on passing the Federal Licensing Examination, was not entitled to a hearing on the refusal of the Board to issue her a permanent license to practice medicine for failure to pass FLEX, on the expiration of her temporary license. Mebane v. Board of Medical Exmrs., — N.C. App. —, 286 S.E.2d 112 (1982).

§ 90-14.2. Hearing before revocation or suspension of a license.

CASE NOTES

Refusal to Issue Permanent License after Failure to Meet Condition of Temporary License. — Physician who was issued a temporary license to practice in this State, her further practice being conditioned on passing the Federal Licensing Examination, was not entitled to a hearing on the refusal of the Board to issue her a permanent license to practice medicine for failure to pass FLEX, on expiration of her temporary license. Mebane v. Board of Medical Exmrs., — N.C. App. —, 286 S.E.2d 112 (1982).

§ 90-18. Practicing without license; practicing defined; penalties.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Shaw, — N.C. —, 289 S.E.2d 325 (1982).

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definition.

CASE NOTES

Quoted in Roberts v. Durham County Hosp. Corp., — N.C. App. —, 289 S.E.2d 875 (1982).

Cited in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

§ 90-21.12. Standard of health care.

CASE NOTES

This section codified the standard of health care necessary for the trier of the facts to establish a defendant's liability. Simons v. Georgiade, — N.C. App. —, 286 S.E.2d 596 (1982).

In order to withstand a motion for a directed verdict under this section, plaintiff must offer evidence which establishes the following elements: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Failure to establish sufficient evidence on any one element entitles the defendant to a directed verdict. Lowery v. Newton, 52 N.C. App. 234, 278 S.E.2d 566 (1981).

Standard Must Be Established by Other Practitioners or Experts. — In malpractice cases the applicable standard of care must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify to that limited field of practice. Lowery v. Newton, 52 N.C. App. 234, 278 S.E.2d 566 (1981).

Testimony as to Standard in Similar Communities. — An expert witness, otherwise qualified, may state his opinion as to whether the treatment and care given by the defendant to the particular patient came up to the standard prevailing in similar communities, with which the witness is familiar, even though the witness be not actually acquainted with actual medical practices in the particular community in which the service was rendered at the time it was performed. Howard v. Piver, 53 N.C. App. 46, 279 S.E.2d 876 (1981).

Expert Need Not Have Practiced at Time of Alleged Act. — It would be unduly restrictive under this section to require an expert to have knowledge of the standard of care in a similar community at the time of the alleged act only by having practiced in the particular field at that time. Simons v. Georgiade, — N.C. App. —, 286 S.E.2d 596 (1982).

Quoted in Roberts v. Durham County Hosp. Corp., — N.C. App. —, 289 S.E.2d 875 (1982).

Stated in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

§ 90-21.13. Informed consent to health care treatment or procedure.

CASE NOTES

Applicability to Cases Pending on Effective Date. — This section became effective on July 1, 1976, and expressly did not apply to cases pending on that date. Simons v. Georgiade, — N.C. App. —, 286 S.E.2d 596 (1982).

Causes Arising But Not Pending before Effective Date. — There is no provision in this section regarding applicability to causes of action which arose before the effective date but in which no litigation was pending on the effective date, and this section therefore must apply to litigation which commenced after the effective date of July 1, 1976. Simons v. Georgiade, — N.C. App. —, 286 S.E.2d 596 (1982).

"Reasonable Person" Test. — This section, governing informed consent to health care treatment or procedure, utilizes a "reasonable person" test to show a valid consent. Simons v. Georgiade, — N.C. App. —, 286 S.E.2d 596 (1982).

Subsection (d) Applicable in Contract Actions. — Subsection (d) clearly and unequivocally relates to an agreement, a contract, between the health care provider and the patient to achieve a definite result, and thus is applicable to actions brought on a theory of contract as well as actions brought on malpractice theories. Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 833 (1981).

Cited in McPherson v. Ellis, — N.C. —, 287 S.E.2d 892 (1982).

Article 4.

Pharmacy.

Part 1. Practice of Pharmacy.

§§ 90-53 to 90-75: Recodified as §§ 90-85.2 to 90-85.26, 90-85.32 to 90-85.40.

Editor's Note. — Part 1 of this Article was rewritten by Session Laws 1981 (Reg. Sess., 1982), c. 1188, effective July 1, 1982, and has been recodified, along with certain sections from Part 1A of this Article as Article 4A, §§ 90-85.2 through 90-85.40.

Part 1A. Drug Product Selection.

§§ 90-76.1 to 90-76.5: Recodified as §§ 90-85.27 to 90-85.31 pursuant to Session Laws 1981 (Regular Session, 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-76.6: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 4, effective July 1, 1982.

Part 2. Dealing in Specific Drugs Regulated.

§§ 90-77 to 90-80.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 5, effective July 1, 1982.

§ 90-85.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 5, effective July 1, 1982.

Article 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.2. Legislative findings.

The General Assembly of North Carolina finds that mandatory licensure of all who engage in the practice of pharmacy is necessary to insure minimum standards of competency and to protect the public from those who might otherwise present a danger to the public health, safety and welfare. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

Editor's Note. — This Article is Part 1 of Article 4 of this Chapter as rewritten by Session Laws 1981 (Reg. Sess., 1982), c. 1188, effective July 1, 1982. Sections 90-76.1 through 90-76.5 from Part 1A of Article 4 were transferred and renumbered by s. 3 of the same 1981 (Reg. Sess., 1982) act, and are incorporated in this Article as recodified as §§ 90-85.27 through 90-85.31. Where appropriate, the historical citations to the sections in former Part 1 of Article 4 have been added to corresponding sections in this Article.

§ 90-85.3. Definitions.

(a) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion or other means.

(b) "Board" means the North Carolina Board of Pharmacy.

(c) "Compounding" means taking two or more ingredients and combining them into a dosage form of a drug, exclusive of compounding by a drug manufacturer, distributor, or packer.

(d) "Deliver" means the actual, constructive or attempted transfer of a drug or device from one person to another.

(e) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article including any component part or accessory, that is required by law to be dispensed only pursuant to a prescription order.

(f) "Dispense" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by State and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a patient is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(g) "Drug" means:

(1) Any article recognized as a drug in the United States Pharmacopeia, or in any other drug compendium or any supplement thereto, or an article recognized as a drug by the United States Food and Drug Administration;

(2) Any article, other than food or devices, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals;

(3) Any article, other than food or devices, intended to affect the structure or any function of the body of man or other animals; and,

(4) Any article intended for use as a component of any articles specified in clause a., b. or c. of this subsection.

(h) "Emancipated minor" means any person under the age of 18 who is or has been married or who is or has been a parent; or whose parents or guardians have surrendered their rights to the minor's services and earnings as well as their right to custody and control of the minor's person; or who has been emancipated by an appropriate court order.

(i) "Health care provider" means any licensed health care professional; any agent or employee of any health care institution, health care insurer, health care professional school; or a member of any allied health profession.

(j) "Label" means a display of written, printed or graphic matter upon the immediate or outside container of any drug.

(k) "Labeling" means preparing and affixing a label to any drug container, exclusive of labeling by a manufacturer, packer or distributor of a nonprescription drug or a commercially packaged prescription drug or device.

(l) "License" means a license to practice pharmacy including a renewal license issued by the board.

(m) "Permit" means a permit to operate a pharmacy or dispense devices, including a renewal license issued by the board.

(n) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.

(o) "Person in loco parentis" means the person who has assumed parental responsibilities for a child.

(p) "Pharmacist" means a person licensed under this Article to practice pharmacy.

(q) "Pharmacy" means any place where prescription drugs are dispensed or compounded.

(r) "Practice of pharmacy" means the responsibility for interpreting and evaluating drug orders, including prescription orders; compounding, dispensing and labeling prescription drugs and devices; properly and safely storing drugs and devices; maintaining proper records; and controlling pharmacy goods and services. A pharmacist may advise and educate patients and health care providers concerning therapeutic values, content, uses and significant problems of drugs and devices; assess, record and report adverse drug and device reactions; take and record patient histories relating to drug and device therapy; monitor, record and report drug therapy and device usage; perform drug utilization reviews; and participate in drug and drug source selection and device and device source selection as provided in G.S. 90-59. A licensed pharmacist who has received special training may be authorized and permitted to administer drugs pursuant to a specific prescription order in accordance with rules and regulations adopted by each of the Boards of Pharmacy, the Board of Nursing, and the Board of Medical Examiners of the State of North Carolina. Such rules and regulations shall be designed to ensure the safety and health of the patients for whom such drugs are administered.

(s) "Prescription drug" means a drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement:

"Caution: Federal law prohibits dispensing without prescription."

(t) "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

(u) "Unit dose medication system" means a system in which each dose of medication is individually packaged in a properly sealed and properly labeled container. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.4. North Carolina Pharmaceutical Association.

The North Carolina Pharmaceutical Association, and the persons composing it, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by that name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do any other things and perform any other acts as appertain to bodies corporate and politic not inconsistent with the Constitution and laws of the State. (1881, c. 355, s. 1; Code, s. 3135; Rev., s. 4471; C. S., s. 6650; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.5. Objective of Pharmaceutical Association.

The objective of the Association is to unite the pharmacists of this State for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent and to evaluate the standard of professional thought. (1881, c. 355, s. 2; Code, s. 3136; Rev., s. 4472; C.S., s. 6651; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.6. Board of Pharmacy; creation; membership; qualification of members.

(a) Creation. — The responsibility for enforcing the provisions of this Article and the laws pertaining to the distribution and use of drugs is vested in the Board. The Board shall adopt reasonable rules for the performance of its duties. The Board shall have all of the duties, powers and authorities specifically granted by and necessary for the enforcement of this Article, as well as any

other duties, powers and authorities that may be granted from time to time by other appropriate statutes.

(b) Membership. — The Board shall consist of six members, one of whom shall be a representative of the public, and the remainder of whom shall be pharmacists.

(c) Qualifications. — The public member of the Board shall not be a health care provider or the spouse of a health care provider. He shall not be enrolled in a program to prepare him to be a health care provider. The public member of the Board shall be a resident of this State at the time of his appointment and while serving as a Board member. The pharmacist members of the Board shall be residents of this State at the time of their appointment and while serving as Board members. (1905, c. 108, ss. 5-7, 9; Rev., ss. 4473, 4475; 1907, c. 113, s. 1; C. S., ss. 6652, 6654; 1945, c. 572, s. 1; 1981, c. 717, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.7. Board of Pharmacy; selection; vacancies; commission; term; removal.

(a) The Board of Pharmacy shall consist of six persons. Five of the members shall be licensed as pharmacists within this State and shall be elected and commissioner by the Governor as hereinafter provided. Pharmacist members shall be chosen in an election held as hereinafter provided in which every person licensed to practice pharmacy in North Carolina and residing in North Carolina shall be entitled to vote. Each pharmacist member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Members chosen by election under this section shall be elected upon the expiration of the respective terms of the members of the present Board of Pharmacy. No pharmacist shall be nominated for membership on said Board, or shall be elected to membership on said Board, unless, at the time of such nomination, and at the time of such election, he is licensed to practice pharmacy in North Carolina. In case of death, resignation or removal from the State of any pharmacist member of said Board, the pharmacist members of the Board shall elect in his place a pharmacist who meets the criteria set forth in this section to fill the unexpired term.

One member of the Board shall be a person who is not a pharmacist and who represents the interest of the public at large. The Governor shall appoint this member.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed or elected to a term on or after July 1, 1981, shall serve more than two complete consecutive three-year terms. The Governor may remove any member appointed by him for good cause shown and may appoint persons to fill unexpired terms of members appointed by him.

It shall be the duty of a member of the Board of Pharmacy, within 10 days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law.

(b) All nominations and elections of pharmacist members of the Board shall be conducted by the Board of Pharmacy, which is hereby constituted a Board of Pharmacy Elections. Every pharmacist with a current North Carolina license residing in this State shall be eligible to vote in all elections. The list of pharmacists shall constitute the registration list for elections. The Board of Pharmacy Elections is authorized to make rules and regulations relative to the conduct of these elections, provided such rules and regulations are not in conflict with the provisions of this section and provided that notice shall be given to all pharmacists residing in North Carolina. All such rules and regu-

lations shall be adopted subject to the procedures of Chapter 150A of the General Statutes of North Carolina. From any decision of the Board of Pharmacy Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes.

(c) All rules, regulations, and bylaws of the North Carolina Board of Pharmacy so far as they are not inconsistent with the provisions of this Article, shall continue in effect. (1905, c. 108, ss. 5-7; Rev., s. 4473; C. S., s. 6652; 1981, c. 717, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.8. Organization.

The board shall elect from its members a president, vice-president, and other officers as it deems necessary. The officers shall serve one-year terms and until their successors have been elected and qualified. (1905, c. 108, s. 8; Rev., s. 4474; C. S., s. 6653; 1923, c. 82; 1981 (Reg. Sess., 1982), 1188, s. 1.)

§ 90-85.9. Meetings.

The board shall meet at least twice annually for the purpose of administering examinations and conducting other business. Four Board members constitute a quorum. The Board shall keep a record of its proceedings, a register of all licensed persons, and a register of all persons to whom permits have been issued. The Board shall report, in writing, annually to the Governor and the presiding officer of each house of the General Assembly. (1905, c. 108, s. 8; Rev., s. 4474; C. S., s. 6653; 1923, c. 82; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.10. Employees; Executive Director.

The Board shall employ as Executive Director a pharmacist to serve as a full-time employee of the Board. The Executive Director shall serve as secretary and treasurer of the Board and shall perform administrative functions as authorized by the Board. The Board shall have the authority to employ other personnel as it may deem necessary to carry out the requirements of this Article. (1905, c. 108, s. 9; Rev., s. 4475; 1907, c. 113, s. 1; C. S., s. 6654; 1945, c. 572, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.11. Compensation of employees.

The Board shall determine the compensation of its employees. Employees shall be reimbursed for all necessary expenses incurred in the performance of their official duties. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.12. Executive Director to make investigations and prosecute.

(a) Upon receiving information concerning a violation of this Article, the Executive Director shall promptly conduct an investigation and if he finds evidence of the violation, he may file a complaint and prosecute the offender in a Board hearing.

(b) In all prosecutions of unlicensed persons for the violation of any of the provisions of this Article, a certificate signed under oath by the Executive Director shall be competent and admissible evidence in any court of this State that the person is not licensed, as required by law. (1905, ch. 108, s. 11; Rev., s. 4477; C. S., s. 6656; 1923, c. 74, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.13. Approval of schools and colleges of pharmacy.

The Board shall approve schools and colleges of pharmacy upon a finding that students successfully completing the course of study offered by the school or college can reasonably be expected to practice pharmacy safely and properly. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.14. Practical experience program.

The Board shall issue regulations governing a practical experience program. These regulations shall assure that the person successfully completing the program will have gained practical experience that will enable him to safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.15. Application and examination for licensure as a pharmacist; prerequisites.

(a) Any person who desires to be licensed as a pharmacist shall file an application with the Executive Director on the form furnished by the Board, verified under oath, setting forth the applicant's name, age, the place at which and the time that he has spend in the study of pharmacy, and his experience in compounding and dispensing prescriptions under the supervision of a pharmacist. The applicant shall also appear at a time and place designated by the Board and submit to an examination as to his qualifications for being licensed. The applicant must demonstrate to the Board his physical and mental competency to practice pharmacy.

(b) On or after July 1, 1982, all applicants shall have received an undergraduate degree from a school of pharmacy approved by the Board. Applicants shall be required to have had up to one year of experience, approved by the Board, under the supervision of a pharmacist and shall pass the required examination offered by the Board. Upon completing these requirements and upon paying the required fee, the applicant shall be licensed. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.16. Examination

The license examination shall be given by the Board at least twice each year. The Board shall determine the subject matter of each exmination and the place, time and date for administering the examination. The Board shall also determine which persons have passed the examination. The examination shall be designed to determine which applicants can reasonably be expected to safely and properly practice pharmacy. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.17. License renewal.

In accordance with Board regulations, each license to practice pharmacy shall expire on December 31 and shall be renewed annually by filing with the Board on or after December 1 an application for license renewal furnished by the Board, accompanied by the required fee. It shall be unlawful to practice pharmacy more than 60 days after the expiration date without renewing the license. All licensees shall give the Board notice of a change of mailing address or a change of place of employment within 30 days after the change. The Board may require licensees to obtain up to 10 hours of continuing education from

Board-approved providers as a condition of license renewal. (1905, c. 108, ss. 18, 19, 27; Rev., ss. 3653, 4484; 1911, c. 48; C. S., s. 6662; 1921, c. 68, s. 2; 1947, c. 781; 1953, c. 1051; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.18. Approval of continuing education programs.

The Board shall approve providers of continuing education programs upon finding that the provider is competent to and does offer an educational experience designed to enable those who successfully complete the program to more safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.19. Reinstatement.

Whenever a pharmacist who has not renewed his license for five or more years seeks to renew or reinstate his license, he must appear before the Board and submit evidence that he can safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.20. Licensure without examination.

(a) The Board may issue a license to practice pharmacy, without examination, to any person who is licensed as a pharmacist in another jurisdiction of the applicant shall present satisfactory evidence of possessing the same qualifications as are required of licensees in this State, that he was licensed by examination in such other jurisdiction, and that the standard of competence required by such other jurisdiction is substantially equivalent to that of this State at that time. The Board must be satisfied that a candidate for licensure has a satisfactory understanding of the laws governing the practice of pharmacy and distribution of drugs in this State.

(b) An applicant who has taken and failed to pass an examination for licensure in North Carolina after July 1, 1977, shall not be granted reciprocal licensure in this State until having completed at least five years of the practice of pharmacy in another state. (1905, c. 108, s. 16; Rev., s. 4482; C. S.., s. 6660; 1945, c. 572, s. 2; 1971, c. 468; 1977, c. 598; 1981, c. 717, ss. 6, 7; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.21. Pharmacy permit.

In accordance with Board regulations, each pharmacy in North Carolina shall annually register with the Board on a form provided by the Board. The application shall identify the pharmacist-manager of the pharmacy and all pharmacist personnel employed in the pharmacy. All pharmacist-managers shall notify the Board of any change in pharmacist personnel within 30 days of such change. (1927, c. 28, s. 1; 1953, c. 183, s. 2; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.22. Devices; registration.

Each place where devices are dispensed shall register annually with the Board on a form provided by the Board; provided this section shall not apply to places with current pharmacy permits. Records of devices dispensed in pharmacies or other places shall be kept in accordance with regulations promulgated by the Board of Pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.23. License and permit to be displayed.

Every pharmacist-manager's license, every permit, and every current renewal shall be conspicuously posted in the place of business owned by or employing the person to whom it is issued. The licenses and every last renewal of all other pharmacists employed in the pharmacy must be readily available for inspection by agents of the Board. Failure to display any license or permit and the most recent renewal shall be a violation of this Article and each day that the license or permit or renewal is not displayed shall be a separate and distinct offense. (1905, c. 108, ss. 18, 26; Rev., ss. 3651, 4485; C. S., s. 6663; 1921, c. 68, s. 3; 1953, c. 1051; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.24. Fees collectible by Board.

The Board of Pharmacy shall be entitled to charge and collect not more than the following fees: for the examination of an applicant for license as a pharmacist, seventy-five dollars ($75.00); for renewing the license as a pharmacist, forty dollars ($40.00); for renewing the license of an assistant pharmacist, ten dollars ($10.00); for licenses without examination as provided in G.S. 90-64, original, two hundred dollars ($200.00); for original registration of a drugstore, two hundred dollars ($200.00), and renewal thereof, one hundred dollars ($100.00); for issuing a permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, ten dollars ($10.00); for the renewal of permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, five dollars ($5.00). All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C. S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183; 1981, c. 72; c. 717, s. 3; 1981 (Reg. Sess., 1982), c. 1188, s. 2.)

Editor's Note. — This section was formerly § 90-60. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 2, effective July 1, 1982.

§ 90-85.25. Disaster reports.

The pharmacist in charge of a pharmacy shall report within 10 days to the Board any disaster, accident, theft, or emergency which may affect the strength, purity, or labeling of drugs and devices in the pharmacy. (1981 Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.26. Prescription orders preserved.

Every pharmacist-manager of a pharmacy shall maintain for at least three years the original of every prescription order and refill compounded or dispensed at the pharmacy except for prescription orders recorded in a patient's medical record. An automated data processing system may be used for the storage and retrieval of refill information for prescriptions pursuant to the regulations of the Board. (1905, c. 108, s. 21; Rev., s. 4490; C. S., s. 6666; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.27. Definitions.

As used in this Part:

(1) "Equivalent drug product" means a drug product which has the same established name, active ingredient, strength, quantity, and dosage form, and which is therapeutically equivalent to the drug product identified in the prescription;

(2) "Established name" has the meaning given in section 502(e)(3) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 352(e)(3);
(3) "Good manufacturing practice" has the meaning given it in Part 211 of Chapter 1 of Title 21 of the Code of Federal Regulations;
(4) "Manufacturer" means the actual manufacturer of the finished dosage form of the drug;
(5) "Prescriber" means anyone authorized to prescribe drugs pursuant to the laws of this State. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.1. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

(a) A pharmacist dispensing a prescription for a drug product prescribed by its brand name may select any equivalent drug product which meets the following standards:
(1) The manufacturer's name and the distributor's name, if different from the manufacturer's name, shall appear on the label of the stock package;
(2) It shall be manufactured in accordance with current good manufacturing practices;
(3) Effective January 1, 1982, all oral solid dosage forms shall have a logo, or other identification mark, or the product name to identify the manufacturer or distributor;
(4) The manufacturer shall have adequate provisions for drug recall; and
(5) The manufacturer shall have adequate provisions for return of outdated drugs, through his distributor or otherwise.

(b) The pharmacist shall not select an equivalent drug product if the prescriber instructs otherwise by one of the following methods:
(1) A prescription form shall be preprinted or stamped with two signature lines at the bottom of the form which read:
". . . .

§ 90-85.29. Prescription label.

The prescription label of every drug product dispensed shall contain the brand name of any drug product dispensed, or in the absence of a brand name, the established name. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.3. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.30. Prescription record.

The pharmacy file copy of every prescription shall include the brand or trade name, if any, or the established name and the manufacturer of the drug product dispensed. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.4. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.31. Prescriber and pharmacist liability not extended.

The selection of an equivalent drug product pursuant to this Article shall impose no greater liability upon the pharmacist for selecting the dispensed drug product or upon the prescriber of the same than would be incurred by either for dispensing the drug product specified in the prescription. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.5. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.32. Filling and refilling regulations.

The Board may promulgate rules governing the filling, refilling and transfer of prescription orders not inconsistent with other provisions of law regarding the distribution of drugs and devices. Such regulations shall assure the safe and secure distribution of drugs and devices. Prescriptions marked PRN shall not be refilled more than one year after the date issued by the prescriber unless otherwise specified. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.33. Unit dose medication systems.

The Board may adopt regulations governing pharmacists providing unit dose medication systems. The regulations shall ensure the safe and proper distribution of drugs in the patient's best health interests. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.34. Unique pharmacy practice.

Consistent with the provisions of this Article, the Board may regulate unique pharmacy practices including, but not limited to, nuclear pharmacy and clinical pharmacy, to ensure the best interests of patient health and safety. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.35. Availability of patient records.

Pharmacists employed in health care facilities shall have access to patient records maintained by those facilities when necessary for the pharmacist to provide pharmaceutical services. The pharmacist shall make appropriate entries in patient records. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.36. Availability of pharmacy records

(a) Except as provided in subsections (b) and (c) below, written prescription orders on file in a pharmacy are not public records and any person having custody of or access to the prescription orders may divulge the contents or provide a copy only to the following persons:

(1) An adult patient for whom the prescription was issued or a person who is legally appointed guardian of that person;

(2) An emancipated minor patient for whom the prescription order was issued or a person who is the legally appointed guardian of that patient;

(3) An unemancipated minor patient for whom the prescription order was issued when the minor's consent is sufficient to authorize treatment of the condition for which the prescription was issued;

(4) A parent or person in loco parentis of an unemancipated minor patient for whom the prescription order was issued when the minor's consent is not sufficient to authorize treatment for the condition for which the prescription is issued;

(5) The licensed practitioner who issued the prescription;

(6) The licensed practitioner who is treating the patient for whom the prescription was issued;

(7) A pharmacist who is providing pharmacy services to the patient for whom the prescription was issued;

(8) Anyone who presents a written authorization for the release of pharmacy information signed by the patient or his legal representative;

(9) Any person authorized by subpoena, court order or statute;

(10) Any firm, association, partnership, business trust, corporation or company charged by law or by contract with the responsibility of providing for or paying for medical care for the patient for whom the prescription order was issued;

(11) A member or designated employee of the board;

(12) The executor, administrator or spouse of a deceased patient for whom the prescription order was issued;

(13) Researchers and surveyors who have approval from the Board. The Board shall issue this approval when it determines that there are adequate safeguards to protect the confidentiality of the information contained in the prescription orders and that the researchers or surveyors will not publicly disclose any information that identifies any person; or

(14) The person owning the pharmacy or his authorized agent.

(b) A pharmacist may disclose any information to any person only when he reasonably determines that the disclosure is necessary to protect the life or health of any person.

(c) Records required to be kept by G.S. 90-93(d) (Schedule V) are not public records and shall be disclosed at the pharmicist's discretion. (1905, c. 108, s. 21; Rev., s. 4490; C. S., s. 6666; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.37. Embargo.

Notwithstanding any other provisions of law, whenever an authorized representative of the Board has reasonable cause to believe that any drug or device presents a danger to the public health, he shall affix to the drug or device a notice that the article is suspected of being dangerous to the public health and warning all persons not to remove or dispose of the article. Whenever an authorized representative of the Board has reasonable cause to believe that any drug or device presents a danger to the public health and that there are reasonable grounds to believe that it might be disposed of pending a judicial resolution of the matter, he shall seize the article and take it to a safe and secure place. When an article has been embargoed under this section, the Board shall, as soon as practical, file a petition in Orange County District Court for a condemnation order for such article. If the judge determines after hearing, that the article is not dangerous to the public health, the Board shall direct the immediate removal of the tag or other marking, and where appropriate, shall direct that the article be returned to its owner. If the judge finds the article is dangerous to the public health, he shall order its destruction at the owner's expense and under the Board's supervision. If the judge determines that the article is dangerous to the public health, he shall order the owner of the article to pay all court costs, reasonable attorney's fees, storage fees, and all other costs incident to the proceeding. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.38. Disciplinary authority.

(a) The Board may, in accordance with Chapter 150A of the General Statutes, issue a letter of reprimand or suspend, restrict, revoke, or refuse to grant or renew a license to practice pharmacy, or require licensees to successfully complete remedial education if the licensee has:

(1) Made false representations or withheld material information in connection with securing a license or permit;

(2) Been found guilty of or plead guilty or nolo contendere to any felony in connection with the practice of pharmacy or the distribution of drugs;

(3) Indulged in the use of drugs to an extent that renders him unfit to practice pharmacy;

(4) Made false representations in connection with the practice of pharmacy that endanger or are likely to endanger the health or safety of the public, or that defraud any person;

(5) A physical or mental disability that renders him unfit to practice pharmacy with reasonable skill, competence and safety to the public;

(6) Failed to comply with the laws governing the practice of pharmacy and the distribution of drugs;

(7) Failed to comply with the rules and regulations of the Board;

(8) Engaged in, or aided and abetted an individual to engage in, the practice of pharmacy without a license; or

(9) Was negligent in the practice of pharmacy.

(b) The Board, in accordance with Chapter 150A of the General Statutes, may suspend, revoke, or refuse to grant or renew any permit for the same conduct as stated in subsection (a).

(c) Any license or permit obtained through false representation or withholding of material information shall be void and of no effect. (1905, c. 108, ss. 17, 25; Rev., s. 4483; C. S., s. 6661; 1967, c. 807; 1973, c. 138; 1981, c. 412, s. 4; c. 717, s. 8; c. 747, s. 66; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.39. Injunctive authority.

The Board may apply to any court for an injunction to prevent violations of this Article or of any rules enacted pursuant to it. The court is empowered to grant the injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.40. Violations.

(a) It shall be unlawful for any owner or manager of a pharmacy or other place to allow or cause anyone other than a pharmacist to dispense or compound any prescription drug except as an aide to and under supervision of a pharmacist.

(b) Every person lawfully authorized to compound or dispense prescription drugs shall comply with all the laws and regulations governing the labeling and packaging of such drugs by pharmacists.

(c) It shall be unlawful for any person not licensed as a pharmacist to compound or dispense any prescription drug, except as an aide to and under the supervision of a pharmacist.

(d) It shall be unlawful for any person to manage any place of business where devices are dispensed or sold at retail without a permit as required by this Article.

(e) It shall be unlawful for any person without legal authorization to dispose of an article that has been embargoed under this Article.

(f) It shall be unlawful to violate any provision of this Article or of any rules or regulations enacted pursuant to it.

(g) This Article shall not be construed to prohibit any person from performing an act that person is authorized to perform pursuant to North Carolina law. Health care providers who are authorized to prescribe drugs without supervision are authorized to dispense drugs without supervision.

(h) A violation of this Article shall be a misdemeanor punishable in the discretion of the court. (1905, c. 108, ss. 4, 23, 24; Rev., ss. 3649, 3650, 4487; C. S., ss. 6667, 6668, 6669; 1921, c. 68, ss. 6, 7; Ex. Sess. 1924, c. 116; 1953, c. 1051; 1957, c. 617; 1959, c. 1222; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-87. Definitions.

CASE NOTES

I. GENERAL CONSIDERATION.

Quoted in State v. Roseboro, — N.C. App. —, 284 S.E.2d 725 (1981).

Cited in State v. Ellers, — N.C. App. —, 289 S.E.2d 924 (1982).

§ 90-90. Schedule II controlled substances.

Editor's Notes. — Subdivision (a)1(iv) of this section in the 1981 Cumulative Supplement should read "powdered opium."

§ 90-93. Schedule V controlled substances.

Cross References. — As to disclosure of the records required to be kept under subsection (d) of this section, see § 90-85.36.

§ 90-94. Schedule VI controlled substances.

CASE NOTES

Cited in State v. Reddick, — N.C. App. —, 286 S.E.2d 654 (1982).

§ 90-95. Violations; penalties.

CASE NOTES

I. GENERAL CONSIDERATION.

The purpose behind paragraph (h)(3)(a) is to deter "trafficking" in controlled substances. State v. Tyndall, — N.C. App. —, 284 S.E.2d 575 (1981).

Quantity of Mixture under Paragraph (h)(3)(a) Sufficient. — The quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation of paragraph (h)(3)(a). State v. Tyndall, — N.C. App. —, 284 S.E.2d 575 (1981).

Applied in State v. Haynes, 54 N.C. App. 186, 282 S.E.2d 830 (1981); State v. Rosser, 54 N.C. App. 660, 284 S.E.2d 130 (1981); State v. Ellers, — N.C. App. —, 289 S.E.2d 924 (1982).

Stated in State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318 (1981); State v. Gray, — N.C. App. —, 289 S.E.2d 894 (1982).

Cited in State v. Gray, — N.C. App. —, 286 S.E.2d 357 (1982); State v. Cherry, — N.C. App. —, 286 S.E.2d 368 (1982).

III. SALE OR DELIVERY.

There is no separate statutory offense entitled delivery of marijuana. Subdivision (b)(2) of this section, however, describes a situation limited in its applicability to the delivery of marijuana. If defendant transfers less than five grams of marijuana and receives no remuneration, he is not guilty of a delivery in violation of subdivision (a)(1) of this section. State v. Pevia, — N.C. App. —, 289 S.E.2d 135 (1982).

When Offense of Delivery Complete. — The offense of delivery under this section is complete when there has been a transfer of a controlled substance. State v. Pevia, — N.C. App. —, 289 S.E.2d 135 (1982).

Proof of Remuneration Not Required. — It is not necessary for the State to prove that defendant received remuneration for the transfer. State v. Pevia, — N.C. App. —, 289 S.E.2d 135 (1982).

Nor Quantity Transferred.—

The State is not required initially to prove the quantity transferred. State v. Pevia, — N.C. App. —, 289 S.E. 2d 135 (1982).

Variance which stated defendant sold 28 grams of cocaine, rather than 28 grams of a mixture containing cocaine, as described in paragraph (h)(3)(a), was not fatal. State v. Tyndall, — N.C. App. —, 284 S.E.2d 575 (1981).

IV. POSSESSION.

A. In General.

Types of Possession.—

In accord with original. See State v. Reddick, — N.C. App. —, 286 S.E.2d 654 (1982).

Establishing Possession.—

In accord with 3rd paragraph in original. See State v. Reddick, — N.C. App. —, 286 S.E.2d 654 (1982).

An accused has possession of a controlled substance within the meaning of this section when he has both the power and the intent to control its disposition or use. Possession does not require ownership of the controlled substance. State v. Pevia, — N.C. App. —, 289 S.E.2d 135 (1982).

Circumstantial Evidence.—

In accord with 1st paragraph in original. See State v. Reddick, — N.C. App. —, 286 S.E.2d 654 (1982).

Finding of Not Guilty of Possession but Guilty of Manufacture. — Failure of the jury to find the defendants guilty of the possession of

marijuana does not preclude it from finding defendants guilty of manufacturing the illicit drug, as a jury is not required to be consistent, and mere inconsistency will not invalidate a verdict. State v. Rosser, 54 N.C. App. 660, 284 S.E.2d 130 (1981).

§ 90-98. Attempt and conspiracy; penalties.

CASE NOTES

Applied in State v. Fleming, 52 N.C. App. 563, 279 S.E.2d 29 (1981).

§ 90-108. Prohibited acts; penalties.

CASE NOTES

Presumption of Forgery. — When a defendant in possession of a forged prescription for narcotics endeavors to obtain narcotics with it in violation of this section, a presumption arises that he either forged the prescription or had knowledge that it was a forgery. State v. Fleming, 52 N.C. App. 563, 279 S.E.2d 29 (1981).

Pharmacist's Knowledge of Invalidity of Forged Prescription. — In a prosecution of defendant for feloniously and intentionally acquiring possession of a controlled substance in violation of subdivision (a)(10) of this section, there was no merit to defendant's contention that, since the pharmacist knew the prescription presented by defendant was invalid before filling it, defendant did not violate the section, since the section prohibits the possession of a controlled substance by "misrepresentation, fraud, forgery, deception or subterfuge"; and, according to the evidence, defendant obtained possession of the controlled substance through the use of a forged prescription. State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501, appeal dismissed and petition for discretionary review denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Cited in State v. Cooper, — N.C. —, 286 S.E.2d 102 (1982).

§ 90-112. Forfeitures.

CASE NOTES

When Order of Seizure Must Be Applied For. — The plain effect of subsection (b) of this section is to circumscribe the authority of law-enforcement officers to seize vehicles unless they first obtain "process" from a neutral judicial officer. There is, however, no requirement in this section that the officers must apply for an order of seizure immediately after they have observed the prescribed criminal activity. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and petition for discretionary review denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Time Within Which Vehicle May Be Seized. — This section does not restrict the time within which a vehicle may be seized after a violation of the controlled substances law has been observed. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and petition for discretionary review denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

To fix a definite time within which officers must act to seize a vehicle after they have seen an illegal drug transaction might hinder seriously the effectiveness of large scale undercover drug investigations in which the officers are trying to find the big drug dealers through various smaller operators. If a vehicle must be seized immediately, or very soon after the commission of a crime, it is likely that the detective's cover would be destroyed, resulting in increased danger to that officer if he continues to work in the investigation or, if he must then drop out of the operation, the waste of his special efforts, requiring much training and planning, whereby he was enabled to make effective contact with those involved in illegal drug trafficking. Thus, though a situation may

arise where the length of time, elapsing between the commission of a crime and the later issuance of an order of seizure, is too unreasonable to be sustained, where process was served within a month after the officer saw a violation occur, the length of time was not unreasonable. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and petition for discretionary review denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Scope of Search of Impounded Vehicle. — A search by police officers of a closed medicine bottle found in defendant's car exceeded the permissible scope of a valid inventory search of a lawfully impounded vehicle. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and petition for discretionary review denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Article 6.

Optometry.

§ 90-114. Optometry defined.

CASE NOTES

The physician-patient privilege against disclosure of confidential communications and information does not extend to optometrists. State v. Shaw, — N.C. —, 289 S.E.2d 325 (1982).

Article 8.

Chiropractic.

§ 90-153. Licensed chiropractors may practice in public hospitals.

OPINIONS OF ATTORNEY GENERAL

Chiropractor May Review, etc. — The correct citation to the opinion of the Attorney General cited under this catchline in the replacement volume is 48 N.C.A.G. 32.

§ 90-157.2. Chiropractor as expert witness.

CASE NOTES

Stated in Mitchem v. Sims, — N.C. App. —, 285 S.E.2d 839 (1982).

Article 12A.

Podiatrists.

§ 90-202.2. "Podiatry" defined.

CASE NOTES

Quoted in Costin v. Shell, 53 N.C. App. 117, 280 S.E.2d 42 (1981).

§ 90-202.13. Injunctions.

CASE NOTES

Cited in Costin v. Shell, 53 N.C. App. 117, 280 S.E.2d 42 (1981).

ARTICLE 15A.

Uniform Anatomical Gift Act.

§ 90-220.10. Use of tissue declared service; standard of care; burden of proof.

CASE NOTES

Cited in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

ARTICLE 18A

Practicing Psychologists.

§ 90-270.11. Licensing and examination.

Editor's Note. — In the historical citation to this section as set out in the 1981 Cumulative Supplement and the 1981 Replacement Volume, "1977, c. 620, s. 7" should read "1977, c. 670, s. 7."

ARTICLE 18B.

Physical Therapy.

§ 90-270.25. Board of Examiners.

The North Carolina Board of Physical Therapy Examiners is hereby created. The Board shall consist of eight members, including one medical doctor licensed and residing in North Carolina, four physical therapists, two physical therapists assistants, and one public member. The public member shall be appointed by the Governor and shall be a person who is not licensed under Chapter 90 who shall represent the interest of the public at large. The medical doctor, physical therapists, and the physical therapists assistants shall be appointed by the Governor from a list compiled by the North Carolina Physical Therapy Association, Inc., following the use of a nomination procedure made available to all physical therapists and physical therapists assistants licensed and residing in North Carolina. The records of the operation of the nomination procedure shall be filed with the Board, to be available for a period of six months following nomination, for reasonable inspection by any licensed practitioner. Each physical therapist member of the Board shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist immediately preceding his appointment and shall be actively engaged in the practice of physical therapy in North Carolina during his incumbency. Each physical therapist assistant member shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist assistant immediately preceding his

appointment and shall be actively engaged in practice as a physical therapist assistant in North Carolina during his incumbency.

Members shall be appointed to serve three year terms, or until their successors are appointed, to commence on January 1, in respective years; provided that members of the Board on July 1, 1979, shall continue to serve for the remainder of their terms, respectively, or until their successors are appointed. In the event that a member of the Board for any reason shall become ineligible to or cannot complete his term of office, another appointment shall be made by the Governor in accordance with the procedure stated above to fill the remainder of the term. No member may serve for more than two successive three-year terms.

The Board each year shall designate one of its physical therapist members as chairman and one member as secretary-treasurer. Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing boards generally. (1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487; 1981, c. 765, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 82.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) deleted the former fifth and sixth sentences of the first paragraph, which read: "One physical therapist member shall be appointed by the Lieutenant Governor and one by the Speaker of the House. The Lieutenant Governor and Speaker of the House, respectively, shall fill the first and second vacancies in physical therapist members of the Board arising by expiration of term after July 1, 1981, and shall continue to appoint their respective successors; the Governor shall fill all other vacancies arising by expiration of term."

Session Laws 1981 (Reg. Sess., 1982), c. 1191, s. 83, provides: "Appointments made under the previous G.S. 90-270.25 are valid until the expiration of the term, or death, resignation or removal of the appointee, but no new appointment may be made which would increase the membership of the Board to more than eight."

Article 19.

Sterilization Operations.

§ 90-272. Operation on unmarried minor.

CASE NOTES

Cited in Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).

Article 20.

Nursing Home Administrator Act.

§ 90-276. Definitions.

For the purposes of this Article and as used herein:

(1) "Administrator-in-training" means an individual registered with the Board who serves a training period under the supervision of a preceptor.

(2) "Board" means the North Carolina State Board of Examiners for Nursing Home Administrators.

(3) "Nursing home" means any institution or facility defined as such for licensing purposes under G.S. 130-9(e) of the General Statutes, whether proprietary or nonprofit, including but not limited to nursing homes owned or administered by the federal or State government or

any agency or political subdivision thereof and nursing homes operated in combination with a home for the aged or any other facility.

(4) "Nursing home administrator" means a person who administers, manages, supervises, or is in general administrative charge of a nursing home, whether such individual has an ownership interest in such home and whether his functions and duties are shared with one or more individuals.

(5) "Preceptor" means a person who is a licensed and registered nursing home administrator and meets the requirements of the Board to supervise administrators-in-training during the training period. (1969, c. 843, s. 1; 1981, c. 722, s. 3; 1981 (Reg. Sess., 1982), c. 1234, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section, adding subdivision (1) and changing the designations of former subdivisions (1) through (3) accordingly, adding subdivision (5), and substituting "G.S. 130-9(e)" for "G.S. 130-9(c)" near the beginning of subdivision (3).

§ 90-278. Qualifications for licensure.

The Board shall have authority to issue licenses to qualified persons as nursing home administrators, and shall establish qualification criteria for such nursing home administrators.

(1) A license as a nursing home administrator shall be issued to any person upon the Board's determination that:

a. He is at least 21 years of age, of good moral character and of sound physical and mental health; and

b. He has satisfactorily completed a course prescribed by the Board, which course contains instruction on the services provided by nursing homes, laws governing nursing homes, protection of patient interests and nursing home administration and he has presented evidence satisfactory to the Board of sufficient education, training and experience in the foregoing fields to administer a nursing home; and

c. He has passed an examination administered by the Board and designed to test for competence in the subject matters referred to in paragraph b hereof.

c1. He has successfully completed his training period as an administrator-in-training as prescribed by the Board.

(1981 (Reg. Sess., 1982), c. 1234, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added paragraph c1 to subdivision (1).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (1) is set out.

§ 90-280. Fees; display of license; duplicate license; inactive list.

(a) Each applicant for an examination administered by the Board and each applicant for an administrator-in-training program shall pay a fee set by the Board not to exceed two hundred dollars ($200.00).

(b) Each person licensed as a nursing home administrator shall be required to pay a license fee in an amount set by the Board not to exceed two hundred fifty dollars ($250.00). A license shall expire on the thirtieth day of September of the second year following its issuance and shall be renewable biennially

upon payment of a renewal fee set by the Board not to exceed two hundred fifty dollars ($250.00).

(c) Each person licensed as a nursing home administrator shall display his license certificate, along with the current certificate of renewal, in a conspicuous place in his place of employment.

(d) Any person licensed as a nursing administrator may receive a duplicate license by payment of a fee set by the Board not to exceed twenty-five dollars ($25.00).

(e) Any person licensed as a nursing home administrator who is not acting, serving, or holding himself out to be a nursing home administrator may have his name placed on an inactive list for such period of time not to exceed five years upon payment of a fee set by the Board not to exceed twenty-five dollars ($25.00).

(f) Any person having a temporary license issued pursuant to G.S. 90-278(3) shall pay a fee in an amount set by the Board not to exceed one hundred dollars ($100.00). If the Board renews the temporary license, no further fee shall be required.

(g) The Board may set fees for conducting and administering initial training and continuing education courses, and may set a fee not to exceed twenty-five dollars ($25.00) for certifying a course submitted for review by another individual or agency wishing to offer such courses. (1969, c. 843, s. 1; 1977, c. 652; 1979, 2nd Sess., c. 1282; 1981 (Reg. Sess., 1982), c. 1234, s. 4.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment substituted "an administrator-in-training program" for "a training program sponsored or supervised by the Board" and "two hundred dollars ($200.00)" for "the cost of administering the examination or of sponsoring or supervising the training program" in subsection (a), substituted "two hundred fifty dollars ($250.00)" for "one hundred fifty dollars ($150.00)" in two places in subsection (b), inserted ", along with the current certificate of renewal," in subsection (c), deleted "the amount of" preceding "twenty-five dollars ($25.00)" at the end of subsection (e) and added subsections (f) and (g).

§ 90-285. Functions and duties of the Board.

The Board shall meet at least once annually in Raleigh or any other location designated by the chairman and shall have the following functions and duties:

(11) Develop an administrator-in-training program to insure that nursing home administrators have adequate training and experience prior to licensure. (1969, c. 843, s. 1; 1981, c. 722, ss. 10, 11; 1981 (Reg. Sess., 1982), c. 1234, s. 3.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment added subdivision (11).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (11) are set out.

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

Article 1.

Sanitarians.

Sec.

90A-1 to 90A-13. [Repealed.]

Article 3.

Certification of Wastewater Treatment Plant Operators.

90A-45 to 90A-49. [Reserved.]

Article 4.

Registrations of Sanitarians.

90A-50. State Board of Sanitarian Examiners.
90A-51. Definitions.
90A-52. Practice without certificate unlawful.
90A-53. Qualifications and examination for registration as a sanitarian.
90A-54. Qualification for registration as a sanitarian intern.
90A-55. State Board of Sanitarian Examiners; appointment and term of office.
Sec.
90A-56. Compensation of Board members; expenses; employees.
90A-57. Election of officers; meetings; regulations.
90A-58. Applicability of Chapter 93B.
90A-59. Record of proceedings; register of application; register of registered sanitarians and sanitarian interns.
90A-60. Rating of educational institutions.
90A-61. Certification and registration of persons practicing as sanitarians on October 1, 1982; temporary provisions.
90A-62. Certification and registration of sanitarians certified in other states.
90A-63. Renewal of certificates.
90A-64. Suspensions and revocations of certificates.
90A-65. Representing oneself as a registered sanitarian.
90A-66. Violations; penalty; injunction.

Article 1.

Sanitarians.

§§ 90A-1 to 90A-13: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1274, s. 1, effective October 1, 1982.

Cross References. — For present provisions as to registration of sanitarians, see § 90A-50 et seq.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1274, s. 3, contains a severability clause.

Article 3.

Certification of Wastewater Treatment Plant Operators.

§§ 90A-45 to 90A-49: Reserved for future codification purposes.

Article 4.

Registrations of Sanitarians.

§ 90A-50. State Board of Sanitarian Examiners.

There is hereby created a State Board of Sanitarian Examiners to register qualified sanitarians to practice within the State. (1959, c. 1271, s. 2; 1973, c. 476, s. 128; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1274, s. 4, makes the act effective October 1, 1982.

Session Laws 1981 (Reg. Sess., 1982), c. 1274, s. 3, contains a severability clause.

§ 90A-51. Definitions.

The words and phrases defined below shall when used in this Article have the following meaning unless the context clearly indicates otherwise:

(1) "Board" means the Board of Sanitarian Examiners.

(2) "Certificate of registration" is a document issued as evidence of registration and qualification to practice as a sanitarian or a sanitarian intern under this Article. The certificate shall bear the designation "registered sanitarian" or "sanitarian intern" and show the name of the person, date of issue, serial number, seal, and signatures of the members of the Board.

(3) "Registered sanitarian" is a sanitarian registered in accordance with the provisions of this Article.

(4) "Sanitarian" is a public health professional qualified by education in the arts and sciences, specialized training, and acceptable environmental health field experience to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health.

(5) "Sanitarian intern" is a person who possesses the necessary educational qualifications as prescribed in G.S. 90A-53(3), but who has not completed the experience and specialized training requirements in the field of public health sanitation as required for registration. (1959, c. 1271, s. 1; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-52. Practice without certificate unlawful.

(a) In order to safeguard life, health and the environment, it shall be unlawful for any person to practice as a sanitarian in the State of North Carolina or use the title "registered sanitarian" unless such person shall have obtained a certificate of registration from the Board. No person shall offer his services as a registered sanitarian or use, assume or advertise in any way any title or description tending to convey the impression that he is a registered sanitarian unless he is the holder of a current certificate of registration issued by the Board.

(b) Notwithstanding the provisions of subsection (a), a person may practice as a sanitarian intern for a period not to exceed three years provided he has obtained a temporary certificate of registration from the Board. (1959, c. 1271, s. 12; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-53. Qualifications and examination for registration as a sanitarian.

The Board shall issue certificates to qualified persons as registered sanitarians. A certificate as a registered sanitarian shall be issued to any person upon the Board's determination that such person:

(1) Has made application to the Board on a form prescribed by the Board;

(2) Is of good moral character;

(3) Has received a degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 15 semester hours or its equivalent in the physical and/or biological sciences;

(4) Has satisfactorily completed a course in specialized instruction and training approved by the Board which course shall be designed as to content and so administered as to present sufficient knowledge of the needs properly to be served by public health sanitation, the elements of good environmental health sanitation, the laws and regulations governing sanitation in environmental health and the protection of the public health;

(5) Has had at least two years' experience in the field of environmental health sanitation, or at least one year of such experience in the field of environmental health sanitation plus one year of graduate study in the sanitary sciences;

(6) Has passed an examination administered by the Board designed to test for competence in the subject matters of environmental health sanitation. The examination shall be in a form prescribed by the Board and may be oral, written, or both. The examination for applicants shall be held annually or more frequently as the Board may by rule prescribe, at a time and place to be determined by the Board. A person shall not be registered if such person fails to meet the minimum grade requirements for examination specified by the Board. Failure to pass an examination shall not prohibit such person from being examined at subsequent times and places as specified by the Board; and

(7) Has paid a fee set by the Board not to exceed the cost of the examination. (1959, c. 1271, s. 6; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-54. Qualification for registration as a sanitarian intern.

(a) A temporary certificate may be issued under requirements and conditions prescribed by the Board to any person to act or serve as a sanitarian intern without meeting the full requirements of a registered sanitarian for a period not to exceed three years provided such person meets the educational requirements in G.S. 90A-53.

(b) Any person meeting the educational requirements of G.S. 90A-53(3) may make application to the Board on a form prescribed by the Board for temporary registration as a sanitarian intern. The Board shall accept such application when submitted upon the payment of a fee set by the Board not to exceed thirty-five dollars ($35.00). (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-55. State Board of Sanitarian Examiners; appointment and term of office.

(a) Board membership. — The Board shall consist of nine members: the Secretary of Human Resources, or his duly authorized representative; one public-spirited citizen, one environmental sanitation educator from an accredited college or university, one local health director, a representative of the Environmental Health Section, North Carolina Division of Health Services; and four practicing sanitarians who qualify by education and experience for registration under this Article, three of whom will represent the Western, Piedmont, and Eastern Regions of the State as described more specifically in the rules and regulations adopted by the Board.

(b) Term of office. — Each member of the State Board of Sanitarian Examiners shall be appointed by the Governor for a term of four years. Members of the Board serving on the effective date of this Article shall serve until the expiration of the terms for which they were appointed. As the term of each current member expires, the Governor shall appoint a successor in accordance with the provisions of this section. If a vacancy occurs on the Board for any other reason than the expiration of a member's term, the Governor shall appoint a successor for the remainder of the unexpired term. No person shall serve as a member of the Board for more than two consecutive four-year terms.

(c) The Environmental Health Section, North Carolina Public Health Association, Inc., shall submit a recommended list of Board member candidates to the Governor for his consideration in appointments.

(d) The Governor may remove an appointee member for misconduct in office, incompetency, neglect of duty, or other sufficient cause. (1959, c. 1271, s. 2; 1973, c. 476, s. 128; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-56. Compensation of Board members; expenses; employees.

Members of the Board shall receive thirty-five dollars ($35.00) per day for each day actually spent in the performance of duties required by this Chapter, plus all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a), (1), (2), and (3) for officers and employees of State departments. The Board may employ necessary personnel for the performance of its functions and fix the compensation therefor, within the limits of funds available to the Board. The total expenses of the administration of this Article shall not exceed the total income therefrom and none of the expenses of said Board or the compensation or expenses of any officer thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina. (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-57. Election of officers; meetings; regulations.

(a) The Board shall annually elect a chairman, vice-chairman and a secretary from among its membership. The officers may serve more than one term. The Board shall meet annually in the City of Raleigh, at a time set by the Board, and it may hold additional meetings and conduct business at any place in the State. Five members of the Board shall constitute a quorum to do business. The Board may designate any member to conduct any proceeding, hearing, or investigation necessary to its purpose, but any final action requires a quorum of the Board. The Board is authorized to adopt such rules and regulations as may be necessary for the efficient operation of the Board.

(b) The Board shall have an official seal and each member shall be empowered to administer oaths in taking of testimony upon any matters pertaining to the function of the Board. (1959, c. 1271, s. 3; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-58. Applicability of Chapter 93B.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes of North Carolina. (1959, c. 1271, s. 5; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-59. Record of proceedings; register of application; register of registered sanitarians and sanitarian interns.

(a) The Board shall keep a record of its proceedings.

(b) The Board shall maintain a register of all applications for registration, which shall show:

(1) The place of residence, name and age of each applicant;
(2) The name and address of the employer of each applicant;
(3) The date of application;
(4) Complete information of educational and experience qualifications;
(5) The action taken by the Board;
(6) The serial number of the certificate of registration issued to the applicant;
(7) The date on which the Board reviewed and acted upon the application; and
(8) Such other pertinent information as may be deemed necessary by the Board.

(c) The Board shall maintain a current registry of all sanitarians and sanitarian interns in the State of North Carolina that have been registered in accordance with the provisions of this Article.

(d) These records shall be public records as defined in Chapter 132 of the General Statutes of North Carolina. (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-60. Rating of educational institutions.

For the purpose of determining the qualifications of applicants for certification and registration under this Article, the Board may accept the ratings of educational institutions as issued by accrediting bodies acceptable to the Board. (1959, c. 1271, s. 7; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-61. Certification and registration of persons practicing as sanitarians on October 1, 1982; temporary provisions.

(a) Any person who submits to the Board under oath evidence that such person was practicing as a sanitarian (as defined in G.S. 90A-51(4) of this Article) or registered sanitarian (as defined in G.S. 90A-51(3) of this Article) in the State of North Carolina on October 1, 1982, shall be certified as a registered sanitarian.

(b) If any person described under subsection (a) does not make application and pay the appropriate fee to the Board within six months from October 1, 1982, he must then satisfy all the requirements of G.S. 90A-53 in order to obtain a certificate of registration.

(c) Within three years from October 1, 1982, every person specified in subsection (a) who has not satisfied the requirements for a certificate of registration listed in subsection (a) shall thereafter satisfy all the requirements listed in G.S. 90A-53 in order to obtain a certificate of registration. (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-62. Certification and registration of sanitarians certified in other states.

The Board may, without examination, grant a certificate as a registered sanitarian to any person who at the time of application, is certified as a registered sanitarian by a similar board of another state, district or territory whose standards are acceptable to the Board but not lower than those required by this Article. A fee to be determined by the Board and not to exceed thirty-five dollars ($35.00) shall be paid by the applicant to the Board for the issuance of a certificate under the provisions of this section. (1959, c. 1271, s. 9; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-63. Renewal of certificates.

(a) A certificate as a registered sanitarian or sanitarian intern issued pursuant to the provisions of this Article will expire on the thirty-first day of December of the current year and must be renewed annually on or before the first day of January. Each application for renewal must be accompanied by a renewal fee to be determined by the Board, but not to exceed thirty-five dollars ($35.00). The Board is authorized to charge an extra five dollar late renewal fee for renewals made after the first day of January of each year.

(b) Registrations expired for failure to pay renewal fees may be reinstated under the rules and regulations adopted by the Board. (1959, c. 1271, s. 10; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-64. Suspensions and revocations of certificates.

(a) The Board shall have the power to refuse to grant, or may suspend or revoke, any certificate issued under provisions of this Article for any of the causes hereafter enumerated:

(1) Fraud, deceit, or perjury in obtaining registration under the provisions of this Article;

(2) Addiction to narcotics;

(3) Drunkenness on duty;

(4) Defrauding the public or attempting to do so;

(5) Failing to renew certificate as required;

(6) Dishonesty;

(7) Incompetency;

(8) Inexcusable neglect of duty;

(9) Guilty of any unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession.

(b) The procedure to be followed by the Board when refusing to allow an applicant to take an examination, or revoking or suspending a certificate issued under the provisions of this Article, shall be in accordance with the provisions of Chapter 150A of the General Statutes of North Carolina. (1959, c. 1271, s. 11; 1973, c. 1331, s. 3; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-65. Representing oneself as a registered sanitarian.

A holder of a current certificate of registration may append to his name the letters, "R.S." (1959, c. 1271, s. 12; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-66. Violations; penalty; injunction.

Any person violating any of the provisions of this Article or of the rules and regulations adopted by the Board shall be guilty of a misdemeanor and punishable in the discretion of the court. The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1959, c. 1271, s. 13; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

Chapter 93.

Public Accountants.

Sec.

93-12. Board of Certified Public Accountant Examiners.

§ 93-12. Board of Certified Public Accountant Examiners.

The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of seven members to be appointed by the Governor, five persons to be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter and two persons who are not certified public accountants who shall represent the interest of the public at large. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this Chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the thirtieth day of June. All Board members serving on June 30, 1980, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1980, shall serve more than two complete consecutive terms. The powers and duties of the Board shall be as follows:

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge and collect a fee not to exceed twenty-five dollars ($25.00) for such renewal.

Editor's Note. — Subdivision (8) of this section, set out above, was inadvertently omitted from the section in the 1981 replacement volume and the 1979 and 1981 supplements.

Only Part of Section Set Out. — As the rest of the section was not affected, only the introductory paragraph and subdivision (8) are set out.

Chapter 93A.

Real Estate License Law.

ARTICLE 1.

Real Estate Brokers and Salesmen.

§ 93A-1. License required of real estate brokers and real estate salesmen.

CASE NOTES

Cited in Gower v. Strout Realty, Inc., — N.C. App. —, 289 S.E.2d 880 (1982).

§ 93A-2. Definitions and exceptions.

CASE NOTES

Person Who Purchases or Leases Land for His Own Account. —

Where plaintiffs allege a contract to buy real estate on their own account under the terms of the listing agreement made by owner with defendant-broker and to share in the sales commission with defendant, and plaintiffs were not engaging in brokerage activities "for others" but were acting for themselves in buying the land and in reducing the purchase price through the commission sharing agreement with defendant, plaintiff's agreement does not violate the licensing statute and it is enforceable. Gower v. Strout Realty, Inc., — N.C. App. —, 289 S.E.2d 880 (1982).

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

CASE NOTES

Quoted in North Carolina Real Estate Licensing Bd. v. Gallman, 52 N.C. App. 118, 277 S.E.2d 853 (1981).

§ 93A-6. Revocation or suspension of licenses by Board.

CASE NOTES

Dishonesty of Licensee as Owner. — The licensing act should not be interpreted to require a licensee to be honest as a broker or salesman while allowing him to be dishonest as

an owner. North Carolina Real Estate Licensing Bd. v. Gallman, 52 N.C. App. 118, 277 S.E.2d 853 (1981).

Stated in Abernathy v. Ralph Squires Realty Co., — N.C. App. —, 285 S.E.2d 325 (1982); Property Shop, Inc. v. Mountain City Inv. Co., — N.C. App. —, 290 S.E.2d 222 (1982).

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

§ 93D-5. Requirements for registration; examinations; apprentice licenses.

Editor's Note. — In the historical citation at the end of this section in the 1981 Cumulative Supplement, "1981, 2nd Sess.," preceding "c. 990", should be deleted.

§ 93D-6. Persons selling in other jurisdictions.

Editor's Note. — In the historical citation at the end of this section in the 1981 Cumulative Supplement, "1981, 2nd Sess.," preceding "c. 990", should be deleted.

§ 93D-9. Registration of apprentices.

Editor's Note. — In the historical citation at the end of this section in the 1981 Cumulative Supplement, "1981, 2nd Sess.," preceding "c. 990", should be deleted.

§ 93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

Editor's Note. — In the historical citation at the end of this section in the 1981 Cumulative Supplement, "1981, 2nd Sess.," preceding "c. 990", should be deleted.

§ 93D-13. Discipline, suspension, revocation of licenses.

Editor's Note. — In the historical citation at the end of this section in the 1981 Cumulative Supplement, "1981, 2nd Sess.," preceding "c. 990", should be deleted.

Chapter 95.

Department of Labor and Labor Regulations.

Article 2A.

Wage and Hour Act.

Sec.

95-25.5. Youth employment.

Article 7.

Board of Bailer Rules and Bureau of Boiler Inspection.

95-54 to 95-69.2. [Repealed.]

Article 7A.

Uniform Boiler and Pressure Vessel Act.

Sec.

95-69.12. Office of Director of Boilers and Pressure Vessels Division created; powers and duties.

95-69.13. Board of Boiler and Pressure Vessels Rules created; appointment, terms, compensation and duties.

Article 2A.

Wage and Hour Act.

§ 95-25.5. Youth employment.

(j) No person who holds any ABC permit issued pursuant to the provisions of Chapter 18B of the General Statutes for the on-premises sale or consumption of alcoholic beverages, including any mixed beverages, shall employ a youth:

(1) Under 16 years of age on the premises for any purpose;

(2) Under 18 years of age to prepare, serve, dispense or sell any alcoholic beverages, including mixed beverages.

(1981, c. 412, ss. 3, 4; c. 489, ss. 1-7; c. 747, s. 66.)

Effect of Amendments. — Pursuant to Session Laws 1981, c. 412, ss. 3, 4, as amended by Session Laws 1981, c. 747, s. 66, "Chapter 18B" has been substituted for "Chapter 18A" and "alcoholic beverages" has been substituted for "intoxicating liquors" in subsection (j) as enacted by Session Laws 1981, c. 489.

Only Part of Section Set Out. — As the rest of the section was not changed, only subsection (j) is set out.

CASE NOTES

Cited in Golden v. Register, 50 N.C. App. 650, 274 S.E.2d 892 (1981).

§ 95-25.14. Exemptions.

CASE NOTES

Stated in Golden v. Register, 50 N.C. App. 650, 274 S.E.2d 892 (1981).

§ 95-25.23. Violation of youth employment; civil penalty.

CASE NOTES

Cited in Golden v. Register, 50 N.C. App. 650, 274 S.E.2d 892 (1981).

ARTICLE 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

§§ 95-54 to 95-69.2: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1187, s. 1.

ARTICLE 7A.

Uniform Boiler and Pressure Vessel Act.

§ 95-69.12. Office of Director of Boilers and Pressure Vessels Division created; powers and duties.

There is hereby created the office of Director of the Boiler and Pressure Vessel Division within the North Carolina Department of Labor. The person holding this office shall assist the Commissioner in carrying out the provisions of this Article in accordance with the provisions of Chapter 126 of the General Statutes. The Director is charged with the responsibility for the administration of this Article on a day-to-day basis.

The Director shall be primarily responsible for the inspection of boilers and pressure vessels subject to this Article and for the issuance of inspection certificates for those boilers and pressure vessels found suitable. He shall also be responsible for the collection of fees for the inspection of boilers and pressure vessels and transmitting the same to the State Treasurer, where they shall be held in a special account to cover the operating expenses of the Division. (1975, c. 895, s. 5; 1981 (Reg. Sess., 1982), c. 1187, ss. 2, 3.)

Effect of amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "of the Division" for "associated with the direct field inspections of this Article" in the present last sentence of the second paragraph, and deleted the former last sentence thereof, which read: "All administrative functions pursuant to this Article shall be paid out of the State general fund."

§ 95-69.13. Board of Boiler and Pressure Vessels Rules created; appointment, terms, compensation and duties.

(a) There is hereby created the North Carolina Board of Boiler and Pressure Vessels Rules consisting of nine members appointed by the Commissioner, of which three shall be appointed for a term of one year, three for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years. At the expiration of their respective terms of office, their successors shall be appointed for terms of five years each. Of these nine appointed members, one shall be a representative of the owners and users of

steam boilers within this State, one a representative of boiler manufacturers within this State, one a representative of boilermakers within this State who has had not less than five years' practical experience as a boilermaker, one shall be a representative of the owners or users of pressure vessels within the State, one shall be a representative of the pressure vessel manufacturers within the State, one a representative of a boiler inspection and insurance company authorized to insure boilers and pressure vessels within the State, one a representative of the operating steam engineers in this State, one a contractor holding a Group I North Carolina Heating License, and one a mechanical engineer on the faculty of a recognized engineering college or a licensed professional engineer having boiler and pressure vessel experience. The Commissioner of Labor shall serve as chairman.

(1981 (Reg. Sess., 1982), c. 1187, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "serve as chairman" for "annually designate one member to serve as chairman" in the last sentence of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

CASE NOTES

Right of Association to Express Wage Views before City Council. — Although this section forbids North Carolina municipalities from entering into contracts or agreements with labor unions or associations, that prohibition does not extend to a union's advocacy of a particular point of view. Thus, North Carolina's policy prohibiting governmental bodies from negotiating with labor unions was not implicated and therefore could not serve as a compelling state interest allowing restriction of the Hickory Fire Fighters Association's right to advocate its position on firefighters' wages in front of the city council. Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory, 656 F.2d 917 (4th Cir. 1981).

ARTICLE 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

CASE NOTES

Quoted in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-127. Definitions.

CASE NOTES

Quoted in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

CASE NOTES

OSHA Regulations Admissible to Establish Standard of Care. — Occupational Safety and Health Act regulations are some evidence of the custom in the construction industry and are admissible to establish the standard of care required of reasonable men in the same circumstances. Cowan v. Laughridge Constr. Co., — N.C. App. —, 291 S.E.2d 287 (1982).

But Violation of OSHA Rules Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. Cowan v. Laughridge Constr. Co., — N.C. App. —, 291 S.E.2d 287 (1982).

Cited in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-135. Safety and Health Review Board.

CASE NOTES

Quoted in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-138. Civil penalties.

CASE NOTES

What Constitutes "Repeated" Violation. — In order for a violation to be repeated, it must be against the same employer and it must also be substantially similar to prior violations. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

A subsequent OSHA violation by the same employer substantially similar to a prior violation or violations is a "repeated" violation only if the employer should have known of the standard by virtue of the prior citation or citations. Factors which should be considered in determining whether the employer should have known of the standard are the extent to which the condition was obviously unsafe, the proximity in time to the prior citation, whether management or key employees had changed between citations, and the number of prior substantially similar violations. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

Where two alleged OSHA violations are of different subsections of the same standard and involve the same hazard, the second violation can form the basis of the citation for a "repeated" violation. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

Burden of Showing "Serious" Violation. — In order to establish a serious OSHA viola-

tion under this section, the Commissioner of Labor must show by substantial evidence that the violation created a possibility of an accident, a substantially probable result of which was death or serious physical injury. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

Violation of OSHA Rule Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. Cowan v. Laughridge Constr. Co., — N.C. App. —, 291 S.E.2d 287 (1982).

§ 95-139. Criminal penalties.

CASE NOTES

Violation of OSHA Rule Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. Cowan v. Laughridge Constr. Co., — N.C. App. —, 291 S.E.2d 287 (1982).

§ 95-141. Judicial review.

CASE NOTES

Stated in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

Chapter 96.

Employment Security.

Article 2.

Unemployment Insurance Division.

Sec.
96-12. Benefits.
Sec.
96-14. Disqualification for benefits.
96-17. Protection of rights and benefits; deductions for child support obligations.

Article 1.

Employment Security Commission.

§ 96-4. Administration.

CASE NOTES

Conclusiveness of Findings of Fact on Review. —

Findings of fact by the Commission which are supported by competent evidence in the record are conclusive on appeal. Yelverton v. Kemp Furn. Indus., Inc., 51 N.C. App. 215, 275 S.E.2d 553 (1981).

Quoted in Cianfarra v. N.C. Dep't of Transp., — N.C. App. —, 289 S.E.2d 100 (1982).

Cited in Intercraft Indus. Corp. v. Morrison, 54 N.C. App. 225, 283 S.E.2d 555 (1981).

Article 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in Baptist Children's Homes of North Carolina, Inc. v. Employment Sec. Comm'n, — N.C. App. —, 290 S.E.2d 402 (1982).

§ 96-12. Benefits.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which:

(a) Begins the third week after a week for which there is an "one" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(I) The third week after the first week for which there is an "off" indicator; or

(II) The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4, effective September 25, 1982.

(3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5, effective September 25, 1982.

(4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediate preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13 weeks and equalled or exceeded five percent (5%), or

b. Equalled or exceeded six percent (6%).

(5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or

b. Was less than five percent (5%).

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

(7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

(8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a

pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

c. (1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

(2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.

B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

1. He is an "exhaustee" as defined in subsection A(10).

2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (1) the gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501 (C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of his subdivision; and

(v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.

3. After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12(e)C.2., to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

D. Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts.

E. Total Extended Benefit Amount. —

(a) Except as provided in subparagraph (b) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or
2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

(b) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual

would, but for this subparagraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All State portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)C, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

I. For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files.

(1981 (Reg. Sess., 1982), c. 1178, ss. 3-14.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective Sept. 25, 1982, rewrote subdivision (e)A(1); deleted former subdivisions (e)A(2) and (e)A(3), relating to national "on" and "off" indicators from January 1, 1975, through December 31, 1976; in subdivision (e)A(4), in the introductory language substituted "an 'on indicator' for this State" for "a 'State "on" indicator' for this State," in subparagraph a substituted "13 weeks" for "13-week period ending in each of the preceding two calendar years," and "five percent (5%)" for "four percent (4%)," and in subparagraph b substituted "six percent (6%)" for "five percent (5%)" and deleted a former last sentence making subdivision (e)A(4)a inoperative for the period between January 1, 1975 through December 31, 1976; in subdivision (e)A(5), in the introductory language, substituted "an 'off indicator' " for "a 'state "off" indicator,' " in subparagraph a substituted "and" for "or" preceding "was less than" and "six percent (6%)" for "four percent (4%)", and deleted the former last sentence, making subdivision (e)A(5)a inoperative for the period between January 1, 1975 through December 31, 1976; in subdivision (e)A(6)a inserted "for regular compensation" following "claims"; in subdivision (e)E, inserted "(a) Except as provided in subparagraph (b) hereof,"

at the beginning of the first paragraph and added a second paragraph, designated (b); in subdivision (e)F1, substituted "effective in this State as a result of an 'on' indicator" for "effective in this State (or in all states) as a result of a State or a national 'on' indicator," and "an 'off' indicator" for "State and national 'off' indicators"; and in subdivision (e)I substituted "an 'off indicator' " for "a State 'off' indicator."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 96-14. Disqualification for benefits.

An individual shall be disqualified for benefits:

(11) a. Notwithstanding any other provisions of this Chapter, no otherwise eligible individual shall be denied benefits for any week because he or she is in training approved under Section 236(a)(1) of the Trade Act of 1974, nor shall such individual be denied benefits by reason of leaving work to enter such training, provided the work left is not suitable employment, or because of the application to any such week in training of provisions in this law (or any applicable Federal unemployment compensation law), relating to availability for work, active search for work, or refusal to accept work.

b. For purposes of this subsection, the term "suitable employment" means with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment (as defined for purposes of the Trade Act of 1974), and wages for such work at not less than eighty percent (80%) of the individual's average weekly wage as determined for the purposes of the Trade Act of 1974. (Ex. Sess. 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 598, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25; 1951, c. 332, s. 14; 1955, c. 385, ss. 7, 8; 1961, c. 454, s. 20; 1965, c. 795, s. 19; 1969, c. 575, s. 12; 1971, c. 673, s. 29; 1977, c. 26; 1981, c. 160, s. 26; c. 593; 1981 (Reg. Sess., 1982), c. 1178, s. 15.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective Sept. 25, 1982, added subdivision (11).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (11) are set out.

Legal Periodicals. —

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1040 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

The doctrine of res judicata is inapplicable to adjudication by unemployment compensation agencies. Roberts v. Wake Forest Univ., — N.C. App. —, 286 S.E.2d 120 (1982).

Applied in Yelverton v. Kemp Furn. Indus., Inc., 51 N.C. App. 215, 275 S.E.2d 553 (1981).

Quoted in Cianfarra v. N.C. Dep't of Transp., — N.C. App. —, 289 S.E.2d 100 (1982).

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

Later Wish to Rescind Resignation. — Fact that claimant later wished to rescind her resignation does not negate the fact that it was voluntarily offered. Whicker v. High Point Pub. Schools, — N.C. App. —, 287 S.E.2d 439 (1982).

"Good Cause" Defined. — "Good cause" is defined as a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. Intercraft Indus. Corp. v. Morrison, — N.C. —, 289 S.E.2d 357 (1982).

Lack of Child Care as Good Cause. — Depending on circumstances disclosed by the evidence, the lack of child care may or may not be "good cause" for an unexcused absence from work and is a matter for the factfinder to decide. Intercraft Indus. Corp. v. Morrison, — N.C. —, 289 S.E.2d 357 (1982).

III. MISCONDUCT.

The term "misconduct," etc. —

In accord with 1st paragraph in original. See Intercraft Indus. Corp. v. Morrison, 54 N.C. App. 225, 283 S.E.2d 555 (1981); In re Chavis, — N.C. App. —, 286 S.E.2d 623 (1982); Walter Kidde & Co. v. Bradshaw, — N.C. App. —, 289 S.E.2d 571 (1982).

"Misconduct," in the context of subdivision (2) of this section, is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. Hagan v. Peden Steel Co., — N.C. App. —, 291 S.E.2d 308 (1982).

Misconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. The obvious reasons for such a rule are to prevent benefits of the statute from going to persons who cause their unemployment by such callous, wanton, and deliberate misbehavior as would reasonably justify their discharge by an employer, and to prevent the dissipation of employment funds by persons engaged in such disqualifying acts. Intercraft Indus. Corp. v. Morrison, — N.C. —, 289 S.E.2d 357 (1982).

"Misconduct" may consist in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee. Hagan v. Peden Steel Co., — N.C. App. —, 291 S.E.2d 308 (1982).

A discharge for "gross insolence" was a discharge for misconduct connected with the employee's work such as to disqualify the employee for unemployment compensation. Hagan v. Peden Steel Co., — N.C. App. —, 291 S.E.2d 308 (1982).

Chronic or persistent absenteeism, in the face of warnings, and without good cause may constitute willful misconduct. Intercraft Indus. Corp. v. Morrison, — N.C. —, 289 S.E.2d 357 (1982).

When Violation of Work Rule Not Misconduct. — A violation of a work rule is not willful misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause. Intercraft Indus. Corp. v. Morrison, — N.C. —, 289 S.E.2d 357 (1982).

§ 96-15. Claims for benefits.

CASE NOTES

Scope of Superior Court's Jurisdiction. —

The scope of judicial review of appeals from decisions of the Employment Security Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. The reviewing court may not consider the evidence to find the facts itself. Baptist Children's Homes of North Carolina, Inc. v. Employment Sec. Comm'n, — N.C. App. —, 290 S.E.2d 402 (1982).

Conclusiveness of Findings of Fact on Appeal. —

Findings of fact by the Commission which are supported by competent evidence in the record are conclusive on appeal. Yelverton v. Kemp Furn. Indus., Inc., 51 N.C. App. 215, 275 S.E.2d 553 (1981).

In accord with 3rd paragraph in original. See In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Even when findings are not supported by the evidence, where there is no exception taken to such findings they are presumed to be supported by the evidence and are binding on appeal. Hagan v. Peden Steel Co., — N.C. App. —, 291 S.E.2d 308 (1982).

Applied in In re Browning, 51 N.C. App. 161, 275 S.E.2d 520 (1981).

Stated in Cianfarra v. N.C. Dep't of Transp., — N.C. App. —, 289 S.E.2d 100 (1982); Walter Kidde & Co. v. Bradshaw, — N.C. App. —, 289 S.E.2d 571 (1982).

Cited in Intercraft Indus. Corp. v. Morrison, 54 N.C. App. 225, 283 S.E.2d 555 (1981).

§ 96-17. Protection of rights and benefits; deductions for child support obligations.

(c) No Assignment of Benefits; Exemptions. — Except as provided in subsection (d) of this section, any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this Chapter shall be

void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debts; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void.

(d) I. Definitions. — For the purpose of this subsection and when used herein:

(A) "Unemployment compensation" means any compensation found by the Commission to be payable to an unemployed individual under the Employment Security Law of North Carolina (including amounts payable by the Commission pursuant to an agreement under any federal law providing for compensation, assistance or allowances with respect to unemployment) provided, that nothing in this subsection shall be construed to limit the Commission's ability to reduce or withhold benefits, otherwise payable, under authority granted elsewhere in this Chapter including but not limited to reductions for wages or earnings while unemployed and for the recovery of previous overpayments of benefits.

(B) "Child support obligation" includes only obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under Part D of Title IV of the Social Security Act.

(C) "State or local child support enforcement agency" means any agency of this State or a political subdivision thereof operating pursuant to a plan described in subparagraph (B) above.

II. (A) An individual filing a new claim for unemployment compensation shall, at the time of filing such claim, disclose whether the individual owes child support obligations, as defined under subparagraph I(B) of this subsection. If any such individual discloses that he or she owes child support obligations and is determined by the Commission to be eligible for payment of unemployment compensation, the Commission shall notify the State or local child support enforcement agency enforcing such obligation that such individual has been determined to be eligible for payment of unemployment compensation.

(B) Upon payment by the State or local child support enforcement agency of the processing fee provided for in paragraph IV of this subsection and beginning with any payment of unemployment compensation that, except for the provisions of this subsection, would be made to the individual during the then current benefit year and more than five working days after the receipt of the processing fee by the Commission, the Commission shall deduct and withhold from any unemployment compensation otherwise payable to an individual who owes child support obligations:

1. The amount specified by the individual to the Commission to be deducted and withheld under this paragraph if neither subparagraph 2 nor subparagraph 3 of this paragraph is applicable; or

2. The amount, if any, determined pursuant to an agreement submitted to the Commission under section 454(20)(B)(i) of the Social Security Act by the State or local child support enforcement agency, unless subparagraph 3 of this paragraph is applicable; or

3. Any amount otherwise required to be so deducted and withheld from such unemployment compensation pursuant to properly served legal process, as that term is defined in section 462(e) of the Social Security Act.

(C) Any amount deducted and withheld under paragraph (B) of this subdivision shall be paid by the Employment Security Commission to the appropriate State or local child support enforcement agency.

(D) The Department of Human Resources and the Commission are hereby authorized to enter into one or more agreements which may provide for the payment to the Commission of the processing fees referred to in subparagraph (B) and the payment to the Department of Human Resources of unemployment compensation benefits withheld, referred to in subparagraph (C), on an open account basis. Where such an agreement has been entered into, the processing fee shall be deemed to have been made and received (for the purposes of fixing the date on which the Commission will begin withholding unemployment compensation benefits) on the date a written authorization from the Department of Human Resources to charge its account is received by the Commission. Such an authorization shall apply to all processing fees then or thereafter (within the then current benefit year) chargeable with respect to any individual name in the authorization. Any agreement shall provide for the reimbursement to the Commission of any start-up costs and the cost of providing notice to the Department of Human Resources of any disclosure required by subparagraph (A). Such an agreement may dispense with the notice requirements of subparagraph (A) by providing for a suitable substitute procedure, reasonably calculated to discover those persons owing child support obligations who are eligible for unemployment compensation payments.

III. Any amount deducted and withheld under paragraph II of this subdivision shall, for all purposes, be treated as if it were paid to the individual as unemployment compensation and then paid by such individual to the State or local child support enforcement agency in satisfaction of the individual's child support obligations.

IV. (A) On or before April 1 of 1983 and each calendar year thereafter, the Commission shall set and forward to the Secretary of Human Resources for use in the next fiscal year, a schedule of processing fees for the withholding and payment of unemployment compensation as provided for in this subsection, which fees shall reflect its best estimate of the administrative cost to the Commission generated thereby.

(B) At least 20 days prior to September 25, 1982, the Commission shall set and forward to the Secretary of Human Resources an interim schedule of fees which will be in effect until July 1, 1983.

(C) The provisions of this subsection apply only if arrangements are made for reimbursement by the State or local child support agency for all administrative costs incurred by the Commission under this subsection attributable to child support obligations enforced by the agency. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150; 1979, c. 660, s. 22; 1981, c. 762, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1178, ss. 1, 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 25, 1982, inserted "Except as provided in subsection (d) of this section," at the beginning of subsection (c) and added subsection (d).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (c) and (d) are set out.

ARTICLE 3.

Employment Service Division.

§ 96-20. Duties of Division; conformance to Wagner-Peyser Act; organization; director; employees.

CASE NOTES

Quoted in Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

Sec.
97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.
97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

Article 1.

Workers' Compensation Act.

§ 97-1. Short title.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

CASE NOTES

The philosophy which supports, etc. —
Workers compensation laws were enacted to treat the cost of industrial accidents as a cost of production. Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982).

Basis of Liability. —
Workers' compensation laws were a statutory compromise, which assured workers compensation for injuries arising out of and in the course of employment without their having to prove negligence on the part of the employer. In exchange for the employer's loss of common law defenses, however, the employee gave up his right to common-law verdicts. In effect, tort liability was replaced with no-fault liability. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

Construction. —
Courts construe the Workers' Compensation Act liberally in favor of compensability. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981).

Act Not Exclusive Remedy for Intentional Injury by Fellow Employee. — North Carolina's Workers' Compensation Act is not the exclusive remedy for an employee intentionally injured by a fellow employee. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

Cited in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 97-2. Definitions.

Legal Periodicals. —
For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

I. IN GENERAL.

Applied in Hyatt v. Waverly Mills, — N.C. App. —, 286 S.E.2d 837 (1982).

Quoted in Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981); McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981).

Stated in Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Cited in Sparks v. Mountain Breeze Restaurant & Fish House, Inc., — N.C. App. —, 286 S.E.2d 575 (1982); Lankford v. Dacotah Cotton Mills, — N.C. App. —, 287 S.E.2d 471 (1982); Harrell v. Yarns, — N.C. App. —, 289 S.E.2d 846 (1982).

II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

B. Employee.

1. In General.

Intentional Injury Inflicted by Supervisor after Resignation. — Where plaintiff sought damages for injuries intentionally inflicted by supervisor immediately after she had orally tendered her resignation, as a matter of law at the time of the alleged incident plaintiff was still an employee. Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982).

3. Employees and Independent Contractors.

The lessor-driver, under a trip-lease agreement with an interstate commerce carrier, is deemed to be an employee of the carrier, for workers' compensation purposes, while operating the equipment under the carrier's Interstate Commerce Commission authority. Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

4. State and Municipal Employees.

CETA Employee. — Where plaintiff was hired, paid and insured by county from federal government CETA funds, but town alone controlled plaintiff's work schedules, duties and work environment, and it alone benefitted from his services, town was obliged to compensate plaintiff for work-related injuries. Godley v. County of Pitt, 54 N.C. App. 324, 283 S.E.2d 430 (1981).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

Performing Unrelated Job Which Has Been Forbidden. — The recognition of the right of employers to establish job descriptions and employment boundaries becomes increasingly important as individual operations become more complex with more sophisticated and dangerous equipment. Specialized jobs not only promote efficiency but also allow employers to guard against accidents caused by unskilled labor. For that reason, the modern trend is to deny compensation when an employee steps outside his regular duties and performs an unrelated job which has been positively forbidden. Hoyle v. Isenhour Brick & Tile Co., — N.C. App. —, 286 S.E.2d 830 (1982).

B. Accident.

"Accident" Defined. —

The correct citation to Porter v. Shelby Knit, Inc., cited under this catchline in the 1981 Cumulative Supplement, is 46 N.C. App. 22, 264 S.E.2d 360 (1980).

Injury While Performing Work in Usual Way, etc. —

An injury which occurs under normal work conditions is not considered an accident arising out of employment, and work conditions may be considered normal despite the presence of changed circumstances. Trudell v. Seven Lakes Heating & Air Conditioning Co., — N.C. App. —, 284 S.E.2d 538 (1981).

An assault is an accident, etc. —

An unexpected assault may be considered an accident despite its characterization as an intentional act. Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982).

C. Arising Out of and in the Course of Employment.

1. In General.

"Out of" and "in the Course of" Distinguished. —

In accord with 6th paragraph in original. See Powers v. Lady's Funeral Home, — N.C. App. —, 290 S.E.2d 720 (1982).

"In the Course of" the Employment Construed. — Whether an injury occurs in the course of the employment depends upon the time, place and circumstances of the accident. Powers v. Lady's Funeral Home, — N.C. App. —, 290 S.E.2d 720 (1982).

"Arising Out of" Defined. —

In accord with 10th paragraph in original. See Powers v. Lady's Funeral Home, — N.C. App. —, 290 S.E.2d 720 (1982).

In accord with 18th paragraph in original. See Powers v. Lady's Funeral Home, — N.C. App. —, 290 S.E.2d 720 (1982).

An accident arises out of employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake, and which is calculated to further,

indirectly or directly, the employer's business. Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

The term "arising out of" requires an employee to demonstrate a causal connection between the injury complained of and an accident which occurred in the course of employment. Buck v. Procter & Gamble Mfg. Co., 52 N.C. App. 88, 278 S.E.2d 268 (1981).

Mixed Question of Law and Fact. — Whether injury arose out of and in the course of employment is a mixed question of fact and law, and where there is evidence to support the commission's findings, the Court of Appeals is bound by them. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981).

2. Origin and Cause of Accident.

e. Assaults and Fights.

No Compensation Where Cause of Assault Is Personal. —

Injury is not compensable when it is inflicted in an assault upon an employee by an outsider as the result of a personal relationship between them, so that the attack was not created by and not reasonably related to the employment; to be compensable, the assault must have had such a connection with the employment that it can be found logically that the nature of the employment created the risk of the attack. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981).

Employer's Knowledge of Threats Irrelevant. — Where employee is injured in the course of employment by an outsider because of hate, jealousy, or revenge based on a personal relationship, fact that the employer has knowledge of prior threats of death or bodily harm does not result in the injury's arising out of the employment; to allow compensation under such circumstances would have the practical effect of placing on the employer the duty of yielding to such threats of violence and terminating the employment of any worker so threatened, which would saddle the employer with a grossly unfair burden and the employee, in many cases, with an unjust job termination. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981).

Shooting by Boyfriend of Coworker. — Injuries received by plaintiff at place of employment when the boyfriend of a coworker shot both plaintiff and coworker did not arise out of his employment where the assault resulted from the personal relationship between coworker and her boyfriend and was not created by or reasonably related to the employment, notwithstanding plaintiff was present in the office in which the shooting occurred because he had been instructed to keep a record of coworker's hours. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981).

3. Time, Place and Circumstances of Accident.

b. Injuries While Going to and from Work.

(1) General Rule.

The "special errand rule" and the "dual purpose rule" constitute exceptions to the general rule that an injury suffered by an employee while going to or coming from work is not an injury arising out of and in the course of employment. Felton v. Hospital Guild, — N.C. App. —, 291 S.E.2d 158 (1982).

As to statement and application of "dual purpose rule," see Felton v. Hospital Guild, — N.C. App. —, 291 S.E.2d 158 (1982).

(2) Special Errand.

Exception to General Rule. — The special errand exception to the "coming and going" rule is no more than that — an exception to the general rule that accidents occurring while the employee is in transit to and from work are not compensable. Therefore the special errand doctrine does not transform all employees covered by the Workers' Compensation Act into absolute insurers of the safety of employees called away on some special mission. Powers v. Lady's Funeral Home, — N.C. App. —, 290 S.E.2d 720 (1982).

The effect of the "special errand rule" is to confer "portal to portal" coverage on the employee. Powers v. Lady's Funeral Home, — N.C. App. —, 290 S.E.2d 720 (1982).

As to statement and application of "special errand rule," see Felton v. Hospital Guild, — N.C. App. —, 291 S.E.2d 158 (1982).

(3) On Employer's Premises.

Injury on Employer's Premises, etc. —

Employee injured while traveling to and from his employment on the employer's premises is covered by this Chapter. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981).

e. Injuries While Traveling.

Employees whose work entails travel away from the employer's premises, etc. —

In accord with original. See Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981); Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981).

Injuries arising out of the necessity of sleeping in hotels, etc. —

In accord with original. See Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

Employee Sent to Africa by Employer. — Where employer sent employee on a business trip to an isolated part of Africa and provided his employees with sleeping, eating and recre-

ational facilities within various company project areas, while within the project areas employees were continuously in an employment situation and were protected by this Chapter. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981).

Employee sent to Africa by employer to work on road project, who went on a personal detour to visit a nearby sugar plantation but was back within the confines of the road project when accident occurred, returning to his place of employment and the sleeping accommodations provided, was entitled to compensation under this Chapter. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981).

D. Injury from Disease.

Apportionment Between Incapacitating Disease and Other Factors Not Proper. — Where an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

E. Aggravation of Existing Infirmity; Contributing to Injury.

Policy Considerations. —

In accord with 1981 Supp. See Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Employment Need Not Be Sole Causative Force. — In workers' compensation actions the rule of causation is that where the right to recover is based on injury by accident, employment need not be the sole causative force to render an injury compensable. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Relative Contribution of Accident and Preexisting Condition Not Weighed. — An employer accepts an employee as he is, and if a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness, and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the preexisting condition. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

V. DISABILITY.

How Disability Measured. —

Entitlement to compensation under this Chapter is rooted in and must be measured by plaintiff's capacity or incapacity to earn wages. Mills v. J.P. Stevens & Co., 53 N.C. App. 341, 280 S.E.2d 802, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

"Disability" Signifies Impairment of Wage-Earning Capacity. —

"Disability" does not mean physical impairment. Rather, the term signifies an impairment in the employee's wage-earning capacity because of injury. Lucas v. Burlington Indus., — N.C. App. —, 291 S.E.2d 360 (1982).

Capacity to Earn Is Test of "Disability". —

In determining disability, the commission is not allowed to consider whether the average employee with plaintiff's injury is capable of working and earning wages. The question is whether this particular employee has such a capacity. Lucas v. Burlington Indus., — N.C. App. —, 291 S.E.2d 360 (1982).

The Workers' Compensation Act does not ensure an employee any particular employment; subdivision (9) of this section speaks of incapacity to earn wages "in the same or any other employment." Lucas v. Burlington Indus., — N.C. App. —, 291 S.E.2d 360 (1982).

Burden of Proving Disability. — In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree. Hilliard v. Apex Cabinet Co., — N.C. —, 290 S.E.2d 682 (1982).

The determination of whether a disability exists is a conclusion of law, which must be based upon findings of fact supported by competent evidence. Hilliard v. Apex Cabinet Co., — N.C. —, 290 S.E.2d 682 (1982).

Findings Required to Support Conclusion of Disability. — In order to support a conclusion of disability, the Industrial Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this incapacity to earn was caused by plaintiff's injury. Hilliard v. Apex Cabinet Co., — N.C. —, 290 S.E.2d 682 (1982).

VII. CHILD, GRANDCHILD, ETC.

How Child Acknowledged. — Word "acknowledged," referring to illegitimate children under this section, is not a term of art requiring a formal declaration before an authorized official; in regard to paternity actions, the term "acknowledgment" generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

§ 97-6.1. Protection of claimants from discharge or demotion by employers.

CASE NOTES

Punitive Damages. — As this section clearly limits recovery to damages "suffered by the employee" as a result of the employer's violation of the Workers' Compensation Act, punitive damages may not be awarded as they are not damages "suffered" by anyone. Buie v. Daniel Int'l Corp., — N.C. App. —, 289 S.E.2d 118 (1982).

§ 97-9. Employer to secure payment of compensation.

CASE NOTES

And the result is that immunity, etc. —

By reading this section in conjunction with § 97-10.1, fellow employees are excluded from common-law liability. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

Meaning of "Those Conducting His Business". —

The phrase "those conducting his business" includes fellow employees. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

Intentional assault by an employer removes the employer from his common-law immunity and the employee must choose between suing his employer at common law or accepting compensation. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

Where the employer is guilty of a felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982).

And assaultive behavior removes a coemployee from his immunity to common-law actions. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

While the Workers' Compensation Act precludes plaintiff from asserting a cause of action against corporate employer for alleged assault of a supervisory employee, the act does not preclude her from pursuing recovery from the assaultive employee. Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982).

§ 97-10.1. Other rights and remedies against employer excluded.

CASE NOTES

Section Construed with § 97-9. — By reading § 97-9 in conjunction with this section, fellow employees are excluded from common-law liability. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

This section is not arbitrary legislation unrelated to the valid objective of compensating injured employees or their dependents. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

Intentional assault by an employer removes the employer from his common-law immunity and the employee must choose between suing his employer at common law or accepting compensation. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

Where the employer is guilty of a felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982).

Assaultive behavior removes a coemployee from his immunity to common-law actions. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

North Carolina's Workers' Compensation Act is not the exclusive remedy for an employee intentionally injured by a fellow employee. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

Assaultive behavior by a coemployee limits the employee's immunity under this Chapter. Such misconduct is outside the realm of

industrial accidents which workers' compensation laws were designed to exclusively cover. Daniels v. Swofford, — N.C. App. —, 286 S.E.2d 582 (1982).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

CASE NOTES

Applicability. — This section applies only to persons who are strangers to the employment and negligently cause an injury. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

This section, which provides for actions against "some person other than the employer," has been held inapplicable to the negligent employee. Andrews v. Peters, — N.C. App. —, 284 S.E.2d 748 (1981).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

Burden of Defense of Intoxication. — This section places the burden of defense based upon intoxication upon the defendants to prove intoxication and to prove that death was proximately caused thereby. Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

Burden under Subdivision (3). — Under subdivision (3) of this section the party seeking an exemption under the statute must prove that the claimant's willful intent to injure was the sole proximate cause of the injury or death in question. Rorie v. Holly Farms Poultry Co., — N.C. App. —, 289 S.E.2d 78 (1982).

The burden of proving intent to injure is not met by merely offering evidence that the claimant precipitated an argument, used "fighting words," or otherwise "goaded" a fellow worker into striking the first blow. Rorie v. Holly Farms Poultry Co., — N.C. App. —, 289 S.E.2d 78 (1982).

A finding of premeditation coupled with an initial assault intending serious injury is necessary to support a conclusion that a claimant's recovery is barred by her willful intent to injure another. Rorie v. Holly Farms Poultry Co., — N.C. App. —, 289 S.E.2d 78 (1982).

Cited in Coleman v. City of Winston-Salem, — N.C. App. —, 291 S.E.2d 155 (1982).

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.

CASE NOTES

Applied in Hyatt v. Waverly Mills, — N.C. App. —, 286 S.E.2d 837 (1982).

§ 97-22. Notice of accident to employer.

CASE NOTES

Application of Section in Occupational Disease Cases, etc. —

With reference to occupational diseases, the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease. McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981).

§ 97-24. Right to compensation barred after two years; destruction of records.

CASE NOTES

When Informal Letter Insufficient. — An informal letter may not serve as the filing of a claim for compensation for statute of limitations purposes where it contains no request for a hearing, it fails to assert in any way that the plaintiff is demanding compensation or that action by the Industrial Commission is necessary to settle the question. Gantt v. Edmos Corp., — N.C. App. —, 289 S.E.2d 75 (1982).

§ 97-25. Medical treatment and supplies.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

CASE NOTES

Permanently Disabled Entitled to Medical Expenses for Life. — In a workers' compensation case there was no merit to defendant's argument that medical expenses should be compensated only to the extent they would tend to lessen the period of disability, since, if a plaintiff is found to be totally and permanently disabled, he will be entitled to medical expenses for life, dating from the time he became totally disabled, subject only to the requirements of § 97-29 that the expenses be "reasonable and necessary." Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 101 (1981).

Controlling Effect of § 97-59 in Cases Involving Occupational Disease. — Section 97-59, which is a more recent and specific statute dealing with awards of medical benefits in cases involving occupational disease, controls over this section in such cases. Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

§ 97-29. Compensation rates for total incapacity.

Legal Periodicals. —

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Application of Section as Amended Upheld. — Where all of the evidence disclosed that plaintiff did not become totally disabled until 1978 and thus had no right to recover for permanent total disability until after the enactment of the 1978 version of this section and where no possible liability accrued to defendants as a result of plaintiff's permanent total disability until after the enactment and effective date of the 1973 revision of this section, the

application of the 1978 version of this section did not constitute an unconstitutional application of substantive law. Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

Stacking of Benefits under § 97-30 and This Section Not Permitted. — If the Industrial Commission in workers' compensation actions should find that a plaintiff became totally and permanently disabled, the plaintiff's compensation should be to the fullest extent allowed under this section and should be awarded without regard to compensation previously awarded the plaintiff under § 97-30 for partial disability; however, a plaintiff should receive full compensation under this section only where an award under § 97-30 was fully paid before the plaintiff became totally disabled, since, if the period for partial disability award overlapped the period for the total award, the stacking of total benefits on top of partial benefits, for the same time period, would allow the plaintiff a greater recovery than the legislature intended. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 101 (1981).

At a given point in time, the provisions of this section and § 97-30 must be mutually exclusive; that is, a claimant cannot simultaneously be both totally and partially incapacitated. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 101 (1981).

In a workers' compensation case plaintiff was compensated for his permanent and total disability under this section as it read in 1978 when his disability became permanent and total, rather than as it read in 1970 when he first became disabled and was entitled to compensation, for partial disability under § 97-30, since plaintiff had no right to claim compensation, nor was the employer exposed to liability, under this section until 1978 when plaintiff appeared to have become totally disabled. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 101 (1981).

Total Incapacity from Emotional Disturbance Caused by Injury. — Where employee receives a compensable injury which causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity under this section. Fayne v. Fieldcrest Mills, Inc., 54 N.C. App. 144, 282 S.E.2d 539 (1981).

Apportionment Required. — Industrial Commission does not have authority to award claimant compensation for total disability when 40 to 50 percent of disability is not occupational in origin and was not aggravated or accelerated by any occupational disease. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Applied in Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981); McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981).

Stated in Gasperson v. Buncombe County Pub. Schools, 52 N.C. App. 154, 277 S.E.2d 872 (1981).

§ 97-30. Partial incapacity.

CASE NOTES

Stacking of Benefits under § 97-29 and This Section Not Permitted. — If the Industrial Commission in workers' compensation actions should find that a plaintiff became totally and permanently disabled, the plaintiff's compensation should be to the fullest extent allowed under § 97-29 and should be awarded without regard to compensation previously awarded the plaintiff under this section for partial disability; however, a plaintiff should receive full compensation under § 97-29 only where an award under this section was fully paid before the plaintiff became totally disabled, since, if the period for partial disability award overlapped the period for the total award, the stacking of total benefits on top of partial benefits, for the same time period, would allow the plaintiff a greater recovery than the legislature intended. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 101 (1981).

At a given point in time, the provisions of § 97-29 and this section must be mutually exclusive; that is, a claimant cannot simultaneously be both totally and partially incapacitated. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 101 (1981).

In a workers' compensation case plaintiff was compensated for his permanent and total disability under § 97-29 as it read in 1978 when his disability became permanent and total, rather than as it read in 1970 when he first became disabled and was entitled to compensa-

tion, for partial disability under this section, since plaintiff had no right to claim compensation, nor was the employer exposed to liability, under § 97-29 until 1978 when plaintiff appeared to have become totally disabled. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, appeal dismissed and petition for discretionary review denied, — N.C. —, 285 S.E.2d 101 (1981).

Apportionment Held Proper. — Where evidence supported the Industrial Commission's conclusion that claimant was totally disabled and that 55 percent of her disability was due to an occupational disease while 45 percent was due to other physical infirmities, it was not error for the Industrial Commission to award claimant compensation for a 55 percent partial disability rather than for total disability. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Cited in Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982); Cloutier v. State, — N.C. App. —, 291 S.E.2d 362 (1982).

§ 97-31. Schedule of injuries; rate and period of compensation.

Legal Periodicals. —
For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Injury to "Hip." — For purposes of this section, an injury to the "hip" will be considered an injury to the "leg." See Gasperson v. Buncombe County Pub. Schools, 52 N.C. App. 154, 277 S.E.2d 872 (1981).

Discretion of Commission in Awarding Compensation for Disfigurement. —
Where serious bodily disfigurement is involved, an award of compensation therefor is not required by this section, but may be allowed in the discretion of the Industrial Commission. Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

There is a serious disfigurement in law, etc. —
In accord with original. See Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

Determining Award for Serious Disfigurement. —
In accord with original. See Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

Sinuses are important internal organs under subdivision (24) of this section. Cloutier v. State, — N.C. App. —, 291 S.E.2d 362 (1982).

Loss of Senses of Taste and Smell, etc. —
The loss of sense of taste and smell is compensable as the loss of an important internal organ. Cloutier v. State, — N.C. App. —, 291 S.E.2d 362 (1982).

Occupational Disease Not Covered by Subdivision (24). — Injury caused by an occupational disease does not fall within the scope of subdivision (24) of this section. Harrell v. Yarns, — N.C. App. —, 289 S.E.2d 846 (1982).

Rights Where Employee Dies Prior to Determination of Award. —
When an employee suffers serious bodily disfigurement due to an accident covered by the Workers' Compensation Act and dies from unrelated causes while drawing compensation for temporary total disability, his dependents are entitled to a postmortem award for serious bodily disfigurement. Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

Proceedings Pend until All Injuries Adjudicated. — Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation. Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

Applied in Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

§ 97-37. Where injured employee dies before total compensation is paid.

Legal Periodicals. — For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Stated in Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.

CASE NOTES

Recipients' Shares Fixed at Date of Death. — General Assembly intended to fix each recipient's share of death benefits at the date of decedent's death. Chinault v. Floyd S. Pike Electrical Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981).

Percentage of Survivors' Benefits Fixed by Subdivision (1). — Paragraph fixing the period of time for which benefits are to be paid as 400 weeks for the widow and for each minor child until he reaches age 18 is not intended to fix the percentage of survivors' benefits; that is done by subdivision (1) of this section. Chinault v. Floyd S. Pike Electrical Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981).

Shares of Partial Dependents Fixed by Subdivisions (2) and (3). — Subdivisions (2) and (3) of this section fix the share each survivor is to receive if there are no persons wholly dependent on decedent at the date of his death. Chinault v. Floyd S. Pike Electrical Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981).

Suicide Due to Derangement Caused by Pain and Suffering from Compensable Injury. — If an employee receives an injury which is compensable under this Chapter and as a result of pain and suffering from this injury he becomes so deranged that he commits suicide, the death is compensable. Fayne v. Fieldcrest Mills, Inc., 54 N.C. App. 144, 282 S.E.2d 539 (1981).

Allocation of Compensation to Widow and Children Upheld. — Industrial Commission properly held that the entire compensation to which survivors, a widow and three minor children, were entitled should be divided into four equal parts, with the widow to receive weekly payments for 400 weeks, and each of the three minor children to receive only its share of weekly compensation beyond the 400 week period and until such child reached 18 years of age. Chinault v. Floyd S. Pike Electrical Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981).

Stated in Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

CASE NOTES

Quoted in Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

Stated in Coleman v. City of Winston-Salem, — N.C. App. —, 291 S.E.2d 155 (1982).

§ 97-47. Change of condition; modification of award.

CASE NOTES

The time limitation is not jurisdictional, etc. —

Two year limitation of this section is not jurisdictional; it merely provides a defense which the employer may assert. Pennington v. Flame Refractories, Inc., 53 N.C. App. 584, 281 S.E.2d 463 (1981).

The time limitation in this section is a nonjurisdictional limit, and is a technical, legal defense, and sound public policy and the fair, effective disposition of contested worker's compensation claims requires that if the time limitation of this section is to be available as a defense to claims based upon a change of condition, such defense must be asserted prior to hearing on the merits, and if not so asserted, it must be deemed to have been waived. Gragg v. W.M. Harris & Son, 54 N.C. App. 607, 284 S.E.2d 183 (1981).

But Is Technical Legal Defense. —

Under general principles of civil procedure, the statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived. There is no reason why this same rule should not apply to cases arising under this section. Gragg v. W.M. Harris & Son, 54 N.C. App. 607, 284 S.E.2d 183 (1981).

Purpose of the two year limitation is to protect the employer against claims too old to be successfully investigated and defended. Pennington v. Flame Refractories, Inc., 53 N.C. App. 584, 281 S.E.2d 463 (1981).

Letter based on change in condition, mailed to the Industrial Commission, held timely. Pennington v. Flame Refractories, Inc., 53 N.C. App. 584, 281 S.E.2d 463 (1981).

Applied in McLean v. Roadway Express, Inc., — N.C. App. —, 289 S.E.2d 58 (1982).

Cited in Lucas v. Burlington Indus., — N.C. App. —, 291 S.E.2d 360 (1982).

§ 97-52. Occupational disease made compensable; "accident" defined.

CASE NOTES

Disability Defined. — Disability is defined as incapacity because of injury to earn wages which employee was receiving at the time of injury in the same or any other employment; this definition applies to occupational diseases. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981).

This Chapter does not guarantee that benefits will be paid whenever an employee is injured or suffers from an occupational disease; it is not designed to be health or accident insurance. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981).

When Benefits Payable. — Benefits are paid only when, due to occupational disease or injury, employee is incapable of earning the same wages he earned at the time of contracting the disease or receiving the injury, at his same job or any other employment. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981).

Disease Must Be Incident to, etc. —

Employees who suffer occupational diseases due to personal sensitivities are not entitled to workers' compensation benefits absent a finding that the disability is due to an occupational disease. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981).

Claimant Must Prove Causation. —

Claimant must show that diminution in earning capacity is due to occupational disease or injury; it is not enough merely to show a diminution in wages earned subsequent to the affliction or injury. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981).

Date Disease "Originates" Irrelevant. — As it is the event of disability which triggers entitlement to compensation and not the date of the last injurious exposure, the date on which a plaintiff's occupational disease "originated" has no relevance to his claim. Taylor v. Cone Mills Corp., — N.C. App. —, 289 S.E.2d 60 (1982).

Industrial Commission did not err in concluding that plaintiff had not contracted an occupational disease while employed in defendant's textile mill where the evidence tended to show that plaintiff suffered from chronic bronchitis and had evidence of mild obstructive lung disease, aggravated by exposure to cotton dust, but such infirmities would not interfere with any work except the most strenuous kind, and plaintiff therefore did not suffer any disablement which would entitle him to compensation. Mills v. J.P. Stevens &

Co., 53 N.C. App. 341, 280 S.E.2d 802, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

Applied in Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Harrell v. Yarns, — N.C. App. —, 289 S.E.2d 846 (1982).

§ 97-53. Occupational diseases enumerated; when due to exposure of chemicals.

Legal Periodicals. —

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

CASE NOTES

"Occupational Disease" Defined. —

Clear language of this section provides that for any disease other than those specifically named to be deemed an "occupational disease," it must be proven to be due to causes and conditions as specified in the section. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Employment Need Not Be Exclusive Cause. — Subdivision (13) in no way requires that the conditions of employment be the exclusive cause of the disease in order to be compensable. Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56 (1981).

The disease need not be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather employment must result in a hazard which distinguishes it in character from the general run of occupations. Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56 (1981).

Despite evidence that plaintiff had smoked three-fourths a pack of cigarettes daily for 30 years, medical evidence and plaintiff's own testimony was sufficient to find him permanently disabled under this section from byssinosis caused by the conditions of his employment in the weave room of a textile plant. Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56 (1981).

When Disease "Characteristic" of Profession. —

In accord with 1981 Cum. Supp. See Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56 (1981); Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Findings of Fact. —

In accord with 2nd paragraph in 1981 Supplement. See Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

To prove the existence of a compensable "occupational disease" under this section: (1) the disease must be characteristic of a trade or occupation; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be proof of causation, i.e., proof of a causal connection between the disease and the employment. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

What Plaintiff Must Show Under Subdivision (13). — Plaintiff must show, in order to be entitled to compensation for disablement resulting from an occupational disease covered by subdivision (13) of this section: (1) that her disablement results from an occupational disease encompassed by this section, i.e., an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement resulting from said occupational disease, i.e., whether she is totally or partially disabled as a result of the disease. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Unless there is a proper finding that plaintiff suffers from an occupational disease, the analysis required by Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981) and Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981) is inappropriate. Lumpkins v. Mills, — N.C. App. —, 289 S.E.2d 848 (1982).

Denial of compensation may be predicated upon failure of claimant to prove any element of compensability under this section. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Award for Total Disability Not Authorized Where 40 to 50 Percent Not Occupational in Origin. — Industrial Commission does not have authority to award compensation for total disability when 40 to 50 percent of claimant's disablement is not occupational in origin and was not aggravated or accelerated by any occupational disease. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Award for Partial Disability Upheld. — Where evidence supported Industrial Commission's conclusion that claimant was totally disabled and that 55 percent of her disability was due to an occupational disease and 45 percent of her disability was due to other physical infirmities, it was not error for the Commission to award claimant compensation for a 55 percent partial disability rather than for total disability. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Finding of Total Disability Proper. — Evidence that plaintiff, age 58, had a fifth grade education and had no training to do any work other than textile work; that prior to his employment in textile mills, plaintiff had no lung disease or breathing difficulties; that during his employment he developed respiratory problems; that plaintiff was diagnosed as having byssinosis; and that he was 50 percent to 70 percent disabled for impairment and totally disabled to perform his former textile employment was evidence supporting the Commission's findings and conclusion that plaintiff was totally disabled due to an occupational disease. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Stated in Goodman v. Linn-Corriher Corp., 53 N.C. App. 612, 281 S.E.2d 458 (1981).

§ 97-54. "Disablement" defined.

CASE NOTES

Quoted in McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981).

§ 97-55. "Disability" defined.

CASE NOTES

Quoted in McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981).

Stated in Hyatt v. Waverly Mills, — N.C. App. —, 286 S.E.2d 837 (1982).

§ 97-57. Employer liable.

CASE NOTES

Function of Section. — The rule under this section, assigning liability to the employee where the employee was last injuriously exposed, serves to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employments to a plaintiff's occupational disease. The possibility that some employers may bear a disproportionate share of the total liability for occupational disease is a problem for the legislature, not the courts, to consider. Frady v. Groves Thread, — N.C. App. —, 286 S.E.2d 844 (1982).

Effect of Preexisting Condition. — An employer must take his employee as he finds him, and the employer will be liable for the full extent of the employee's compensable injury even where a preexisting condition substantially contributes to the degree of the injury. Frady v. Groves Thread, — N.C. App. —, 286 S.E.2d 844 (1982).

The Commission erred in requiring plaintiff to prove that her last employment was the cause of her occupational disease as this section assesses liability to the employer in whose employment the employee was last injuriously exposed, however minimal the exposure, to the hazards of the occupational disease. Rutledge v. Tultex Corp., — N.C. App. —, 289 S.E.2d 72 (1982).

Portion of Disability Due to Industrial Disease Not Chargeable to Age and Education. — Where an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to employee's advanced age and poor learning on the ground that if it were not for these factors he might still retain some earning capacity. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.

CASE NOTES

It is not enough that the workman be told a medical name for his disease, which may be meaningless to him, without a statement of its causal relationship to an extra-hazardous occupation. McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981).

No Duty to Inquire and Discover Relationship of Disease to Employment. — The legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim; likewise, plaintiff cannot be expected to inquire further and discover the relationship of his condition to his employment. McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981).

The two-year time limit for filing claims under subsection (c) is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. Poythress v. J.P. Stevens & Co., 54 N.C. App. 376, 283 S.E.2d 573 (1981).

Employer's Reliance upon Subsection (c) Not Estopped by Failure under § 97-92(a). — The prescribed penalty against an employer for the neglectful omission to report to the Industrial Commission an employee's absence under § 97-92(a) is not the tolling of a "statute of limitation" or a bar, either through estoppel or waiver, to the defendant's reliance upon subsection (c) of this section. Poythress v. J.P. Stevens & Co., 54 N.C. App. 376, 283 S.E.2d 573 (1981).

Cited in Gragg v. W.M. Harris & Son, 54 N.C. App. 607, 284 S.E.2d 183 (1981).

§ 97-59. Employer to pay for treatment.

CASE NOTES

Section Controls Over § 97-25. — This section, which is a more recent and specific statute dealing with awards of medical benefits in cases involving occupational disease, controls over § 97-25, which is an older and more general statute. Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

Grounds for Award of Medical Benefits. — This section states two grounds upon which the Commission shall extend medical benefits; if either is found to exist by the Commissioner, an award for medical benefits must be made. Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

There is no provision in the Act allowing the Commission to limit the award of medical expenses under this section to the period of time in which disability is paid; moreover, upon finding that the treatment would provide needed relief, it is not necessary under this section for the Commission to determine that such treatment would also lessen the period of disability. Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

Prior Approval Only Required Where Practicable. — The requirement in this section of prior approval of medical treatment applies only in cases where it is reasonably practicable to seek such prior approval. Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

Cited in Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83 (1981).

§ 97-69. Examination by advisory medical committee; inspection of medical reports.

CASE NOTES

Cited in Ward v. Beaunit Corp., — N.C. App. —, 287 S.E.2d 464 (1982).

§ 97-73. Expenses of making examinations.

CASE NOTES

Cited in Ward v. Beaunit Corp., — N.C. App. —, 287 S.E.2d 464 (1982).

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(b) The Commission may appoint deputies who shall have the same power to issue subpoenas, administer oaths, conduct hearings, hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes, take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission, and such deputy or deputies shall be subject to the State Personnel System.
(1981 (Reg. Sess., 1982), c. 1243, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes" in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. Processes and procedure under this Article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, and to subpoena witnesses, administer or cause to have administered oaths, hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.
(1981 (Reg. Sess., 1982), c. 1243, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes," in the third sentence of subsection (a). The amendatory act directed that the words be inserted in the second sentence of subsection (a), but the third sentence was plainly intended, and the amendment has been given effect according to its obvious intent.

Only Part of Section Set Out. — As subsections (b) and (c) were not changed by the amendment, they are not set out.

CASE NOTES

Construction, etc. —

In accord with original. See Shore v. Chatham Mfg. Co., 54 N.C. App. 678, 284 S.E.2d 179 (1981).

Attorney's Travel Expenses in Taking Deposition Out-of-State. — The travel expenses of the attorney who took a deposition of a witness out-of-state by order of the Commissioner were part of the cost of taking the deposition under this section, and should have been so taxed by the full commission. Cloutier v. State, — N.C. App. —, 291 S.E.2d 362 (1982).

§ 97-83. In event of disagreement, Commission is to make award after hearing.

CASE NOTES

Quoted in Samuel v. Claude Puckett/Lincoln Used Cars, — N.C. App. —, 285 S.E.2d 876 (1982).

§ 97-84. Determination of disputes by Commission or deputy.

CASE NOTES

Exclusive Jurisdiction of Commission. — Industrial Commission has exclusive original jurisdiction of the rights and remedies afforded by this chapter. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

Function of the Commission necessarily includes determining paternity of an illegitimate child when such a determination is necessary to resolve a dispute as to who is entitled to the compensation due under this Chapter. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

§ 97-85. Review of award.

CASE NOTES

Applied in Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981).

Quoted in Hyatt v. Waverly Mills, — N.C. App. —, 286 S.E.2d 837 (1982).

Stated in Harrell v. J.P. Stevens & Co., 54 N.C. App. 582, 284 S.E.2d 343 (1981).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

CASE NOTES

Scope of Review. —

In accord with 12th paragraph in original. See Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981); Rutledge v. Tultex Corp., — N.C. App. —, 289 S.E.2d 72 (1982).

Matters to Be Considered on Appeal. —

This section, in effect, requires appellate courts to limit their review of workers' compensation awards for legal errors to a two-fold determination of whether the Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings. Buck v. Procter & Gamble Mfg. Co., 52 N.C. App. 88, 278 S.E.2d 268 (1981).

Scope of review of workers' compensation awards made by the Industrial Commission is limited (1) to a determination of whether the Commission's findings of fact are supported by any competent evidence, and (2) to a determination of whether the Commission's findings of fact support its conclusions of law. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981).

Appellate court's review in a workers' compensation proceeding is simply to determine whether the Industrial Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Commission Sole Judge, etc. —

In accord with original. See McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981); Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981).

By authority of this section the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it. Its findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. Mayo v. City of Washington, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

It is not for a reviewing court to weigh the evidence before the Industrial Commission in a workers' compensation case. Mayo v. City of Washington, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

It is not the function of any appellate court to retry the facts found by the Commission or weigh the evidence received by it and decide anew the issue of compensability of an employee's claim. Buck v. Procter & Gamble Mfg. Co., 52 N.C. App. 88, 278 S.E.2d 268 (1981).

Authority to Find Facts, etc. —

The Commission is the sole fact-finding agency in cases in which it has jurisdiction. Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981).

The findings of fact of the Industrial Commission, etc. —

In accord with 6th paragraph in original. See McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981).

In accord with 23rd paragraph in original. See Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981).

If the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary. Mayo v. City of Washington, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

Under this section, the Industrial Commission is the fact-finding body and the findings of fact made by the Commission are conclusive on appeal, both before the Court of Appeals and in the Supreme Court, if supported by competent evidence; this is so even though there is evidence which would support a finding to the contrary. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Industrial Commission's findings of fact are binding on a reviewing court if supported by competent evidence, and may be set aside on appeal only when there is a complete lack of competent evidence to support them. Carrington v. Housing Auth., 54 N.C. App. 158, 282 S.E.2d 541 (1981).

Mere recitals of medical opinion are not sufficiently specific to enable a reviewing court to judge the propriety of the Commission's order, and therefore cannot properly form the basis for the conclusion of law as to compensation. Harrell v. J.P. Stevens & Co., 54 N.C. App. 582, 284 S.E.2d 343 (1981).

Dismissal Where Notice of Appeal Untimely. — Defendant's purported appeal from a workers' compensation proceeding must be dismissed where notice of appeal was filed after expiration of the 30-day period provided by this section. Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Dismissal of Appeal as Interlocutory. — Appeal must be dismissed as interlocutory where the Industrial Commission determines only that plaintiff sustained an injury by accident and no final award has been entered. Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Quoted in Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56 (1981).

Cited in Church v. G.G. Parsons Trucking Co., — N.C. —, 288 S.E.2d 803 (1981); Bingham v. Smith's Transf. Corp., — N.C. App. —, 286 S.E.2d 570 (1982); Ward v. Beaunit Corp., — N.C. App. —, 287 S.E.2d 464 (1982); In re Vandiford, — N.C. App. —, 287 S.E.2d 912 (1982).

§ 97-86.1. Payment of award pending appeal in certain cases.

CASE NOTES

Stated in Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

§ 97-88.1. Attorney's fees at original hearing.

CASE NOTES

The General Assembly did not intend to deter an employer with legitimate doubt regarding the employee's credibility, based on substantial evidence of conduct by the employee inconsistent with his alleged claim, from compelling the employee to sustain his burden of proof. Sparks v. Mountain Breeze Restaurant & Fish House, Inc., — N.C. App. —, 286 S.E.2d 575 (1982).

Purpose. — The evident purpose of this section is to deter stubborn, unfounded litigiousness, which is inharmonious with the primary consideration of the Workers' Compensation Act, compensation for injured employees. Sparks v. Mountain Breeze Restaurant & Fish House, Inc., — N.C. App. —, 286 S.E.2d 575 (1982).

Test. — The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness. Sparks v. Mountain Breeze Restaurant & Fish House, Inc., — N.C. App. —, 286 S.E.2d 575 (1982).

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

CASE NOTES

Applied in Cloutier v. State, — N.C. App. —, 291 S.E.2d 362 (1982).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.

CASE NOTES

Cited in Poythress v. J.P. Stevens & Co., 54 N.C. App. 376, 283 S.E.2d 573 (1981).

§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.

CASE NOTES

Cited in Graves v. ABC Roofing Co., — N.C. App. —, 284 S.E.2d 718 (1981).

Chapter 99A.

Civil Remedies for Criminal Actions.

§ 99A-1. Recovery of damages for interference with property rights.

CASE NOTES

Owner May Collect, etc. —
This section created a right of action in the owner, his agent or a bailee of stolen property for recovery of damages from one who is criminally guilty of receiving stolen property. Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

Deletion of Attorney's Name from Appointment Lists. — Plaintiff attorney's allegations that defendant members of a county bar association committee had deleted plaintiff's name from indigent defendant appointment lists and that the district bar had not adopted a plan authorizing defendants to formulate rules for appointment of counsel failed to state a claim for damages based on a denial of due process or trespass against plaintiff's property rights under this section. Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

Chapter 99B.

Products Liability.

§ 99B-2. Liability of seller and manufacturer.

CASE NOTES

In action to recover for death of farm worker who died after drinking pesticide, trial court properly entered summary judgment for the seller of the pesticide where plaintiff did not present any specific facts tending to show that the seller knew or should have known that manufacturer's written warnings on the product's label were inadequate, nor did plaintiff demonstrate that seller should have known that purchaser would not appreciate the possible harm involved in using a toxic pesticide which was packaged in a clear plastic container and looked like water. Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510, petition for discretionary review denied, — N.C. —, 285 S.E.2d 838 (1981) (decided under law applicable prior to effective date of this Chapter).

In action to recover for wrongful death of a farm laborer who drank a toxic pesticide, trial court erred in entering summary judgment for the manufacturer of the pesticide where evidence raised questions for the jury as to whether the manufacturer exercised the required degree of due care in its general manufacture and packaging of the pesticide, whether the manufacturer failed to provide adequate warnings on the product's label to notify others of its toxicity, and whether the manufacturer's first aid instructions on the product's label were ambiguous and incomplete. Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510, petition for discretionary review denied, — N.C. —, 285 S.E.2d 838 (1981) (decided under law applicable prior to effective date of this Chapter).

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

Article 1.

Schedule A. Inheritance Tax.

Sec.

105-3. Property exempt.
105-22. Duties of clerks of superior court.
105-23. Information by administrator and executor.

Article 2.

Schedule B. License Taxes.

105-44. [Repealed.]
105-59. [Repealed.]
105-68. [Repealed.]
105-92. [Repealed.]
105-96. [Repealed.]
105-102. [Repealed.]
105-102.2. [Repealed.]

Article 2A.

Schedule B-A. Cigarette Tax.

105-113.18. Reports.

Article 3.

Schedule C. Franchise Tax.

105-122. Franchise or privilege tax on domestic and foreign corporations.

Article 4.

Schedule D. Income Tax.

Division I. Corporation Income Tax.

105-130.4. Allocation and apportionment of income for corporations.
105-130.27A. Credit against corporate income tax for construction of a peat facility.

Division II. Individual Income Tax.

105-141. "Gross income" defined.
105-142. Basis of return of net income.
105-144.2. Sale of principal residence of taxpayer — nonrecognition of gain.
105-147. Deductions.
105-151.6A. Credit against personal income tax for construction of a peat facility.

Article 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

Sec.

105-163.5. Exemptions allowable; certificates.
105-163.9. Refund to employer; application.
105-163.16. Overpayment refunded.

Article 5.

Schedule E. Sales and Use Tax.

Division II. Taxes Levied.

Part 1. Retail Sales Tax.

105-164.4. Imposition of tax; retailer.

Article 7.

Schedule H. Intangible Personal Property.

105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.

Article 9.

Schedule J. General Administration; Penalties and Remedies.

105-241.1. Additional taxes; assessment procedure.
105-241.3. Appeal without payment of tax from Tax Review Board decision.
105-250.1. [Repealed.]
105-266. Overpayment of taxes to be refunded with interest.
105-266.1. Refunds of overpayment of taxes.

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

Article 12.

Property Subject to Taxation.

105-275. Property classified and excluded from the tax base.
105-277.1A. Property classified for taxation at reduced valuation; duties of tax collectors; reimbursement of localities for portion of tax lost.

SUBCHAPTER V. GASOLINE TAX.

Article 36.

Gasoline Tax.

105-446.1. (Effective July 1, 1983) Refunds of taxes paid by counties and municipalities.
105-446.6. Refund on taxpaid motor fuel transported to another state.

Article 36A.
Special Fuels Tax.

Sec.
105-449.31. Refund on taxpaid fuel transported to another state.

Article 36B.
Tax on Carriers Using Fuel Purchased outside State.

105-449.43. Taxes and fees to be paid to Highway Fund.

Sec.
105-449.45. Reports of carriers.
105-449.49. Temporary permits.

SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of Subchapter.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

ARTICLE 1.

Schedule A. Inheritance Tax.

§ 105-2. General provisions.

CASE NOTES

The purpose of the inheritance tax laws is to raise revenues for the operation of the State government by imposing a tax on the transfer of property when the transfer occurs by reason of death. In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

No Assessment on Basis of Settlement or Compromise Agreements. — Subdivision (1) makes no provision for assessment of inheritance taxes on the basis of settlement or compromise agreements. Greene v. Lynch, 51 N.C. App. 665, 277 S.E.2d 454 (1981).

§ 105-3. Property exempt.

The following property shall be exempt from taxation under this Article:

(5) The value of an annuity or other payment receivable by any beneficiary (other than the executor) under (a) an employees' trust (or under a contract or insurance policy purchased by an employees' trust) forming part of a pension, stock bonus, or profit-sharing plan, which at the time of the decedent's separation from employment (whether by death or otherwise), or at the time of termination of the plan if earlier, met the requirements of section 401(a) of the United States Internal Revenue Code; or (b) a retirement annuity contract purchased by an employer (and not by an employees' trust) pursuant to a plan, which at the time of decedent's separation from employment (by death or otherwise), or at the time of termination of the plan if earlier, met the requirements of section 403(a) or 403(b) of such Code. If such amounts payable after the death of the decedent under a plan described in clause (a) or (b) are attributable to any extent to payments or contributions made by the decedent, no exemption shall be allowed for

that part of the value of such amounts in the proportion that the total payments or contributions made by the decedent bears to the total payments or contributions made. For purposes of the preceding sentence contributions or payments made by the decedent's employer or former employer under a trust or plan described in clause (a) or (b) shall not be considered to be contributed by the decedent. For purposes of this subdivision, contributions or payments on behalf of the decedent while he was an employee within the meaning of section 401(c)(1) of the United States Internal Revenue Code made under a trust or plan described in clause (a) or (b) shall, to the extent allowable as a deduction under section 404 of such Code, be considered to be made by a person other than the decedent and, to the extent not so allowable, shall be considered to be made by the decedent. Provided, that the value of such annuities or other payments receivable described in this subdivision shall not be exempt unless the payments received therefrom are or will be subject to income taxation under Article 4 of this Subchapter, and if such payments are not or will not be subject to income taxation under Article 4 of this Subchapter the value of such annuities or other payments receivable shall be included in the gross value of the estate of the decedent and taxable under the provisions of this Article.

(8) The value of an annuity receivable by any beneficiary, other than the estate, under a federal employee retirement program to which the employee made contributions during his working years. (1939, c. 158, s. 2; 1943, c. 400, s. 1; 1947, c. 501, s. 1; 1951, c. 643, s. 1; 1959, c. 1247; 1973, c. 476, s. 193; 1975, c. 534, s. 1; c. 535; 1977, c. 900, ss. 2, 3; c. 1025; 1979, c. 801, ss. 17-19; 1981 (Reg. Sess., 1982), cc. 1218, 1220.)

Effect of Amendments. — The first 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on or after that date, added subdivision (8).

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on and after that date, deleted "(other than a lump sum distribution described in section 402(e)(4) of the United States Internal Revenue Code, determined without regard to the next to the last sentence of section 402(e)(4)(A) of such Code)" following "or other payment" near the beginning of the first sentence of subdivision (5).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (5) and (8) are set out.

§ 105-4. Rate of tax — Class A.

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

§ 105-5. Rate of tax — Class B.

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

§ 105-6. Rate of tax — Class C.

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

§ 105-9. Deductions.

Legal Periodicals. — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

CASE NOTES

Life Insurance Proceeds Held Deductible Decedent's Debt. — Where a separation agreement required the decedent to maintain in full force and effect a life insurance trust in the amount of at least $150,000 for the benefit of decedent's former wife and their children and to make timely payment of all premiums due on the policies placed in said trust, and all premiums due on the policies had been paid at the time of decedent's death, the decedent's "debt" under the agreement was not the amount of money required to maintain the policies but was the $150,000 in life insurance proceeds required to fund the trust. Furthermore, the obligation to fund the trust was supported by consideration and was a valid contractual debt where the separation and trust agreements showed an intention by decedent to extend his obligation to provide alimony and child support beyond the time of his death in exchange for his former wife's relinquishment of her marital claims and all other claims against decedent. Therefore, the life insurance proceeds were a "debt of decedent" deductible from decedent's estate for inheritance tax purposes pursuant to subdivision (4) of this section. In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

§ 105-22. Duties of clerks of superior court.

It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, distributees, devisees, etc., as far as practical, the approximate value and character of the property or estate, both real and personal, the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and forward the same to the Secretary of Revenue on or before the tenth day of each month. The clerk shall make no report of a death where (i) the estate of a decedent is less than seventy-five thousand dollars ($75,000) in gross value, including the value of transfers over which the decedent retained any interest as described in G.S. 105-2(3), as well as the value of any gifts made within three years prior to the date of death of the decedent, as also required by G.S. 105-2(3), and (ii) all the beneficiaries belong to the class (A) as defined in G.S. 105-4(a). Any clerk of the superior court who shall fail, neglect, or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars ($100.00) to be recovered by the Secretary of Revenue in an action to be brought by the Secretary of Revenue. (1939, c. 158, s. 20; 1943, c. 400, s. 1; 1953, c. 1302, s. 1; 1973, c. 108, s. 49; c. 476, s. 193; c. 1287, s. 2; 1979, c. 801, s. 23; 1981 (Reg. Sess., 1982), c. 1221, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on or after that date, substituted "seventy-five thousand dollars ($75,000)" for "twenty thousand dollars ($20,000)" in the second sentence.

§ 105-23. Information by administrator and executor.

Every administrator shall prepare a statement showing as far as can be ascertained the names of all the heirs-at-law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the post-office address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the State, and of all personal property, wherever situate, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath or affirmation of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. The statement herein provided for shall be filed with the Secretary of Revenue at Raleigh, North Carolina, within nine months after the qualification of the executor or administrator, upon blank forms to be prepared by the Secretary of Revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars ($500.00), to be recovered by the Secretary of Revenue in an action to be brought by the Secretary of Revenue to collect such sum in the Superior Court of Wake County against such administrator or executor. The Secretary of Revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the Secretary of Revenue, based on the inventory supported by oath or affirmation provided in this section. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this State holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this Article, shall fail to file the statement herein required, within the times herein required, the Secretary of Revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided.

Notwithstanding any other provision of this section, no executor, administrator or other personal representative shall be required to file a return hereunder when (i) an estate shall have a gross value of less than seventy-five thousand dollars ($75,000), including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(3), as well as any property transferred within three years prior to the date of the decedent's death, and (ii) all of the beneficiaries belong to the class (A) as defined in G.S. 105-4(a). (1939, c. 158, s. 21; 1947, c. 501, s. 1; 1951, c. 643, s. 1; 1971, c. 1054, s. 4; 1973, c. 476, s. 193; 1979, c. 801, s. 24; 1981 (Reg. Sess., 1982), c. 1221, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on or after that date, substituted "seventy-five thousand dollars ($75,000)" for "twenty thousand dollars ($20,000)" near the middle of the second paragraph.

ARTICLE 2.

Schedule B. License Taxes.

§ 105-44: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1228, effective July 1, 1983.

Cross References. — For this section as in effect until July 1, 1983, see the bound volume.

§ 105-59: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1282, s. 44, effective April 1, 1983.

Cross References. — For this section as in effect until April 1, 1983, see the bound volume.

§ 105-68: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1229, effective July 1, 1983.

Cross References. — For this section as in effect until July 1, 1983, see the bound volume.

§ 105-92: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1227, effective July 1, 1983.

Cross References. — For this section as in effect until July 1, 1983, see the bound volume.

§ 105-96: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1231, effective July 1, 1983.

Cross References. — For this section as in effect until July 1, 1983, see the bound volume.

§ 105-102: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1230, effective July 1, 1983.

Cross References. — For this section as in effect until July 1, 1983, see the bound volume.

§ 105-102.2: Repealed by Session Laws 1981, (Regular Session, 1982), c. 1213, effective July 1, 1983.

Cross References. — For this section as in effect until July 1, 1983, see the bound volume.

ARTICLE 2A.

Schedule B-A. Cigarette Tax.

§ 105-113.18. Reports.

The following reports are required to be filed with the Secretary:

(4) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1209, s. 1. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1209, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment repealed subdivision (4), relating to reports to be filed by distributors of coin-operated machines under § 105-250.1 (also repealed by the amendatory act).

Only Part of Section Set Out. — As subdivisions (1), (2), and (3) were not changed by the amendment, they are not set out.

§ 105-113.32. Unstamped cigarettes subject to confiscation.

Editor's Note. — In this section as it appears in the replacement volume, the reference to § 195-113.31 should be to § 105-113.31.

ARTICLE 2C.

Schedule B-C. Alcoholic Beverages Tax.

§ 105-113.86. Additional tax.

Cross References. — As to withholding of tax owed under this section to county failing to pay full share of public assistance cost, see § 108A-93.

ARTICLE 3.

Schedule C. Franchise Tax.

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1211, s. 5. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2½; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2; 1973, c. 476, s. 193; c. 695, s. 17; c. 1262, s. 23; c. 1287, s. 3; 1975, c. 764, s. 2; 1977, c. 771, s. 4; 1981, c. 704, s. 18; c. 855, s. 3; 1981 (Reg. Sess., 1982), c. 1211, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted subsection (h), relating to taxes levied and returns due in the year 1968.

Only Part of Section Set Out. — As subsections (a) through (g) were not changed by the amendment, they are not set out.

ARTICLE 4.

Schedule D. Income Tax.

DIVISION I. CORPORATION INCOME TAX.

§ 105-130.4. Allocation and apportionment of income for corporations.

(b) A corporation having income from business activity which is taxable both within and without this State shall allocate and apportion its net income or net loss as provided in this section. For purposes of allocation and apportionment, a corporation is taxable in another state if (i) the corporation's business activity in that state subjects it to a net income tax or a tax measured by net income, or (ii) that state has jurisdiction based on the corporation's business activity in that state to subject the corporation to a tax measured by net income regardless whether that state exercises its jurisdiction. For purposes of this section, "business activity" includes any activity by a corporation that would establish a taxable nexus pursuant to 15 United States Code section 381.

(1981 (Reg. Sess., 1982), c. 1212.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote the second sentence and added the third sentence in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 105-130.27A. Credit against corporate income tax for construction of a peat facility.

(a) Any corporation which constructs in North Carolina a facility which uses peat as the feedstock for the production of a commercially manufactured energy source to replace petroleum, natural gas or other nonrenewable energy sources shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction; provided, that the credit shall not be allowed to the extent that any of the cost of the system was provided by federal, State, or local grants. In order to secure the credit allowed by this section, the taxpayer must own or control such facility at the time of construction, and the credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer.

(b) The amount of unused credit allowed under this section may be carried over for the next succeeding five years. (1981 (Reg. Sess., 1982), c. 1204, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1204, s. 3, provides: "This act shall become effective with respect to taxable years beginning on and after January 1, 1982."

DIVISION II. INDIVIDUAL INCOME TAX.

§ 105-141. "Gross income" defined.

(b) The words "gross income" do not include the following items, which shall be exempt from taxation under this Division, but shall be reported in such form and manner as may be prescribed by the Secretary of Revenue:

(1) The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured.

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.

(3) The value of property acquired by gift, bequest, devise or descent except as provided in G.S. 105-142.1 (but the income from such property shall be included in gross income).

(4) Interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina: Provided, interest upon the obligations of the United States shall not be excluded from gross income unless interest upon obligations of the State of North Carolina or any of its political subdivisions is excluded from income taxes imposed by the United States.

(5) Any amounts received as compensation for personal injuries or sickness (i) through accident or health insurance, (ii) through health or accident plans financed by profit-sharing trusts or pension trusts, (iii) under workmen's compensation acts or similar acts (which have been judicially declared to provide benefits in the nature of workmen's compensation benefits, by whatever name called), and (iv) for damages (whether by suit or agreement); and any amounts received through self-funded reimbursement plans adopted by an employer for the benefit of his employees, reimbursing them for expenses incurred for their medical care or for the medical care of their spouses or their dependents; provided, that any amounts received from sources mentioned in this subdivision as reimbursement for medical care expenses incurred and claimed as a deduction in a prior year or in prior years shall be excluded only to the extent that such amounts exceed the deduction claimed under subdivision (11) of G.S. 105-147, except that nothing in this subdivision shall be construed as preventing a taxpayer from filing an amended return for a taxable year in which a medical deduction was claimed and allowed for the purpose of reducing the amount of the medical expense deduction claimed in such year by any reimbursement for such medical expenses received in a later year when a change in the prior year is not barred by the provisions of this Division.

(6) The rental value of a home and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation, or the rental allowance paid to him as a part of his compensation to the extent used by him to rent or provide a home including the appurtenances thereof; also the rental value of any homes and quarters and the appurtenances thereof furnished the officers and employees of orphanages whose duties require them to live on the premises and in buildings owned by such institutions as a part of their compensation.

(7) The amounts received in lump sum or monthly payments of benefits under the Social Security Act.

(8) The amounts received in lump sum or monthly payment benefits from retirement or pension systems of other states by former teachers or State employees of such states: Provided, this exclusion shall apply only to individuals receiving benefits from states which grant similar exclusions or exemptions for individual income tax purposes to retired members of the North Carolina Retirement System for Teachers and State Employees or which levy no income tax on individuals.

(9) The gross income of an employee shall not include:
a. The value of meals or lodging furnished for the convenience of the employer to the extent that the value of such meals or lodging is excluded from gross income under the provisions of section 119 of the Internal Revenue Code of 1954 as amended; and
b. Amounts expended by his employer for premiums on group life, accident, health, or hospitalization insurance plans for the benefit of the employee.

(10) The amounts received as a scholarship at an educational institution (as defined in G.S. 105-135) or as a fellowship grant, including the value of contributed services and accommodations; and the amounts received to cover expenses for travel, research, clerical help, or equipment which are incident to such scholarship or fellowship grant to the extent that such amounts are exempt for federal income tax purposes under the provisions of section 117 of the Internal Revenue Code of 1954 as amended.

(11) Amounts received by the estate, widow or heirs of an employee paid by or on behalf of one or more employers and paid by reason of death of any one employee to the extent of five thousand dollars ($5,000) with respect to the death of any one employee regardless of the number of employers making such payments, except that such exclusion shall not apply to amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living, except that even though an employee possessed a nonforfeitable right immediately before his death to receive the amounts while living, the exclusion provided in this subdivision will still apply in those cases in which the total distributions are payable within one taxable year of the distributee to such a distributee by a pension, profit-sharing, stock bonus or annuity trust qualifying under the provisions of subsection (f)(1)a of G.S. 105-161, or plan qualifying under the provisions of section 401(a) of the Internal Revenue Code of 1954 as amended.

(12) Compensation received for active service as a member of the armed forces of the United States below the grade of commissioned officers; and so much of the compensation of a commissioned officer in such armed forces as does not exceed five hundred dollars ($500.00), for any month during any part of which such member served in a combat zone, or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone, except that this subdivision shall not apply with respect to compensation received while such member was hospitalized for any month beginning more than two years after the date of the termination of combatant activities in such zone. With respect to service in the combat zone designated for purposes of the Vietnam conflict, this subdivision shall not apply with respect to compensation received while such member was hospitalized for any month beginning after January 2, 1977. For the purposes of this subdivision, the term "commissioned officer" does not include a warrant officer; the term "combat zone" means an area which the President of the United States by executive order designates as an area in which armed forces of the United States are or have been engaged in combat; service is performed in a combat zone only if performed on or after the date designated by the President by executive order as the date of the commencing of combatant activities in such zone; and the term "compensation" does not include pension and retirement pay.

(13) The amounts received in lump sum or monthly payments of benefits from retirement and pension funds established for firemen or law-enforcement officers by or under the control of cities or counties

located in North Carolina; provided, that such amounts shall be exempt from income tax only if they would have been exempt under the provisions of either G.S. 143-166 (relating to the Law-Enforcement Officers' Benefit and Retirement Fund) or G.S. 128-31 (relating to North Carolina Local Governmental Employees' Retirement Fund) if such cities or counties had elected to provide such benefits for firemen or law-enforcement officers under the provisions of such laws.

(14) Any amount not to exceed three thousand dollars ($3,000) received during any year under a federal employee retirement program to which the employee made contributions during his working years.

(15) Amounts received by members of the armed forces as hostile-fire duty pay which is authorized by Public Law 88-132 enacted by the Congress of the United States on October 2, 1963.

(16) All disability pay received from the United States government by reason of service in either the army, navy, marine corps, nurses' corps, air corps, air force, or any of the armed services of the United States.

(17) a. A portion of amounts contributed for the purchase of an annuity contract for an employee by an employer described in section 501(c)(3) of the federal Internal Revenue Code which is exempt from federal income tax under section 501(a) of such Code, or for an employee who performs services for an educational institution (as defined in G.S. 105-135(3)) by an employer which is a state, a political subdivision of a state, or an agency or instrumentality of any one or more of the foregoing, if such annuity contract is not purchased under a plan which meets the requirements of G.S. 105-161(f)(1)a, and if the employee's rights under the annuity contract are nonforfeitable except for failure to pay future premiums. However, such portion of amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year only to the extent that the aggregate of such amounts does not exceed the exclusion allowance (as herein defined) for such taxable year. In addition, the employee shall include in his gross income the amounts received under such annuity contract for the year received as provided in G.S. 105-141.1 (relating to annuities).

b. For purposes of this subdivision, the "exclusion allowance" for an employee for the taxable year is an amount equal to the excess, if any, of (i) the amount determined by multiplying twenty percent (20%) of his includible compensation (as herein defined) by the number of years of service, over (ii) the aggregate of the amounts contributed by the employer for annuity contracts and excludible from gross income of the employee for any prior taxable year; provided, however, that in the case of an employee who makes an election under section 415(c)(4)(D) of the Internal Revenue Code of 1954 as amended to have the provisions of section 415 apply, the exclusion allowance of the employee shall be computed under the provisions of section 415 of the Internal Revenue Code of 1954 as amended.

For purposes of this subdivision, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received from the employer described in the first paragraph of this subdivision, and which is includible in gross income for the most recent period (ending not later than the close of the taxable year) which under the following paragraph may be counted as one year of service. Such term does not include any amount contributed by the employer for any annuity contract to which this subdivision applies.

In determining the number of years of service for purposes of this subdivision there shall be included (i) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and (ii) a fraction of a year (determined as the Secretary of Revenue may prescribe) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization. In no case shall the number of years of service be less than one.

If for any taxable year of the employee this subdivision applies to two or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

For purposes of this subdivision and G.S. 105-141.1(e) (relating to specific rules for computing employees' contributions to annuity contract), if rights of the employee under an annuity contract described in the first paragraph of this subdivision change from forfeitable to nonforfeitable rights, then the amount (determined without regard to this subsection) includible in gross income by reason of such change shall be treated as an amount contributed by the employer for such annuity contract as of the time such rights become nonforfeitable.

c. For purposes of this Division, amounts paid by an employer described in paragraph a of this subdivision to a custodial account which satisfies the requirements of section 401(f)(2) of the Internal Revenue Code of 1954 as amended shall be treated as amounts contributed by him for an annuity contract for his employee if the amounts are paid to provide a retirement benefit for that employee and are to be invested in regulated investment company stocks to be held in that custodial account. For purposes of this Division, a custodial account which satisfies the requirements of section 401(f)(2) of the Internal Revenue Code of 1954 as amended shall be treated in the same manner as an exempt trust qualifying under the provisions of G.S. 105-161(f)(1)a solely for purposes of taxing the income earned or received by such account.

d. An amount distributed from an annuity contract described in this subdivision or a custodial account described in this subdivision which qualifies for rollover treatment as provided in the Internal Revenue Code of 1954 as amended, shall likewise qualify for rollover hereunder and shall be excluded from gross income to the extent such amount is excluded from gross income as provided in the Internal Revenue Code of 1954 as amended unless such exclusion is contrary to the context and intent of State law.

(18) Any amount not to exceed three thousand dollars ($3,000) received by a taxpayer during any year as retired or retainer pay as a result of service in any of the armed forces of the United States.

(19) Amounts earned during the income year by a pension, profit-sharing, stock bonus, or annuity plan established by an employer for the benefit of his employees or for himself and his employees, provided that such plan shall have been determined by the Internal Revenue Service to be a qualified plan for federal income tax purposes under the provisions of section 401(a) of the Internal Revenue Code of 1954 as amended; and amounts earned during the income year by an individual retirement account described in section 408(a) of the Internal Revenue Code of 1954 as amended, or an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 as amended, provided that such individual retirement account or individual retirement annuity is exempt from federal income taxation

under section 408(e) of the Internal Revenue Code of 1954 as amended.

(20) The amount of any reduction after December 31, 1973, in the retired or retainer pay of a member or former member of the uniformed services of the United States who has made an election under Chapter 73 of Title 10 of the United States Code to receive a reduced amount of retired or retainer pay.

In the case of any individual referred to in the preceding paragraph, all amounts received after December 31, 1973, as retired or retainer pay shall be excluded from gross income until there has been so excluded an amount equal to the consideration for the contract. The preceding sentence shall apply only to the extent that the amounts received would, but for such sentence, be includible in gross income.

For the purpose of this subdivision and subsection (i) of G.S. 105-141.1, the term "consideration for the contract" means, in respect of any individual, the sum of: (i) the total amount of the reductions before January 1, 1974, in his retired or retainer pay by reason of an election under Chapter 73 of Title 10 of the United States Code, and, (ii) any amounts deposited at any time by him pursuant to section 1438 of such Title 10.

(21) No amount shall be included in gross income by reason of the discharge of all or part of the indebtedness of an individual under a student loan if such discharge was pursuant to a provision of such loan under which all or part of the indebtedness of an individual would be discharged if the individual worked for a certain period of time in certain geographical areas or for certain classes of employers.

For the purposes of this subdivision, the term "student loan" has the same meaning as found in section 2117(b) of the Internal Revenue Code of 1954 as amended.

(22) In the case of a North Carolina resident any amounts excludable from gross income as income earned by individuals living abroad under the provisions of section 911 of the Internal Revenue Code of 1954 as amended and as exemptions for certain allowances received by civilian officers or employees of the government of the United States under the provisions of section 912 of the Internal Revenue Code of 1954 as amended.

(23) Educational expenses incurred by the employer for educational assistance to the employee to the extent excluded from federal gross income under the provisions of section 127 of the Internal Revenue Code of 1954 as amended. No deduction or credit shall be allowed under any other section of this Division for any amount excluded from income by reason of this section.

(24) In the case of an individual whose principal residence is damaged or destroyed by fire, storm, or other casualty, or who is denied access to his principal residence by governmental authorities because of the occurrence or threat of occurrence of such a casualty, gross income does not include amounts received by such individual under an insurance contract which are paid to compensate or reimburse such individual for living expenses incurred for himself and members of his household resulting from the loss of use or occupancy of such residence. The exclusion provided in this subdivision shall apply to amounts received by the taxpayer for living expenses incurred during any period only to the extent the amounts received do not exceed the amounts by which:

a. The actual living expenses incurred during such period for himself and members of his household resulting from the loss of use or occupancy of their residence, exceeds

b. The normal living expenses which would have been incurred for himself and members of his household during such period.

(25) Any amount, not exceeding one thousand five hundred dollars ($1,500), paid to an individual as compensation for the performance of duties as a member of the North Carolina organized militia, the national guard as defined in G.S. 127A-3.

(26) a. General Rule. — At the election of the taxpayer, gross income does not include gain from the sale or exchange of property if with respect to a sale or exchange of a residence on or after July 27, 1978,

1. The taxpayer has attained the age of 55 before the date of such sale or exchange, and
2. During the five-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as his principal residence for periods aggregating three years or more.

b. Limitation. —

1. The amount of the gain excluded from gross income under sub-subdivision a shall not exceed one hundred twenty-five thousand dollars ($125,000) (not to exceed sixty-two thousand five hundred dollars ($62,500) to each spouse with respect to property held by a husband and wife as tenants by the entirety or held as joint tenants with right of survivorship).
2. Sub-subdivision a shall not apply to any sale or exchange by the taxpayer if an election by the taxpayer or his spouse under sub-subdivision a with respect to any other sale or exchange is in effect.

c. Election. — An election under sub-subdivision a may be made or revoked at any time before the expiration of the period for making a claim for credit or refund of the tax imposed by this Article for the taxable year in which the sale or exchange occurred, and shall be made or revoked in such manner as the Secretary of Revenue shall prescribe. In the case of a taxpayer who is married, an election under sub-subdivision a or a revocation thereof may be made only if his spouse joins in such election or revocation.

d. Special Rules. —

1. For purposes of this subdivision, if
   I. Property is held by a husband and wife as tenants by the entirety or held as joint tenants with right of survivorship,
   II. Such husband and wife make a joint return under section 6013 of the Internal Revenue Code for the taxable year of the sale or exchange, and
   III. One spouse satisfies the age, holding, and use requirements of sub-subdivision a with respect to such property, then both husband and wife shall be treated as satisfying the age, holding, and use requirements of sub-subdivision a with respect to such property.
2. For purposes of this subdivision, if property is held by a husband and wife as tenants by the entirety or held as joint tenants with right of survivorship, they shall be treated as one person for purpose of determining a gain under this subdivision. After such gain has been determined, one half the gain shall be attributed as income to each spouse. In order to enjoy the benefits of the election with respect to entirety property or property held as joint tenants with right of

survivorship, the husband and wife shall file a combined return.

3. For purposes of this subdivision, in the case of an unmarried individual whose spouse is deceased on the date of the sale or exchange of property, if
   I. The deceased spouse (during the five-year period ending on the date of the sale or exchange) satisfied the holding and use requirements of sub-subdivision a 2 with respect to the property, and
   II. No election by the deceased spouse under sub-subdivision a is in effect with respect to a prior sale or exchange, then such individual shall be treated as satisfying the holding and use requirements of sub-subdivision a with respect to the property.
4. For purposes of this subdivision, if the taxpayer holds stock as a tenant-stockholder (as defined in section 216 of the Internal Revenue Code) in a cooperative corporation (as defined in that section), then
   I. The holding requirements of sub-subdivision a shall be applied to the holding of the stock, and
   II. The use requirements of sub-subdivision a shall be applied to the house or apartment which the taxpayer was entitled to occupy as such stockholder.
5. For purposes of this subdivision, the destruction, theft, seizure, requisition, or condemnation of property shall be treated as the sale of the property.
6. In the case of property only a portion of which, during the five-year period ending on the date of the sale or exchange, has been owned and used by the taxpayer as his principal residence for periods aggregating three years or more, this subdivision shall apply with respect to so much of the gain from the sale or exchange of such property as is determined, under regulations prescribed by the Secretary of Revenue, to be attributable to the portion of the property so owned and used by the taxpayer.
7. In the case of any sale or exchange, for purposes of this subdivision:
   I. The determination of whether an individual is married shall be made as of the date of the sale or exchange, and
   II. An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.
8. In applying G.S. 105-144.1 (relating to involuntary conversions) and 105-144.2 (relating to sale or exchange of residence), the amount realized from the sale or exchange of property shall be treated as being the amount determined without regard to this subdivision, reduced by the amount of gain not included in gross income pursuant to an election under this subdivision.
9. If the basis of property sold or exchanged is determined (in whole or in part) under subsection (b) of G.S. 105-144.1 (relating to the basis of property acquired through involuntary conversion), then the holding and use by the taxpayer of the converted property shall be treated as holding and use by the taxpayer of the property sold or exchanged.

(27) The portion of payments received from governmental programs listed under section 126 of the Internal Revenue Code which are excludable

from gross income for federal income tax purposes. No deduction or credit allowable under any other provision of this Division shall be allowed for any expenditure made with the use of such payments or for any property acquired with such payments (to the extent that the basis is allocable to the use of such payments). No adjustment to basis shall be made for property acquired through the use of such payments, to the extent that such adjustment would reflect the amount of such payment.

(28) Interest received, not to exceed two hundred dollars ($200.00), from savings deposits or certificates evidencing savings deposits in banks, credit unions, and savings and loan associations located within the State of North Carolina.

(29) Money and other benefits, other than salary or wages, received by a driver or passenger while in a ridesharing arrangement as defined by G.S. 136-44.21. (1939, c. 158, s. 317; 1941, c. 50, s. 5; c. 283; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1951, c. 643, s. 4; 1957, c. 1224; c. 1340, s. 4; 1961, c. 893; 1963, c. 1169, s. 2; 1965, c. 833; c. 1003, s. 1; 1967, c. 716, s. 1; cc. 871, 1025; c. 1110, s. 3; cc. 1151, 1221; 1969, cc. 178, 1272; 1971, cc. 792, 996; 1973, c. 287; c. 476, s. 193; c. 1287, s. 5; 1975, c. 275, s. 4; c. 559, ss. 3, 4, 6; 1977, c. 657, s. 5; c. 900, ss. 4, 6; 1977, 2nd Sess., c. 1200, s. 2; c. 1221; 1979, c. 179, s. 2; c. 801, ss. 37-39; 1979, 2nd Sess., c. 1109; c. 1301, s. 1; 1981, c. 606, s. 4; 1981 (Reg. Sess., 1982), c. 1205, s. 1; c. 1217.)

Cross References. — As to income from property held in tenancy by the entirety, see § 39-13.6.

Effect of Amendments. —

The first 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on and after Jan. 1, 1982, substituted "living abroad" for "in certain camps" near the beginning of subdivision (22) of subsection (b).

The second 1981 (Reg. Sess., 1982) amendment, applicable to residences sold or exchanged after July 20, 1981, substituted "one hundred twenty-five thousand dollars ($125,000)" for "one hundred thousand dollars ($100,000)" and "sixty-two thousand five hundred dollars ($62,500)" for "fifty thousand dollars ($50,000)" in subdivision (26)b1 of subsection (b).

Only Part of Section Set Out. — As subsection (a) was not changed by the amendments, it is not set out.

§ 105-142. Basis of return of net income.

(d) The amount actually distributed to any employee or the beneficiary of an employee by an employees' trust, which qualifies under subsection (f)(1)a of G.S. 105-161 as an exempt organization, or qualified plan which meets the requirements of section 401(a) of the Internal Revenue Code of 1954 as amended shall be taxable to the employee or his beneficiary in the year in which distributed except to the extent such distribution is a rollover amount which is not includable in federal gross income under section 402(a) of the Internal Revenue Code of 1954 as amended; provided, that if such employee has made contributions to such trust or such qualified plan, and the benefits are received as periodic payments, the amounts annually received shall be taxed as an annuity as provided in G.S. 105-141.1. The amount actually received by the employee or his beneficiary which consists of corporate shares or other securities shall be taken into account in determining the amount distributed at their fair market value, except that the net unrealized appreciation in the corporation shares or other securities of the employer corporation shall not be included in determining such amount distributed for purposes of this subsection.

The amount paid or distributed out of an individual retirement account described in section 408(a) of the Internal Revenue Code of 1954 as amended,

or individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 as amended, shall be includable in the gross income of the payee or distributee to the extent such amounts are includable in the payee's or distributee's gross income for federal income tax purposes.

Subject to the provisions of G.S. 105-141(b)(4) the amount received from a retirement bond described in section 409 of the Internal Revenue Code of 1954 as amended, shall be included in the gross income of the payee or distributee to the extent such amounts are includable in the payee's or distributee's gross income for federal income tax purposes.

In the case of a pension, profit-sharing, or stock bonus plan or trust established by an employer for the benefit of his employees which does not meet the requirements of G.S. 105-161(f)(1)a or section 401(a) of the Internal Revenue Code of 1954 as amended, any contributions to such plan or trust made by an employer during a taxable year shall be reportable as income in such taxable year by employees in whose names such contributions are credited only to the extent that such employees shall have acquired a nonforfeitable right to such contributions in such taxable year.

(1981 (Reg. Sess., 1982), c. 1222, ss. 1-3.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on and after Jan. 1, 1982, deleted "or made available" following "distributed" near the beginning and again near the middle of the first sentence of the first paragraph of subsection (d), deleted "in the year in which distributed or made available" immediately preceding the proviso in the first sentence of the first paragraph of subsection (d), substituted "by" for "or made available to" near the beginning of the second sentence in subsection (d) and deleted "or made available" following "distributed" near the middle and again near the end of that sentence and following "amount received" near the beginning of the third paragraph in subsection (d).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 105-144.2. Sale of principal residence of taxpayer — nonrecognition of gain.

(a) If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1956, and, within a period beginning two years before the date of such sale and ending two years after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

(c) Rules for Application of Section. — For the purposes of this section:

(1) An exchange by the taxpayer of his residence for other property shall be treated as a sale of such residence, and the acquisition of a residence on the exchange of property shall be treated as a purchase of such residence.

(2) A residence any part of which was constructed or reconstructed by the taxpayer shall be treated as purchased by the taxpayer. In determining the taxpayer's cost of purchasing a residence, there shall be included only so much of his cost as is attributable to the acquisition, construction, reconstruction, and improvements made which are properly chargeable to capital account, during the period specified in subsection (a).

(3) If a residence is purchased by the taxpayer before the date of his sale of the old residence, the purchased residence shall not be treated as his new residence if sold or otherwise disposed of by him before the date of the sale of the old residence.

(4) If the taxpayer, during the period described in subsection (a), purchases more than one residence which is used by him as his principal residence at some time within two years after the date of the sale of the old residence, only the last of such residences so used by him after the date of such sale shall constitute the new residence. If a principal residence is sold in a sale to which paragraph (2) of subsection (d) applies within two years after the sale of the old residence, for purposes of applying the preceding sentence with respect to the old residence, the principal residence so sold shall be treated as the last residence used during such two-year period.

(5) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1208, s. 3.

(d) Limitation. —

(1) Subsection (a) shall not apply with respect to the sale of the taxpayer's residence if within two years before the date of such sale the taxpayer sold at a gain other property used by him as his principal residence, and any part of such gain was not recognized by reason of subsection (a).

(2) Paragraph (1) of this subsection shall not apply with respect to the sale of the taxpayer's residence if

a. Such sale was in connection with the commencement of work by the taxpayer as an employee or as a self-employed individual at a new principal place of work, and

b. If the residence so sold is treated as the former residence for purposes of Section 217 of the Internal Revenue Code (relating to moving expenses), the taxpayer would satisfy the conditions of subsection (c) of section 217 (as modified by the other subsections of such section).

(h) Members of the Armed Forces. — The running of any period of time specified in subsection (a) or (c) (other than the two years referred to in subsection (c)(4)) shall be suspended during any time that the taxpayer (or his spouse if the old residence and the new residence are each used by the taxpayer and his spouse as their principal residence) serves on extended active duty with the armed forces of the United States after the date of sale of the old residence except that any such period of time as so suspended shall not extend beyond the date four years after the date of sale of the old residence. For purposes of this subsection, the term "extended active duty" means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period.

(i) Individual Whose Tax Home is Outside of United States. — The running of any period of time specified in subsection (a) or (c) of this section (other than the two years referred to in paragraph (4) of subsection (c)) shall be suspended during the time the taxpayer (or his spouse if the old residence and new residence are each used by the taxpayer and his spouse as their principal residence) has a tax home (as defined in section 913 (j)(1)(B) of the Internal Revenue Code) outside of the United States after the date of the sale of the old residence; except that any such period of time as so suspended shall not extend beyond the date four years after the date of the sale of the old residence.

(1981 (Reg. Sess., 1982), c. 1208, ss. 1-3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "two years" for "18 months" in two places in subsection (a), in one place in the first sentence and in one place in the second sentence of subdivision (c)(4), near the beginning of subdivision (d)(1), near the beginning of the first sentence of subsection (h) and near the beginning of subsection (i). The amendment also substituted "two-year period" for "18-month period" at the end of subdivision (c)(4) and deleted subdivision (c)(5), relating to the case of a new residence, the construction of which was commenced by the taxpayer before the expiration of 18 months after the date of the sale of the old residence.

Session Laws 1981 (Reg. Sess., 1982), c. 1208,

s. 4, provides: "This act is effective upon ratification [June 18, 1982] and applies to old residences sold or exchanged (i) after July 20, 1981, or (ii) on or before July 20, 1981, if the rollover period under G.S. 105-144.2 determined without regard to this act expires on or after July 20, 1981."

Only Part of Section Set Out. — Only the subsections changed by the amendment are set out.

§ 105-147. Deductions.

In computing net income there shall be allowed as deductions the following items:

(1) All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:

a. As to individuals, reasonable wages of employees for services rendered in producing such income.

b. As to partnership, reasonable wages of employees and a reasonable allowance for copartners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the copartner receiving same.

c. As to taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of soil and water conservation or prevention of erosion of land to the extent allowable for federal income tax purposes under the provisions of section 175 of the Internal Revenue Code of 1954 as amended.

d. Repealed by Session Laws 1967, c. 1110, s. 3.

e. As to taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of clearing land to make such land suitable for the purpose of farming to the extent allowable under section 182 of the Internal Revenue Code of 1954 as amended.

f. Repealed by Session Laws 1981 (Regular Session, 1982), c. 1205, s. 2.

g. As to taxpayers engaged in the commercial growing of trees, reasonable expenses paid for reforestation and cultivation, including site preparation, natural and artificial forestation, noncommercial removal of residual stands for silvicultural purposes, and cultivation of established young growth of desirable trees. Such expenses may, at the taxpayer's option, be amortized based on a period of 60 months. No deduction shall be allowable under this subdivision for amounts deducted under other provisions of this Division. The deduction provided under this subdivision shall be reduced by amounts received for incentive payments excludable from income under this Division. No adjustment to the basis of property shall be made for expenses deducted under this subdivision. The election under this subdivision for any taxable year shall be made within the time prescribed by law (including extensions thereof) for filing the return for the taxable year. The election shall be made in such manner as the Secretary of Revenue may prescribe, and such election may not be revoked.

(7) Dividends from stock issued by any corporation to the extent herein provided. As soon as may be practicable after the close of each calendar year, the Secretary of Revenue shall determine from each corporate income tax return filed with him during such year, and due from the filing corporation during such year, the proportion of the entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein; if a corpora-

tion has a net taxable income in North Carolina and a net loss from all sources wherever located, or, if a corporation has a net loss in North Carolina and a net income from all sources wherever located, the Secretary shall require the use of the allocation fraction determined under the provisions of G.S. 105-130.4. A taxpayer who is a stockholder in any such corporation shall be allowed to deduct from his gross income the same proportion of the dividends received by him from such corporation during his income year ending at or after the end of such calendar year. Provided that notwithstanding any other provision of this subdivision, a taxpayer who is a stockholder in a holding company as defined in G.S. 105-130.7(5) shall determine the deductible portion of dividend received from such holding company as provided therein. No deduction shall be allowed for any part of any dividend received by such taxpayer from any corporation which filed no income tax return with the Secretary of Revenue during such calendar year. Dividends received by a taxpayer from stock in any insurance company of this State taxed under the provisions of G.S. 105-228.5 shall be deductible from the gross income of such taxpayer, and a proportionate part of any dividends received from stock in any foreign insurance corporation shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this State to total premiums collected both in and out of the State. Dividends received on shares of capital stock owned in a stock-owned savings and loan association taxed under Article 8D of this Chapter shall be deductible. A taxpayer shall be allowed to deduct such proportionate part of dividends received by him from a regulated investment company and real estate investment trust as defined in G.S. 105-130.12 as represents and corresponds to income received by such regulated investment company and real estate investment trust which would not be taxed by this State if received directly by the North Carolina resident. In no case shall the total amount of dividends that are deducted from a taxpayer's gross income as a result of the application of the provisions of this subdivision be in excess of fifteen thousand dollars ($15,000) for the taxable year, except that this limitation shall not apply to dividends received from a corporation for which a valid election to be taxed under Subchapter S of Chapter 1 of the Internal Revenue Code is in effect.

(25a) The purchase price of a hearing-ear dog designated as such by the North Carolina Council for the hearing impaired, actually purchased and used by a person who is hearing impaired as defined in G.S. 8B-1(2), or purchased by a parent or guardian for the use of a hearing impaired child and/or all of the cost of maintenance and upkeep of a hearing-ear dog, including veterinary expenses. The amount claimed under this subdivision shall not be allowed as a deduction under G.S. 105-147(11).

(1981 (Reg. Sess., 1982), c. 1177, s. 2; c. 1205, ss. 2, 3; c. 1211, s. 4.)

Effect of Amendments. —

The first 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on or after Jan. 1, 1982, added subdivision (25a).

The second 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on and after Jan. 1, 1982, repealed subdivision (1)f, which read: "As to a North Carolina resident any amounts deductible as certain expenses of living abroad under the provisions of section 913 of the Internal Revenue Code of 1954 as amended."

The third 1981 (Reg. Sess., 1982) amendment substituted "G.S. 105-130.7(5)" for "G.S. 105-130.7(6)" in the fourth sentence of subdivision (7).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (1), (7) and (25a) are set out.

§ 105-151.6A. Credit against personal income tax for construction of a peat facility.

(a) Any person who constructs in North Carolina a facility which uses peat as the feedstock for the production of a commercially manufactured energy source to replace petroleum, natural gas or other nonrenewable energy sources shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction; provided, that the credit shall not be allowed to the extent that any of the cost of the system was provided by federal, State, or local grants. In order to secure the credit allowed by this section, the taxpayer must own or control such facility at the time of construction, and the credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer.

(b) The amount of unused credit allowed under this section may be carried over for the next succeeding five years. (1981 (Reg. Sess., 1982), c. 1204, s. 2.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1204, s. 3, provides: "This act shall become effective with respect to taxable years beginning on and after January 1, 1982."

ARTICLE 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

§ 105-163.5. Exemptions allowable; certificates.

(f) In addition to any criminal penalty provided by law, if an individual furnishes his employer with an exemption certificate that contains information which has no reasonable basis and that results in a lesser amount of tax being withheld under this Article than would have been withheld if the individual had furnished reasonable information, the individual is subject to a penalty of fifty percent (50%) of the amount not properly withheld. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1277.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, applicable to offenses committed on and after June 22, 1982, added subsection (f).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (f) is set out.

§ 105-163.9. Refund to employer; application.

(a) Where there has been an overpayment to the Secretary by the employer or withholding agent under the provisions of this Article, refund shall be made to the employer or withholding agent, as the case may be, only to the extent that the amount of such overpayment was not deducted and withheld by the employer or withholding agent from the employee's wages, and such refund shall be paid together with interest thereon at the rate established in G.S. 105-241.1(i) for assessments; provided, that interest on any such refund shall be computed from a date 90 days after the date the overpayment was originally made by the employer or withholding agent.

(1981 (Reg. Sess., 1982), c. 1223, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to refunds and assessments made on and after that date, substituted "established in G.S. 105-241.1(i) for assessments" for "of six percent (6%) per annum" preceding the proviso in subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 105-163.16. Overpayment refunded.

(c) Where there has been an overpayment (as specified in subsections (a) and (b) of this section) of any tax imposed under Article 4 of this Chapter, as disclosed by the taxpayer's annual return required to be filed by Article 4, the amount of such overpayment shall be refunded to the taxpayer; except that overpayments of less than one dollar ($1.00) shall be refunded only upon receipt by the Secretary of a written demand for such refund from the taxpayer and except that there shall be no refund to the taxpayer of any sum set-off under the provisions of Chapter 105A, the Set-off Debt Election Act. Every refund authorized by this section shall be made as expeditiously as possible, and within six months from the date on which the annual return is filed or due to be filed, whichever is later, insofar as the same is practicable; except that no refunds for overpayment of estimated tax shall be made by the Secretary prior to the date on which the final return is filed by the taxpayer. No interest shall be paid with respect to any such refund if the refund is made within the six months' period above referred to. Interest computed at the rate established in G.S. 105-241.1(i) for assessments shall be paid on refunds made after the expiration of said six months' period, such interest to be computed from the time of the expiration of said six months' period until paid. It shall not be necessary for the Attorney General or any member of his staff to approve such refund. The making of such refund does not absolve any taxpayer of any income tax liability which may in fact exist and the Secretary may make any assessment for any deficiency in the manner provided in Article 4 of this Chapter. No overpayment of tax by the taxpayer shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the date set by the statute for the filing of the annual return by the taxpayer or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later.

(1981 (Reg. Sess., 1982), c. 1223, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to refunds and assessments made on and after that date, substituted "established in G.S. 105-241.1(i) for assessments" for "of six percent (6%) per annum" in the fourth sentence of subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 5.

Schedule E. Sales and Use Tax.

DIVISION II. TAXES LEVIED.

Part 1. Retail Sales Tax.

§ 105-164.4. Imposition of tax; retailer.

There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

(1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State, the tax to be computed on total net taxable sales as defined herein but for the purpose of computing the amount due the State each and every taxable retail sale, or retail sales upon which the tax has been collected, or the amount of tax actually collected, whichever be greater and whether or not erroneously collected, shall be included in the computation of tax due the State. Provided, however, that in the case of the sale of any aircraft, railway locomotive, railway car or the sale of any motor vehicle or boat, the tax shall be only at the rate of two percent (2%) of the sales price, but at no time shall the maximum tax with respect to any one such aircraft, railway locomotive, railway car or motor vehicle or boat, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of one hundred twenty dollars ($120.00).

The separate sale of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or by different retailers shall be subject only to the tax herein prescribed with respect to a single motor vehicle. No tax shall be imposed upon a body mounted on the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof.

The tax levied under this Division shall not apply to the sale of a motor vehicle by some person, firm or corporation who or which is not engaged in business as a retailer of motor vehicles if the tax levied under this Article has previously been paid with respect to said motor vehicle. Provided, however, persons who lease or rent motor vehicles shall collect and remit the tax provided for in this Article on the separate retail sale of motor vehicles in addition to the tax imposed upon the receipts from the lease or rental of such motor vehicles.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price on the following items:

a. Horses or mules by whomsoever sold.
b. Semen to be used in the artificial insemination of animals.
c. Sales of fuels to farmers to be used by them for any farm purposes other than preparing food, heating dwellings and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.

d. Sales of fuel to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuels to be used for residential heating purposes. The quantity of fuel purchased used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.

e. Sales of fuel to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars ($80.00) per article, on the following items:

g. Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops, and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, which are operated, drawn or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under Chapter 20 of the General Statutes.

The term shall include all nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached to handfired furnaces or used in connection with mechanical burners.

h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants, and sales to contractors and subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with manufacturing industries and plants, and sales to subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with general contractors who have contracts with manufacturing industries and plants.

i. Sales of central office equipment and switchboard and private branch exchange equipment to telephone and telegraph companies regularly engaged in providing telelphone and telegraph service to subscribers on a commercial basis.

j. Sales to commercial laundries or to pressing and dry-cleaning establishments of machinery used in the direct performance of the laundering or the pressing and cleaning service and of parts and accessories thereto.

k. Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto.

l. Sales of broadcasting equipment and parts and accessories thereto and towers to commercial radio and television companies which are under the regulation and supervision of the Federal Communications Commission.

m. Sales to farmers of bulk tobacco barns and racks and all parts and accessories thereto and similar apparatus used for the curing and drying of any farm produce.

n. Sales to farmers of commercially manufactured portable swine equipment or facilities and accessories thereto.

o. Sales to farmers of grain, feed or soybean storage facilities and accessories thereto, whether or not dryers are attached, and all similar apparatus and accessories thereto for the storage of grain, feed or soybeans.

p. Sales to farmers of bulk feed handling equipment used to raise, feed or produce livestock or poultry products, including cages used in the production of these products. The sale of the total number of poultry cages to be served by the same automatic feeder, automatic waterer or automatic egg collector constitutes the sale of a single article that is separate and distinct from a feeder, waterer or egg collector.

q. Sales of containers to farmers or producers for use in the planting, producing, harvesting, curing, marketing, packaging, sale, or transporting or delivery of their products when such containers do not go with and become part of the sale of their products at wholesale or retail.

(1981 (Reg. Sess., 1982), cc. 1207, 1273.)

Effect of Amendments. —

The first 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote the present first sentence of paragraph (l)p of subdivision (1), making no change of substance, and added the second sentence of that paragraph.

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added paragraph q to subdivision (1).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (1) are set out.

Part 4. General Provisions.

§ 105-164.7. Sales tax part of purchase price.

CASE NOTES

Effect of Failure to Add Tax at Proper Time. — In an action to determine who was liable to the Secretary of Revenue for the sales tax from a transaction, plaintiff retailer could not collect from defendant purchaser for sales taxes on materials sold by plaintiff to defendant where plaintiff failed to add sales taxes to the sales price of the material at the "time of selling or delivering or taking an order" as required by this section. Carolina-Atlantic Distribs., Inc. v. Teachey's Insulation, Inc., 51 N.C. App. 705, 277 S.E.2d 460 (1981).

ARTICLE 7.

Schedule H. Intangible Personal Property.

§ 105-201. Accounts receivable.

CASE NOTES

Customer advances on construction contracts are not "accounts payable" which are deductible under this intangible tax statute. Midrex Corp. v. Lynch, 50 N.C. App. 611, 274 S.E.2d 853, cert. denied, 303 N.C. 181, 280 S.E.2d 453 (1981).

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.

(a) The Secretary of Revenue shall keep a separate record by counties of the taxes collected under the provisions of this Article and shall, as soon as practicable after the close of each fiscal year, certify to the State Disbursing Officer and to the State Treasurer the amount of such taxes to be distributed to each county and municipality in the State. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each county and municipality in the amount so certified.

In determining the amount to be distributed there shall be deducted from net collections (total collections less refunds) the following:

(1) The tax credit specified in the second paragraph of G.S. 105-122(d), and
(2) The cost to the State to administer and collect the taxes levied under this Article for the preceding fiscal year, and
(3) The cost to the State for the operation of the Ad Valorem Tax Division of the Department of Revenue and of the Property Tax Commission for the preceding fiscal year, and
(4) The cost to the State of the operation of a training program in property tax appraisal and assessment administration by the Institute of Government for the preceding fiscal year.

The net amount after such deductions shall be distributed to the counties and municipalities of the State as follows:

The amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 105-200, 105-201, 105-202, 105-203 and 105-204 shall be determined upon the basis of the amounts collected in each county; and the amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 105-199 and 105-205 shall be determined upon the basis of population in each county according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. The amounts so allocated to each county shall in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied by each during the fiscal year preceding such distribution. For the purpose of computing the distribution of the intangibles tax to any county and the municipalities located therein for any year with respect to which the property valuation of a public service company is the subject of an appeal pursuant to the provisions of the Machinery Act, or to applicable provisions of federal law, and the Department of Revenue is restrained by operation of law or by a court of competent jurisdiction from certifying such valuation to the county and municipalities therein, the Department shall use the last property valuation of such public service company which has been so certified in order to determine the ad valorem tax levies

applicable to such public service company in the county and the municipalities therein.

It shall be the duty of the chairman of the board of county commissioners of each county and the mayor of each municipality therein to report to the Secretary of Revenue such information as he may request for his guidance in making said allotments. In the event any county or municipality fails to make such report within the time prescribed, the Secretary of Revenue may disregard such defaulting unit in making said allotments. The amounts so allocated to each county and municipality shall be distributed and used by said county or municipality in proportion to other property tax levies made for the various funds and activities of the taxing unit receiving said allotment.

(1981 (Reg. Sess., 1982), c. 1282, s. 69.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, inserted "and" at the end of subdivision (3) and added subdivision (4) in the second unnumbered paragraph of subsection (a).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 70, provides that for the purpose of determining net collections for the fiscal year ending June 30, 1982, certain amounts shall be deducted in addition to the amounts specified by the second paragraph of G.S. 105-213(a), as amended by s. 69 of the act. The section further provides for distribution of any unexpended funds deducted thereunder.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Article 9.

Schedule J. General Administration; Penalties and Remedies.

§ 105-241.1. Additional taxes; assessment procedure.

(h) General Statutes 150A-29 does not apply to hearings before the Secretary of Revenue held pursuant to this section, but the provisions of G.S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall apply to any tax or additional tax assessed pursuant to this section.

(i) All assessments of taxes or additional taxes, exclusive of penalties assessed thereon, shall bear interest from the time the taxes or additional taxes were due until paid. The Secretary of Revenue shall set the rate of interest as follows: The Secretary shall, no later than December 1 of any year, set the rate to be in effect for the succeeding calendar year at the rate that will be in effect on January 1 of the succeeding year under the provisions of the Internal Revenue Code, or at a different rate, taking current market conditions into consideration. The rate established by the Secretary may not be less than five percent (5%) per year and may not exceed sixteen percent (16%) per year. For refunds and assessments made between July 1, 1982, and December 31, 1982, the rate shall be twelve percent (12%) per year.

From and after January 1, 1978, interest upon assessments and upon additional taxes shall be computed at the rate established by G.S. 105-241.1(i) and shall be computed without regard to any former rate of interest which might have been established by G.S. 105-241.1 for the taxable period for which said assessment was made, or for the period within which said taxes were due to be paid.

(1981 (Reg. Sess., 1982), c. 1211, s. 2; c. 1223, s. 4.)

Effect of Amendments. — The first 1981 (Reg. Sess., 1982) amendment substituted "General Statutes 150A-29 does not apply" for "The provisions of Article 33A of Chapter 143 of the General Statutes shall not apply" at the beginning of subsection (h).

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to

refunds and assessments made on and after that date, rewrote the first paragraph of subsection (i), so changing the paragraph that a detailed comparsion is not here practical.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsections (h) and (i) are set out.

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

§ 105-241.2. Administrative review.

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

§ 105-241.3. Appeal without payment of tax from Tax Review Board decision.

(a) Any taxpayer aggrieved by the decision of the Tax Review Board may, upon payment of the tax, penalties and interest asserted to be due or upon filing with the Secretary a bond in such form as the Secretary may prescribe in the amount of said taxes, penalties and interest conditioned on payment of any liability found to be due on an appeal, appeal said decision to the superior court under the provisions of Article 4 of Chapter 150A of the General Statutes; provided, neither this section nor the provisions of Article 4 of Chapter 150A shall be construed to prohibit a jeopardy assessment and execution made in accordance with the provisions of G.S. 105-241.2.

(1981 (Reg. Sess., 1982), c. 1211, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "Article 4 of Chapter 150A" for "Article 33 of Chapter 143" in two places in subsection (a).

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

§ 105-250.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1209.

§ 105-266. Overpayment of taxes to be refunded with interest.

If the Secretary of Revenue discovers from the examination of any return, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs if any), such overpayment if the amount of three dollars ($3.00) or more, shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate established in G.S.

105-241.1(i) for assessments; provided, that interest on any such refund shall be computed from a date 90 days after the date the tax was originally paid by the taxpayer; except that there shall be no refund to the taxpayer of any sum set off under the provisions of Chapter 105A, the Set-off Debt Collection Act. If said overpayment is less than three dollars ($3.00) said overpayment shall be refunded as aforesaid but only upon receipt by the Secretary of Revenue of a written demand for such refund from the taxpayer. Provided, however, that no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the date set by the statute for the filing of the return or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later. The provisions of this paragraph shall not apply to interest required under G.S. 105-267. When a husband and wife have elected under G.S. 105-152(e) to file their separate income tax returns on a single form and a refund for overpayment of tax is made payable to both spouses as provided in that subsection, the provisions of this section shall apply to such refund. (1939, c. 158, s. 937; 1941, c. 50, s. 10; 1947, c. 501, s. 9; 1949, c. 392, s. 6; 1951, c. 643, s. 9; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; c. 903, s. 5; 1975, c. 74, s. 3; 1979, c. 801, s. 90; 1981 (Reg. Sess., 1982), c. 1223, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to refunds and assessments made on and after that date, substituted "established in G.S. 105-241.1(i) for assessments" for "of six percent (6%) per annum" near the middle of the first sentence.

§ 105-266.1. Refunds of overpayment of taxes.

(b) General Statutes 150A-29 does not apply to hearings before the Secretary of Revenue held pursuant to this section, but the provisions of G.S. 105-241.2, 105.241.3 and 105.241.4 with respect to review and appeal shall apply to any tax or additional tax assessed pursuant to this section.

(1981 (Reg. Sess., 1982), c. 1211, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "General Statutes 150A-29 does not apply" for "The provisions of Article 33A of Chapter 143 of the General Statutes shall not apply" at the beginning of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

CASE NOTES

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

ARTICLE 11.

Short Title, Purpose, and Definitions.

§ 105-271. Official title.

CASE NOTES

The assessment, listing, etc. — The discovery, assessment, listing and collection of ad valorem taxes on tangible personal property in North Carolina is regulated by the Machinery Act. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

§ 105-272. Purpose of Subchapter.

CASE NOTES

Stated in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

§ 105-273. Definitions.

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Cited in City of Charlotte v. Little McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981).

ARTICLE 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.

CASE NOTES

Legislative Purpose. — The legislature has decreed that all property, real and personal, within the jurisdiction of the State, is subject to taxation whether owned by a resident or a nonresident. The purpose of this strong decree is to treat all property owners equally so that the tax burden will be shared proportionately, and to gather in all the tax money to which the various counties and municipalities are entitled. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

All property privately owned, etc. —

All property — real and personal — within the jurisdiction of this State, whether owned by a foreign corporation or a domestic corporation, is subject to taxation unless specifically excluded or exempted from the tax base. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Cited in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

§ 105-275. Property classified and excluded from the tax base.

The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

(8) a. Rewritten and recodified as subdivision (27).

b. Recodified as subdivision (28).

(27) a. 1. Real and personal property that is used, or if under construction, is to be used for air cleaning or to abate, reduce or prevent the pollution of air or water as defined in G.S. 143-213. It shall also include waste lagoons or facilities owned by public or private utilities and used to provide sewer service to residential areas not otherwise having such service. This exclusion shall be applicable only to property having as its primary purpose the prevention, control, abatement or reduction of air pollution resulting from the emission of air contaminants or water pollution resulting from the discharge of sewage and waste.

2. Real and personal property that is used, or if under construction, is to be used to abate, reduce or prevent the pollution of air as defined in G.S. 143-213 without the restriction that the air contaminants be present in the outdoor atmosphere, but only if:

I. The property is for the reduction of air pollution existing solely within commercial or industrial plants, works, or shops; and

II. The property has as its primary purpose the prevention, control, abatement, or reduction of air pollution; and

III. The property has as a purpose the protection of the health of the employees at the plant, work, or shop.

b. To claim the exclusions provided in subdivisions 1 or 2 of subdivision a the owner shall file an application for exemption as required in G.S. 105-282.1 with the tax supervisor of the county in which the property is situated during the regular listing period each year. There shall be submitted with the application a complete description of the property claimed as exempt and any other information requested by the tax supervisor to enable him to determine that the property comes within the provisions of this classification and its value.

c. In making such determination, the tax supervisor is hereby empowered to inspect any property claimed as exempt under this classification. He may also request assistance from the Department of Natural Resources and Community Development, the Department of Labor or other appropriate agency for this purpose. The named departments shall provide such assistance upon request.

d. The Department of Revenue, with the assistance of the Department of Natural Resources and Community Development, or the Department of Labor as appropriate shall promulgate appropriate rules and regulations to facilitate the administration of this subdivision (27). Such rules and regulations shall include listings of classes, types, or models of equipment which qualify for the exemption.

(28) Real or personal property that is used or, if under construction, is to be used exclusively for recycling or resource recovering of or from solid waste, if the Department of Human Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Human Resources has found that the described property has been or will be constructed or installed, complies or will comply with the regulations of the Department of Human Resources, and has, or will have as its primary purpose recycling or resource recovering of or from solid waste. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973, cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment rewrote and recodified former subdivision (8)a as present subdivision (27) and recodified former subdivision (8)b as present subdivision (28).

Session Laws 1981 (Reg. Sess., 1982), c. 1244, s. 3, provides: "This act shall become effective January 1, 1983, except that proposed G.S. 105-275(27)d is effective upon ratification [June 18, 1982]."

Only Part of Section Set Out. — As only subdivisions (8), (27) and (28) were affected by the amendment, the other subdivisions are not set out.

Legal Periodicals. —

For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

CASE NOTES

Construction. — This section provides an exemption from taxation and is strictly construed against the taxpayer and in favor of the State. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

While the courts have consistently held that tax exemption statutes must be strictly construed against exemption, they have also held that such statutes should not be given a narrow or stingy construction. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

Use, rather than ownership, etc. —

It is not the nature or characteristic of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated which controls. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

Classification of Tobacco Generally. — The legislature plainly intended to establish two classes of property: (1) under subdivision (1) of this section, if tobacco is held or stored for shipment to any foreign country, it is exempt; and (2) under § 105-277(a), if tobacco (or other farm products) is held or stored for manufacture or processing, it is taxed at the preferential rate. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Raw Tobacco To Be Manufactured into Cigarettes and then Shipped. — Raw tobacco is not exempt from taxation as being held or stored for shipment to a foreign country within the meaning of subdivision (1) of this section where the tobacco is to be manufactured into cigarettes and other tobacco products, and the cigarettes and other products will be shipped to a foreign country; rather, the tobacco is held or stored for processing or manufacture and is taxable at the preferential rate of 60 percent of value under § 105-277(a). In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

§ 105-277. Property classified for taxation at reduced rates; certain deductions.

CASE NOTES

Classification of Tobacco Generally. — The legislature plainly intended to establish two classes of property: (1) under § 105-275(1), if tobacco is held or stored for shipment to any foreign country, it is exempt; and (2) under subsection (a) of this section, if tobacco (or other farm products) is held or stored for manufacture or processing, it is taxed at the preferential rate. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

When Tobacco Taxed Pursuant to Subsection (a). — Tobacco that is being held or stored to be manufactured or processed is taxed pursuant to this section, where it is given a preferential rate of 60 percent of value for tax purposes. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Tobacco is an agricultural product under this section until it is manufactured into the finished product. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Raw tobacco is not exempt from taxation as being held or stored for shipment to a foreign country within the meaning of § 105-275(1) where the tobacco is to be manufactured into cigarettes and other tobacco products, and the cigarettes and other products will be shipped to a foreign country; rather, the tobacco is held or stored for processing or manufacture and is taxable at the preferential rate of 60 percent of value under subsection (a) of this section. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

§ 105-277.1A. Property classified for taxation at reduced valuation; duties of tax collectors; reimbursement of localities for portion of tax lost.

(f) In order to pay for the reimbursement under this section and the cost to the Department of Revenue for administering the reimbursement, the Secretary of Revenue may withhold from net collections received by the Department under Article 2A and Article 2C of Chapter 105 of the General Statutes an amount equal to the reimbursement and the cost of administration.

(1981, c. 1052, ss. 2-4; 1981 (Reg. Sess., 1982), c. 1282, s. 70.1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (f).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (f) is set out.

§ 105-277.2. Agricultural, horticultural and forestland — definitions.

Legal Periodicals. — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

CASE NOTES

Property to Be Valued on Ability to Produce Income in Present Use. — Clear legislative intent under this section is that property be valued on the basis of its ability to produce income in the manner of its present use; all other uses for which the property might be employed, and the many factors enunciated in § 105-317(a), are irrelevant and immaterial. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

§ 105-277.3. Agricultural, horticultural and forestland — classifications.

Legal Periodicals. — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

CASE NOTES

Stated in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

§ 105-277.4. Agricultural, horticultural and forestland — application for taxation at present-use value.

CASE NOTES

Stated in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

§ 105-277.6. Agricultural, horticultural and forestland — appraisal; computation of deferred tax.

CASE NOTES

Cited in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

§ 105-278.1. Exemption of real and personal property owned by units of government.

Legal Periodicals. —
For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

§ 105-278.4. Real and personal property used for educational purposes.

CASE NOTES

Exemption of Portion of Property. — Where Wake Forest University granted a corporation an easement to use a football stadium parking lot for employee and visitor parking and general access to the corporation's headquarters building, the Property Tax Commission properly determined that a portion of the parking lot not regularly used by the corporation is wholly and exclusively used by Wake Forest University for educational purposes and is exempt from ad valorem taxation under subsection (c) of this section. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

§ 105-282.1. Applications for property tax exemption or exclusion.

CASE NOTES

Cited in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

ARTICLE 13.

Standards for Appraisal and Assessment.

§ 105-283. Uniform appraisal standards.

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Quoted in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

§ 105-284. Uniform assessment standard.

CASE NOTES

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

ARTICLE 14.

Time for Listing and Appraising Property for Taxation.

§ 105-285. Date as of which property is to be listed and appraised.

CASE NOTES

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

§ 105-286. Time for general reappraisal of real property.

CASE NOTES

Applied in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Stated in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

Article 15.

Duties of Department and Property Tax Commission as to Assessments.

§ 105-288. Functions of Department and Property Tax Commission; oath; expenses.

CASE NOTES

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

§ 105-290. Appeals to Property Tax Commission.

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

Article 16.

County Listing, Appraisal, and Assessing Officials.

§ 105-296. Powers and duties of tax supervisor.

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

Article 17.

Administration of Listing.

§ 105-302. In whose name real property is to be listed.

Editor's Note. — The catchline to this section is set out above to correct an error in the 1981 Cumulative Supplement.

CASE NOTES

Cited in City of Charlotte v. Little McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981).

§ 105-304. Place for listing tangible personal property.

CASE NOTES

The theory of taxation is, that the right to tax is derived from the protection afforded to the subject upon which it is imposed. The actual situs and control of the property within this State, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Business Situs Defined. — Business situs means a situs acquired for tax purposes by one who has carried on a business in the state more or less permanent in its nature. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Determination of Situs. —

The situs of personal property for purposes of taxation is ordinarily the domicile of the owner. Where, however, the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the situs of said property for purposes of taxation is its actual situs, and not that of his domicile. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Generally, Personalty of Corporation, etc. —

The tax situs of a corporation's tangible personal property within the jurisdiction of the State is at the place of its principal office in North Carolina. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Subdivision (d)(2) Contemplates Property in Transient Condition. — Subdivision (d)(2) of this section contemplates a situation in which a corporation has no principal office in this State, and its property is in a transient condition through the state. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Temporary Absence of Property. — Subdivision (f)(4) of this section clearly provides that the temporary absence of tangible personal property from the place at which it is normally taxable shall not affect the rule of taxation. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

A foreign corporation which was a broker of high fashion jeans acquired a business situs in Mecklenburg County so as to subject its property (piece goods and finished goods) to ad valorem taxation by Mecklenburg County where its only warehouse for assembling and shipping its inventory was located in Mecklenburg County, and the tax situs of such property remained in Mecklenburg County while it was outside North Carolina on the tax date being stitched or laundered. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

§ 105-309. What the abstract shall contain.

Editor's Note. — In the second sentence of subsection (g) of this section as it appears in the 1981 Cumulative Supplement, the reference to § 105-227.1 should be to § 105-277.1.

§ 105-311. Duty to appear for purposes of listing and signing affirmation; use of agents and mail.

CASE NOTES

This section must be read narrowly because of its incorporation into § 105-312, a penalty statute. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981).

Word "when" in the second paragraph of subsection (b) of this section refers to a time, not a contingency, necessarily requiring receipt as a prerequisite to application of this section. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981).

Second paragraph of subsection (b) of this section merely creates logical preferences for determination of timeliness where there has been delivery to the tax supervisor by mail. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981).

And Applies Only Where Abstract Is Received and Envelope Is Available. — Second paragraph of subsection (b) of this section applies only where an abstract has actually been received and the envelope is available for scrutiny. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981).

And Not Where Receipt Is Denied. — Where property owner alleged he mailed tax listing before deadline, but receipt of the listing was denied by the taxing authority, second paragraph of subsection (b) of this section was not dispositive. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981).

§ 105-312. Discovered property; appraisal; penalty.

CASE NOTES

Quoted in Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981).

ARTICLE 19.

Administration of Real and Personal Property Appraisal.

§ 105-317. Appraisal of real property; adoption of schedules, standards, and rules.

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Factors in Subsection (a) Irrelevant to Valuation under § 105-277.2. — Clear legislative intent under § 105-277.2 is that property be valued on the basis of its ability to produce income in the manner of its present use; all other uses for which the property might be employed, and the many factors enunciated in subsection (a) of this section, are irrelevant and immaterial. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Appraisal 27 Months Prior to Effective Date Held Arbitrary. — Decision to conduct an appraisal in a time of less than two months, and to complete it some 27 months prior to its effective date, does not comport with the realities of the economic world, and is plainly arbitrary under subdivision (a)(3) of this section, which requires that partially completed buildings be appraised "in accordance with the degree of completion on January 1." In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Applied in In re McElwee, 51 N.C. App. 163, 275 S.E.2d 865 (1981).

Stated in In re Odom, — N.C. App. —, 289 S.E.2d 83 (1982).

ARTICLE 21.

Review and Appeals of Listings and Valuations.

§ 105-322. County board of equalization and review.

Local Modification. — Buncombe: 1981 (Reg. Sess., 1982), c. 1279.

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

§ 105-324. Appeals to Property Tax Commission from listing and valuation decisions of boards of equalization and review and boards of county commissioners.

Local Modification. — Buncombe: 1981 (Reg. Sess., 1982), c. 1279.

CASE NOTES

Quoted in In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

§ 105-325. Powers of board of county commissioners to change abstracts and tax records after board of equalization and review has adjourned.

Local Modification. — Buncombe: 1981 (Reg. Sess., 1982), c. 1279.

ARTICLE 23.

Public Service Companies.

§ 105-338. Allocation of appraised valuation of system property among local taxing units.

CASE NOTES

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

§ 105-342. Notice, hearing, and appeal.

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

ARTICLE 24.

Review and Enforcement of Orders.

§ 105-345.1. No evidence admitted on appeal; remission for further evidence.

Editor's Note. — The catchline to this section is set out above to correct an error in the 1981 Cumulative Supplement.

§ 105-345.2. Record on appeal; extent of review.

CASE NOTES

This section is the controlling judicial review statute for appeals from the Property Tax Commission. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Review Procedure Equal to That Under Administrative Procedure Act. — Procedure for judicial review provided by this section is equal to that under the Administrative Procedure Act (Chapter 150A). In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

"Substantial Prejudice" Defined. — Substantial prejudice under this section is a substantially higher valuation than one which would have been reached under a legal valuation process. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Appraisal Notice in Violation of Constitutional Provisions and Unlawful. — Where timing of notice, size, generalities of wording and single publication newspaper of schedule of values used by county in appraising property for ad valorem tax purposes were not reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections, such notice was insufficient to fulfill due process requirement and to bar an attack against the revaluation schedules themselves; hence, Property Tax Commission's action in affirming the procedure employed by county was in violation of constitutional provisions and made upon unlawful proceedings within the meaning of subdivisions (b)(1) and (3) of this section. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Error of Law in Using Comparable Sales in Present Use Valuation. — Property Tax Commission committed an error of law as contemplated by this section by upholding the use of sales of similarly used land as a factor upon which a present use valuation was based. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Burden of Overcoming Presumption of Correctness of Ad Valorem Assessments. — The presumption in this State that ad valorem tax assessments are presumed correct places the burden upon the taxpayer to prove that the assessments are incorrect. In order to overcome this presumption, the taxpayer must produce competent material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property. In re Odom, — N.C. App. —, 289 S.E.2d 83 (1982).

Burden of Proving Reasonableness of Valuation. — When taxpayer has rebutted the presumption of regularity in favor of the county, burden shifts to the county to demonstrate to the Property Tax Commission that the values determined in the revaluation process were not substantially higher than those called for by the statutory formula, and the county must demonstrate the reasonableness of its valuation under subdivision (b)(5) of this section. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Applied in In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

ARTICLE 26.

Collection and Foreclosure of Taxes.

§ 105-350. General duties of tax collectors.

CASE NOTES

Cited in Great S. Media, Inc. v. McDowell County, 50 N.C. App. 705, 275 S.E.2d 226 (1981).

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.

Local Modification. — Lincoln: 1981 (Reg. Sess., 1982), c. 1171.

§ 105-366. Remedies against personal property.

CASE NOTES

Constitutionality. — This section and § 105-368, enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing, do not violate the due process or equal protection rights of the taxpayer as guaranteed by the Constitutions of the United States and this State. Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc., 54 N.C. App. 272, 283 S.E.2d 417 (1981).

§ 105-368. Procedure for attachment and garnishment.

CASE NOTES

Constitutionality. — Section 105-366 and this section, enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing, do not violate the due process or equal protection rights of the taxpayer as guaranteed by the Constitutions of the United States and this State. Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc., 54 N.C. App. 272, 283 S.E.2d 417 (1981).

§ 105-369. Sale of tax liens on real property for failure to pay taxes.

CASE NOTES

Newspaper Must Meet Requirements of Both Subsection (d) and § 1-597. — In order to qualify to publish notices of tax lien sales a newspaper must meet the "general circulation" requirements of both subsection (d) of this section, and § 1-597. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

Reading both § 1-597 and subsection (d) of this section together and giving effect to each, in order for a newspaper to qualify to publish notices of tax lien sales it must be a newspaper

of general circulation to actual paid subscribers in the taxing unit. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

The "general circulation" provision in subsection (d) of this section does not conflict with its counterpart in § 1-597. It simply specifies the geographic area, i.e., "the taxing unit" in which there must be a newspaper of general circulation and the times at which publication must be made. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

General Circulation to Actual Paid Subscribers in Taxing Unit. — For a newspaper to be one of general circulation to actual paid subscribers in the taxing unit it must meet a four-pronged test: first, it must have a content that appeals to the public generally; second, it must have more than a de minimis number of actual paid subscribers in the taxing unit; third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit; and fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

The term "general circulation," when applied to newspapers, refers not so much to the numerical or geographic distribution of the newspaper as it does to the contents of the paper itself. The primary consideration is whether the newspaper contains information of general interest. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

Although courts have focused on content in defining "general circulation," the term is not devoid of quantitative aspects. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

More than de Minimus Number of Readers Required. — In order to satisfy the quantitative considerations inherent in the term "general circulation," a newspaper must enjoy more than a de minimis number of readers in the taxing unit; this number must not be so insignificant that the newspaper simply fails to reach a diverse group of people in the area prescribed. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

The need for more than a de minimis number of paid subscribers does not mean that those subscribers must be evenly distributed in every city, town or section of the county or taxing unit, nor must publication be in the paper with the widest geographical distribution in the county. Neither § 1-597 nor subsection (d) of this section so require. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

Whether a given newspaper has a de minimis number of subscribers must always be determined in context. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

To determine whether more than a de minimis number of readers exists, only actual paid subscribers may be considered. Great S. Media, Inc. v. McDowell County, — N.C. —, 284 S.E.2d 457 (1981).

§ 105-372. Assignment of tax liens by taxing unit after lien sale.

CASE NOTES

Cited in City of Charlotte v. Little McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981).

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

CASE NOTES

Award of Attorney's Fee Not Limited by § 6-21.2. — The amount of an attorney's fee awarded in a tax foreclosure proceeding under this section is to be determined pursuant to subsection (i) in the discretion of the trial court and is not limited by the provisions of § 6-21.2. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115 (1981).

ARTICLE 27.

Refunds and Remedies.

§ 105-381. Taxpayer's remedies.

Local Modification. — Union: 1981 (Reg. Sess., 1982), c. 1154.

ARTICLE 28.

Special Duties to Pay Taxes.

§ 105-386. Tax paid by holder of lien; remedy.

CASE NOTES

Cited in City of Charlotte v. Little McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981).

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-446.1. (Effective July 1, 1983) Refunds of taxes paid by counties and municipalities.

The following entities shall be entitled to be reimbursed at the rate of eleven cents (11¢) per gallon of the tax levied by G.S. 105-434 upon filing a statement in writing with the Secretary of Revenue, which statement shall be made upon the oath or affirmation of the chief executive officer of said entity, showing the number of gallons of fuel purchased and used by said entity on which the tax levied by G.S. 105-434 has been paid: the Board of Transportation, counties, municipal corporations, volunteer fire departments, county fire departments, volunteer rescue squads, and "sheltered workshop" organizations recognized and approved by the Department of Human Resources. "Chief executive officer" shall mean the Director of Highways, the mayor, city manager or other municipal officer designated by the governing body of the municipality, the chairman of the board of county commissioners or other county officer designated by the board of county commissioners, or the president or other duly designated officer or agent of a volunteer fire department, county fire department, volunteer rescue squad or "sheltered workshop" organization. All claims for refunds for tax or taxes for motor fuels under the provisions of this section shall be filed with the Secretary of Revenue on forms to be prescribed by him on or before the last day of January, April, July and October of each year, and shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates,

fifty percent (50%); but refunds claimed after six months following said dates shall be barred. (1957, c. 1226; 1969, c. 600, s. 20; c. 1298, s. 4; 1971, c. 1160; 1973, c. 476, s. 193; c. 507, s. 5; c. 1287, s. 14; 1975, c. 845; 1981, c. 690, s. 1; 1981 (Reg. Sess., 1982), c. 1246, ss. 1, 2.)

Cross References. — For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, and applicable to fuel purchased on and after that date, inserted "volunteer rescue squads," in the first sentence and ", volunteer rescue squad" in the second sentence.

§ 105-446.6. Refund on taxpaid motor fuel transported to another state.

Upon application to the Secretary, any person, association or corporation who purchases motor fuel upon which the tax imposed by this Article has been paid, and who transports the fuel to another state for sale or use in that state may be reimbursed at the rate of eleven cents (11¢) per gallon for the amount of tax paid. As used in this section, to "transport" means to carry motor fuel in a cargo tank, tank car, barge or barrel and does not include carrying fuel in a tank connected with or attached to the engine of a motor vehicle. (1981 (Reg. Sess., 1982), c. 1219, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1219, s. 2, provides: "This act shall become effective July 1, 1982, and shall apply to purchases of motor fuel made on or after that date."

ARTICLE 36A.

Special Fuels Tax.

§ 105-449.31. Refund on taxpaid fuel transported to another state.

Upon application to the Secretary, any person, association or corporation who purchases special fuel upon which the tax imposed by this Article has been paid, and who transports the fuel to another state for sale or use in that state may be reimbursed at the rate of eleven cents (11¢) per gallon for the amount of tax paid. As used in this section, to "transport" means to carry special fuel in a cargo tank, tank car, barge or barrel and does not include carrying fuel in a tank connected with or attached to the engine of a motor vehicle. (1955, c. 822, s. 1; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1206.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to purchases of special fuel made on or after that date, rewrote this section to the extent that a detailed comparison is not here practical.

ARTICLE 36B.

Tax on Carriers Using Fuel Purchased outside State.

§ 105-449.43. Taxes and fees to be paid to Highway Fund.

All taxes and fees collected under this Article shall be paid to the State Highway Fund. (1955, c. 823, s. 7; 1981 (Reg. Sess., 1982), c. 1211, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section, which formerly read: "All taxes collected pursuant to the provisions of this Article shall be paid into the State Highway and Public Works Fund."

§ 105-449.45. Reports of carriers.

Except as provided in G.S. 105-449.49, every motor carrier subject to the tax imposed by this Article shall on or before the last day of April, July, October and January of every year make to the Secretary such reports of its operations during the quarter of the year ending the last day of the preceding month as the Secretary may require and such other reports from time to time as the Secretary may deem necessary. When any person required to file a report as provided by this Article fails to file such report within the time prescribed by this Article, he shall be subject to a penalty of not more than fifty dollars ($50.00) for the first failure, and not more than one hundred dollars ($100.00) for any subsequent failure, and any penalty pursuant to this section shall be assessed and collected by the Secretary in the same manner as is provided in this Article with respect to any tax deficiency, and shall be subject to all other applicable provisions relating to the assessment and collection of taxes pursuant to this Article. However, motor carriers are not required to make any reports with respect to vehicles used exclusively in intrastate operations in this State except as the Secretary may specifically from time to time require, but this is not to be construed to eliminate the requirements as to registration and identification markers with respect to all such vehicles as provided in G.S. 105-449.47. (1955, c. 823, s. 9; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1086, s. 2; 1981 (Reg. Sess., 1982), c. 1254, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, added "Except as provided in G.S. 105-449.49," at the beginning of the section.

§ 105-449.49. Temporary permits.

Upon application to the Secretary and payment of a fee of twenty-five dollars ($25.00), a motor carrier may obtain a temporary permit authorizing the carrier to operate a vehicle in the State without a registration card and identification marker for not more than 20 days. A motor carrier to whom a temporary permit has been issued may elect not to report its operation of the vehicle during the 20-day period, as otherwise required by G.S. 105-449.45. A motor carrier who files a report for a quarter in which the carrier paid a temporary permit fee may claim a credit for the amount of the fee. A motor carrier whose operations are exclusively intrastate may obtain a refund of the fee by filing a report for the quarter in which the fee was paid. (1955, c. 823, s. 13; 1973, c. 476, s. 193; 1979, c. 11; 1981 (Reg. Sess., 1982), c. 1254, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, rewrote this section, which formerly read in its entirety: "In an emergency, the Secretary, by letter or telegram, may authorize a vehicle to be operated without a registration card or identification marker for not more than 20 days."

Chapter 105A.

Setoff Debt Collection Act.

§ 105A-8. Hearing procedure.

CASE NOTES

A constituent member of the University of North Carolina is not specifically exempted from the hearing procedures of the Setoff Debt Collection Act. In re Willett, — N.C. App. —, 289 S.E.2d 576 (1982).

Chapter 106.

Agriculture.

Article 1B.

State Farm Operations Commission.

Sec.

106-26.13. Recreation of State Farm Operations Commission.

Article 26.

Inspection of Ice Cream Plants, Creameries, and Cheese Factories.

106-253. Standards of purity and sanitation; Sec. regulating trade or brand names of frozen or semifrozen desserts.

Article 45.

Agricultural Societies and Fairs.

Part 1. State Fair.

106-503. Board of Agriculture to operate fair.

Article 1B.

State Farm Operations Commission.

§ 106-26.13. Recreation of State Farm Operations Commission.

There is hereby recreated a State Farm Operations Commission within the Department of Agriculture. The Commission shall consist of two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121, and the following ex officio members or their designees: a member of the Board of Agriculture appointed by the Commissioner of Agriculture; the Dean of the School of Agriculture and Life Sciences of North Carolina State University; the Dean of the School of Forest Resources of North Carolina State University; the Secretary of Human Resources; and the Secretary of Correction. The two members appointed by the General Assembly shall be farmers whose principal residence is on a farm, whose principal occupation is farming or farm operations, and whose principal source of income is from farming or farm operations. The initial members appointed to the Commission by the General Assembly shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. (1977, c. 1122, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 47.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote this section to the extent that a detailed comparison is not possible.

ARTICLE 26.

Inspection of Ice Cream Plants, Creameries, and Cheese Factories.

§ 106-253. Standards of purity and sanitation; regulating trade or brand names of frozen or semifrozen desserts.

The Board of Agriculture is authorized to make such definitions and to establish such standards of purity for products and sanitation for plants or places of manufacture named herein with such regulations, not in conflict with this Article, as shall be necessary to make provisions of this Article effective and insure the proper enforcement of same, and the violation of said standards of purity or regulations shall be deemed to be a violation of this Article. The Board is authorized to require the posting of inspection certificates. It shall be unlawful for any person, firm or corporation to use the words "cream," "milk," or "ice cream," or either of them, or any similar sounding word or terms, as a part of or in connection with any product, trade name or brand of any frozen or semifrozen dessert manufactured, sold or offered for sale and not in fact made from dairy products under and in accordance with regulations, definitions or standards approved or promulgated by the Board of Agriculture. (1921, c. 169, s. 8; C. S., s. 7251(h); 1933, c. 431, s. 3; 1945, c. 846; 1959, c. 707, s. 3; 1981 (Reg. Sess., 1982), c. 1359, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the present second sentence.

ARTICLE 31.

North Carolina Seed Law.

§ 106-277.7. Labels of vegetable seeds in containers of more than one pound.

CASE NOTES

Stated in Central Carolina Farmers, Inc. v. Hilliard, 54 N.C. App. 418, 283 S.E.2d 558 (1981).

§ 106-277.8. Responsibility for presence of labels.

CASE NOTES

Stated in Central Carolina Farmers, Inc. v. Hilliard, 54 N.C. App. 418, 283 S.E.2d 558 (1981).

Article 45.

Agricultural Societies and Fairs.

Part 1. State Fair.

§ 106-503. Board of Agriculture to operate fair.

The State fair and other projects provided for in G.S. 106-502, shall be managed, operated and conducted by the Board of Agriculture established in G.S. 106-502. To that end, said Board of Agriculture shall, at its first meeting after the ratification of this section, take over said State fair, together with all the lands, buildings, machinery, etc., located thereon, now belonging to said State fair and shall operate said State fair and other projects with all the authority and power conferred upon the former board of directors, and it shall make such rules and regulations as it may deem necessary for the holding and conducting of said fair and other projects, and/or lease said fair properties so as to provide a State fair.

The Board of Agriculture may adopt regulations establishing fees or charges for admission to the State Fairgrounds and for services provided incidental to the use of the State Fairgrounds.

The Board of Agriculture, after giving notice and receiving public comment pursuant to G.S. 150A-12, and pursuant to the provisions of Chapter 146 of the General Statutes, may establish a schedule of rental rates for fair properties and specifications for the issuance of premiums so as to provide a State fair and other projects. (1931, c. 360, s. 3; 1959, c. 1186, s. 2; 1981, c. 495, s. 4; 1981 (Reg. Sess., 1982), c. 1359, s. 2.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment added the third paragraph.

Article 56.

North Carolina Commercial Fertilizer Law.

§ 106-662. Sampling, inspection and testing.

Editor's Note. — The catchline to this section is set out above to correct an error in the 1981 Cumulative Supplement.

Chapter 108A.

Social Services.

Article 2.

Programs of Public Assistance.

Sec.

Part 2. Aid to Families with Dependent Children.

108A-29. Limitations on eligibility.

Article 1.

County Administration.

Part 1. County Boards of Social Services.

§ 108A-1. Creation.

Cross References. — For section providing that notwithstanding this Chapter, the setting of rates or fees for social services for services provided hereunder, or the setting of eligibility standards or the designation of services to be provided, if granted by this Chapter to the Social Services Commission, instead shall be done only by enactment of laws enacted by the General Assembly, but authorizing the adoption by the Social Services Commission of interim rules or regulations, see § 143B-153.1.

Article 2.

Programs of Public Assistance.

Part 2. Aid to Families with Dependent Children.

§ 108A-29. Limitations on eligibility.

(c) The Social Services Commission shall adopt rules imposing work requirements under the Community Work Experience Program demonstration project, in accordance with federal laws and regulations, as a condition for eligibility for Aid to Families with Dependent Children. (1961, c. 998; 1963, c. 1061; 1965, c. 939, s. 2; 1969, c. 546, s. 1; 1971, c. 283; 1973, c. 476, s. 138; 1977, c. 362; 1981, c. 275, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 19.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 108A-39. Fraudulent misrepresentation.

CASE NOTES

Purpose. — This section was passed to define and punish a particular, specific crime. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

All of the elements of § 14-100 are not required to sustain a charge under this section. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

The agency making the payments does not have to be deceived. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Who May Be Guilty. — An employee of the agency providing the funds, or the provider of the funds, can be guilty of violating this section. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Part 6. Medical Assistance Program.

§ 108A-54. Authorization of Medical Assistance Program.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

§ 108A-55. Payments.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Medically Unnecessary Abortions. — By no stretch of the imagination can medically unnecessary abortions be considered as "essential to the health and welfare" of the recipients. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

Chapter 110.

Child Welfare.

Article 7.

Day-Care Facilities.

Sec.
110-91. Mandatory standards for a license.

ARTICLE 7.

Day-Care Facilities.

§ 110-86. Definitions.

CASE NOTES

Quoted in Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

§ 110-91. Mandatory standards for a license.

The following standards relating to the health and safety of children shall be complied with by all day-care facilities, except as otherwise provided in this Article. These standards shall be the only required standards for issuance of a license by the Secretary of Administration under policies and procedures of the Commission.

(7) Staff-Child Ratio. — In determining the staff-child ratio, children of the supervisor or other children under 13 years of age shall be included. The Commission shall adopt rules and regulations regarding staff-child ratio, provided, however, that such rules and regulations shall in no event require a ratio of staff members to children more stringent than the following:

a. For day-care facilities caring for less than 30 children, the ratios shall be as follows:

1. In facilities licensed for six to 10 children, inclusive, one full-time supervising adult with another person who is at least 16 years of age available for emergencies in relief.
2. In facilities licensed for 11 to 20 children, inclusive, there must be one full-time supervising adult and one full-time staff member, one of whom may have responsibility for food preparation.
3. In facilities licensed for 21 to 29 children, inclusive, there must be one full-time supervising adult and two full-time staff members, one of whom may have responsibility for food preparation.

b. For facilities caring for 30 or more children, the ratio shall be as follows:

Ages of Children	*No. of Children*	*Staff Members*
0 to 2 years	8	1
2 to 3 years	12	1
3 to 4 years	15	1

Ages of Children	*No. of Children*	*Staff Members*
4 to 5 years	20	1
5 or more years	25	1

1. Children under two years of age in any facility must be kept separate from older children, and with a full-time adult always in attendance.
2. Staff members required to be responsible for the care of children shall not have responsibility for food preparation.

c. Any facility may provide care for twenty percent (20%) more children than the number for which it is licensed, including preschool and school age children. No more than 25 children shall be attended by one staff member or supervising adult.

d. Repealed by Session Laws 1981 (Regular Session, 1982), c. 1382, s. 2, effective July 1, 1982.

(1981 (Reg. Sess., 1982), c. 1382, ss. 1, 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote subdivision (7)c, which formerly provided for a 20% tolerance as to groups and numbers of children specified and as to the total number for which the facility was licensed, with the exception that no more than 25 children could be attended by one staff member. The amendment also deleted subdivision (7)d, relating to the care of school age children in after-school hours.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (7) are set out.

Article 9.

Child Support.

§ 110-128. Purposes.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

Cited in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 110-129. Definitions.

CASE NOTES

Stated in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

§ 110-130. Action by the designated representatives of the county commissioners.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

§ 110-131. Compelling disclosure of information respecting the nonsupporting responsible parent of a child receiving public assistance.

CASE NOTES

Stated in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 110-132. Acknowledgment of paternity and agreement to support.

CASE NOTES

Effect of Subsection (a). — Subsection (a) makes a father's voluntary written acknowledgment of paternity, and agreement to support his illegitimate child, a binding and fully enforceable substitute for a judicial determination of paternity and order of support. Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

Father's Acknowledgment Must Be Accompanied by Mother's. — The court may not approve defendant's voluntary agreement for support of an illegitimate child where defendant's acknowledgment of paternity is not simultaneously accompanied by a sworn affirmation of paternity by the child's mother as required by this section. Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

Stated in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 110-133. Agreements of support.

CASE NOTES

Stated in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

§ 110-135. Debt to State created.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

Cited in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

OPINIONS OF ATTORNEY GENERAL

Application of Last Sentence. — The last sentence applies to all proceedings brought by or on behalf of the State under this section and § 110-137. See opinion of Attorney General to Mr. David R. Johnson, Staff Attorney, The North Carolina State Bar, 50 N.C.A.G. 70 (1981).

§ 110-136. Garnishment for enforcement of child-support obligation.

CASE NOTES

Cited in Durham County v. Riggsbee, — N.C. App. —, 289 S.E.2d 579 (1982).

§ 110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

Cited in Durham County v. Riggsbee, — N.C. App. —, 289 S.E.2d 579 (1982).

§ 110-138. Duty of county to obtain support.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

Cited in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 110-139. Location of absent parents.

CASE NOTES

Public Officials to Furnish, etc. — The correct citation to the opinion of the attorney general cited under this catchline in the 1981 Cumulative Supplement is 48 N.C.A.G. 85.

Chapter 113.

Conservation and Development.

SUBCHAPTER II. STATE FORESTS AND PARKS.

Article 4C.

Regulation of Open Fires.

Sec.
113-60.21. Purpose and findings.
113-60.23. High hazard counties; permits required; standards.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

Article 21.

Licenses and Permits Issued by the Wildlife Resources Commission.

113-270.2. (Effective July 1, 1983) Hunting licenses.
113-270.2B. Voluntary migratory waterfowl conservation stamp.
113-270.3. (Effective July 1, 1983) Special activity licenses; big game kill reports.
113.270.4. (Effective July 1, 1983) Hunting guide license.
Sec.
113.270.5. (Effective July 1, 1983) Trapping licenses.
113.271. (Effective July 1, 1983) Hook-and-line licenses in inland fishing waters.
113-272. (Effective July 1, 1983) Special trout licenses.
113-272.2. (Effective July 1, 1983) Special device licenses.

Article 22.

Regulation of Wildlife.

113-291.4. Regulation of foxes; study of fox and fur-bearer populations.

Article 23C.

North Carolina Seafood Industrial Park Authority.

113-315.25. Creation of Authority; membership; appointment; terms and vacancies; officers; meetings and quorum; compensation.

SUBCHAPTER II. STATE FORESTS AND PARKS.

ARTICLE 4C.

Regulation of Open Fires.

§ 113-60.21. Purpose and findings.

The purpose of this Article is to regulate certain open burning in order to protect the public from the hazards of forest fires and air pollution and to adapt such regulation to the needs and circumstances of the different areas of North Carolina. The General Assembly finds that open burning in proximity to woodlands must be regulated in all counties to protect against forest fires and air pollution. The General Assembly further finds that in certain counties a high percentage of the land area contains organic soils or forest types which may pose greater problems of forest fire and air pollution controls, and that in counties in which a great amount of land-clearing operations is taking place on these organic soils or these forest types, additional control of open burning is required. The counties subject to the need for additional control are classified as high hazard counties for purpose of this Article. (1981, c. 1100, s. 2; 1981 (Reg. Sess., 1982), c. 1385, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote the third sentence, which formerly read "The General Assembly further finds that certain counties contain organic soils or forest types which pose greater problems of forest fires and air pollution control and which require additional regulation of open burning, particularly open burning associated with land-clearing operations."

§ 113-60.23. High hazard counties; permits required; standards.

(a) The provisions of this section apply only to the counties of Beaufort, Bladen, Camden, Carteret, Chowan, Craven, Currituck, Dare, Duplin, Gates, Hyde, Jones, Onslow, Pamlico, Pasquotank, Perquimans, Tyrrell, and Washington which are classified as high hazard counties in accordance with G.S. 113-60.21.
(1981 (Reg. Sess., 1982), c. 1165; c. 1385, s. 2.)

Effect of Amendments. — The first 1981 (Reg. Sess., 1982) amendment deleted references to Martin, Brunswick, Pender and Columbus Counties from subsection (a).

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, deleted references to Brunswick, Columbus, and Pender Counties in subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsection (a) is set out.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

ARTICLE 17.

Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department.

§ 113-229. Permits to dredge or fill in or about estuarine waters or state-owned lakes.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

ARTICLE 21.

Licenses and Permits Issued by the Wildlife Resources Commission.

§ 113-270.1. License agents.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1201, s. 8, provides:

"Notwithstanding the foregoing provisions of this act, any of the following licenses that shall be issued after July 31, 1982, and before July 1, 1983, shall run until July 31, 1983:

Resident sportsman combination license

Resident State hunting license

Resident combination hunting-fishing license

Resident county hunting license

Nonresident sportsman combination license

Nonresident State hunting license

Game land license."

Session Laws 1981 (Reg. Sess., 1982), c. 1201, s. 9 provides:

"Notwithstanding any other provision of this act, the Wildlife Resources Commission shall issue, for the term beginning January 1, 1983, and ending June 30, 1983, the following fishing licenses at the prices indicated:

Resident State fishing license	$4.75
Resident county fishing license	$2.50
Nonresident State fishing license	$8.00
Resident special trout license	$2.50
Nonresident special trout license	$4.00
Resident special device license	$5.00

Nonresident special device license . . $12.50
Resident personal use special device license $1.50
Nonresident personal use special device license $5.00
License agents issuing any of these licenses shall be entitled to retain from the proceeds a fee in the amount authorized by G.S. 113-270.1(b)."

Session Laws 1981 (Reg. Sess., 1982), c. 1201, s. 10 makes s. 9 effective Jan. 1, 1983.

§ 113-270.2. (Effective July 1, 1983) Hunting licenses.

(b) Except when indicated otherwise, all hunting licenses are annual licenses beginning July 1 each year running until the following June 30.

(1981 (Reg. Sess., 1982), c. 1201, s. 1.)

Cross References. — For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, substituted "beginning July 1" for "issued beginning August 1" and "June 30" for "July 31" in subsection (b).

For provisions of Session Laws 1981 (Reg. Sess., 1982), c. 1201, ss. 8 and 9, as to the term of licenses issued after July 31, 1982, and before July 1, 1983, and provisions setting forth fishing license fees for the term Jan. 1, 1983, through June 30, 1983, see the Editor's Note under § 113-270.1.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 113-270.2B. Voluntary migratory waterfowl conservation stamp.

(a) The Wildlife Resources Commission has exclusive production rights for the voluntary migratory waterfowl conservation stamp, and is authorized to adopt policy for the annual selection of an appropriate design for the stamp and to have the stamp produced for sale at a price not to exceed ten dollars ($10.00). This policy may include ownership rights of the original art selected and arrangements for the reproduction, distribution and marketing of prints of the design of the stamp, and for sharing the resulting revenues.

(b) The proceeds accruing to the Commission from its share of the voluntary migratory waterfowl conservation stamp program shall be used by the Commission for the benefit of migratory waterfowl management in North Carolina.

(1981 (Reg. Sess., 1982), c. 1269.)

§ 113-270.3. (Effective July 1, 1983) Special activity licenses; big game kill reports.

(a) In addition to any hunting, trapping, or fishing license that may be required, individuals engaging in specially regulated activities must have the appropriate special activity license prescribed in this section before engaging in the regulated activity. Special activity licenses are annual licenses issued beginning July 1 each year running until the following June 30.

(1981 (Reg. Sess., 1982), c. 1201, s. 2.)

Cross References. — For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Editor's Note. —

For provisions of Session Laws 1981 (Reg. Sess., 1982), c. 1201, ss. 8 and 9, as to the term of licenses issued after July 31, 1982, and before July 1, 1983, and provisions setting forth fishing license fees for the term Jan. 1, 1983 through June 30, 1983, see the Editor's Note under § 113-270.1.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, substituted "July 1" for "August 1" and "June 30" for "July 31" in the second sentence of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 113-270.4. (Effective July 1, 1983) Hunting guide license.

(b) The hunting guide license is an annual-license issued upon payment of five dollars and twenty-five cents ($5.25) beginning July 1 of each year running until the following June 30.

(1981 (Reg. Sess., 1982), c. 1201, s. 3.)

Cross References. — For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Editor's Note. —

For provisions of Session Laws 1981 (Reg. Sess., 1982), c. 1201, ss. 8 and 9, as to the term of licenses issued after July 31, 1982, and before July 1, 1983, and provisions setting forth fishing license fees for the term Jan. 1, 1983, through June 30, 1983, see the Editor's Note under § 113-270.1.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, substituted "July 1" for "August 1" and "June 30" for "July 31" in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 113-270.5. (Effective July 1, 1983) Trapping licenses.

(a) Except as otherwise specifically provided by law, no one may take fur-bearing animals by trapping, or by any other authorized special method that preserves the pelt from injury, without first having procured a current and valid trapping license. When the trapping license is required, it serves in lieu of a hunting license in the taking of fur-bearing animals. If fur-bearing animals are taken as game, at the times and by the hunting methods that may be authorized, hunting license requirements apply. All trapping licenses are annual licenses issued beginning July 1 each year running until the following June 30.

(1981 (Reg. Sess., 1982), c. 1201, s. 4.)

Cross References. — For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Editor's Note. —

For provisions of Session Laws 1981 (Reg. Sess., 1982), c. 1201, ss. 8 and 9, as to the term of licenses issued after July 31, 1982, and before July 1, 1983, and provisions setting forth fishing license fees for the term Jan. 1, 1983, through June 30, 1983, see the Editor's Note under § 113-270.1.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, substituted "July 1" for "August 1" and "June 30" for "July 31" in the last sentence of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 113-271. (Effective July 1, 1983) Hook-and-line licenses in inland fishing waters.

(b) Except when indicated otherwise, all hook-and-line fishing licenses are annual licenses. Annual fishing liceses are issued beginning July 1 each year running until the following June 30.

(d) The hook-and-line fishing licenses issued by the Wildlife Resources Commission are as follows:

(1) Repealed by Session Laws 1979, c. 830, s. 1, effective August 1, 1980.

(1a) Resident sportsman combination license — $27.50. This license is valid only for use by an individual resident of the State.

(1b) Resident comprehensive daily fishing license — $4.00. This license is valid only for use during the day indicated by an individual resident of the State.

(1c) Lifetime sportsman combination licenses. — These licenses are valid only for use by individual holders and are of the following types depending on the holders' ages on the dates of issue:

a. Type I available only to an individual under one year of age — $100.00.

b. Type Y available only to an individual under 12 years of age — $200.00.

c. Type A available to a resident individual of any age — $300.00.

(2) Resident combination hunting-fishing license — $12.50. This license is valid only for use by an individual resident of the State.

(2a) Resident State fishing license — $9.50. This license is valid only for use by an individual resident of the State.

(2b) Lifetime resident State fishing license — $150.00. This license is valid only for use by an individual resident of the State.

(3) Resident county fishing license — $4.50. This license is valid only for use by an individual resident of the State within the county in which he resides.

(4) Resident State daily license — $1.25. This license is valid only for use during the day indicated by an individual resident of the State.

(4a) Nonresident sportsman combination license — $55.00. This license is valid for use by an individual within the State.

(4b) Nonresident comprehensive daily fishing license — $6.00. This license is valid only for use during the day indicated by an individual within the State.

(5) Nonresident State fishing license — $15.50. This license is valid for use by an individual within the State.

(6) Nonresident State daily license — $2.25. This license is valid only for use during the day indicated by an individual within the State.

(7) Repealed by Session Laws 1975, c. 197, s. 15.

(8) Lifetime fishing license for the legally blind — No charge. This license is valid only for use by an individual resident of the State who has been certified by the Department of Human Resources as a person whose vision with glasses is insufficient for use in ordinary occupations for which sight is essential. This license is valid for the life of the individual so long as he remains legally blind.

(9) Disabled veteran lifetime combination hunting-fishing license — $7.50. This license is valid only for use by an individual resident of the State who is a fifty percent (50%) or more disabled war veteran as determined by the Veterans Administration. The license is valid for the life of the individual so long as he remains fifty percent (50%) or more disabled.

(10) [Reserved.]

(11) Age 70 lifetime combination hunting-fishing license — $10.00. This license is valid only for use by an individual resident of the State who has attained the age of 70 years. The license is valid for the life of the individual.

(12) Totally disabled resident combination hunting-fishing license — $7.50. This license is valid only for use by an individual resident of the State who is totally disabled (physically incapable of being gainfully employed). This license is valid for the life of the individual so long as he remains totally disabled.

(1981 (Reg. Sess., 1982), c. 1201, s. 5.)

Cross References. —

For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Editor's Note. — For provisions of Session Laws 1981 (Reg. Sess., 1982), c. 1201, ss. 8 and 9, as to the term of licenses issued after July 31, 1982, and before July 1, 1983, and provisions setting forth fishing license fees for the term Jan. 1, 1983 through June 30, 1983, see the Editor's Note under § 113-270.1.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, in subsection (b) deleted "except for the sportsman combination licenses

and the resident combination hunting-fishing license" following "annual fishing licenses" and substituted "July 1" for "January 1" and "June 30" for "Dec. 31," deleted the former second sentence of subdivision (d)(1a), relating to the period of validity of the resident sportsman combination license, deleted the second sentence of subdivision (d)(2), relating to the validity of the resident combination hunting-fishing license, and deleted the former second sentence of subdivision (d)(4a), relating to the validity of the nonresident sportsman combination license.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (b) and (d) are set out.

§ 113-272. (Effective July 1, 1983) Special trout licenses.

(b) Except as otherwise indicated, special trout licenses or annual licenses issued beginning July 1 each year running until the following June 30.

(d) The special trout licenses issued by the Wildlife Resources Commission are as follows:

(1) Repealed by Session Laws 1979, c. 830, s. 1, effective August 1, 1980.

(1a) Resident sportsman combination license — $27.50. This license is valid in public mountain trout waters for use only by an individual resident of the State.

(1a1) Resident comprehensive daily fishing license — $4.00. This license is valid for use during the day indicated in public mountain trout waters only by an individual resident of the State.

(1a2) Lifetime sportsman combination licenses. — These licenses are valid only for use by individual holders and are of the following types depending on the holders' ages on the dates of issue:

a. Type I available only to an individual under one year of age — $100.00.

b. Type Y available only to an individual under 12 years of age — $200.00.

c. Type A available to a resident individual of any age — $300.00.

(1b) Resident special trout license — $4.50. This license is valid only for use by an individual resident of the State in public mountain trout waters.

(1c) Nonresident sportsman combination license — $55.00. This license is valid for use by an individual within the State in public mountain trout waters.

(1d) Nonresident comprehensive daily fishing license — $6.00. This license is valid only for use during the day indicated in public mountain trout waters by an individual within the State.

(2) Nonresident special trout license — $8.00. This license is valid for use by an individual within the State in public mountain trout waters.

(3) Lifetime fishing license for the legally blind — No charge. This license is valid in public mountain trout waters for use only by an individual resident of the State. It is issued upon the terms set out in G.S. 113-271(d)(8). (1953, cc. 432, 828; 1955, c. 198, s. 2; 1961, c. 834, s. 2; 1965, c. 957, s. 2; 1969, c. 1042, s. 10; 1973, c. 1262, s. 18; 1975, c. 197, s. 16; 1979, c. 748, s. 7; c. 830, s. 1; 1979, 2nd Sess., c. 1178, ss. 4, 5; 1981, c. 482, s. 6; 1981 (Reg. Sess., 1982), c. 1201, s. 6.)

Cross References. —

For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Editor's Note. — For provisions of Session Laws 1981 (Reg. Sess., 1982), c. 1201, ss. 8 and 9, as to the term of licenses issued after July 31, 1982, and before July 1,1983, and provisions setting forth fishing license fees for the term Jan. 1, 1983, through June 30, 1983, see the Editor's Note under § 113-270.1.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, in subsection (b) substituted "July 1" for "January 1" and "June 1" for "December 31", deleted the former second sentence of subdivision (d)(1a), relating to the validity of the resident sportsman combination license, and deleted the former second sentence

of subdivision (d)(1c), relating to the validity of the nonresident sportsman combination license.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (b) and (d) are set out.

§ 113-272.2. (Effective July 1, 1983) Special device licenses.

(b) All special device licenses are annual licenses issued beginning July 1 each year running until the following June 30.

(1981 (Reg. Sess., 1982), c. 1201, s. 7.)

Cross References. — For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Editor's Note. — For provisions of Session Laws 1981 (Reg. Sess., 1982), c. 1201, ss. 8 and 9, as to the term of licenses issued after July 31, 1982, and before July 1, 1983, and provisions setting forth fishing license fees for the term Jan. 1, 1983, through June 30, 1983, see the Editor's Note under § 113-270.1.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, substituted "July 1" for "January 1" and "June 30" for "December 31" in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 22.

Regulation of Wildlife.

§ 113-291.1. Manner of taking wild animals and wild birds.

Local Modification. — Alamance, Davidson, Randolph, Rockingham, Rowan and Wilkes: 1981, c. 410; 1981 (Reg. Sess., 1982), c. 1180.

§ 113-291.4. Regulation of foxes; study of fox and fur-bearer populations.

(c) Foxes may not be taken with firearms except:

(1) As provided in subsection (f) or (i).

(2) As an incidental method of humanely killing them following any lawful method of taking that does not result in death.

(3) When they are lawfully shot under laws and regulations pertaining to the distruction of animals committing depredations to property.

(f) When there is filed with the Wildlife Resources Commission a written petition requesting establishment in a county of an open season for taking foxes by trapping or with weapons, and the petition has been signed by not less than fifteen percent (15%) of the residents of the county who hold either a current and valid hunting license or trapping license, the Commission, upon verification of the petitioners in accordance with its policy, must institute a survey of the population of foxes in the county and, if adequate foxes are found to be available, must hold a public hearing in the county on the advisability of opening a fox season in the county. Population surveys must be conducted in accordance with policy developed by the Commission, consistent with its regional personnel and financial capabilities. If, on the basis of the survey and other available information, the Commission determines the population of foxes in the county is fully adequate to support a harvest of that population, the Commission may open a season for taking foxes by trapping or with weapons in the county, or in such portion of the county as it may deem appropriate. The petition authorized by this subsection must be submitted on forms provided by the Commission and must include each petitioner's signature,

address, telephone number, if any, type of license held, the number of the license, and the driver's license number, if any, and must identify the sponsor of the petition. A petition determined by the Commission to contain inadvertent defects will be returned to the sponsor with an explanation of its deficiencies and necessary corrective measures; a fraudulent petition will be impounded by the Commission, and its sponsor will be so notified. When the season is open for trapping, foxes may also be taken by the use of methods lawful for taking game animals, including the use of firearms. Any bag, possession, or season limits imposed on foxes taken from the area in question will apply in the aggregate to all foxes killed without regard to the method of taking.

(i) Upon notification by the North Carolina Division of Health Services of the presence of a contagious animal disease in a local fox population, the Commission is authorized to establish such population control measures as are appropriate until notified by public health authorities that the problem is deemed to have passed. (1979, c. 830, s. 1; 1981 (Reg. Sess., 1982), c. 1203, ss. 1-3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote subsection (f) and added new subsection (i). The amendment also substituted "subsections (f) or (i)" for "subsection (f)" in subdivision (c)(1). Session Laws 1981 (Reg. Sess., 1982), c. 1203, s. 4, provides that the amendment to subsection (f) shall remain in effect only until July 1, 1987.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (c), (f) and (i) are set out.

Article 23C.

North Carolina Seafood Industrial Park Authority.

§ 113-315.25. Creation of Authority; membership; appointment; terms and vacancies; officers; meetings and quorum; compensation.

(c) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 36.

(d) The General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. The terms of subsequent appointees by the General Assembly shall be two years.

(g) The Authority shall meet once in each 90 days at such regular meeting time as the Authority by rule may provide and at any place within the State as the Authority may provide, and shall also meet upon the call of its chairman or a majority of its members. A majority of its members shall constitute a quorum for the transaction of business. The members of the Authority shall not be entitled to compensation for their services, but shall receive per diem and necessary travel and subsistence epxense in accordance with G.S. 138-5 and G.S. 138-6. (1979, c. 459, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 36, 37.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) deleted subsection (c), providing for appointment of one Senator by the President of the Senate, rewrote subsection (d), which formerly provided for the appointment of one Representative by the Speaker of the House, and substituted the last sentence of subsection (g) for the former last two sentences, which provided for per diem and necessary

travel and subsistence expense reimbursement for members of the Authority who were not members of the General Assembly and travel and subsistence reimbursement for the members of the Authority who were members of the General Assembly.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (d) and (g) and the repeal line for subsection (c) are set out.

Chapter 113A.

Pollution Control and Environment.

Article 8.

North Carolina Land Conservancy Corporation.

Sec.
113A-137. Board of trustees.

ARTICLE 1.

Environmental Policy Act.

§ 113A-2. Purposes.

CASE NOTES

Quoted in In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

§ 113A-3. Declaration of State environmental policy.

CASE NOTES

Toxic Waste Disposal Falls within Zone of Protected Interests. — County had standing to challenge the creation of a toxic waste disposal site within its borders under the North Carolina Environmental Policy Act as such a site falls within the zone of interests protected under this section. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

Quoted in In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981); State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

§ 113A-4. Cooperation of agencies; reports; availability of information.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

CASE NOTES

I. General Consideration.
II. Environmental Impact Statements.
A. In General.
B. Contents.
C. Agency Actions Requiring Statements.

I. GENERAL CONSIDERATION.

Stated in State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

II. ENVIRONMENTAL IMPACT STATEMENTS.

A. In General.

Purpose. — The purpose of an environmental impact statement is to provide the responsible State agency with a useful decision-making tool. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

The requirement of the impact statement is designed to provide a mechanism by which all affected State agencies raise and consider environmental factors of proposed projects. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

Statement Must Be Before Decisionmaker. — In order for the statement to be a decisionmaking tool, the responsible State agency must have the statement before it when it is determining the action it is going to take or recommend. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

"Rule of Reason" Measures Adequacy. — In determining the adequacy of an environmental impact statement under this section, the federal courts' "rule of reason" is sufficient to determine if the statement was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to consider and balance fully environmental factors. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

B. Contents.

Method of Quality Control for Toxic Waste Site. — There is no requirement under this section for the State to set forth in an environmental impact statement how quality control of a toxic waste disposal site will be done. The Environmental Policy Act's reporting requirements insure that it is done. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

C. Agency Actions Requiring Statement.

Authorization for Acquisition of Land for Reservoir. — The issuance of a certificate by the Environmental Management Commission authorizing acquisition of land for the construction of a reservoir constitutes a "recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment," thereby necessitating an environmental impact statement. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

ARTICLE 4.

Sedimentation Pollution Control Act of 1973.

§ 113A-64. Penalties.

CASE NOTES

Defendant Entitled to Jury Trial in Civil Action under Subdivision (a)(2). — Where the Attorney General, on behalf of the department, filed action for the collection of civil penalties under subdivision (a)(2) of this section and for the imposition of an order enforcing compliance with the act and an injunction under § 113A-66, the action was a civil action, not one for review of a final agency decision, and defendant, who requested a jury trial in his answer, was therefore entitled to jury trial on all factual issues. State ex rel. Lee v. Williams, — N.C. App. —, 284 S.E.2d 572 (1981).

§ 113A-66. Civil relief.

CASE NOTES

Defendant Held Entitled to Jury Trial. — Where the Attorney General, on behalf of the department, filed action for the collection of civil penalties under § 113A-64(a)(2) and for the imposition of an order enforcing compliance with the act and an injunction under this section, the action was a civil action, not one for review of a final agency decision, and defendant, who requested a jury trial in his answer, was therefore entitled to jury trial on all factual

issues. State ex rel. Lee v. Williams, — N.C. App. —, 284 S.E.2d 572 (1981).

ARTICLE 8.

North Carolina Land Conservancy Corporation.

§ 113A-137. Board of trustees.

The board of trustees of the North Carolina Land Conservancy Corporation, hereinafter referred to as the trustees, shall be composed of and governed by nine members. The Governor shall appoint five trustees of the Corporation who shall be residents of the State and who may hold other public offices. The General Assembly shall appoint four trustees of the Corporation, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees of the General Assembly shall expire on June 30, 1983. The terms of subsequent appointees of the General Assembly shall be two years. The State Treasurer, the Secretary of Administration, and the Secretary of Natural Resources and Community Development, or their designees, shall be ex officio nonvoting trustees.

Insofar as possible the voting trustees should come from different regions of the State. The Governor shall appoint one trustee of the Corporation for a one-year term, two of the trustees of the Corporation for a two-year term, and two of the trustees of the Corporation for a three-year term, as designated by the Governor, and until their successors shall be duly appointed and qualified. The successor of each such member shall be appointed for a term of four years and until his successor shall be duly appointed and qualified, except that any person appointed to fill a vacancy shall serve only for the unexpired term. Any member of the board of trustees shall be eligible for reappointment. Each member of the board of trustees appointed by the Governor may be removed by the Governor for misfeasance, malfeasance or willful neglect or duty after reasonable notice and a public hearing, unless the same are in writing expressly waived. Each trustee of the Corporation appointed by the Governor before entering upon his duty shall take an oath to administer the duties of his office faithfully and impartially and a record of such oath shall be filed in the office of the Secretary of State. The Governor shall designate a member of the board of trustees to serve as chairman. The term of the chairman of the board of trustees shall extend for a period of one year. The trustees shall annually elect one of its members as vice-chairman. The Secretary of Administration, or his designee, shall serve as Executive Director and Secretary to the Corporation.

Five members of the board of trustees shall constitute a quorum and the affirmative vote of a majority of the members present at a duly called meeting shall be necessary for any action taken by the trustees, except adjournment. Trustees shall receive no compensation for their services, but shall be entitled to receive, from the funds of the Corporation, for attendance at meetings of the Corporation or any committee thereof, and for other services for the Corporation, reimbursement for such actual expenses as may be incurred for travel and subsistence in the performance of official duties and, only as to members appointed by the Governor, such per diem as is allowed by law for members of other State boards, commissions, and committees. (1973, c. 1405, s. 3; 1977, c. 771, s. 4; 1981 (Reg. Sess., 1982), c. 1191, s. 28.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted the present third through sixth sentences of the first paragraph for a former third sentence providing for the appointment by the Speaker of the House of Representatives of two trustees from the House and the appointment by the Lieutenant Governor of two trustees from the Senate.

Chapter 114.

Department of Justice.

Article 1.

Attorney General.

Sec.
114-2.1. Consent judgments.

Article 1.

Attorney General.

§ 114-2.1. Consent judgments.

In litigation in which the State is interested or is a party, no consent judgment shall be entered into by the State unless and no consent judgment shall be binding on the State except to the extent that the State's entire obligation for the current and for future fiscal years can be satisfied with funds that are available for the current fiscal year, including funds that the Council of State agrees to allot from the Contingency and Emergency Fund. The Director of the Budget shall report to the appropriation committees of the General Assembly concerning all funds made available during the preceding fiscal year from the Contingency and Emergency Fund for the purpose of carrying out consent judgments. (1981 (Reg. Sess., 1982), c. 1282, s. 51.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 83, makes this section effective July 1, 1982.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Chapter 115C.

Elementary and Secondary Education.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION OF STATE AND LOCAL EDUCATION AGENCIES.

Article 5.

Local Boards of Education.

Sec.

115C-46. Powers of local boards to regulate parking of motor vehicles.

SUBCHAPTER IV. EDUCATION PROGRAM.

Article 8.

General Education.

Part 2. Calendar.

115C-84. Length of school day, month, and term; Veterans Day.

Article 9.

Special Education.

Part 13. Budget Analysis and Departmental Funding.

115C-143. [Repealed.]

Article 11.

High School Competency Testing.

115C-176. Competency Test Commission.

Article 15.

North Carolina School of Science and Mathematics.

115C-223. Board of Trustees; appointment; terms of office.

Article 17.

Supporting Services.

Part 1. Transportation.

Sec.

115C-250. Authority to expend funds for transportation of children with special needs.

SUBCHAPTER V. PERSONNEL.

Article 22.

General Regulations.

Part 3. Principal and Teacher Employment Contracts.

115C-325. System of employment for public school teachers.

115C-326. Performance standards and criteria for professional employees; law suits arising out of this section.

SUBCHAPTER VI. STUDENTS.

Article 25.

Admission and Assignment of Students.

115C-366.1. Local boards of education; tuition charges.

SUBCHAPTER IX. PROPERTY.

Article 37.

School Sites and Property.

115C-518. Disposition of school property; easements and rights-of-way.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION OF STATE AND LOCAL EDUCATION AGENCIES.

ARTICLE 2.

State Board of Education.

§ 115C-10. Appointment of Board.

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

§ 115C-12. Powers and duties of the Board generally.

Editor's Note. — In the historical citation at the end of this section in the 1981 Cumulative Supplement, substitute "1975, c. 686, s. 1; c. 699, s. 2; c. 975" for "1973, c. 686, s. 1; c. 699, s. 2; c. 975."

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

ARTICLE 3.

Department of Public Instruction.

§ 115C-18. Election of Superintendent of Public Instruction.

CASE NOTES

Cited in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

§ 115C-19. Chief administrative officer of the State Board of Education.

CASE NOTES

Cited in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

ARTICLE 5.

Local Boards of Education.

§ 115C-46. Powers of local boards to regulate parking of motor vehicles.

(d) Any motor vehicle parked in a parking lot on school grounds, when such lot is clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at each entrance thereto, in violation of the rules and regulations adopted by the local board of education, or any motor vehicle otherwise parked on school grounds in violation of the rules and regulations adopted by the county or city local board of education, may be removed from school grounds to a place of storage subject to the lien creation, notice and hearing provisions of G.S. 20-161.2. No person shall be held to answer in any civil or criminal action to any owner, lienholder, or other person legally

entitled to the possession of any motor vehicle removed pursuant to this section except where such motor vehicle is willfully, maliciously or negligently damaged in the removal from school grounds to place of storage. (1979, c. 821; 1981, c. 423, s. 1; 1981 (Reg. Sess., 1982), c. 1239, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Aug. 1, 1982, substituted "subject to the lien creation, notice and hearing provisions of G.S. 20-161.2" for "and the registered owner of such vehicle shall become liable for removal and storage charges" at the end of the first sentence of subsection (d).

Session Laws 1981 (Reg. Sess., 1982), c. 1239, s. 5, provides that the act shall expire on July 1, 1983.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

SUBCHAPTER IV. EDUCATION PROGRAM.

ARTICLE 8.

General Education.

Part 2. Calendar.

§ 115C-84. Length of school day, month, and term; Veterans Day.

(c) School Term. — There shall be operated in every school in the State a uniform school term of 180 days for instructing pupils. For up to five of these days during the school year on which schools are closed due to hazardous weather conditions, natural disaster or other emergency, local boards of education may excuse teachers and students from attendance without requiring that the days be made up or affecting teachers' pay. For up to 60 of these days, when in the sound judgment of the State Board of Education, or the local board with the approval of the State Board, conditions justify the suspension of school, the State Board of Education or the local board with the approval of the State Board, conditions justify the suspension of school, the State Board of Education or the local board with the approval of the State Board, may suspend operation of a school and for 15 of these days, teachers shall be entitled to normal pay. Local boards of education are directed to report all days waived to the State Board of Education. Such report shall include justification for their actions.

Full authority is hereby given to the State Board of Education during any period of emergency to order general, and if necessary, extended recesses or adjournment of the public schools in any section of the State where the planting or harvesting of crops or any emergency conditions make such action necessary.

(1981 (Reg. Sess., 1982), c. 1282, s. 15.1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote the first paragraph of subsection (c), to the extent that a detailed comparison is not possible. The amendatory act purported to rewrite the first paragraph of the section, but the first paragraph of subsection (c) was plainly intended, and the amendment has been given effect according to its obvious intent.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Part 3. Textbooks.

§ 115C-96. Powers and duties of the State Board of Education in regard to textbooks.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

Article 9.

Special Education.

Part 1. State Policy.

§ 115C-106. Policy.

Editor's Note. — Session Laws 1981, (Reg. Sess., 1982), c. 1282, s. 25, establishes a schedule of priorities for allocating funds to local area mental health programs and local education agencies to provide appropriate treatment and education programs to children under the age of 18 who suffer from emotional, mental, or neurological handicaps accompanied by violent or assaultive behavior, identified as a class in the case of Willie M., et al. vs. Hunt, et al. The act appropriates funds to the Division of Mental Health, Mental Retardation, and Substance Abuse, to the Division of Youth Services, and to the Department of Public Education, establishes a reserved fund, and provides for certain reporting requirements. The act further provides that the prohibitions on use of State funds prescribed by G.S. 122-35.53(c) do not apply to any funds appropriated for the treatment of members of the above named class.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 32, authorizes the Frank Porter Graham Child Development Center, which has contracted with the General Assembly to study the costs of implementing the legislative policy declared in this section (to ensure every child a full and fair opportunity to reach his potential and to provide a free appropriate publicly supported education to every child with special needs), to have the same right of access to all State and local records pertaining to the study that the General Assembly has, consistent with federal law and conditions of federal grants, notwithstanding the provisions of G.S. 115C-114 or any other provision of State law.

Part 2. Nondiscrimination in Education.

§ 115C-114. Records; privacy and expunction.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 32, authorizes the Frank Porter Graham Child Development Center, which has contracted with the General Assembly to study the costs of implementing the legislative policy declared in G.S. 115C-106 (to ensure every child a full and fair opportunity to reach his potential and to provide a free appropriate publicly supported education to every child with special needs), to have the same right of access to all State and local records pertaining to the study that the General Assembly has, consistent with federal law and conditions of federal grants, notwithstanding the provisions of this section or any other provision of State law.

§ 115C-115. Placements in private schools, out-of-state schools and schools in other local educational agencies.

Cross References. — For provision authorizing the State Board of Education and local boards to expend public funds for transportation of certain children with special needs, see § 115C-250(a).

Part 13. Budget Analysis and Departmental Funding.

§ 115C-143: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1282, s. 29, effective July 1, 1982.

Article 11.

High School Competency Testing.

§ 115C-176. Competency Test Commission.

(a) The Governor shall appoint a Competency Test Commission which shall be composed of 17 members who shall hold office for four years or until their successors are appointed. Any vacancy on the Competency Test Commission shall be filled by the Governor for the unexpired term. Five members of the Competency Test Commission shall be persons serving as teachers or principals in high schools; five shall be citizens of the State interested in education; two shall be professional educators from the faculties of institutions of higher education in the State; two shall be persons competent in the field of psychological measurement; two shall be persons under the age of 21 at the time of their appointment; and one shall be the superintendent of a local school administrative unit in the State. The members shall be entitled to compensation for each day spent on the work of the Competency Test Commission as approved by the State Board of Education and receive reimbursement for travel and subsistence expenses incurred in the performance of their duties at rates specified in G.S. 138-5 or 138-6, whichever is applicable to the individual member. All currently employed teachers serving on the Commission shall be entitled to receive full pay for each day spent on the work of the Commission without any reduction in salary for a substitute teacher's pay.

(1981 (Reg. Sess., 1982), c. 1189, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "17" for "15" in the first sentence and inserted "two shall be persons under the age of 21 at the time of their appointment" in the third sentence following "psychological measurement." The amendatory act directed that the substitution of "17" for "15" be made in "line 3" of subsection (a). Line 2 of the subsection was plainly intended, and the amendment has been given effect in subsection (a) as set out above.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Article 15.

North Carolina School of Science and Mathematics.

§ 115C-223. Board of Trustees; appointment; terms of office.

(a) The Board of Trustees of the North Carolina School of Science and Mathematics consists of the following members:

(1) Five ex officio nonvoting members: the Chairman of the State Board of Education; the Superintendent of Public Instruction; the President of the Community College System; the President of the Association of

Independent Colleges and Universities; and one member of the Board of Governors of The University of North Carolina designated by the Chairman of that Board.

(2) Two members appointed by the Superintendent of Public Instruction: a science teacher; and a mathematics teacher; both of whom are from within the State.

(3) Two members, one of whom shall be a superintendent of a local school administrative unit, appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121.

(4) Two members, one of whom shall be a principal of a local school administrative unit, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

(5) Fifteen members appointed by the Governor, at least 12 of whom shall be scientists and mathematicians. One of these scientists or mathematicians shall be designated by the Governor as Chairman of the Board of Trustees.

(b) The initial members appointed by the General Assembly upon the recommendation of the President of the Senate shall serve for terms expiring June 30, 1983; their successors shall serve for four-year terms beginning July 1 of 1983 and each fourth year thereafter. The initial members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. The two initial appointments of the Superintendent of Public Instruction shall be for terms of four years. Five of the initial appointments of the Governor shall be for terms of two years; five shall be for terms of four years; and five shall be for terms of six years. With the exception of the appointments of the General Assembly, at the expiration of the terms of the initial appointees, their successors shall be appointed for terms of six years, beginning July 1 in the year of the respective appointments.

(c) Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies in appointive terms shall be filled for the unexpired portion of the terms by appointment of the officer who appointed the person causing each vacancy. (1977, 2nd Sess., c. 1219, s. 42; 1981, c. 423, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 40-43.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in subsection (a) rewrote subdivision (3), which formerly provided for two members appointed by the Lieutenant Governor, and subdivision (4), which formerly provided for two members appointed by the Speaker of the House, in subsection (b) substituted the present first and second sentences for the former first sentence, relating to the terms of the appointments of the Lieutenant Governor and the Speaker of the House, and substituted "General Assembly" for "Lieutenant Governor and the Speaker of the House" in the last sentence thereof, and rewrote subsection (c), which read "Vacancies and appointive terms shall be filled for the unexpired portion of the term by appointment of the officer who appointed the person causing each vacancy."

ARTICLE 17.

Supporting Services.

Part 1. Transportation.

§ 115C-239. Authority of local boards of education.

Editor's Note. — Subsection (d) of § 115C-250, included in the references in this section, was relettered as subsection (b) by Session Laws 1981, c. 912, s. 1.

§ 115C-240. Authority and duties of State Board of Education.

Editor's Note. — Subsection (d) of § 115C-250, included in the references in subsections (a) and (f) in this section, was relettered as subsection (b) by Session Laws 1981, c. 912, s. 1.

§ 115C-242. Use and operation of school buses.

Editor's Note. — Subsection (d) of § 115C-250, included in the references in subdivision (1) in this section, was relettered as subsection (b) by Session Laws 1981, c. 912, s. 1.

§ 115C-244. Assignment of pupils to school buses.

Editor's Note. — Subsection (d) of § 115C-250, included in the references in subsection (c) in this section, was relettered as subsection (b) by Session Laws 1981, c. 912, s. 1.

§ 115C-249. Purchase and maintenance of school buses, materials and supplies.

Editor's Note. — Subsection (d) of § 115C-250, included in the references in subsections (a) and (d), was relettered as subsection (b) by Session Laws 1981, c. 912, s. 1.

§ 115C-250. Authority to expend funds for transportation of children with special needs.

(a) The State Board of Education and local boards of education may expend public funds for transportation of children with special needs who have been placed in programs by a local school board as a part of its duty to provide such children with a free appropriate education, including its duty under G.S. 115C-115.

The Department of Human Resources and the Department of Correction may also expend public funds for transportation of children with special needs who have been placed in programs by one of these agencies as a part of that agency's duty to provide such children with a free appropriate public education.

If a local area mental health center places a child with special needs in an educational program, the local area mental health center shall pay for the transportation of the child to the program.

(1981 (Reg. Sess., 1982), c. 1282, s. 31.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment rewrote subsection (a) to the extent that a detailed comparison is not possible.
Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 115C-253. Contracts for transportation.

Editor's Note. —
Subsection (d) of § 115C-250, included in the references in this section, was relettered as subsection (b) by Session Laws 1981, c. 912, s. 1.

SUBCHAPTER V. PERSONNEL.

ARTICLE 21.

Other Employees.

§ 115C-315. Hiring of school personnel.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1399, s. 3, effective July 1, 1982, provides: "The Department of Public Education and the State Board of Education shall provide for liability insurance for nonteaching public school personnel to the extent that such personnel's salaries are funded by the State. The insurance shall cover claims made for injury liability and property damage liability on account of an act done or an omission made in the course of the employee's duties. As provided by law or the rules and policies of the Department of Public Education or the local school administrative unit, the Department and State Board of Education shall comply with the State's laws in securing the insurance and shall provide it at the earliest possible date for the 1982-83 school year. Funds for this purpose shall be allocated from the State's Contingency and Emergency Fund. Nothing in this section shall prevent the Department and the State Board from furnishing the same liability insurance protection for nonteaching public school personnel not supported by State funds, provided that the cost of the protection shall be funded from the same source that supports the salaries of these employees."

ARTICLE 22.

General Regulations.

Part 3. Principal and Teacher Employment Contracts.

§ 115C-325. System of employment for public school teachers.

(c) (1) Election of a Teacher to Career Status. — When a teacher will have been employed by a North Carolina public school system for three consecutive years, the board, near the end of the third year, shall vote upon his employment for the next school year. The board shall give him written notice of that decision at least 30 days before the end of his third year of employment. If a majority of the board votes to reemploy him, he becomes a career teacher on the first day of the fourth year of employment. If the board votes to reemploy the teacher and thus grant career status at the beginning of the next school year, and if it has notified him of this decision, it may not later rescind that

action but must proceed under the provisions of this section for the demotion or discharge of a teacher if it decides to terminate his employment. If a majority of the board votes against reemploying the teacher, he shall not teach beyond the current school term. If the board fails to vote on granting career status but reemploys him for the next year, he automatically becomes a career teacher on the first day of the fourth year of employment.

A year, for purposes of computing time as a probationary teacher, shall be not less than 120 workdays performed as a full-time, permanent teacher in a normal school year.

(2) Employment of a Career Teacher. — A teacher who has obtained career status in another North Carolina public school system need not serve another probationary period of more than two years, and may, at the option of the board, be employed immediately as a career teacher. In any event, if the teacher is reemployed for a third consecutive year, he shall automatically become a career teacher. A teacher with career status who resigns and within five years seeks to be reemployed by the same local school administrative unit need not serve another probationary period of more than one year and may, at the option of the board, be reemployed as a career teacher. In any event, if he is reemployed for a second consecutive year, he shall automatically become a career teacher.

(3) Ineligible for Career Status. — No superintendent, associate superintendent, assistant superintendent or other school employee who is not a teacher as defined by G.S. 115C-325(a)(6) is eligible to obtain career status or continue in a career status if he no longer performs the responsibilities of a teacher as defined in G.S. 115C-325(a)(6).

(4) Leave of Absence. — A career teacher who has been granted a leave of absence by a board shall maintain his career status if he returns to his teaching position at the end of the authorized leave.

(e) Grounds for Dismissal or Demotion of a Career Teacher.

(1) No career teacher shall be dismissed or demoted or employed on a part-time basis except for one or more of the following:

a. Inadequate performance.
b. Immorality.
c. Insubordination.
d. Neglect of duty.
e. Physical or mental incapacity.
f. Habitual or excessive use of alcohol or nonmedical use of a controlled substance as defined in Article 5 of Chapter 90 of the General Statutes.
g. Conviction of a felony or a crime involving moral turpitude.
h. Advocating the overthrow of the government of the United States or of the State of North Carolina by force, violence, or other unlawful means.
i. Failure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State.
j. Failure to comply with such reasonable requirements as the board may prescribe.
k. Any cause which constitutes grounds for the revocation of such career teacher's teaching certificate.
l. A justifiable decrease in the number of positions due to district reorganization, decreased enrollment, or decreased funding, provided that there is compliance with subdivision (2).
m. Failure to maintain his certificate in a current status.

n. Failure to repay money owed to the State in accordance with the provisions of Article 60, Chapter 143 of the General Statutes.

(2) When a career teacher is dismissed pursuant to G.S. 115C-325(e)(1)l above, his name shall be placed on a list of available teachers to be maintained by the board. Career teachers whose names are placed on such a list shall have a priority on all positions for which they are qualified which become available in that system for the three consecutive years succeeding their dismissal. However, if the local school administrative unit offers the dismissed teacher a position for which he is certified and he refuses it, his name shall be removed from the priority list.

(3) In determining whether the professional performance of a career teacher is adequate, consideration shall be given to regular and special evaluation reports prepared in accordance with the published policy of the employing local school administrative unit and to any published standards of performance which shall have been adopted by the board. Failure to notify a career teacher of an inadequacy in his performance shall be conclusive evidence of satisfactory performance.

(4) Dismissal under subdivision (1) above, except paragraph g thereof, shall not be based on conduct or actions which occurred more than three years before the written notice of the superintendent's intention to recommend dismissal is mailed to the teacher.

(k) Panel Finds Grounds for Superintendent's Recommendation True and Substantiated.

(1) If the panel found that the grounds for the recommendation of the superintendent are true and substantiated, at the hearing the board shall consider the recommendation of the superintendent, the report of the panel, including any minority report, and any evidence which the teacher or the superintendent may wish to present with respect to the question of whether the grounds for the recommendation are true and substantiated. The hearing may be conducted in an informal manner.

(2) If, after considering the recommendation of the superintendent, the report of the panel and the evidence adduced at the hearing, the board concludes that the grounds for the recommendation are true and substantiated, the board, if it sees fit, may by resolution order such dismissal.

(p) Notwithstanding any law or regulation to the contrary and the teacher salary schedule as adopted by the State Board of Education, this section shall apply to all persons defined as teachers by this section who serve as teachers in the following schools and institutions:

Juvenile Evaluation Center.

C. A. Dillon.

Dobbs School for Girls.

Samarkand Manor.

Stonewall Jackson. (1955, c. 664; 1967, c. 223, s. 1; 1971, c. 883; c. 1188, s. 2; 1973, c. 315, s. 1; c. 782, ss. 1-30; 1979, c. 864, s. 2; 1981, c. 423, s. 1; c. 538, ss. 1-3; c. 731, s. 1; c. 1127, ss. 39, 40; 1981 (Reg. Sess., 1982), c. 1282, s. 30.)

Editor's Note. — Subsection (c) of this section is set out to change the reference to § 115C-325(a)(9) at the end of the subdivision to § 115C-325(a)(6). Subsections (e) and (k) of this section are set out to correct typographical errors in the first line of subdivison (e)(2) and in the fourth line of subdivision (k)(2) of the section in the 1981 Cumulative Supplement.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, deleted "Cameron Morrison," "Samuel Leonard", and "Richard T. Fountain" from the list at the end of subsection (p).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment or the errors, only subsections (c), (e), (k) and (p) are set out.

CASE NOTES

Neglect of Duty. — The term "neglect of duty" under subdivision (e)(1)d of this section is defined as a failure to perform some duty imposed by contract or law and encompasses, clearly, the failure to report for work. However, a dismissal upon this ground alone cannot be sustained unless it is proven that a reasonable man under such circumstances causing his dismissal for a neglect of duty would have recognized the duty and would have considered himself obliged to conform. Overton v. Goldsboro City Bd. of Educ., 304 N.C. 312, — S.E.2d — (1981).

§ 115C-326. Performance standards and criteria for professional employees; law suits arising out of this section.

(a) The State Board of Education, in consultation with local boards of education, shall develop uniform performance standards and criteria to be used in evaluating professional public school employees. It shall develop rules and regulations to recommend the use of these standards and criteria in the employee evaluation process. The performance standards and criteria shall be adopted by the Board by July 1, 1982, and may be modified in the discretion of the Board.

Local boards of education shall adopt rules and regulations by July 1, 1982, to provide for annual evaluation of all professional employees defined as teachers by G.S. 115C-325(a)(6). Local boards may also adopt rules and regulations requiring annual evaluation of other school employees not specifically covered in this section. Rules and regulations adopted by local boards shall utilize performance standards and criteria adopted by the State Board of Education pursuant to the first paragraph of this section; however, the standards and criteria used by local boards are not to be limited by those adopted by the State Board of Education.

(b) If any claim is made or any legal action is instituted against an employee of a local school administrative unit on account of an act done or an omission made in the course of the employee's duties in evaluating employees pursuant to this section, the local board of education, if the employee is held not liable, shall reimburse the employee for reasonable attorney's fees. (1979, 2nd Sess., c. 1137, s. 35; 1981, c. 423, s. 1; c. 859, s. 29.12; 1981 (Reg. Sess., 1982), c. 1282, s. 32.1.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, designated the original section as subsection (a), and added subsection (b). In the second sentence of the first paragraph of present subsection (a) the amendment substituted "to recommend" for "to insure," and in the last sentence of the second paragraph of present subsection (a) the amendment deleted "All such" preceding "rules and regulations" at the beginning of the sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

SUBCHAPTER VI. STUDENTS.

ARTICLE 25.

Admission and Assignment of Students.

§ 115C-366.1. Local boards of education; tuition charges.

(a) Local boards of education may charge tuition to the following persons:

(1) Persons of school age who are not domiciliaries of the State.

(2) Persons of school age who are domiciliaries of the State but who do not reside within the school administrative unit or district.

(3) Persons of school age who reside on a military or naval reservation located within the State and who are not domiciliaries of the State. Provided, however, that no person of school age residing on a military or naval reservation located within the State and who attends the public schools within the State may be charged tuition if federal funds designed to compensate for the impact on public schools of military dependent persons of school age are funded by the federal government at not less than fifty percent (50%) of the total per capita cost of education in the State, exclusive of capital outlay and debt service, for elementary or secondary pupils, as the case may be, of such school administrative unit.

(b) The tuition charge for a student shall not exceed the amount of per pupil local funding.

(1982, Ex. Sess., c. 2, ss. 1, 2.)

Effect of Amendments. — The 1982, Ex. Sess., amendment, in the introductory language of subsection (a) substituted "may" for "shall," and rewrote subsection (b), which formerly read: "If the tuition charge for a student exceeds the amount of per capita local funding, that excess shall be remitted to the State Board of Education."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a) and (b) are set out.

SUBCHAPTER VII. FISCAL AFFAIRS.

ARTICLE 30.

Financial Powers of the State Board of Education.

§ 115C-408. Funds under control of the State Board of Education.

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

ARTICLE 32.

Loans from State Literary Fund.

§ 115C-459. Terms of loans.

Editor's Note. — This section is erroneoulsy numbered 115C-429 in the 1981 Cumulative Supplement.

SUBCHAPTER IX. PROPERTY.

ARTICLE 37.

School Sites and Property.

§ 115C-518. Disposition of school property; easements and rights-of-way.

(a) When in the opinion of any local board of education the use of any building site or other real property or personal property owned or held by the board is unnecessary or undesirable for public school purposes, the local board of education may dispose of such according to the procedures prescribed in General Statutes, Chapter 160A, Article 12, or any successor provisions thereto. For the purposes of this section references in Chapter 160A, Article 12, to the "city," the "council," or a specific city official are deemed to refer, respectively, to the school district or administrative unit, the board of education, and the school administrative official who most nearly performs the same duties performed by the specified city official. A local board of education may also sell any property other than real property through the facilities of the North Carolina Department of Administration. The proceeds of any sale of real property or from any lease for a term of over one year shall be applied to reduce the county's bonded indebtedness for the school administrative unit disposing of such real property or for capital outlay purposes.

(b) In addition to the foregoing, local boards of education are hereby authorized and empowered, in their sound discretion, to grant easements to any public utility, municipality or quasi-municipal corporations to furnish utility services, with or without compensation except the benefits accruing by virtue of the location of the said public utility, and to dedicate portions of any lands owned by such boards as rights-of-way for public streets, roads or sidewalks, with or without compensation except the benefits accruing by virtue of the location or improvement of such public streets, roads or sidewalks.

(c) Any sale, exchange or lease of real or personal property by any local board of education prior to June 18, 1982, and pursuant to the authority of G.S. 115-126 is hereby validated, ratified and confirmed. (1955, c. 1372, art. 15, s. 2; 1959, ch. 324; c. 573, s. 11; 1961, c. 395; 1975, c. 264; c. 879, s. 46; 1977, c. 803; 1981, c. 423, s. 1; 1981 (Reg. Sess., 1982), c. 1216.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

§ 115C-524. Repair of school property.

CASE NOTES

Day Care Program. — The legislature may constitutionally delegate to the school board the power or authority to maintain a day care program. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981), (decided under former § 115-133).

Chapter 115D.

Community Colleges and Technical Institutes.

ARTICLE 2.

Local Administration.

§ 115D-21. Traffic regulations; fines and penalties.

Cross References. — As to hearing procedure for motor vehicles removed, towed or stored pursuant to the provisions of this Chapter, see § 20-161.2.

Chapter 116.

Higher Education.

Article 1.

The University of North Carolina.

Part 2. Organization, Governance and Property of the University.

Sec.

116-7. General provisions concerning members of the Board of Governors.

Part 3. Constituent Institutions.

116-37.1. Center for public television.

Part 6. Traffic and Parking.

Sec.

116-44.4. Regulation of traffic and parking and registration of motor vehicles.

Article 14.

General Provisions as to Tuition and Fees in Certain State Institutions.

116-143.2. [Expired.]

Article 1.

The University of North Carolina.

Part 1. General Provisions.

§ 116-1. Purpose.

CASE NOTES

Quoted in Nova Univ. v. Board of Governors, — N.C. —, 287 S.E.2d 872 (1982).

Part 2. Organization, Governance and Property of the University.

§ 116-6. Election and terms of members of Board of Governors.

CASE NOTES

Applied in Poovey v. Edmisten, 526 F. Supp. 759 (E.D.N.C. 1981).

§ 116-7. General provisions concerning members of the Board of Governors.

(c) Whenever any vacancy shall occur in the elected membership of the Board of Governors, it shall be the duty of the Board to inform the Speaker of the House of Representatives and the President of the Senate of the vacancy, and the vacancy shall remain unfilled until the General Assembly elects a person to fill the vacancy.

The General Assembly shall fill the vacancy not later than the adjournment sine die of the next regular session of the General Assembly. The election shall be for the remainder of the unexpired term. Whenever a member shall fail, for any reason other than ill health or service in the interest of the State or nation,

to be present for four successive regular meetings of the Board, his place as a member shall be deemed vacant. (1971, c. 1244, s. 1; 1977, c. 875; 1982, Ex. Sess., c. 1, s. 1.)

Effect of Amendments. — The 1982, Ex. Sess., amendment substituted the present first paragraph and the first two sentences of the second paragraph of subsection (c) for the former first and second sentences of the subsection, which provided for the filling of vacancies by the Chairman of the Board of Governors, pending election of a successor at the next regular session of the General Assembly.

Session Laws 1982, Ex. Sess., c. 1, s. 2, adopts procedures for nominating and electing a member of the Board of Governors of the University of North Carolina to fill for the remainder of the unexpired term the vacancy which existed at the convening of the 1982 extra session of the General Assembly. Section 3 of the Act provides that s. 2 shall apply only to the vacancy in existence upon the convening of the said 1982 extra session.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

CASE NOTES

Quoted in Poovey v. Edmisten, 526 F. Supp. 759 (E.D.N.C. 1981).

§ 116-11. Powers and duties generally.

CASE NOTES

Powers of planning and coordination of a system of higher education in North Carolina, granted to the Board in a number of subsections of this section, each of which deals with a specific power, are expressly relative to the Board's governance of the constituent institutions of the University of North Carolina. Nova Univ. v. Board of Governors, — N.C. —, 287 S.E.2d 872 (1982).

§ 116-15. Licensing of nonpublic educational institutions; regulation of degrees.

CASE NOTES

Inherent in the power to license degrees is the power to establish minimum criteria which a North Carolina institution must meet in order to be licensed to grant degrees, and this is sufficient power for the Board to ensure that degrees conferred by North Carolina institutions are backed by curricula meeting the minimum standards of quality prescribed by the Board's regulations. Nova Univ. v. Board of Governors, — N.C. —, 287 S.E.2d 872 (1982).

Board of Governors does not have authority, etc. —

This section does not authorize the Board of Governors of the University of North Carolina to regulate through a licensing procedure teaching in North Carolina by an out-of-state university when the teaching leads to conferral of academic degrees in Florida and pursuant to Florida law. Nova Univ. v. Board of Governors, — N.C. —, 287 S.E.2d 872 (1982).

This section expressly authorizes the Board to license only the conferral of degrees, and not teaching. Nova Univ. v. Board of Governors, — N.C. —, 287 S.E.2d 872 (1982).

Part 3. Constituent Institutions.

§ 116-37.1. Center for public television.

(b) The Center shall have a board of trustees, to be named "the Board of Trustees of the University of North Carolina Center for Public Television" (hereinafter called "the Board of Trustees"). The Board of Governors is hereby authorized and directed to establish the Board of Trustees of the Center and to delegate to the Board of Trustees such powers and duties as the Board of Governors deems necessary or appropriate for the effective discharge of the functions of the Center; provided, that the Board of Governors shall not be deemed by the provisions of this section to have the authority to delegate any responsibility it may have as licensee of the broadcast facilities of the University of North Carolina.

(1) The Board of Trustees of the University of North Carolina Center for Public Television shall be composed of the following membership: 11 persons appointed by the Board of Governors; four persons appointed by the Governor; two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121; and ex officio, the Secretary of the Department of Cultural Resources, the Secretary of the Department of Human Resources, the Superintendent of Public Instruction, the State President of the Community College System, and the President of the University of North Carolina. In making initial appointments to the Board of Trustees, the Board of Governors shall designate six persons for two-year terms and five persons for four-year terms, and the Governor shall designate two persons for two-year terms and two persons for four-year terms. The initial members appointed to the Board of Trustees by the General Assembly shall serve for terms expiring June 30, 1983, and notwithstanding anything else in this section, their successors shall be appointed in 1983 and biennially thereafter for two-year terms. Thereafter, the term of office of appointed members of the Board of Trustees of the Center shall be four years. In making appointments to the Board of Trustees the appointing authorities shall give consideration to promoting diversity among the membership, to the end that, in meeting the responsibilities delegated to it, the Board of Trustees will reflect and be responsive to the diverse needs, interests, and concerns of the citizens of North Carolina.

(2) No person shall be appointed to the Board of Trustees who is an employee of the State or of any constituent institution; a public officer of the State as defined in G.S. 147-1, 147-2, and 147-3(c); a member of the Board of Governors; a trustee of a constituent institution; or the spouse of any of the foregoing. Any appointed member of the Board of Trustees who after appointment becomes any of the foregoing shall be deemed to have resigned from the Board of Trustees.

(3) Each ex officio member of the Board of Trustees shall personally serve on the Board of Trustees but may designate in writing a proxy for specified meetings which the ex officio member finds he or she is unable reasonably to attend.

(4) Each appointive member of the Board of Trustees shall personally serve on the Board of Trustees without benefit of proxy. Any appointive member who fails, for any reason other than ill health or service in the the interest of the State or the nation, to attend three consecutive regular meetings of the Board of Trustees, shall be deemed to have resigned from the Board of Trustees.

(5) Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies occurring during a term among the appointive membership of the Board of Trustees shall be filled for the remainder of the unexpired term by appointment of the original appointing authority for the vacant seat. The principal officer of the Board of Trustees shall promptly notify the Secretary of the University of North Carolina of the vacancy and the Secretary shall give written notice of the vacancy to the appropriate appointing authority.

(1981 (Reg. Sess., 1982), c. 1191, ss. 54, 55.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in subdivision (1) of subsection (b) substituted the language beginning "two members appointed by the General Assembly" and ending "in accordance with G.S. 120-121" for "one Senator appointed by the President of the Senate; one member of the House of Representatives appointed by the Speaker of the House" in the first sentence and inserted the present third sentence, and in subdivision (5) of subsection (b) substituted the present first sentence and the language "Other vacancies occurring" at the beginning of the present second sentence for the language "Any vacancy which occurs."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Part. 6. Traffic and Parking.

§ 116-44.4. Regulation of traffic and parking and registration of motor vehicles.

(i) An ordinance adopted under any portion of this Part may provide that any vehicle illegally parked may be removed to a storage area subject to the lien creation, notice and hearing provisions of G.S. 20-161.2. The cost of any such removal constitutes a lien on the vehicle that may be enforced in the manner provided by law for enforcement of mechanics' and materialmen's liens.

(1981 (Reg. Sess., 1982), c. 1239, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Aug. 1, 1982, added "subject to the lien creation, notice and hearing provisions of G.S. 20-161.2" at the end of the first sentence of subsection (i).

Session Laws 1981 (Reg. Sess., 1982), c. 1239, s. 5, provides that the act shall expire on July 1, 1983.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (i) is set out.

Article 14.

General Provisions as to Tuition and Fees in Certain State Institutions.

§ 116-143.2: Expired.

Editor's Note. This section, which was enacted by Session Laws 1977, c. 590, s. 1, expired by the terms of s. 2 of the 1977 act on July 1, 1982.

ARTICLE 21A.

Higher Educational Facilities Finance Act.

§ 116-198.6. Short title.

Editor's Note. — This Article, enacted by Session Laws 1981, c. 784, s. 1, was made effective upon certification of adoption of a constitutional amendment authorizing the enactment of general laws dealing with the transactions of the type contemplated by this Article. Such an amendment was proposed by Session Laws 1981, c. 887, and submitted to the people at an election held June 29, 1982, and defeated. This Article, therefore, did not go into effect.

Chapter 118.

Firemen's Relief Fund.

Article 2.

State Appropriation.

Sec.
118-12. Application of fund.

Article 1.

Fund Derived from Fire Insurance Companies.

§ 118-1. Fire insurance companies to report premiums collected.

Local Supplemental Firemen's Retirement Fund. — City of Reidsville: 1979, c. 94; 1981 (Reg. Sess., 1982), c. 1235.

Article 2.

State Appropriation.

§ 118-12. Application of fund.

The money paid into the hands of the treasurer of the North Carolina State Firemen's Association shall be known and remain as the "Firemen's Relief Fund" of North Carolina, and shall be used as a fund for the relief of firemen, members of such Association, who may be injured or rendered sick by disease contracted in the actual discharge of duty as firemen, and for the relief of widows, children, and if there be no widow or children, then dependent mothers of such firemen killed or dying from disease so contracted in such discharge of duty; to be paid in such manner and in such sums to such individuals of the classes herein named and described as may be provided for and determined upon in accordance with the constitution and bylaws of said Association, and such provisions and determinations made pursuant to said constitution and bylaws shall be final and conclusive as to the persons entitled to benefits and as to the amount of benefit to be received, and no action at law shall be maintained against said Association to enforce any claim or recover any benefit under this Article or under the constitution and bylaws of said Association; but if any officer or committee of said Association omit or refuse to perform any duty imposed upon him or them, nothing herein contained shall be construed to prevent any proceedings against said officer or committee to compel him or them to perform such duty. No fireman shall be entitled to receive any benefits under this section until the firemen's relief fund of his city or town shall have been exhausted. Notwithstanding the above provisions, the Executive Board of the North Carolina State Firemen's Association is hereby authorized to grant educational scholarships to the children of members; and to subsidize premium payments of members over 65 years of age to the Firemen's Fraternal Insurance Fund of the North Carolina State Firemen's Association. (1891, c. 468, s. 3; Rev., s. 4393; C. S., s. 6058; 1925, c. 41; 1981 (Reg. Sess., 1982), c. 1215.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the last sentence.

Chapter 120.

General Assembly.

Article 1.

Apportionment of Members; Compensation and Allowances.

Sec.
120-1. Senators.
120-2. House apportionment specified.

Article 6C.

Review of Administrative Rules.

120-30.25. Filing of rules.
120-30.28. Review of rules.
120-30.29A. Actions on rules.
120-30.34. Review of and objection to temporary rules.
120-30.35. Hearings.
120-30.36. Failure to object; inadmissibility into evidence.

Article 7.

Legislative Services Commission.

120-32. Commission duties.

Article 12.

Commission on Children with Special Needs.

Sec.
120-61. Members to serve without compensation; subsistence and travel expenses.

Article 13A.

Joint Legislative Committee to Review Federal Block Grant Funds.

120-84.4. Powers.
120-84.5. Review procedure.

Article 15.

Retirement Systems Actuarial Note Act.

120-115 to 120-120. [Reserved.]

Article 16.

Legislative Appointments to Boards and Commissions.

120-121. Legislative appointments.
120-122. Vacancies in legislative appointments.
120-123. Service by members of the General Assembly on certain boards and commissions.

Article 1.

Apportionment of Members; Compensation and Allowances.

§ 120-1. Senators.

(a) For the purpose of nominating and electing members of the Senate in 1982 and every two years thereafter, senatorial districts are established and seats in the Senate are apportioned among those districts as follows:

District 1 elects one Senator and consists of Camden, Currituck, Dare, Hyde, Pasquotank, Perquimans and Tyrrell Counties; the following townships of Beaufort County: Bath, Long Acre, Pantego, Richland, and Washington; and the following townships of Washington County: Scuppernong and Skinnersville.

District 2 elects one Senator and consists of Bertie, Chowan, Gates, Hertford, and Northampton Counties: the following townships of Edgecombe County: 3 (Upper Conetoe), and 4 (Deep Creek); the following townships of Halifax County: Conoconnara, Halifax, Palmyra, Roseneath, and Scotland Neck; the following townships of Martin County: Goose Nest, Hamilton and Robersonville; and the Lees Mills and Plymouth Townships of Washington County.

District 3 elects one Senator and consiyts of Carteret, Craven and Pamlico Counties.

District 4 elects one Senator and consists of Onslow County.

District 5 elects one Senator and consists of Duplin, Jones and Lenoir Counties and Columbia and Union Townships in Pender County.

District 6 elects one Senator and consists of Warren County; the following townships of Edgecombe County: 1 (Tarboro), 2 (Lower Conetoe), 5 (Lower Fishing Creek), 6 (Upper Fishing Creek), 7 (Swift Creek), 8 (Sparta), 9 (Otter Creek), 10 (Lower Town Creek), 11 (Walnut Creek), 12 (Rocky Mount), 13 (Cokey), 14 (Upper Town Creek); and the following townships of Halifax County: Brinkleyville, Butterwood, Enfield, Faucett, Littleton, Roanoke Rapids, and Weldon.

District 7 elects one Senator and consists of New Hanover County and the following townships of Pender County: Burgaw, Canetuck, Caswell, Grady, Holly, Long Creek, Rocky Point and Topsail.

District 8 elects one Senator and consists of Greene and Wayne Counties.

District 9 elects one Senator and consists of Pitt County; the Chocowinity township of Beaufort County; and the following townships of Martin County: Beargrass, Cross Roads, Gifffins, Jamesville, Poplar Point, Williams, and Williamston.

District 10 elects one Senator and consists of Wilson County; and the following townships of Nash County: Coopers, Jackson, Nashville, North Whitakers, Oak Level, Red Oak, Rocky Mount, South Whitakers and Stony Creek.

District 11 elects one Senator and consists of Franklin and Vance Counties; the following townships in Nash County: Baileys, Castalia, Dry Wells, Ferrells, Griffins, and Mannings; and the following townships in Wake County: Bartons Creek, Leesville, Little River, New Light, and Wake Forest.

District 12 elects two Senators and consists of the following townships of Cumberland County: Black River, Carvers Creek, Cedar Creek, Cross Creek, Eastover, Gray's Creek, Manchester, Pearces Mill, Rockfish and Seventy-First.

District 13 elects two Senators and consists of Durham, Granville and Person Counties and the following townships of Orange County: Cedar Grove, Eno and Little River.

District 14 elects three Senators and consists of Harnett and Lee Counties and the following townships of Wake County: Buckhorn, Cary, Cedar Fork, Holly Springs, House Creek, Marks Creek, Meredith, Middle Creek, Neuse, Panther Branch, Raleigh, St. Mary's, St. Matthew's, Swift Creek, and White Oak.

District 15 elects one Senator and consists of Johnston and Sampson Counties.

District 16 elects two Senators and consists of Chatham, Moore and Randolph Counties and the following townships of Orange County: Bingham, Chapel Hill, Cheeks and Hillsborough.

District 17 elects two Senators and consists of Anson, Montgomery, Richmond, Scotland, Stanly and Union Counties.

District 18 elects one Senator and consists of Bladen, Brunswick and Columbus Counties and the Beaver Dam Township of Cumberland County.

District 19 elects one Senator and consists of the following townships of Forsyth County: Belews Creek and Kernersville; and consists of the following townships and precincts of Guilford County: Bruce Township, Center Grove Township, Clay Township, Fentress Township, Friendship Precinct I, Greene Township, Madison Township, Monroe Township, Greensboro Precincts 10, 20, 21, 27, 28, 32, 34, and 35, and Oak Ridge Township, Rock Creek Township, and Washington Township.

District 20 elects two Senators and consists of the following townships of Forsyth County: Abbotts Creek, Bethania, Broadbay, Clemmonsville, Lewisville, Middle Fork, Old Richmond, Old Town, Salem Chapel, South Fork, Vienna and Winston Townships.

District 21 elects one Senator and consists of Alamance and Caswell Counties.

District 22 elects four Senators and consists of Cabarrus and Mecklenburg Counties.

District 23 elects two Senators and consists of Davidson, Davie and Rowan Counties.

District 24 elects two Senators and consists of Alleghany, Ashe, Rockingham, Stokes, Surry and Watauga Counties.

District 25 elects three Senators and consists of Cleveland, Gaston, Lincoln and Rutherford Counties.

District 26 elects two Senators and consists of Alexander, Catawba, Iredell and Yadkin Counties.

District 27 elects two Senators and consists of Avery, Burke, Caldwell, Mitchell and Wilkes Counties.

District 28 elects two Senators and consists of Buncombe, McDowell, Madison and Yancey Counties.

District 29 elects two Senators and consists of Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Polk, Swain and Transylvania Counties.

District 30 elects one Senator and consists of Hoke and Robeson Counties.

District 31 elects one Senator and consists of the following townships and precincts of Guilford County: Jefferson Township, Greensboro Precincts 3, 4, 5, 6, 7, 8, 9, 11, 19, 25, 29, and 30, High Point Precincts 3, 5, 6, 7, 11, 12, and 19, Jamestown Precincts 1, 2, and 3, Sumner Township, and Block 921 of Census Tract 166 in High Point Township.

District 32 elects one Senator and consists of the following townships and precincts in Guilford County: Deep River Township, Friendship Precinct II, Greensboro Precincts 1, 2, 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, 33, and 36, and High Point Precincts 1, 2, 4, 8, 9, 10, 13, 14, 15, 16, 17, 18, 20, and 21, but it does not include Block 921 of Census Tract 166 in High Point Township.

(b) The names and boundaries of townships specified in this section are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 census.

(c) For Guilford County, precinct boundaries are as shown on the maps on file with the State Board of Elections on January 1, 1982, in accordance with G.S. 163-128(b). (Code, s. 2844; Rev., s. 4398; 1911, c. 150; C. S., s. 6087; 1921, c. 161; 1941, c. 225; 1963, Ex. Sess., c. 1; 1966, Ex. Sess., c. 1, s. 1; 1971, c. 1177; 1981, c. 821; 1982, Ex. Sess., c. 5; 1982, 2nd Ex. Sess., c. 2.)

Effect of Amendments. —

The 1982, Ex. Sess., amendment rewrote this section to the extent that a detailed comparison is not possible.

The 1982 second Ex. Sess. amendment, in subsection (a), rewrote the paragraphs relating to Districts 1 and 2, inserted Pamlico County in the paragraph relating to District 3, rewrote the paragraph relating to Districts 6 and 9, transferred Mannings township from District 10 to District 11, and in the paragraph relating to District 11 deleted references to the townships of Fishing Creek, Fork, Judkins, Nutbush, Sandy Creek, Shocco, Smith Creek, and Warrenton in Warren County.

§ 120-2. House apportionment specified.

(a) For the purpose of nominating and electing members of the North Carolina House of Representatives in 1982 and periodically thereafter, the State of North Carolina shall be divided into the following districts:

District 1 shall elect two Representatives and shall consist of Camden, Chowan, Currituck, Dare, Pasquotank, Perquimans, and Tyrrell Counties; Holly Grove Township of Gates County; and Lees Mills, Plymouth, and Skinnersville Townships of Washington County.

District 2 shall elect one Representative and shall consist of Beaufort and Hyde Counties; and Scuppernong Township of Washington County.

District 3 shall elect three Representatives and shall consist of Craven, Lenoir, and Pamlico Counties.

District 4 shall elect three Representatives and shall consist of Carteret and Onslow Counties.

District 5 shall elect one Representative and shall consist of Northampton County; Indian Woods, Roxobel, Snake Bite, and Woodville Townships of Bertie County; Gatesville, Hall, Haslett, Hunters Mill, Mintonsville, and Reynoldson Townships of Gates County; and Harrellsville, Maneys Neck, Murfreesboro, St. Johns, and Winton Townships of Hertford County.

District 6 shall elect one Representative and shall consist of Colerain, Merry Hill, Mitchells, Whites, and Windsor Townships of Bertie County; Ahoskie Township of Hertford County; Beargrass, Cross Roads, Giffins, Jamesville, Poplar Point, Williams, and Williamston Townships of Martin County; and Bethel and Carolina Townships of Pitt County.

District 7 shall elect one Representative and shall consist of Brinkleyville, Butterwoood, Conoconnara, Enfield, Faucett, Halifax, Palmyra, Roseneath, Scotland Neck, and Weldon Townships of Halifax County; Goose Nest, Hamilton, and Robersonville Townships of Martin County; and Fishing Creek, Fork, Sandy Creek, Shocco, and Warrenton Townships of Warren County.

District 8 shall elect four Representatives and shall consist of Edgecombe, Nash, and Wilson Counties.

District 9 shall elect two Representatives and shall consist of Greene County; and Arthur, Ayden, Belvoir, Chicod, Falkland, Farmville, Fountain, Greenville, Grifton, Grimesland, Pactolus, Swift Creek, and Winterville Townships of Pitt County.

District 10 shall elect one Representative and shall consist of Duplin and Jones Counties.

District 11 shall elect two Representatives and shall consist of Wayne County.

District 12 shall elect two Representatives and shall consist of Bladen and Sampson Counties; and Burgaw, Caswell, Columbia, Holly, Canetuck, Grady, Long Creek, Rocky Point, and Union Townships of Pender County.

District 13 shall elect two Representatives and shall consist of Federal Point, Harnett, Masonboro, and Wilimington Townships of New Hanover County.

District 14 shall elect one Representative and shall consist of Brunswick County; Cape Fear Township of New Hanover County; and Topsail Township of Pender County.

District 15 shall elect one Representative and shall consist of Columbus County.

District 16 shall elect three Representatives and shall consist of Hoke and Robeson Counties; and Spring Hill, Stewartsville, and Williamsons Townships of Scotland County.

District 17 shall elect two Representatives and shall consist of Block 901 and Enumeration District 534 of Census Tract 34 in Manchester Township, Block 901 and Enumeration and District 535 of Census Tract 34 in Seventy-First Township, Block 901 of Census Tract 34 in Carver's Creek Township, Cross Creek Precincts 1, 3, 5, 9, 13, 16, 17, and 19, Spring Lake Precinct, Morganton Road 1 Precinct, Beaver Lake Precinct, Westarea Precinct, and that part of Census Tract 33.02 in Precinct Seventy-First 1. Any part of Cross Creek Township which may be entirely surrounded by Morganton Road 1 Precinct shall also be in the District. Block 304 of Census Tract 26 of Cross Creek Township is not in the District.

District 18 shall elect three Representatives and shall consist of the remainder of Cumberland County not included in District 17.

District 19 shall elect two Representatives and shall consist of Harnett and Lee Counties.

District 20 shall elect two Representatives and shall consist of Franklin and Johnston Counties.

District 21 shall elect six Representatives and shall consist of Wake County.

District 22 shall elect three Representatives and shall consist of Caswell, Granville, Person, and Vance Counties; Littleton and Roanoke Rapids Townships of Halifax County; and Hawtree, Judkins, Nutbush, River, Roanoke, Sixpound, and Smith Creek Townships of Warren County.

District 23 shall elect three Representatives and shall consist of Durham County.

District 24 shall elect two Representatives and shall consist of Orange County; and Baldwin, Cape Fear, Center, Hadley, Haw River, Hickory Mountain, Matthews, New Hope, Oakland, and Williams Townships of Chatham County.

District 25 shall elect four Representatives and shall consist of Alamance and Rockingham Counties; and Beaver Island and Snow Creek Townships of Stokes County.

District 26 shall elect one Representative and shall consist of Providence Township of Randolph County and Greensboro Precincts 5, 6, 7, 8, 19, 29, and 30, and Fentress Township of Guilford County.

District 27 shall elect three Representatives and shall consist of South Center Grove Precinct, Jamestown Precinct 2, North Madison Precinct, South Monroe Precinct, North Sumner Precinct, and Greensboro Precincts 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36 of Guilford County.

District 28 shall elect two Representatives and shall consist of Deep River Township, Friendship Township, High Point Township, Jamestown Precincts 1 and 3, and South Sumner Precinct of Guilford County.

District 29 shall elect one Representative and shall consist of Belews Creek and Salem Chapel Townships of Forsyth County and North Center Grove Precinct, South Madison Precinct, North Monroe Precinct and Bruce, Clay, Greene, Jefferson, Oak Ridge, Rock Creek and Washington Townships of Guilford County.

District 30 shall elect one Representative and shall consist of Albright, Bear Creek, and Gulf Townships of Chatham County; and Asheboro, Coleridge, Columbia, Franklinville, Liberty, and Randleman Townships of Randolph County.

District 31 shall elect one Representative and shall consist of Moore County.

District 32 shall elect one Representative and shall consist of Richmond County; and Laurel Hill Township of Scotland County.

District 33 shall elect one Representative and shall consist of Anson and Montgomery Counties.

District 34 shall elect four Representatives and shall consist of Cabarrus, Stanly, and Union Counties.

District 35 shall elect two Representatives and shall consist of Rowan County.

District 36 shall elect eight Representatives and shall consist of Mecklenburg County.

District 37 shall elect three Representatives and shall consist of Davidson and Davie Counties; and Eagle Mills and Union Grove Townships of Iredell County.

District 38 shall elect one Representative and shall consist of Back Creek, Brower, Cedar Grove, Concord, Grant, Level Cross, New Hope, New Market, Pleasant Grove, Richland, Tabernacle, Trinity, and Union Townships of Randolph County.

District 39 shall elect five Representatives and shall consist of Abbotts Creek, Bethania, Broadbay, Clemmonsville, Kernersville, Lewisville, Middle Fork, Old Richmond, Old Town, South Fork, Vienna, and Winston Townships of Forsyth County.

District 40 shall elect three Representatives and shall consist of Alleghany, Ashe, and Surry Counties; Big Creek, Danbury, Meadows, Peters Creek, Quaker Gap, Sauratown, and Yadkin Townships of Stokes County; and Bald Mountain, Blowing Rock, Blue Ridge, Boone, Brushy Fork, Cove Creek, Elk, Meat Camp, New River, North Fork, Stony Fork, and Watauga Townships of Watauga County.

District 41 shall elect two Representatives and shall consist of Wilkes and Yadkin Counties; and Gwaltneys, Sharpes, and Sugar Loaf Townships of Alexander County.

District 42 shall elect one Representative and shall consist of Bethany, Chambersburg, Concord, Cool Spring, New Hope, Olin, Sharpesburg, Statesville, and Turnersburg Townships of Iredell County.

District 43 shall elect one Representative and shall consist of Millers Township of Alexander County; Caldwell, Catawba, and Mountain Creek Townships of Catawba County; and Barringer, Coddle Creek, Davidson, Fallstown, and Shiloh Townships of Iredell County.

District 44 shall elect four Representatives and shall consist of Gaston and Lincoln Counties.

District 45 shall elect two Representatives and shall consist of Lower Fork and Upper Fork Townships of Burke County; and Bandy's, Clines, Hickory, Jacobs Fork, and Newton Townships of Catawba County.

District 46 shall elect three Representatives and shall consist of Avery, Caldwell, and Mitchell Counties; Ellendale, Little River, Taylorsville, and Wittenberg Townships of Alexander County; Drexel, Icard, Jonas Ridge, Lower Creek, Smoky Creek, and Upper Creek Townships of Burke County; and Beaverdam, Laurel Creek, and Shawneehaw Townships of Watauga County.

District 47 shall elect one Representative and shall consist of Linville, Lovelady, Morganton, Quaker Meadow, and Silver Creek Townships of Burke County.

District 48 shall elect three Representatives and shall consist of Cleveland, Polk, and Rutherford Counties.

District 49 shall elect one Representative and shall consist of McDowell and Yancey Counties.

District 50 shall elect one Representative and shall consist of Blue Ridge, Clear Creek, Edneyville, Green River, Hendersonville, and Mills River Townships of Henderson County.

District 51 shall elect four Representatives and shall consist of Buncombe and Transylvania Counties; and Crab Creek and Hoopers Creek Townships of Henderson County.

District 52 shall elect two Representatives and shall consist of Haywood, Jackson, Madison, and Swain Counties; and Stecoah and Yellow Creek Townships of Graham County.

District 53 shall elect one Representative and shall consist of Cherokee, Clay, and Macon Counties; and Cheoah Township of Graham County.

(b) The names and boundaries of townships specified in this section are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census.

(c) For Guilford and Cumberland Counties, precinct boundaries are as shown on the maps on file with the State Board of Elections on Janaury 1, 1982, in accordance with G.S. 163-128(b).

If any changes in precinct boundaries are made, the areas on the map shall still remain in the same House District. (Code, s. 2845; Rev., c. 4399; 1911, c. 151; C. S., s. 6088; 1921, c. 144; 1941, c. 112; 1961, c. 265; 1966, Ex. Sess., c. 5, s. 1; 1971, c. 483; 1981, c. 800; c. 1130, s. 1; 1982, Ex. Sess., c. 4; 1982, 2nd Ex. Sess., c. 1.)

Editor's Note. — Session Laws 1982, 2nd Ex. Sess., c. 3, makes special provisions for the primary elections in 1982 only. Session Laws 1981, c. 1130, s. 3, and Session Laws 1982, Ex. Sess., c. 3, also made special provisions for the 1982 primaries, but were repealed in their entirety by Session Laws 1982, 2nd Ex. Sess., c. 3, s. 20.

Effect of Amendments. —

The 1981 amendment rewrote this section to the extent that a detailed comparison is not possible.

The 1982 Ex. Sess. amendment again rewrote this section to the extent that a detailed comparison is not possible.

The 1982, 2nd Ex. Sess. amendment rewrote the paragraph relating to District 17 and substituted "three" for "four" preceding "Representatives" in the paragraph relating to District 18.

ARTICLE 5.

Investigating Committees.

§ 120-19. State officers, etc., upon request, to furnish data and information to legislative committees.

OPINIONS OF ATTORNEY GENERAL

Committee Membership Not Required, etc. — The correct citation to the opinion of the Attorney General cited under this catchline in the replacement volume is 48 N.C.A.G. 84.

ARTICLE 6C.

Review of Administrative Rules.

§ 120-30.25. Filing of rules.

(c) The rules filed with the Director pursuant to subsection (b) of this section shall be accompanied by a report on a form approved by the Administrative Rules Review Committee. This report shall contain:

(1) A brief summary of the content of the rule if adopted or repealed, or a brief summary of the change in the rule if amended;

(2) A citation of the enabling legislation purporting to authorize the adoption, amendment, or repeal of the rule;

(3) A statement of the circumstances that required adoption, amendment, or repeal of the rule; and

(4) A statement of the effective date of the rule.

(1981 (Reg. Sess., 1982), c. 1233, s. 1.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment inserted "on a form approved by the Administrative Rules Review Committee" at the end of the first sentence of the introductory language of subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 120-30.28. Review of rules.

(a) After a rule is filed with the Director, he shall submit it to the Committee which may determine whether or not the agency acted within its statutory authority in promulgating the rule. The Committee shall review a rule submitted to it by the Director not later than the last day of the first calendar month following the filing of the rule with the Director.

The Committee, by a majority vote of the members present and voting, may extend the time for review of a rule by 60 days to obtain additional information on the rule.

(b) If the Committee finds that an agency did not act within its statutory authority in promulgating a rule or a part of the rule, the Committee shall object to the rule. The Director of Research shall transmit to the cochairmen of the Legislative Research Commission, the Attorney General, and the agency a written report of the objection to the rule and the reasons therefor.

(c) Within 30 days after receipt of the Committee's written report, an agency shall either amend or repeal the rule to cure the defects cited as reasons for the Committee's objection or return the rule unamended to the Committee.

(d) To cure the defects cited as reasons for the Committee's objection, the agency may amend or repeal a rule without complying with the notice and hearing requirements contained in G.S. 150A-12. The curative rule is effective upon its filing with the Attorney General.

(e) The filing of an amendment to a rule places the entire rule before the Committee for its review.

(f) If an agency amends or repeals a rule to meet the Committee objection, the Committee shall transmit to the cochairmen of the Legislative Research Commission, the Attorney General, and the agency a written report removing its objection to the rule. If an agency does not amend or repeal a rule to cure the defects cited as reasons for the Committee's objection, the Committee, by a majority vote of the members present and voting, may remove its objection and shall transmit a written report of such action to the cochairmen of the Legislative Research Commission, the Attorney General, and the agency. If the objection is not removed, the Committee shall transmit to the Governor and the cochairmen of the Legislative Research Commission a written report of the objection to the rule containing the reasons for the objection and the notation that the agency returned the rule unamended to the Committee or failed to return the rule within the time specified in subsection (c).

(g) The Committee or Commission may submit corrective legislation concerning a rule or its part to which the Committee has objected to the General Assembly if then in session or, if not in session, to it in the next regular session. The Committee or Commission may consider and recommend to the General Assembly any legislation it believes would improve administrative procedure and practices in this State. A bill submitted to the General Assembly under this subsection is eligible for consideration in that part of the regular session to which the bill is submitted. (1977, c. 915, s. 1; 1981, c. 688, s. 6; 1981 (Reg. Sess., 1982), c. 1233, s. 2.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment deleted the former last two sentences in subsection (a), relating to the filing of notice of extension for review of the rule, rewrote subsection (b), in subsection (c) deleted "and delay" following "Committee's objection," in subsection (d) deleted the former first sentence, relating to the delay of effectivenes of a rule or its part, and in the present first sentence substituted "objection" for "delay" and "that rule" for "a rule," rewrote subsection (f), and in subsection (g) rewrote the present first sentence and in the present second sentence inserted "or Commission" following "The Committee."

§ 120-30.29A. Actions on rules.

The Committee may institute an action in the Superior Court of Wake County for a declaratory judgment on the issue of whether a rule to which the Committee has objected is valid or within the statutory authority of the agency.

The agency which promulgated the rule shall be notified of the commencement of the action by service of process pursuant to G.S. 1A-1, Rule 4.

The Committee shall have standing to appear in any action authorized by this section or any appeals therefrom. Notwithstanding any other provision of alw, the Committee may direct any licensed attorney on the staff of the General Assembly or contract with other counsel to represent the Committee in the action.

In any action in which a rule is determinative of the outcome and in which the rule was objected to by the Committee, the agency must prove that the rule is valid as defined in G.S. 150A-2(9) and within the statutory authority of the agency; provided, however, that five years after the date of adoption of a rule, there is a presumption that the rule was filed in accordance with the procedures set forth in Chapter 150A.

The clerk of the superior court shall file a copy of the order of the court with the Attorney General. (1981, c. 688, s. 7; 1981 (Reg. Sess., 1982), c. 1233, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

§ 120-30.34. Review of and objection to temporary rules.

(a) Rules adopted in accordance with the procedures in G.S. 150A-13 shall be reviewed by the Committee and are subject to objection as provided in G.S. 120-30.28.

(b) The Committee shall review the reasons given for the adoption of a temporary rule and may object to the rule due to the agency's failure to make the finding required by G.S. 105A-13. (1977, c. 915, s. 1; 1981, c. 1127, s. 55; 1981 (Reg. Sess., 1982), 1232, s. 2.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment rewrote this section, which formerly provided that rules adopted in accordance with § 150A-13 could be reviewed by the Committee but were not subject to objection and delay under § 120-30.28.

§ 120-30.35. Hearings.

(a) Notwithstanding the time limitation on review of rules contained in G.S. 120-30.28(a), the cochairmen of the Commission may at any time call a public hearing before the Committee on any rule or part of rule upon the recommendation of the Committee or upon the motion of any member of the Commission. Within 60 days after the public hearing, the Committee may find that the agency did not act within its statutory authority in promulgating the rule or its part and object to the rule in accordance with subsections (b), (c), (d), (e), (f), and (g) of G.S. 120-30.28.

(1981 (Reg. Sess., 1982), c. 1233, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "object to the rule" for "delay the continued effectiveness of the rule or a part" in the second sentence of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 120-30.36. Failure to object; inadmissibility into evidence.

(a) The failure of the Committee to object to a rule shall not be deemed to be approval of the statutory authority of the rule or its part by the Committee, Commission or the legislative branch.

(b) Evidence of the Committee's failure to object to the rule shall be inadmissible in all civil and criminal trials or other proceedings before courts,

administrative agencies, or other tribunals. (1981, c. 688, s. 11; 1981 (Reg. Sess., 1982), c. 1233, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "object to a rule" for "object and delay the effectiveness of a rule or its part" in subsection (a) and "object to the rule" for "object and delay the effectiveness of the rule or its part" in subsection (b).

Article 7.

Legislative Services Commission.

§ 120-32. Commission duties.

The Legislative Services Commission is hereby authorized to:

(10) To select the locations for buildings occupied by the General Assembly, and to name any building occupied by the General Assembly. (1969, c. 1184, s. 2; 1971, c. 685, s. 2; c. 1200, s. 8; 1977, c. 802, s. 50.60; 1981 (Reg. Sess., 1982), c. 1191, s. 67.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) added subdivision (10).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (10) are set out.

Article 9A.

Lobbying.

§ 120-47.6. Statements of legislative agent's lobbying expenses required.

Legal Periodicals. — For a note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

Article 12.

Commission on Children with Special Needs.

§ 120-61. Members to serve without compensation; subsistence and travel expenses.

Members of the Commission shall serve without compensation but they shall be paid such per diem and travel expenses as are provided for members of State boards and commissions generally pursuant to G.S. 138-5. The Commission shall be funded by the Legislative Services Commission from appropriations made to the General Assembly for that purpose. (1973, c. 1422; 1981 (Reg. Sess., 1982), c. 1282, s. 28.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added the second sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

ARTICLE 13A.

Joint Legislative Committee to Review Federal Block Grant Funds.

§ 120-84.4. Powers.

The Committee may review all aspects of the acceptance and use of federal block grant funds. The Committee may also make recommendations to the General Assembly for legislation relating to federal block grant funds and may suggest mechanisms for legislative review of all federal funds, at all stages of the process, from application through receipt, appropriation, and expenditure. (1981, c. 1127, s. 63; 1981 (Reg. Sess., 1982), c. 1389, s. 10.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the language beginning "and may suggest mechanisms" at the end of the second sentence.

§ 120-84.5. Review procedure.

(a) After federal block grant funds have been accepted by the General Assembly, the Director of the Budget shall propose administration and use of those funds. All proposals shall be submitted to the Committee, or to the General Assembly if it is in session, for its review.

(b) None of the following actions with regard to State use of federal block grant funds may be taken without the review of the Committee or of the General Assembly if it is in session:

(1) Acceptance of federal block grants,
(2) Determination of pro rata reduction procedures and amounts for State programs,
(3) Determination of distribution formulas,
(4) Transfer of funds between block grants,
(5) Intradepartmental transfer of block grant funds,
(6) Encumbrance of anticipated block grant funds,
(7) Adoption of departmental rules relating to federal block grant funds,
(8) Contracting between State departments involving block grant funds, and
(9) Any other final action affecting acceptance or use of federal block grant funds.

The Committee shall review the recommended action within 40 days of receiving a request for review from the Office of State Budget and Management. All federal block grant funds are subject to appropriation by the General Assembly. (1981, c. 1127, s. 63; 1981, (Reg. Sess., 1982), c. 1389, ss. 11, 12.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "review" for "prior approval" in the second sentence, of subsection (a) and in the introductory language of subsection (b). In subsection (b) the amendment also substituted "review the recommended action within 40 days of receiving a request for review" for "take action within 40 days of receiving a request for approval," in the next-to-last sentence and added the last sentence.

Article 15.

Retirement Systems Actuarial Note Act.

§§ 120-115 to 120-120: Reserved for future codification purposes.

Article 16.

Legislative Appointments to Boards and Commissions.

§ 120-121. Legislative appointments.

(a) In any case where the General Assembly is called upon by law to appoint a member to any board or commission, that appointment shall be made by enactment of a bill.

(b) A bill may make more than one appointment.

(c) The bill shall state the name of the person being appointed, the board or commission to which the appointment is being made, the effective date of the appointment, the date of expiration of the term, the county of residence of the appointee, and whether the appointment is made upon the recommendation of the Speaker of the House of Representatives or the President of the Senate. (1981 (Reg. Sess., 1982), c. 1191, s. 2.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1191, which enacted this Article and enacted and amended numerous sections throughout the General Statutes, provides, in s. 1: "this act may be cited as the Separation of Powers Act of 1982."

§ 120-122. Vacancies in legislative appointments.

When a vacancy occurs, other than by the expiration of term, in any office subject to appointment by the General Assembly upon the recommendation of the Speaker of the House of Representatives or upon the recommendation of the President of the Senate, and the vacancy occurs either: (i) after election of the General Assembly but before convening of the regular session; (ii) when the General Assembly has adjourned to a date certain, which date is more than 10 days after the date of adjournment; or (iii) after sine die adjournment of the regular session, then the Governor may appoint a person to serve until the expiration of the term or until the General Assembly fills the vacancy, whichever occurs first. The General Assembly may fill the vacancy in accordance with G.S. 120-121 during a regular or extra session. Before making an appointment, the Governor shall consult the officer who recommended the original appointment to the General Assembly (the Speaker of the House of Representatives or the President of the Senate), and ask for a written recommendation. The Governor may not appoint a person other than the person so recommended. Any positions subject to appointment by the 1981 General Assembly but not filled prior to sine die adjournment of the 1981 Session may be filled by the Governor under this section as if it were a vacancy occurring after the General Assembly had made an appointment. (1981 (Reg. Sess., 1982), 1191, s. 2.)

§ 120-123. Service by members of the General Assembly on certain boards and commissions.

No member of the General Assembly may serve on any of the following boards or commissions:

(1) The Board of Agriculture, as established by G.S. 106-2.
(2) The Art Museum Building Commission, as established by G.S. 143B-59.
(3) The Governor's Advocacy Council for Persons with Disabilities, as established by G.S. 143B-403.2.
(4) The Board of Public Telecommunications Commissioners, as established by G.S. 143B-426.9.
(5) The Board of Transportation, as established by G.S. 143B-350.
(6) The Board of Trustees Teachers' and State Employees' Retirement System, as established by G.S. 135.6.
(7) The Coastal Resources Commission, as established by G.S. 113A-104.
(8) The Environmental Management Commission, as established by G.S. 143B-283.
(9) The State Fire Commission, as established by G.S. 143B-481.
(10) The Public Officers and Employees Liability Insurance Commission, as established by G.S. 143B-422.
(11) The North Carolina Land Conservancy Corporation, as established by G.S. 113A-137.
(12) The North Carolina Capital Building Authority, as established by G.S. 129.40.
(13) The North Carolina Criminal Justice Education and Training Standards Commission, as established by G.S. 17C-3.
(14) The North Carolina Housing Finance Agency Board of Directors, as established by G.S. 122A-4.
(15) The North Carolina Seafood Industrial Park Authority, as established by G.S. 113-315.25.
(16) The Committee for Review of Applications for Incentive Pay for State Employees, as established by G.S. 126-64.
(17) The Board of Trustees of the North Carolina School of Science and Mathematics, as established by G.S. 115C-223.
(18) The North Carolina Board of Science and Technology, as established by G.S. 143B-441.
(19) The State Farm Operations Commission, as established by G.S. 106-26.13.
(20) The Board of Commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund, as established by G.S. 143-166.
(21) The Board of Trustees of the University of North Carolina Center for Public Television, as established by G.S. 116-37 [G.S. 116-37.1].
(22) The Commission for Mental Health, Mental Retardation and Substance Abuse Services, as established by G.S. 143B-148.
(23) The Governor's Waste Management Board, as established by G.S. 143B-216.12.
(24) The North Carolina Alcoholism Research Authority, as established by G.S. 122-120.
(25) The North Carolina Ports Railway Commission, as established by G.S. 143B-469.
(26) The North Carolina State Ports Authority, as established by G.S. 143B-452.
(27) The Property Tax Commission, as established by G.S. 143B-223.
(28) The Social Services Commission, as established by G.S. 143B-154.

(29) The North Carolina State Commission of Indian Affairs, as established by G.S. 143B-407.
(30) The Wildlife Resources Commission, as established by G.S. 143-240.
(31) The Council on the Status of Women, as established by G.S. 143B-294 [G.S. 143B-393].
(32) The Board of Trustees of North Carolina Museum of Art, established by G.S. 140-5.13. (1981 (Reg. Sess., 1982), c. 1191, s. 2.)

Editor's Note. — "G.S. 116-37.1" has been inserted in brackets in subdivision (21) to correct the erroneous reference to § 116-37 in this section as enacted.

"G.S. 143B-393" has been inserted in brackets in subdivision (31) to correct the erroneous reference to § 143B-294 in this section as enacted.

Chapter 121.

Archives and History.

Article 1.

General Provisions.

Sec.
121-6. Historical publications.

ARTICLE 1.

General Provisions.

§ 121-6. Historical publications.

(c) It shall be the duty and the responsibility for the Department of Cultural Resources to edit and publish a second or new series of the most significant records of colonial North Carolina. From records which have been compiled in the North Carolina State Archives concerning the colonial period of North Carolina, a selection of the most significant documents shall be made therefrom by a skilled and competent editor. The editor shall edit, according to acceptable scholarly standards, the selected materials which shall be published in documentary volumes not to exceed approximately 700 pages each in length until full and representative published colonial records of North Carolina shall have been achieved. The number of copies of each volume to be so printed shall be determined by the Department of Cultural Resources, and such determination shall be based on the number of copies the Department can reasonably expect to sell in a period of 10 years from the date of publication. In any year during which the the Department of Cultural Resources has completed a volume and has it ready for publication, the Department may include in its continuation budget for that year sufficient funds to pay the estimated costs of publishing the volume. In the event that the volume is not published during that year, the appropriation made, or any unencumbered balance, shall revert to the general fund. (1971, c. 480, s. 6; 1973, c. 476, s. 48; 1979, c. 1010; 1981 (Reg. Sess., 1982), c. 1290.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added the last two sentences in subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 121-8. Historic preservation program.

Legal Periodicals. — For article discussing legal issues of historic preservation for local governments in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

§ 121-9. Historic properties.

Legal Periodicals. — For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

Chapter 122.

Hospitals for the Mentally Disordered.

Article 1.

Organization and Management.

§ 122-8.1. Disclosure of information, records, etc.

CASE NOTES

Cited in Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

Article 2F.

Area Mental Health, Mental Retardation, and Substance Abuse (Alcohol and Drug Abuse) Programs.

Part 4. Appropriations for Mental Health, Mental Retardation, and Substance Abuse Service Programs.

§ 122-35.53. Allocation of all funds to area mental health, mental retardation, and substance abuse authorities.

Editor's Note. — Session Laws 1981, (Reg. Sess., 1982), c. 1282, s. 25, establishes a schedule of priorities for allocating funds to local area mental health programs and local education agencies to provide appropriate treatment and education programs to children under the age of 18 who suffer from emotional, mental, or neurological handicaps accompanied by violent or assaultive behavior, identified as a class in the case of Willie M., et al. vs. Hunt, et al. The act appropriates funds to the Division of Mental Health, Mental Retardation, and Substance Abuse, to the Division of Youth Services, and to the Department of Public Education, establishes a reserved fund, and provides for certain reporting requirements. The act further provides that the prohibitions on use of State funds prescribed by G.S. 122-35.53(c) do not apply to any funds appropriated for the treatment of members of the above named class.

Article 3.

Admission of Patients; General Provisions; Patients' Rights.

Part 1. Admission of Patients; General Provisions.

§ 122-36. Definitions.

CASE NOTES

Prisoners Not Covered by Subsection (g). — Prisoners receiving mental health care are not covered by subsection (g) of this section and § 122-55.2; the statute applies only to mental

health patients who are not imprisoned with the Department of Corrections. Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

With respect to the rights of prisoners receiving care in Department of Human Resources-operated facilities, § 143B-261.1 and the regulations adopted pursuant thereto apply, rather than this section and § 122-55.2(d), as they do to those prisoners who remain in prison for their mental health care. Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

Quoted in In re Guffey, 54 N.C. App. 462, 283 S.E.2d 534 (1981).

Stated in In re Holt, 54 N.C. App. 352, 283 S.E.2d 413 (1981).

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981).

Part 2. Patients' Rights.

§ 122-55.1. Declaration of policy on patients' rights.

OPINIONS OF ATTORNEY GENERAL

The Provisions of §§ 122-55.1 Through 122-55.14, etc. —

The correct citation to the opinion of the Attorney General cited under this catchline in the replacement volume is 48 N.C.A.G. 9.

§ 122-55.2. Patients' rights.

CASE NOTES

Section Not Applicable to Prisoners. — Prisoners receiving mental health care are not covered by § 122-36(g) and this section; the statutes apply only to mental health patients who are not imprisoned with the Department of Corrections. Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

With respect to the rights of prisoners receiving care in Department of Human Resources-operated facilities, § 143B-261.1 and the regulations adopted pursuant thereto apply, rather than § 122-36 and this section, as they do to those prisoners who remain in prison for their mental health care. Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

Part 3. Rights of Minor Patients.

Article 4.

Voluntary Admission.

§ 122-56.1. Declaration of policy.

CASE NOTES

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981).

§ 122-56.2. Definitions.

CASE NOTES

The North Carolina Special Care Facility for Re-Education of Adolescent Children has been properly designated by the Department of Human Resources a "treatment facility" within the meaning of this Article. State v. Wilkinson, 302 N.C. 393, 275 S.E.2d 836 (1981).

§ 122-56.7. Judicial determination.

CASE NOTES

Cited in State v. Wilkinson, 302 N.C. 393, 275 S.E.2d 836 (1981).

§ 122-56.8. Confidentiality of court record of minors; violation a misdemeanor; court record to be expunged when minor becomes adult.

Legal Periodicals. — For an article on the result of the 1979 statutory changes in involuntary civil commitment in North Carolina, see 60 N.C.L. Rev. 985 (1982).

ARTICLE 5A.

Involuntary Commitment.

§ 122-58.1. Declaration of policy.

Legal Periodicals. —

For an article on the result of the 1979 statutory changes in involuntary civil commitment in North Carolina, see 60 N.C.L. Rev. 985 (1982).

For an article on the attorney's role in involuntary civil commitment in North Carolina, see 60 N.C.L. Rev. 1027 (1982).

CASE NOTES

Policy to Prevent Unnecessary Commitments. — The policy of this State is to prevent the possibility that persons who are not mentally ill or inebriates and dangerous to themselves or others would be involuntarily committed. McLean v. Sale, 54 N.C. App. 538, 284 S.E.2d 160 (1981).

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981).

§ 122-58.2. Definitions.

CASE NOTES

Test for Dangerousness to Self. — The language of subdivision (1) of this section established a two prong test for dangerousness to self. The first prong addresses self-care ability regarding one's daily affairs. The second prong, which also must be satisfied for involuntary commitment to result, mandates a specific finding of a probability of serious physical debilitation resulting from the more general finding of lack of self-caring ability. In re Crainshaw, 54 N.C. App. 429, 283 S.E.2d 553 (1981).

Stated in In re Guffey, 54 N.C. App. 462, 283 S.E.2d 534 (1981).

§ 122-58.3. Affidavit and petition before clerk or magistrate; custody order.

Legal Periodicals. —

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

§ 122-58.4. Duties of law-enforcement officer; examination by qualified physician.

CASE NOTES

Duty of Physician, etc. —

In accord with 2nd paragraph in original. See McLean v. Sale, 54 N.C. App. 538, 284 S.E.2d 160 (1981).

Physical Presence of Person to Be Examined Required. — "Examine" as used in this section requires that the person to be examined be physically in the presence of the qualified physician, so that the physician may actually utilize his five senses, or such of them as he deems necessary, in carrying out the mandate of this section. McLean v. Sale, 54 N.C. App. 538, 284 S.E.2d 160 (1981).

The requirement that the law-enforcement officer must take and present the person to be examined to the physician requires that the person must be physically present before the physician for the purpose of the examination. McLean v. Sale, 54 N.C. App. 538, 284 S.E.2d 160 (1981).

Relief from Wrongful Certification. —

A physician's failure to perform an examination prior to signing certificate is a violation of the statute, and if plaintiff is involuntarily committed as a result of defendant's actions, a cause of action arises against defendant, and this is true regardless of what may have prompted defendant to fail to make the examination of plaintiff. McLean v. Sale, 54 N.C. App. 538, 284 S.E.2d 160 (1981).

Relevance of Reasons for Failing to Examine. — The reasons defendant physician failed to make the required examination prior to signing certificate were competent on the question of punitive damages, but not on the issue of whether defendant violated his statutory duty to plaintiff. McLean v. Sale, 54 N.C. App. 538, 284 S.E.2d 160 (1981).

§ 122-58.7. District court hearing.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

In its order the trial court must record the facts, etc. —

Pursuant to subsection (i) of this section the facts supporting the danger the patient presents to herself and to others must be recorded by the trial court. In re Crainshaw, 54 N.C. App. 429, 283 S.E.2d 553 (1981).

Applied in In re Holt, 54 N.C. App. 352, 283 S.E.2d 413 (1981).

§ 122-58.8. Disposition.

Legal Periodicals. —

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

§ 122-58.9. Appeal.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

§ 122-58.18. Special emergency procedure for violent persons.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

ARTICLE 11.

Mentally Ill Criminals.

§ 122-85. Convicts becoming mentally ill.

CASE NOTES

Cited in Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

Chapter 122A.

North Carolina Housing Finance Agency.

Sec.
122A-4. North Carolina Housing Finance Agency.
Sec.
122A-16. Oversight by committees of General Assembly; annual reports.

§ 122A-4. North Carolina Housing Finance Agency.

(a) There is hereby created a body politic and corporate to be known as "North Carolina Housing Finance Agency" which shall be constituted a public agency and an instrumentality of the State for the performance of essential public functions.

(b) The Agency shall be governed by a board of directors composed of 13 members. The directors of the Agency shall be residents of the State and shall not hold other public office.

(c) The General Assembly shall appoint eight directors, four upon the recommendation of the Speaker of the House of Representatives (at least one of whom shall have had experience with a mortgage-servicing institution and one of whom shall be experienced as a licensed real estate broker), and four upon the recommendation of the President of the Senate (at least one of whom shall be experienced with a savings and loan institution and one of whom shall be experienced in home building). Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. Notwithstanding any other provision of law, the terms of the four noncategorical appointments by the General Assembly shall expire on June 30, 1983. Subsequent noncategorical appointments shall be for terms of two years each. The terms of the initial categorical appointees by the General Assembly upon the recommendation of the Speaker shall expire on June 30, 1983; the terms of subsequent appointees shall be two years. The term of one of the initial catagorical appointees by the General Assembly upon the recommendation of the President of the Senate shall expire on June 30, 1983, and the other on June 30, 1985; the terms of subsequent appointees shall be four years.

(d) The Governor shall appoint four of the directors of the Agency; one of such appointees shall be experienced in community planning, one shall be experienced in subsidized housing management, one shall be experienced as a specialist in public housing policy, and one shall be experienced in the manufactured housing industry. The four appointees of the Governor shall be appointed for staggered four-year terms, two being appointed initially for three years and two for four years, and shall continue in office until their successors are duly appointed and qualified. Any person appointed to fill a vacancy shall serve only for the unexpired term.

(e) Any member of the board of directors shall be eligible for reappointment. The 12 members of the board shall then elect a thirteenth member to the board by simple majority vote. Each member of the board of directors may be removed by the Governor for misfeasance, malfeasance or neglect of duty after reasonable notice and a public hearing, unless the same are in writing expressly waived. Each member of the board of directors before entering upon his duties shall take an oath of office to administer the duties of his office faithfully and impartially, and a record of such oath shall be filed in the office of the Secretary of State.

(f) The Governor shall designate from among the members of the Board a chairman and a vice-chairman. The terms of the chairman and vice-chairman shall extend to the earlier of either two years or the date of expiration of their then current terms as members of the Board of Directors of the Agency. The

Secretary of Natural Resources and Community Development or his designee shall serve as secretary of the Board. The Agency shall exercise all of its prescribed statutory powers independently of any principal State Department except as described in this Chapter. The Executive Director of the Agency shall be appointed by the Board of Directors, subject to approval by the Governor. All staff and employees of the Agency shall be appointed by the Executive Director, subject to approval by the Board of Directors; shall be eligible for participation in the State Employees' Retirement System; and shall be exempt from the provisions of the State Personnel Act; provided, however, that the Executive Director shall, on or before January 15 of each year, subject to the approval of the Board of Directors, designate those employees of the Agency which are employed in secretarial, clerical or administrative positions. All employees designated as secretarial, clerical or administrative shall be compensated in accordance with the salary schedules adopted pursuant to the State Personnel Act. The Board of Directors shall set the salary of the Executive Director and all other staff and employees of the Agency whose positions are not designated as secretarial, clerical or administrative, subject to prior approval by the Advisory Budget Commission. The salary of the Executive Director and all staff and employees of the Agency shall not be subject to any limitations imposed pursuant to any salary schedule adopted pursuant to the terms of the State Personnel Act. The Board of Directors shall, subject to the approval of the Governor, elect and prescribe the duties of such other officers as it shall deem necessary or advisable, and the Advisory Budget Commission shall fix the compensation of such officers. The books and records of the Agency shall be maintained by the Agency and shall be subject to periodic review and audit by the State.

No part of the revenues or assets of the Agency shall inure to the benefit of or be distributable to its members or officers or other private persons. The members of the Agency shall receive no compensation for their services but shall be entitled to receive, from funds of the Agency, for attendance at meetings of the Agency or any committee thereof and for other services for the Agency reimbursement for such actual expenses as may be incurred for travel and subsistence in the performance of official duties and such per diem as is allowed by law for members of other State boards, commissions and committees.

The Executive Director shall administer, manage and direct the affairs and business of the Agency, subject to the policies, control and direction of the members of the Agency Board of Directors. The Secretary of the Agency shall keep a record of the proceedings of the Agency and shall be custodian of all books, documents and papers filed with the Agency, the minute book or journal of the Agency and its official seal. He shall have authority to cause copies to be made of all minutes and other records and documents of the Agency and to give certificates under the official seal of the Agency to the effect that such copies are true copies, and all persons dealing with the Agency may rely upon such certificates. Seven members of the Board of Directors of the Agency shall constitute a quorum and the affirmative vote of a majority of the members present at a meeting of the Board of Directors duly called and held shall be necessary for any action taken by the Board of Directors of the Agency, except adjournment; provided, however, that the Board of Directors may appoint an executive committee to act in behalf of said Board during the period between regular meetings of said Board, and said committee shall have full power to act upon the vote of a majority of its members. No vacancy in the membership of the Agency shall impair the rights of a quorum to exercise all the rights and to perform all the duties of the Agency. (1969, c. 1235, s. 4; 1973, c. 476, s. 128; c. 1262, ss. 51, 86; c. 1296, ss. 18-20; 1975, c. 19, s. 43; 1977, c. 673, s. 4; c. 771, s. 4; 1981, c. 895, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 32.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted present subsections (a) through (e) for the former first 13 sentences of the former first paragraph. The balance of the former first paragraph has been designated as subsection (f).

Session Laws 1981 (Reg. Sess., 1982), c. 1191, s. 33, provides that nothing in s. 32 of the act, which amended this section, shall be construed as affecting the terms of office or requiring reappointment of the four directors of the Housing Finance Agency appointed by the Governor and serving on June 17, 1982, the effective date thereof.

§ 122A-16. Oversight by committees of General Assembly; annual reports.

The Finance Committee of the House of Representatives and the Finance Committee of the Senate shall exercise continuing oversight of the Agency in order to assure that the Agency is effectively fulfilling its statutory purpose; provided, however, that nothing in this Chapter shall be construed as required by the Agency to receive legislative approval for the exercise of any of the powers granted by this Chapter. The Agency shall, promptly following the close of each fiscal year, submit an annual report of its activities for the preceding year to the Governor, the Office of State Budget and Management, State Auditor, the aforementioned committees of the General Assembly, the Advisory Budget Commission and the Local Government Commission. Each such report shall set forth a complete operating and financial statement of the Agency during such year. The Agency shall cause an audit of its books and accounts to be made at least once in each year by an independent certified public accountant and the cost thereof may be paid from any available moneys of the Agency. The Agency shall on January 1 and July 1 of each year submit a written report of its activities to the Joint Legislative Commission on Governmental Operations. (1969, c. 1235, s. 16; 1973, c. 1296, s. 56; 1977, c. 673, s. 3; c. 771, s. 4; 1981, c. 895, s. 4; 1981 (Reg. Sess., 1982), c. 1191, s. 34.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) added the last sentence.

Chapter 124.

Internal Improvements.

Sec.

124-5. Approval of encumbrance on State's interest in corporations.

§ 124-5. Approval of encumbrance on State's interest in corporations.

No corporation or company in which the State has or owns any stock or any interest shall sell, lease, mortgage, or otherwise encumber its franchise, right-of-way, or other property, except by and with the approval and consent of the Governor and Council of State. Prior to taking any action under this section between July 1, 1982, and June 1, 1983, concerning the Atlantic and North Carolina Railroad or the North Carolina Railroad, the Governor and Council of State shall give at least 20 days' notice to the Legislative Research Commission. No extension of any lease to expire December 31, 1994, may be granted to the lessee or the operating company of the railroad during that 11-month period. (1925, c. 157, s. 5; 1981 (Reg. Sess., 1982), c. 1372, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess. 1982) amendment added the second and third sentences.

Chapter 126.

State Personnel System.

Article 11.

Committee for Review of Applications for Incentive Pay for State Employees.

Sec.
126-64. Committee established.

Article 1.

State Personnel System Established.

§ 126-4. Powers and duties of State Personnel Commission.

CASE NOTES

Applied in Dyer v. Bradshaw, 54 N.C. App. 136, 282 S.E.2d 548 (1981).

§ 126-5. Employees subject to Chapter; exemptions.

CASE NOTES

Quoted in Employment Security Comm'n v. Lachman, 52 N.C. App. 368, 278 S.E.2d 307 (1981); Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

Article 7.

The Privacy of State Employee Personnel Records.

§ 126-22. Personnel files not subject to inspection under § 132-6.

Legal Periodicals. —
For a note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

Article 8.

Employee Appeals of Grievances and Disciplinary Action.

§ 126-34. Grievance appeal for State employees.

CASE NOTES

Cited in Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

§ 126-35. Written statement of reason for disciplinary action.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1040 (1981).

CASE NOTES

Stated in Dyer v. Bradshaw, 54 N.C. App. 136, 282 S.E.2d 548 (1981).

Cited in Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

§ 126-37. Personnel Director to investigate, hear and recommend settlement; Personnel Commission to hear or review findings and make binding decision.

CASE NOTES

Jurisdiction Where Appellant Not Employed Five Continuous Years. — The State Personnel Commission had jurisdiction to hear employment Security Commission employee's appeal from a dismissal even though she had not been employed continuously for five years. Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

§ 126-39. State employee defined.

CASE NOTES

Quoted in Employment Security Comm'n v. Lachman, 52 N.C. App. 368, 278 S.E.2d 307 (1981); Dyer v. Bradshaw, 54 N.C. App. 136, 282 S.E.2d 548 (1981).

Cited in Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

ARTICLE 11.

Committee for Review of Applications for Incentive Pay for State Employees.

§ 126-64. Committee established.

There is hereby created the committee for Review of Applications for Incentive Pay for State Employees, hereinafter referred to as "the Committee." The committee shall consist of the Secretary of Administration, who shall act as chairman, the State Auditor, the State Budget Officer, and the State

Personnel Director. In addition, the Governor shall appoint one person who has experience in administering incentive pay as used in industry, and the General Assembly shall appoint two persons who have experience in administering incentive pay as used in industry. Of the two members appointed by the General Assembly, one shall be appointed upon the recommendation of the Speaker of the House of Representatives, and one shall be appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Members appointed by the General Assembly shall serve until the Committee expires on July 1, 1984. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. (1979, ch. 945, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 39.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted the last four sentences for the former last sentence, which read "The Governor, Lieutenant Governor and Speaker of the House of Representatives shall each also appoint one person who has experience in administering incentive pay as used in industry."

Chapter 128.

Offices and Public Officers.

Article 3.

Retirement System for Counties, Cities and Towns.

Sec.

128-24. Membership.

Sec.

128-26. Allowance for service.

128-27. (Effective July 1, 1983) Benefits.

128-30. Method of financing.

Article 3.

Retirement System for Counties, Cities and Towns.

§ 128-24. Membership.

The membership of this Retirement System shall be composed as follows:

(3a) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1396, s. 1, effective July 1, 1982.

(5) The provisions of this subdivision (5) shall apply to any member whose membership is terminated on or after July 1, 1965, and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 15 or more years of creditable serivce, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; and further provided that in the case of a member who so separates from service on or after July 1, 1967, the aforestated requirement of 15 or more years of creditable service shall be reduced to 12 or more years of creditable service; and further provided that in the case of a member who so separates from service on or after July 1, 1971, or whose account is active on July 1, 1971, the aforestated requirement of 12 or more years of creditable service shall be reduced to five or more years of creditable service. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 128-27(b1), provided that such benefits will be computed in accordance with subsection (b2) on or after July 1, 1967, but prior to July 1, 1969; and provided further that such benefits will be computed in accordance with subsection (b3) on or after July 1, 1969.

b. In lieu of the benefits provided in paragraph a of this subdivision, any member who separates from service prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System may elect to retire on an early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees

setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such early retirement allowance so elected shall be equal to the deferred retirement allowance otherwise payable at the attainment of the age of 60 years reduced by the percentage thereof indicated below.

Age at Retirement	*Percentage Reduction*
59	7
58	14
57	20
56	25
55	30
54	35
53	39
52	43
51	46
50	50

c. Should a beneficiary who retired on an early or service retirement allowance be restored to service for a period of time exceeding six calendar months, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the uniform contribution rate payable by all members. Upon his subsequent retirement, he shall be entitled to the allowance described in 1 below increased by the amount in 2 below.

1. The allowance to which he would be entitled had he not been restored to service with cessation of retirement allowance.
2. The allowance to which he would be entitled on account of his service after restoration to service and membership calculated on the basis of such service; provided for the sale purpose of determining retirement eligibility, that his creditable service shall be taken as the sum of his creditable service prior to and subsequent to his restoration to service.

Should a beneficiary who retired on an early or service retirement allowance be employed by an employer on a contractual or fee basis for a period of time exceeding six calendar months, his retirement allowance shall cease. His retirement allowance shall be restored prospectively beginning the first of the month following the month he is no longer so employed.

(1981 (Reg. Sess., 1982), c. 1396, ss. 1, 2.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, deleted former subdivision (3a). The amendment also rewrote subdivision (5)c, to the extent that a detailed comparison is not possible.

Session Laws 1981 (Reg. Sess., 1982), c. 1396, s. 5, empowers and directs the Board of Trustees of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System to adjust the employers' rates of contribution to the level necessary to fund the provisions of the act.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language, subdivision (5) and the repeal line for subdivision (3a) are set out.

§ 128-26. Allowance for service.

(e) Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of the service certified on his prior

service certificate; and if he has sick leave standing to his credit upon retirement on or after July 1, 1971, one month of credit for each 20 days or portion thereof not to exceed one month of credit for each two years of prior and membership service or fraction thereof, but sick leave shall not be counted in computing creditable service for the purpose of determining eligibility for service retirement, disability retirement, early retirement or for a vested deferred allowance.

On and after July 1, 1971, a member whose account was closed on account of absence from service under the provisions of G.S. 128-24(1a) and who subsequently returns to service for a period of five years, may thereafter repay the amount withdrawn plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service by the amount of creditable service lost when this account was closed.

On and after July 1, 1973, a member whose account in the Teachers' and State Employees' Retirement System was closed on account of absence from service under the provisions of G.S. 135-3(3) and whose subsequently became or becomes a member of this System with credit for five years of service, may thereafter repay in a lump sum the amount withdrawn from the Teachers' and State Employees' Retirement System plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service in this System by the amount of creditable service lost when his account was closed.

Notwithstanding any other provision of this Chapter, any member who entered service or was restored to service prior to July 1, 1982, and was excluded from membership service solely on account of having attained the age of 62 years, in accordance with former G.S. 128-24(3a), may purchase membership service credits for such excluded service by making a lump-sum payment equal to the contributions that would have been deducted pursuant to G.S. 128-30(b) had he been a member of the Retirement System, increased by interest calculated at a rate of seven percent (7%) per annum.

(1981, (Reg. Sess., 1982), c. 1283, s. 1; c. 1396, s. 3.)

Effect of Amendments. —

The first 1981 (Reg. Sess., 1982) amendment inserted "prior and" preceding "membership service" near the middle of the first paragraph of subsection (e).

Session Laws 1981 (Reg. Sess., 1982), c. 1283, s. 2, provides: "This act is effective upon ratification [June 22, 1982] and applies to limit sick leave as creditable service on or after September 1, 1981."

The second 1981 (Reg. Sess. 1982) amendment, effective July 1, 1982, added the last paragraph in subsection (e).

Session Laws 1981 (Reg. Sess., 1982), c. 1396, s. 5 empowers and directs the Board of Trustees of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System to adjust the employers' rates of contribution to the level necessary to fund the provisions of the act.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsection (e) is set out.

§ 128-27. (Effective July 1, 1983) Benefits.

(b6) Service Retirement Allowance of Members Retiring on or after July 1, 1978, but prior to July 1, 1983. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1978, but prior to July 1, 1983, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-five one-hundredths percent (1.55%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b7) Service Retirement Allowances of Members Retiring on or after July 1, 1983. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1983, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-seven one-hundredths percent (1.57%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixth-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(1981 (Reg. Sess., 1982), c. 1284, ss. 1, 2.)

Cross References. —

For this section as in effect until July 1, 1983, see the 1981 Cumulative Supplement.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1983, in subsection (b6) inserted "but prior to July 1, 1983" in two places and substituted "Allowance" for "Allowances." The amendment also added subsection (b7). In amending subsection (b6), the amendment referred to "rewriting the words prior to the first semi-colon." "The first colon" was plainly intended, and the amendment has been given effect.

Only Part of Section Set Out. — As the rest of section was not changed by the amendment, only subsections (b6) and (b7) are set out.

§ 128-30. Method of financing.

(b1) Pick Up of Employee Contributions. — Anything within this section to the contrary notwithstanding, effective July 1, 1982, an employer, pursuant to the provisions of section 414(h)(2) of the Internal Revenue Code of 1954 as amended, may elect to pick up and pay the contributions which would be payable by the employees as members under subsection (b) of this section with respect to the service of employees after June 30, 1982.

The members' contributions picked up by an employer shall be designated for all purposes of the Retirement System as member contributions, except for the determination of tax upon a distribution from the System. These contributions shall be credited to the annuity savings fund and accumulated within the fund in a member's account which shall be separately established for the purpose of accounting for picked-up contributions.

Member contributions picked up by an employer shall be payable from the same source of funds used for the payment of compensation to a member. A deduction shall be made from a member's compensation equal to the amount of his contributions picked up by his employer. This deduction, however, shall not reduce his compensation as defined in subdivision (7a) of G.S. 128-21. Picked-up contributions shall be transmitted to the System monthly for the preceding month by means of a warrant drawn by the employer and payable to the Local Governmental Employees' Retirement System and shall be accompanied by a schedule of the picked-up contributions on such forms as may be prescribed. In the case of a failure to fulfill these conditions the provisions of subsection (f)(3) [subsection (g)(3)] of this section shall apply.

(1981 (Reg. Sess., 1982), c. 1282, s. 9.)

Editor's Note. —"Subsection (g)(3)" has been inserted in brackets in subsection (b1) to correct the erroneous reference to subsection (f)(3) in the subsection as enacted.

Effect of Amendments. —

The 1982 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (b1).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b1) is set out.

Chapter 129.

Public Buildings and Grounds.

Article 7.

North Carolina Capital Building Authority.

Sec.

129-40. Creation of North Carolina Capital Building Authority.

ARTICLE 7.

North Carolina Capital Building Authority.

§ 129-40. Creation of North Carolina Capital Building Authority.

There is hereby created the North Carolina Capital Building Authority which shall consist of the following: the General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate; the Attorney General; the State Treasurer; Secretary of the Department of Cultural Resources; the Secretary of Administration who shall serve as chairman; and two members to be appointed by the Governor of North Carolina. The Governor shall serve as ex officio member. The vice-chairman shall be elected at the first meeting of the Authority. The Secretary of Administration may designate a member of his Department to serve as secretary to the Authority. All appointed members shall serve for a period of two years or until their successor has been named. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. Subsequent appointees by the General Assembly shall serve two-year terms. (1967, c. 994, s. 1; 1975, c. 879, s. 46; 1979, c. 3, § 1; 1981 (Reg. Sess., 1982), c. 1191, s. 29.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted the language beginning "the General Assembly shall appoint" and ending "President of the Senate" for "a member of the Senate to be appointed by the Lieutenant Governor; a member of the House of Representatives to be appointed by the Speaker of the House" in the first sentence and added the last three sentences.

Chapter 130.

Public Health.

Article 12.

Sanitary Districts.

Sec.

130-126.2. Special election if election not held in November of 1981.
130-126.3. Actions validated.
130-128. Corporate powers.

Article 13C.

Ground Absorption Sewage Disposal System Act of 1973.

Sec.

130-166.22 to 130-166.33. [Repealed.]

Article 2.

Administration of Public Health Law.

§ 130-9. Powers and duties of the Department of Human Resources and Commission for Health Services.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 20.1, provides that the Department of Human Resources shall not accept applications received after July 1, 1982, or before February 1, 1983, for initial licensure of a home for the aged and disabled operated in conjunction with a nursing home to be licensed under G.S. 130-9(e)(5) or additional facilities, including beds, for any such home. Section 20.2 provides that the Joint Legislative Commission on Governmental Operations shall recommend to the General Assembly, upon its convening in 1983, legislation which would establish a permitting procedure for such homes with standards based principally on the public need. However, s. 20.2A provides that nothing in ss. 20.1 or 20.2 shall apply to a facility owned or operated by an organization that is exempt from taxation under section 501(C)(3) of the Internal Revenue Code.

Session Laws 1981, (Reg. Sess., 1982), c. 1282, s. 25, establishes a schedule of priorities for allocating funds to local area mental health programs and local education agencies to provide appropriate treatment and education programs to children under the age of 18 who suffer from emotional, mental, or neurological handicaps accompanied by violent or assaultive behavior, identified as a class in the case of Willie M., et al. vs. Hunt, et al. The act appropriates funds to the Division of Mental Health, Mental Retardation, and Substance Abuse, to the Division of Youth Services, and to the Department of Public Education, establishes a reserve fund, and provides for certain reporting requirements. The act further provides that the prohibitions on use of State funds prescribed by G.S. 122-35.53(c) do not apply to any funds appropriated for the treatment of members of the above-named class.

OPINIONS OF ATTORNEY GENERAL

Posting of sign concerning right to object to release of information is insufficient notice. — See opinion of Attorney General to Mr. I.O. Wilkerson, Jr., Director, Division of Facility Services, 51 N.C.A.G. 17 (1981).

Article 3.

Local Health Departments.

§ 130-13. Provision of public health services.

CASE NOTES

Cited in Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).

§ 130-17. Powers and duties of local boards; expenditures.

CASE NOTES

Quoted in Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).

§ 130-20. Abatement of nuisances.

CASE NOTES

Local Director Must Initiate Action. — As this section invests the power to initiate action to abate a public nuisance in the local health director, a county may not proceed without him. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

State's Use of Property as Nuisance. — The State of North Carolina may not be enjoined by the courts as a nuisance in the use of its property in a manner authorized by valid legislative authority. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

ARTICLE 7.

Vital Statistics.

§ 130-50. Birth registration.

CASE NOTES

Constitutionality. — Subsection (e) of this section violates the constitutional right to be free from arbitrary State interference in making private decisions, and is adjudged and declared void and of no force or effect insofar as it precludes parents from recording the surnames of their choice on the birth certificates of their children called for under this section. O'Brien v. Tilson, 523 F. Supp. 494 (E.D.N.C. 1981).

ARTICLE 12.

Sanitary Districts.

§ 130-126.2. Special election if election not held in November of 1981.

(a) If in any sanitary district, an election of board members was required to be held in November of 1981 under G.S. 130-126 but was not held, the county board of commissioners of the county in which the district is located may by resolution order a special election of all the board members to be held at the same time as the general election in November of 1982.

(b) The election shall be held under the procedures of Articles 23 and 24 of Chapter 163 of the General Statutes and in accordance with G.S. 130-126, except that filing shall open at noon on Monday, August 9, 1982, and close at noon on Monday, August 23, 1982.

(c) In the election held under this section, all of the members of the board shall be elected. If the board of commissioners has provided for two- or four-year terms, the members elected in 1982 shall serve until the 1983 or 1985 election, respectively, and then their successors shall be elected for the two- or four-year terms provided by the county board of commissioners.

(d) Any resolution adopted under subsection (a) of this section shall be filed with the Commission for Health Services. (1981 (Reg. Sess., 1982), c. 1271, s. 1.)

§ 130-126.3. Actions validated.

Any action of a sanitary district taken prior to June 1, 1982, shall not be invalidated by failure to hold an election for members of the board. (1981 (Reg. Sess., 1982), c. 1271, s. 1.)

§ 130-128. Corporate powers.

When a sanitary district is organized as herein provided the sanitary district board selected under the provisions of this Article shall be a body politic and corporate and as such may sue and be sued in matters relating to such sanitary district. In addition, such board shall have the following powers:

(23) To acquire or renovate property for, or construct, a medical clinic to serve the district, and to maintain real and personal property for a medical clinic to serve the district. (1927, c. 100, s. 7; 1933, c. 8, ss. 1, 2; 1935, c. 287, ss. 1, 2; 1941, c. 116; 1945, c. 651, ss. 1, 2; 1947, c. 476; 1949, c. 880, s. 1; cc. 1130, 1145; 1951, c. 17, s. 1; c. 1035, s. 1; 1957, c. 1357, s. 1; 1961, cc. 669, 865, 1155; 1963, c. 1232; 1965, c. 496, s. 1; 1967, c. 632; c. 637, s. 1; c. 798, s. 2; 1969, cc. 478, 700, 944; 1971, c. 780, s. 29; 1973, c. 476, s. 128; 1979, c. 520, s. 2; c. 619, s. 7; 1981, cc. 629, 655; c. 820, ss. 1-3; c. 898, ss. 1-4; 1981 (Reg. Sess., 1982), c. 1237.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added subdivision (23).

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory paragraph and subdivision (23) are set out.

§ 130-130. Power to condemn property.

Local Modification. — Ashe, Brunswick: 1981, c. 283; 1981 (Reg. Sess., 1982), c. 1150.

Article 13C.

Ground Absorption Sewage Disposal System Act of 1973.

§§ 130-166.22 to 130-166.33: Repealed by Session Laws 1981, c. 949, s. 2, effective January 1, 1982.

Cross Reference. — For present statute covering the subject matter of the repealed sections, see § 130-166.62 et seq.

Editor's Note. — This Article was repealed by Session Laws 1981, c. 949, s. 3, effective Jan. 1, 1982, and a new Article 13C was enacted,

which has been recodified as Article 13E of this Chapter.

Article 13E.

Ground Absorption Sewage Treatment and Disposal Act of 1981.

§ 130-166.62. Short title.

Editor's Note. — This Article replaces former Article 13C, which was repealed by Session Laws 1981, c. 949, s. 2, effective Jan. 1, 1982. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sections in this Article.

Article 15A.

Home Health Agencies.

§ 130-170.1. Definitions; licensing; regulations of Commission; appeals.

OPINIONS OF ATTORNEY GENERAL

Posting of sign concerning right to object to release of information is insufficient notice. — See opinion of Attorney General to Mr. I.O. Wilkinson, Jr., Director, Division of Facility Services, 51 N.C.A.G. 17 (1981).

Chapter 131.

Public Hospitals.

Article 13.

Department of Human Resources and Program of Hospital Care.

Sec.
131-121. [Repealed.]
131-121.3. [Repealed.]
131-124. [Repealed.]
131-124.1. Transfer of loan and scholarship funds to Office of State Budget and Management.
131-125. [Repealed.]

Article 13.

Department of Human Resources and Program of Hospital Care.

§ 131-121: Repealed by Session Laws 1981, (Regular Session, 1982), c. 1388, s. 1, effective July 1, 1982.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 6, provides that the repeal of §§ 131-121, 131-121.3, 131-124 and 131-125 shall not be construed as affecting the status of any loan or scholarship already granted, and that any loan or scholarship already granted under Article 13 of Chapter 131 shall be administered by the North Carolina Board for Need-Based Medical Student Loans.

§ 131-121.3: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1388, s. 1, effective July 1, 1982.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 6, provides that the repeal of §§ 131-121, 131-121.3, 131-124 and 131-125 shall not be construed as affecting the status of any loan or scholarship already granted, and that any loan or scholarship already granted under Article 13 of Chapter 131 shall be administered by the North Carolina Board for Need-Based Medical Student Loans.

§ 131-124: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1388, s. 1, effective July 1, 1982.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 6, provides that the repeal of §§ 131-121, 131-121.3, 131-124 and 131-125 shall not be construed as affecting the status of any loan or scholarship already granted, and that any loan or scholarship already granted under Article 13 of Chapter 131 shall be administered by the North Carolina Board for Need-Based Medical Student Loans.

§ 131-124.1. Transfer of loan and scholarship funds to Office of State Budget and Management.

Effective July 1, 1982, all funds previously appropriated to the Department of Human Resources for student loans and scholarships under prior G.S. 131-121, G.S. 131-121.3, G.S. 131-124 and G.S. 131-125, and for the administration thereof, shall be transferred to the Office of State Budget and Management, including all loans or scholarship funds repaid to the Department of Human Resources pursuant to prior G.S. 131-121, G.S. 131-121.3, G.S. 131-124 and G.S. 131-125. (1981 (Reg. Sess., 1982), c. 1388, s. 2.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 7, makes this section effective July 1, 1982.

Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 5, provides: "In effecting this transfer, the director of the program shall be transferred to the Office of State Budget and Management. In addition, other staff in the discretion of the State Budget Officer may be transferred."

§ 131-125: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1388, s. 1, effective July 1, 1982.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 6, provides that the repeal of §§ 131-121, 131-121.3, 131-124 and 131-125 shall not be construed as affecting the status of any loan or scholarship already granted, and that any loan or scholarship already granted under Article 13 of Chapter 131 shall be administered by the North Carolina Board for Need-Based Medical Student Loans.

ARTICLE 13B.

Additional Authority of Subdivisions of Government to Finance Hospital Facilities.

ARTICLE 13A.

Hospital Licensing Act.

§ 131-126.9. Inspections and consultations.

OPINIONS OF ATTORNEY GENERAL

Posting of sign concerning right to object to release of information is insufficient notice. — See opinion of Attorney General to Mr. I.O. Wilkerson, Jr., Director, Division of Facility Services, 51 N.C.A.G. 17 (1981).

§ 131-126.12. Information to be disclosed.

OPINIONS OF ATTORNEY GENERAL

Posting of sign concerning right to object to release of information is insufficient notice. — See opinion of Attorney General to Mr. I.O. Wilkerson, Jr., Director, Division of Facility Services, 51 N.C.A.G. 17 (1981).

§ 131-126.18. Definitions.

CASE NOTES

Cited in News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

§ 131-126.28. Public purpose; county and municipal purpose.

CASE NOTES

Quoted in News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

ARTICLE 18.

Certificate of Need Law.

§ 131-175. Findings of fact.

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1182, s. 4, as amended by Session Laws 1981, ch. 1127, s. 30, and Session Laws 1981 (Reg. Sess., 1982), c. 1242, s. 1(a), provides: "This act shall not apply to any project which has received approval under the Section 1122, P.L. 92-603 program prior to January 1, 1979, as long as construction has commenced before January 1, 1980.

"This act shall not apply to any project for which application is made under the Section 1122, P.L. 92-603 program between July 1, 1978, and January 1, 1979, if such application is approved, and construction has commenced before January 1, 1980.

"Rules and Regulations under this act may be issued at any time after the date of ratification of this act [June 16, 1978], but shall not become effective prior to January 1, 1979.

"Provided, that, notwithstanding the previous two paragraphs, this act shall apply to any project described in either of those two paragraphs or exempt from this act because construction had commenced prior to June 16, 1978, unless, prior to January 1, 1983:

(1) Sufficient land has been acquired for the project;

(2) All necessary building permits and zoning or subdivision approval has been obtained;

(3) A construction contract has been awarded and payments have been made on the construction contract; and

(4) Either foundation walls for the project have been raised above grade level, or if a building or buildings existed on that site on January 1, 1983, a contract has been signed to raze them and total or partial demolition has taken place.

Provided further, that this paragraph does not apply to any project required to be licensed under Article 13A of Chapter 131 of the General Statutes."

Session Laws 1981 (Reg. Sess., 1982), c. 1242, s. 1(b) provides: "Any beds released as a result of tests set forth in subsection (a) of this section shall be placed in a statewide pool, from which allocations can be made, with first priority being given to those counties which do not have at least one skilled care or one intermediate care facility."

Session Laws 1981, c. 1127, s. 89 and 1981 (Reg. Sess., 1982), c. 1242, s. 2 contain severability clauses.

CASE NOTES

Applied in In re Wilkesboro, Ltd., — N.C. App. —, 285 S.E.2d 626 (1982).

OPINIONS OF ATTORNEY GENERAL

Certificate of Need Not Required, etc. — The correct citation to the opinion of the Attorney General cited under this catchline in the replacement volume is 48 N.C.A.G. 26.

§ 131-176. Definitions.

CASE NOTES

Stated in In re Wilkesboro, Ltd., — N.C. App. —, 285 S.E.2d 626 (1982).

§ 131-177. Department of Human Resources is designated State Health Planning and Development Agency; powers and duties.

CASE NOTES

Cited in In re Wilkesboro, Ltd., — N.C. App. —, 285 S.E.2d 626 (1982).

§ 131-185. Administrative and judicial review.

CASE NOTES

Applied in In re Wilkesboro, Ltd., — N.C. App. —, 285 S.E.2d 626 (1982).

Chapter 131A.

Health Care Facilities Finance Act.

§ 131A-1. Short title.

CASE NOTES

Cited in News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

Chapter 131B.

Licensing of Ambulatory Surgical Facilities.

§ 131B-7. Inspections.

OPINIONS OF ATTORNEY GENERAL

Posting of sign concerning right to object to release of information is insufficient notice. — See Opinion of Attorney General to Mr. I.O. Wilkerson, Jr., Director, Division of Facility Services, 51 N.C.A.G. 17 (1981).

Chapter 131C.

Charitable Solicitation Licensure Act.

Sec.
131C-16. Disclosure.

§ 131C-5. Exemptions.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

§ 131C-11. Denial and revocation of license.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

§ 131C-16. Disclosure.

Any person subject to licensure under this Chapter, or his agent for service of process if the person subject to licensure is not a resident of North Carolina, shall disclose in writing his percentage of fund-raising expenses and the purpose of the organization, upon receipt of a written or oral request from the Department or any citizen of North Carolina. (1981, c. 886, s. 1; 1981 (Reg. Sess., 1982), c. 1268.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not practical.

Chapter 131D.

Inspection and Licensing of Facilities.

Article 1.

Licensing of Facilities.

Sec.

131D-2. Licensing of domiciliary homes for the aged, disabled and infirm.

Article 3.

Domiciliary Home Residents' Bill of Rights.

Sec.

131D-20. Definitions.

Article 1.

Licensing of Facilities.

§ 131D-2. Licensing of domiciliary homes for the aged, disabled and infirm.

(a) The following definitions will apply in the interpretation of this section:

(1) "Abuse" means abuse as defined in G.S. 108A-101(a).

(2) "Developmentally disabled adult" means a person who has attained the age of 18 years and who has a developmental disability as defined in G.S. 143B-178(1).

(3) "Domiciliary home" means any facility, by whatever name it is called, which provides residential care for aged or disabled persons whose principal need is a home with the sheltered or personal care their age or disability requires. Medical care at a domiciliary home is only occasional or incidental, such as may be required in the home of any individual or family, but the administration of medication is supervised. Domiciliary homes are to be distinguished from nursing homes subject to licensure under G.S. 130-9(e). The three types of domiciliary homes are homes for the aged and disabled, family care homes and group homes for developmentally disabled adults.

(4) "Exploitation" means exploitation as defined in G.S. 108A-101(j).

(5) "Family care home" means a domiciliary home having two to six residents. The structure of a family care home may be no more than two stories high and none of the aged or physically disabled persons being served there may be housed in the upper story without provision for two direct, exterior ground-level accesses to the upper story.

(6) "Group home for developmentally disabled adults" means a domiciliary home which has two to nine developmentally disabled adult residents.

(7) "Home for the aged and disabled" means a domiciliary home which has six or more residents.

(8) "Neglect" means the failure to provide the services necessary to maintain a resident's physical or mental health.

(1981 (Reg. Sess., 1982), c. 1282, s. 20.2B.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, substituted "six" for "five" in the first sentence of subdivision (a)(5).

Session Laws 1981 (Reg. Sess. 1982), c. 1282, s. 20.1, provides that the Department of Human Resources shall not accept applications received after July 1, 1982, or before February 1, 1983, for initial licensure of a home for the aged and disabled as defined by G.S. 131D-2(a)(7) or additional facilities, including beds for any such home. Section 20.2A provides, however, that nothing in s. 20.1 shall apply to a facility owned or operated by an organization that is exempt from taxation under section 501(C)(3) of the Internal Revenue Code.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 3.

Domiciliary Home Residents' Bill of Rights.

§ 131D-20. Definitions.

As used in this Article, the following terms have the meanings specified:

(1) "Abuse" has the same meaning as in G.S. 108A-101(a).

(3) "Exploitation" means exploitation as defined in G.S. 108A-101(j).

(5) "Family care home" means a domiciliary home having two to six residents. The structure of a family care home may be no more than two stories high and none of the aged or physically disabled persons being served there may be housed in the upper story without provision for two direct, exterior ground-level accesses to the upper story.

(1981 (Reg. Sess., 1982), c. 1282, s. 20.2C.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, substituted "six" for "five" in the first sentence of subdivision (5).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment and the errors, only the introductory paragraph and subdivisions (1), (3) and (5) are set out.

Chapter 132.

Public Records.

§ 132-1. "Public records" defined.

Legal Periodicals. —
For a note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

CASE NOTES

Chapter Contemplates Disclosure as Well as Storage. — A presumed legislative intent to mandate the extensive preservation of public records prescribed by this Chapter, with storage at public expense, but to which the public is denied access, is untenable. Preservation for its own sake, absent access, would be an absurdity. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

The phrase "pursuant to law or ordinance in connection with the transaction of public business," should include, in addition to those records required by law, those records that are kept in carrying out lawful duties. News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

"Agency of North Carolina government or its subdivisions". — The phrase "agency of North Carolina government or its subdivisions" in this section need be construed only upon the plain meaning of this section and in the context of the public records statutes. News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

Letter from Engineer Consulting for City. — A letter received by the manager of defendant-city from a consulting engineer whom defendant-city employed to inspect construction work on additions and modifications to its water treatment plant is a public record subject to disclosure. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

Wake County Hospital System is an agency of the county under the North Carolina public records statutes. News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

By virtue of the definitions in §§ 143-318.10(b) and 159-39(a), the Wake County Hospital System is a "public body" that must, by law, record settlement terms considered in executive sessions; in addition, the public has the right to know the terms of settlements made by the system in actions for wrongful terminations of its agreements, since the funds from which the settlements were paid must be considered the county's funds. News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

Cited in Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981); Housing Auth. v. Montgomery, — N.C. App. —, 286 S.E.2d 114 (1982).

OPINIONS OF ATTORNEY GENERAL

Copies of Forms Maintained, etc. —
The correct citation to the opinion of the Attorney General cited under this catchline in the replacement volume is 48 N.C.A.G. 63.

§ 132-1.1. Confidential communications by legal counsel to public board or agency; not public records.

CASE NOTES

Cited in News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

§ 132-3. Destruction of records regulated.

CASE NOTES

Applied in State v. Caldwell, 53 N.C. App. 1, 279 S.E.2d 852 (1981).

§ 132-6. Inspection and examination of records.

Legal Periodicals. —
For a note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

CASE NOTES

"Any Person" Includes Corporation. — The General Assembly did not intend to exclude corporate entities from the scope of the phrase "any person" in this section. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

§ 132-9. Access to records.

CASE NOTES

"Any Person" Includes Corporation. — The General Assembly did not intend to exclude corporate entities from the scope of the phrase "any person" in this section. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

Cited in Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981); Housing Auth. v. Montgomery, — N.C. App. —, 286 S.E.2d 114 (1982).

Chapter 134A.

Youth Services.

Article 1.

Division of Youth Services in the Department of Human Resources.

§ 134A-1. Legislative intent and purpose.

Editor's Note. — Session Laws 1981, (Reg. Sess., 1982), c. 1282, s. 25, establishes a schedule of priorities for allocating funds to local area mental health programs and local education agencies to provide appropriate treatment and education programs to children under the age of 18 who suffer from emotional, mental, or neurological handicaps accompanied by violent or assaultive behavior, identified as a class in the case of Willie M., et al. vs. Hunt, et al. The act appropriates funds to the Division of Mental Health, Mental Retardation, and Substance Abuse, to the Division of Youth Services, and to the Department of Public Education, establishes a reserve fund, and provides for certain reporting requirements. The act further provides that the prohibitions on use of State funds prescribed by G.S. 122-35.53(c) do not apply to any funds appropriated for the treatment of members of the above named class.

Chapter 135.

Retirement System for Teachers and State Employees; Social Security.

Article 1.

Retirement System for Teachers and State Employees.

Sec.

135-3. Membership.
135-4. Creditable service.
135-5. Benefits.
135-6. Administration.
135-8. Method of financing.

Article 3.

Other Teacher, Employee Benefits.

Part 1. General Provisions.

135-32 to 135-33.1. [Repealed.]
135-34. Disability salary continuation.
135-35. [Repealed.]
135-36. [Repealed.]
135-37. Information received from insurer held confidential.
135-38. Committee on Employee Hospital and Medical Benefits.

Part 2. Administrative Structure.

135-39. Board of Trustees established.
135-39.1. Auditing of the Plan.
135-39.2. Officers, quorum, meetings.
135-39.3. Oversight team.
135-39.4. Selection of Plan Administrator.
135-39.5. Powers and duties of the Board of Trustees.
135-39.5A. Termination.
135-39.5B. Prepaid Plan.
135-39.6. Special funds created.
135-39.6A. Premiums set.
135-39.7. Administrative review.
135-39.8. Rules and regulations.
135-39.9. Reports to the General Assembly.

Part 3. Comprehensive Major Medical Plan.

135-40. Undertaking.
135-40.1. General definitions.
135-40.2. Eligibility.
135-40.3. Effective dates of coverage.
135-40.4. Benefits in general.
135-40.5. Benefits not subject to deductible or coinsurance.
135-40.6. Benefits subject to deductible and coinsurance (comprehensive benefits).
135-40.7. General limitations and exclusions.
135-40.8. Out-of-pocket expenditures.
135-40.9. Maximum benefits.
135-40.10. Persons eligible for Medicare.
135-40.11. Cessation of coverage.
135-40.12. Conversion.
135-40.13. Coordination of benefits.
135-40.14. Right to amend.
135-41 to 135-49. [Reserved.]

Article 1.

Retirement System for Teachers and State Employees.

§ 135-1. Definitions.

CASE NOTES

The intent of this Chapter is not to exclude, but to include, State employees under an umbrella of protections designed to provide maximum security in their work environment and to afford a measure of freedom from apprehension of old age and disability. Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 286 S.E.2d 643 (1982).

§ 135-3. Membership.

The membership of this Retirement System shall be composed as follows:

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1396, s. 1, effective July 1, 1982.

(8) The provisions of this subsection (8) shall apply to any member whose membership is terminated on or after July 1, 1963 and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 15 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; and further provided that in the case of a member who so separates from service on or after July 1, 1967 or whose account is active on July 1, 1967, or has not withdrawn his contributions, the aforestated requirement of 15 or more years of creditable service shall be reduced to 12 or more years of creditable service; and further provided that in the case of a member who so separates from service on or after July 1, 1971, or whose account is active on July 1, 1971, the aforestated requirement of 12 or more years of creditable service shall be reduced to five or more years of creditable service shall be reduced to five or more years of creditable service. Such deferred retirement allowance shall be computed in accordance shall be computed in accordance with the provisions of G.S. 135-5(b1); provided that such benefits will be computed in accordance with (b2) on or after July 1, 1967, but prior to July 1, 1969; and provided further that such benefits will be computed in accordance with (b3) on or after July 1, 1969. Notwithstanding the foregoing, any member whose services as a teacher or employee are terminated for any reason other than retirement, who becomes employed by a nonprofit, nonsectarian private school in North Carolina below the college level within one year after such teacher or employee has ceased to be a teacher or employee, may elect to leave his total accumulated contributions in the Teachers' and State Employees' Retirement System during the period he is in the employment of such employer; provided that he files notice thereof in writing with the Board of Trustees of the Retirement System within five years after separation from service as a public school teacher or State employee; such member shall be deemed to have met the requirements of the above provisions of this subdivision upon attainment of age 60 while in such employment provided that he is otherwise vested.

b. In lieu of the benefits provided in paragraph a of this subdivision (8), any member who separates from service prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on an early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such early retirement allowance so

elected shall be equal to the deferred retirement allowance otherwise payable at the attainment of the age of 60 years reduced by the percentage thereof indicated below.

Age at Retirement	*Percentage Reduction*
59	7
58	14
57	20
56	25
55	30
54	35
53	39
52	43
51	46
50	50

c. Should a beneficiary who retired on an early or service retirement allowance be restored to service for a period of time exceeding six calendar months, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the uniform contribution rate payable by all members. Upon his subsequent retirement, he shall be entitled to the allowance described in 1 below increased by the amount in 2 below.

1. The allowance to which he would be entitled had he not been restored to service with cessation of retirement allowance.
2. The allowance to which he would be entitled on account of his service after restoration to service and membership calculated on the basis of such service; provided for the sole purpose of determining retirement eligibility, that his creditable service shall be taken as the sum of his creditable service prior to and subsequent to his restoration to service.

Should a beneficiary who retired on an early or service retirement allowance be employed by an employer on a contractual or fee basis for a period of time exceeding six calendar months, his retirement allowance shall cease. His retirement allowance shall be restored prospectively beginning the first of the month following the month he is no longer so employed.

(1981 (Reg. Sess., 1982), c. 1396, ss. 1, 2.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, deleted subdivision (6). The amendments also rewrote subdivision (8)c, to the extent that a detailed comparison is not possible.

Session Laws 1981 (Reg. Sess., 1982), c. 1396, s. 5 empowers and directs the Board of Trustees of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System to adjust the employers' rates of contribution to the level necessary to fund the provisions of the act.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language, the repeal line for subdivision (6) and subdivision (8) are set out.

§ 135-4. Creditable service.

(q) Notwithstanding any other provision of this Chapter, any member who entered service or was restored to service prior to July 1, 1982, and was excluded from membership service solely on account of having attained the age of 62 years, in accordance with former G.S. 135-3(6), may purchase membership service credits of such excluded service by making a lump-sum payment equal to the contributions that would have been deducted pursuant

to G.S. 135-8(b) had he been a member of the Retirement System, increased by interest calculated at a rate of seven percent (7%) per annum. (1941, c. 25, s. 4; 1943, cc. 200, 783; 1945, c. 797; 1947, c. 575; 1949, c. 1056, ss. 2, 4; 1953, c. 1050, s. 3; 1959, c. 513, s. 1½; 1961, c. 516, s. 3; c. 779, s. 2; 1963, c. 1262; 1965, c. 780, s. 1; c. 924; 1967, c. 720, s. 3; 1969, c. 1223, ss. 3, 4; 1971, c. 117, ss. 9, 10; c. 993; 1973, c. 241, s. 2; c. 242, s. 1; c. 667, s. 2; c. 737, s. 1; c. 816, s. 1; c. 1063; c. 1311, ss. 1-5; 1975, c. 205, s. 2; c. 875, s. 47; 1977, cc. 317, 790; 1979, c. 826; c. 866, s. 2; c. 867; c. 972, s. 3; 1981, c. 557, s. 3; c. 636, s. 1; c. 1116, s. 1; 1981 (Reg. Sess., 1982), c. 1396, s. 4.)

Editor's Note. — Session Laws 1981 (Reg. Sess. 1982), c. 1282, s. 46, provides: "The State Personnel Commission and the Office of State Personnel, Department of Administration, shall grant aggregate State Service credit to former employees of the General Assembly for the amount of service to the General Assembly that those employees are authorized, for the purposes of retirement under Chapter 135 of the North Carolina General Statutes. This section shall not apply to legislators, participants in the Legislative Interim Program or pages."

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (q).

Session Laws 1981 (Reg. Sess., 1982), c. 1396, s. 5, empowers and directs the Board of Trustees of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System to adjust the employers' rates of contribution to the level necessary to fund the provisions of the act.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (q) is set out.

CASE NOTES

Stated in In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981).

Cited in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 286 S.E.2d 643 (1982).

OPINIONS OF ATTORNEY GENERAL

Subsection 135-4(m) Was Not Repealed by Session Laws 1975, Chapter 875. — See opinion of Attorney General to Mr. W. H. Hambleton, Director, Retirement and Health Benefits Division, Department of the Treasurer, Nov. 8, 1977. This paragraph is set out to correct a misleading catchline appearing in the replacement volume. — Ed. note.

§ 135-5. Benefits.

(ff) From and after July 1, 1982, the retirement allowance to or on account of beneficiaries on the retirement rolls as of July 1, 1981, shall be increased by one-tenth of one percent (0.1%) of the allowance payable on July 1, 1981. (1941, c. 25, s. 5; 1945, c. 218; 1947, c. 458, ss. 3, 4, 7, 8a; 1949, c. 1056, ss. 3, 5; 1955, c. 1155, ss. 1, 2; 1957, c. 855, ss. 5-8; 1959, c. 490; c. 513, ss. 2, 3; c. 620, ss. 1-3; c. 624; 1961, c. 516, s. 4; c. 779, s. 1; 1963, c. 687, s. 3; 1965, c. 780, s. 1; 1967, c. 720, ss. 4-10; c. 1223; 1969, c. 1223, ss. 2, 5-12; 1971, c. 117, ss. 11-15; c. 118, ss. 3-7; 1973, c. 241, ss. 3-7; c. 242, ss. 2-4; c. 737, s. 2; c. 816, s. 2; c. 994, ss. 1, 3; c. 1312, ss. 1-3; 1975, c. 457, ss. 2-4; c. 511, ss. 1, 2; c. 634, ss. 1, 2; c. 875, s. 47; 1977, c. 561; c. 802, ss. 50.65-50.70; 1979, c. 838, s. 99; c. 862, ss. 1, 4, 5; c. 972, s. 4; c. 975, s. 1; 1979, 2nd Sess., c. 1137, ss. 63, 64, 66; c. 1196, s. 1; c. 1216; 1981, c. 672, s. 1; c. 689, s. 2; 859, ss. 42, 42.1, 44; c. 940, s. 1; c. 975, s. 3; c. 978, ss. 1, 2; c. 980, ss. 3, 4; 1981 (Reg. Sess., 1982), c. 1282, s. 11.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (ff).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (ff) is set out.

CASE NOTES

Constitutionality. — Subsection (l) of this section, as in effect in 1974, was constitutional on its face. Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 286 S.E.2d 643 (1982).

§ 135-5.1. Optional retirement program for State institutions of higher education.

Cross references. — As to the pick up of certain employee contributions by the employer, see § 135-8.

§ 135-6. Administration.

(b) Membership of Board; Terms. — The Board shall consist of 13 members, as follows:

(1) The State Treasurer, ex officio;

(2) The Superintendent of Public Instruction, ex officio;

(3) Nine members to be appointed by the Governor and confirmed by the Senate of North Carolina. One of the appointive members shall be member of the teaching profession of the State; one of the appointive members shall be an employee of the Board of Transportation, who shall be appointed by the Governor for a term of four years commencing April 1, 1947, and quadrennially thereafter; one of the appointive members shall be a representative of higher education appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one of the appointive members shall be a retired teacher who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one shall be a retired State employee who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1977, and quadrennially thereafter; one to be a general State employee, and three who are not members of the teaching profession or State employees; two to be appointed for a term of two years, two for a term of three years and one for a term of four years. At the expiration of these terms of office the appointment shall be for a term of four years;

(4) Two members appointed by the General Assembly, one appointed upon the recommendation of the Speaker of the House of Representatives, and one appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Neither of these members may be an active or retired teacher or State employee or an employee of a unit of local government. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successsors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(1981 (Reg. Sess., 1982), c. 1191, s. 11.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote subdivision (4) of subsection (b), which formerly provided for two members, one to be a member of the House of Representatives appointed by the Speaker of the House and one to be a member of the Senate appointed by the President thereof.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

CASE NOTES

Board without Power to Waive Statutory Deadlines. — The Board of Trustees of the Retirement System does not have discretionary power to extend or waive statutory deadlines for the reinstatement of a withdrawn account or for purchase of out-of-state service, since a waiver would not be a rule or regulation to prevent injustice and inequality across the board but simply a waiver in a specific instance. In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981).

§ 135-8. Method of financing.

(b1) Pick Up of Employee Contributions. — Anything within this section to the contrary notwithstanding, effective July 1, 1982, an employer, pursuant to the provisions of section 414(h)(2) of the Internal Revenue Code of 1954 as amended, shall pick up and pay the contributions which would be payable by the employees as members under subsection (b) of this section with respect to the service of employees after June 30, 1982.

The members' contributions picked up by an employer shall be designated for all purposes of the Retirement System as member contributions, except for the determination of tax upon a distribution from the System. These contributions shall be credited to the annuity savings fund and accumulated within the fund in a member's account which shall be separately established for the purpose of accounting for picked-up contributions.

Member contributions picked up by an employer shall be payable from the same source of funds used for the payment of compensation to a member. A deduction shall be made from a member's compensation equal to the amount of his contributions picked up by his employer. This deduction, however, shall not reduce his compensation as defined in subdivision (7a) of G.S. 135-1. Picked up contributions shall be transmitted to the System monthly for the preceding month by means of a warrant drawn by the employer and payable to the Teachers' and State Employees' Retirement System and shall be accompanied by a schedule of the picked-up contributions on such forms as may be prescribed. In the case of a failure to fulfill these conditions, the provisions of subsection (f)(3) of this section shall apply.

The pick up of employee contributions by an employer as provided for hereunder shall be equally applicable to participant contributions required under the optional retirement program as specified in G.S. 135-5.1(c).

(1981 (Reg. Sess., 1982), c. 1282, s. 8.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (b1).

Session Laws 1981 (Reg. Sess., 1982), c. 1982, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b1) is set out.

CASE NOTES

Cited in Stanley v. Retirement & Health Benefits Div., — N.C. App. —, 286 S.E.2d 643 (1982).

ARTICLE 2.

Coverage of Governmental Employees under Title II of the Social Security Act.

§ 135-29. Referenda and certification.

Editor's Note. — The historical citation at the end of this section in the replacement volume should read: (1955, c. 1154, s. 11; 1961, c. 516, s. 8.)

ARTICLE 3.

Other Teacher, Employee Benefits.

Part 1. General Provisions.

§§ 135-32 to 135-33.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1398, s. 1, effective October 1, 1982.

§ 135-34. Disability salary continuation.

The Board of Trustees of the Retirement System shall formulate, establish and administer for teachers and State employees with one or more years of service, including all employees of the General Assembly except participants in the Legislative Intern Program and pages, a program of disability salary continuation benefits to the extent that funds for such benefits are specifically appropriated by the General Assembly. Such a program may be provided by the Board either directly or through the purchase of contracts therefor, or any combination thereof, as in its discretion it may deem wise and expedient. Benefits provided under this program of disability salary continuation shall not be reduced in any manner as a result of social security payments received with respect to any dependent or dependents of the disabled employee or as a result of compensation received from the Veterans Administration of the United States for disease or disability incurred while a member of the armed forces of the United States. (1971, c. 1009, s. 1; 1973, c. 746; c. 1278, s. 2; 1979, c. 972, s. 6; 1981, c. 859, s. 13.16; 1981 (Reg. Sess., 1982), c. 1398, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment reenacted this section as it read before the 1981 amendment (Session Laws 1981, c. 859, s. 13.16).

§ 135-35: Repealed by Session Laws 1981, c. 859, s. 13.17 effective July 1, 1981; 1981 (Regular Session, 1982), c. 1398, s. 1, effective October 1, 1982.

Editor's Note. — This section was again repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1398, s. 1.

§ 135-36: Repealed by Session Laws 1981 (Regular Session 1982), c. 1398, s. 1, effective October 1, 1982.

§ 135-37. Information received from insurer held confidential.

Any information received from an insurer contracted with by the Retirement System under the provisions of this Article, or received from the Plan Administrator contracted with by the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan and concerning an individual insured shall be held confidential and shall be exempt from the provisions of Chapter 132 of the General Statutes or any other provision requiring information and records held by State agencies to be made public or accessible to the public. This section shall apply to all information concerning individuals, including the fact of coverage or noncoverage, whether or not a claim has been filed, medical information, whether or not a claim has been paid, and any other information or materials concerning an individual claim, claimant, or insured, including spouses, dependents and persons believed to be claimants or insureds, or spouses and dependents of claimants or insureds. Provided, however, such information may be released to the State Auditor or to the Attorney General, or to the persons designated under G.S. 135-39.3 in furtherance of their statutory duties and responsibilites and shall retain its character as confidential information exempt from Chapter 132 of the General Statutes and other provisions of a similar nature when so acquired by the State Auditor or the Attorney General. (1981, c. 355; 1981 (Reg. Sess., 1982), c. 1398, ss. 3, 4.)

Editor's Note. — The editor's note under this section in the 1981 Cumulative Supplement should be deleted.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted ", or received from the Plan Administrator contracted with by the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan" in the first sentence and in the third sentence inserted "or to the persons designated under G.S. 135-39.3" and substituted "their" for "his" preceding "statutory duties."

§ 135-38. Committee on Employee Hospital and Medical Benefits.

(c) The Committee shall recommend to the General Assembly programs for hospital, medical care and disability salary continuation benefits as provided in this Article. The Committee may consult with the Board of Trustees of the Retirement System concerning the Disability Salary Continuation Plan, and with the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan in connection with the Comprehensive Major Medical Plan, and those two Boards, and their directors, staff, and contractors shall provide the Committee with any information or assistance requested by the Committee in performing its duties under this Article.

(1981 (Reg. Sess., 1982), c. 1398, s. 5.)

Editor's Note. — Session Laws 1981, c. 859, s. 98, makes the act effective July 1, 1981.

Session Laws 1981, c. 859, s. 97, contains a severability clause.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote subsection (c) to the extent that a detailed comparison is not possible.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Part 2. Administrative Structure.

§ 135-39. Board of Trustees established.

(a) There is established within the office of State Budget and Management the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan.

(a1) The Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan shall consist of nine members.

(b) Three members shall be appointed by the Governor. Of the initial members, one shall serve a term to expire June 30, 1983, and two shall serve terms to expire June 30, 1984. Subsequent terms shall be for two years. Vacancies shall be filled by the Governor.

(c) Three members shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. Of the initial members, two shall serve terms expiring June 30, 1983, and one shall serve a term expiring June 30, 1984. Vacancies shall be filled in accordance with G.S. 120-122.

(d) Three members shall be appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Of the initial members, two shall serve terms expiring June 30, 1983, and one shall serve a term expiring June 30, 1984. Vacancies shall be filled in accordance with G.S. 120-122.

(d1) In case the General Assembly fails to make appointments under subsections (c) or (d) of this section prior to sine die adjournment of the 1981 General Assembly, the Governor may fill the vacancy or vacancies in accordance with G.S. 120-122 as if the vacancy had occurred while the General Assembly was not in session, provided that the terms of those appointees shall expire on April 1, 1983.

(e) The Governor shall have the power to remove any member appointed by him under subsection (b). The General Assembly may remove any member appointed under subsections (c) or (d).

(f) The members of the Board of Trustees shall receive a salary of two hundred dollars ($200.00) per day when the Board of Trustees meets or when holding a hearing under G.S. 135-39.7, and travel allowances under G.S. 138-6 when traveling to and from meetings of the Board of Trustees or hearings under G.S. 135-39.7, but shall not receive any subsistence allowance or per diem under G.S. 138-5.

(g) No State employee, member of the General Assembly, State officer, or anyone who is receiving benefits under the Plan or who is eligible to receive benefits under the Plan or who provides services, equipment or supplies under the Plan shall be eligible for membership on the Board of Trustees.

(h) No member of the Commission may serve more than three consecutive two-year terms. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.1. Auditing of the Plan.

The State Auditor shall annually audit the Plan Administrator and the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, including the two special funds established under G.S. 135-39.6. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.2. Officers, quorum, meetings.

(a) The Board of Trustees shall elect from its own membership for a one-year term a chairman and vice-chairman, and shall elect a secretary.

(b) Six members of the Board of Trustees in office shall constitute a quorum. Decisions of the Board of Trustees shall be made by a majority vote of the Trustees present, except as otherwise provided in this Part.

(c) The Board of Trustees shall meet initially upon the call of the Governor. Meetings may be called by the Chairman, or at the written request of three members. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.3. Oversight team.

(a) The Legislative Services Officer shall designate two employees of the Fiscal Research Division, and the Director of the Budget shall designate two employees of the Office of State Budget and Management as an oversight team, to monitor the Board of Trustees, the Plan Administrator, and the Comprehensive Major Medical Plan.

(b) The oversight team shall, jointly or individually, have access to all records of the Board of Trustees, the Plan Administrator, and the Comprehensive Major Medical Plan. They shall, jointly or individually, be entitled to attend all meetings of the Board of Trustees.

(c) The oversight team shall report to the Committee on Employee Hospital and Medical Benefits when requested by the Committee. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.4. Selection of Plan Administrator.

(a) The General Assembly requests, authorizes and directs the State Budget Officer to select the lowest responsible bidder on a per transaction basis from the proposals submitted April 8, 1982, to the Division of Purchase and Contract, North Carolina Department of Administration and opened April 14, 1982, in response to Request for Proposals #2-V04-01, as the Plan Administrator to administer the Comprehensive Major Medical Plan described in Part 3 of this Article for the period October 1, 1982, through September 30, 1986, on an Administrative Services only basis. Upon ratification of this Part, the State Budget Officer may authorize the Plan Administrator selected pursuant to this paragraph to begin preparatory work.

(b) The Board of Trustees shall contract with the Plan Administrator under the terms and conditions of the Request for Proposals dated February 15, 1982, by the Department of Administration, Division of Purchase and Contract, as amended or clarified by Addendum Number 1 of March 2, 1982; Addendum Number 2 of March 4, 1982; and Addendum Number 3 of March 15, 1982, as long as the Plan Administrator contracts as proposed in the offer in response to the request for proposal.

(c) Modifications from the request for proposal and the offer made in response may be made by the Board of Trustees, but such modification may not change any of the provisions of the Comprehensive Major Medical Plan provided in Part 3 of this Article except to correct a typographical error, or except as provided in subsection (e). No modification may be made without prior consultation with the Committee on Employee Hospital and Medical Benefits.

(d) Notwithstanding the provisions of Part 3 of this Article, the Board of Trustees shall negotiate cost-containment measures with the Plan Administrator, which, in case of conflict with Part 3, shall prevail.

(e) If the Board of Trustees determines that the annualized cost of the Plan will exceed the amount budgeted, it may, after consultation with the Committee on Employee Hospital and Medical Benefits and after receiving the advice of the Committee, modify the benefits under Part 3 of this Article to reduce the costs to that level. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

Editor's Note. — The act which enacted this Part was ratified on June 23, 1982.

§ 135-39.5. Powers and duties of the Board of Trustees.

The Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan shall have the following powers and duties:

(1) Supervising and monitoring of the Plan Administrator.
(2) Providing for enrollment of employees in the Plan.
(3) Communicating with employees enrolled under the Plan.
(4) Communicating with health care providers providing services under the plan.
(5) Making payments at appropriate intervals to the Plan Administrator for benefit costs and administrative costs.
(6) Conducting administrative reviews under G.S. 135-39.7.
(7) Annually assessing the performance of the Plan Administrator.
(8) Preparing and submitting to the Governor and the General Assembly cost estimates for the health benefits plan.
(9) Recommending to the Governor and the General Assembly changes or additions to the health benefits program and health care cost containment programs.
(10) Working with State employee groups to improve health benefit programs.
(11) Employing such clerical, professional staff, and other such assistance as may be necessary to assist the Board of Trustees in carrying out its duties and responsibilities under this Article provided that all such action under this subdivision must have the approval of the State Budget Officer after consultation with the Committee on Employee Hospital and Medical Benefits.
(12) Determining basis of payments to health care providers.
(13) Requiring bonding of the Plan Administrator in the handling of State funds.
(14) Establishing advisory councils of beneficiaries and providers.
(15) In case of termination of the contract under G.S. 135-39.5A, or failure to contract under G.S. 135-39.4(b), to select a new Plan Administrator, after competitive bidding procedures approved by the Department of Administration. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.5A. Termination.

The Board of Trustees may terminate the contract with the Plan Administrator as provided in the request for proposal. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.5B. Prepaid Plan.

The Board of Trustees may, after consultation with the Committee on Employee Hospital and Medical Benefits, provide for an optional prepaid hospital and medical benefits plan, but the amount of State funds shall be the same as for each person eligible on a noncontributory basis, with the person paying any excess, if necessary. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.6. Special funds created.

(a) There are hereby established two special funds, to be known as the Public Employee Health Benefit Fund and the Health Benefit Reserve Fund.

All premiums, fees, charges, rebates, refunds or any other receipts including, but not limited to, earnings on investments, occurring or arising in connection with health benefits programs established by this Article, shall be deposited into the Public Employee Health Benefit Fund. Disbursements from the fund shall include any and all amounts required to pay the benefits and the administrative costs of such programs and the administrative costs of the investment programs established herewith in accordance with G.S. 147-69.2 and 147-69.3.

Any unencumbered balance in excess of prepaid premiums or charges in the Public Employee Health Benefit Fund at the end of each fiscal year shall be used first, to provide an actuarially determined Health Benefit Reserve Fund for incurred but unpresented claims, second, to reduce the premiums required in providing the benefits of the health benefits programs, and third to improve the plan, as may be provided by the General Assembly. The balance in the Health Benefits Reserve Fund may be transferred from time to time to the Public Employee Health Benefit Fund to provide for any deficiency occurring therein.

The Public Employee Health Benefit Fund and the Health Benefit Reserve Fund shall be deposited with the State Treasurer and invested as provided in G.S. 147-69.2 and 147-69.3.

(b) Disbursement from the Public Employee Health Benefit Fund may be made by warrant drawn on the State Treasurer by the Commission, or the Commission may by contract authorize the Plan Administrator to draw the warrant. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.6A. Premiums set.

The Board of Trustees shall, from time to time, establish premium rates for the Comprehensive Major Medical Plan, and establish regulations for payment of the premiums. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.7. Administrative review.

If, after exhaustion of internal appeal handling as outlined in the contract with the Plan Administrator any person is aggrieved, the Plan Administrator shall bring the matter to the attention of the Board of Trustees, which may make a binding decision on the matter in accordance with procedures established by the Board of Trustees. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.8. Rules and regulations.

The Board of Trustees may issue rules and regulations to implement Parts 2 and 3 of this Article. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-39.9. Reports to the General Assembly.

(a) The Board of Trustees shall report to the General Assembly at such times and in such forms as shall be provided by the Committee on Employee Hospital and Medical Benefits.

(b) The Board of Trustees shall report to the Committee on Employee Hospital and Medical Benefits no later than April 1, 1983 on the status of the Plan as of February 28, 1983.

(c) The Board of Trustees shall continually monitor expenditures under the Plan, and at any time it estimates that expenditures on an annualized basis will exceed one hundred twenty million dollars ($120,000,000) it shall report that fact to the Committee on Employee Hospital and Medical Benefits. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

Part 3. Comprehensive Major Medical Plan.

§ 135-40. Undertaking.

(a) The State of North Carolina undertakes to make available a Comprehensive Major Medical Plan (hereinafter called the "Plan") to employees, retired employees and certain of their dependents which will pay benefits in accordance with the terms hereof.

(b) The Plan benefits will be provided under contracts between the State and the Plan Administrator selected by the State. Plan Administrator refers to the administrator, third party administrator or other party contracting with the State to administer the Plan benefits. Such contracts shall include the substance of G.S. 135-40.1 through G.S. 135-40.13 and Parts I through K of the description of Plan in the request for proposal, and shall be administered by the respective Plan Administrator of the State which will determine benefits and other questions arising thereunder. The contracts necessarily will conform to applicable State laws. If any of the provisions of G.S. 135-40.1 through G.S. 135-40.13 and Parts I through K must be modified for inclusion in the contract because of State laws, such modification will be made.

(c) Payroll deduction shall be available for coverage under this Part of amounts not paid by the State. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1398, s. 2, [7], makes this Part effective Oct. 1, 1982.

§ 135-40.1. General definition.

As used in Parts 2 and 3 of this Article, the following terms have the meaning specified as follows:

(1) Covered Services. — Any necessary, reasonable, and customary items of service, at least a portion of the expense of which is covered under at least one of the plans covering the person for whom claim is made or service provided. To the extent legally possible, it shall be synonymous with allowable expenses.

(2) Deductible. — Deductible shall mean an amount of covered expenses during a calendar year which must be incurred after which benefits (subject to the deductible) become payable. The deductible for an employee, retired employee and/or his or her dependents shall be one hundred dollars ($100.00) for each calendar year.

Covered expenses incurred during the last three months of a calendar year and used toward satisfying the deductible in that calendar year may be reused toward satisfying the deductible for the next calendar year.

The deductible applies separately to each covered individual in each calendar year, except that a maximum of three such deductibles shall apply to each family (employee or retiree and his or her covered dependents) in any calendar year.

If two or more family members are injured in the same accident only one deductible is required for charges related to that accident during the benefit period.

(3) Dependent Child. — A natural, legally adopted, or foster child of the employee and/or spouse, unmarried, up to the first of the month following his or her 19th birthday, whether or not the child is living with the employee, as long as the employee is legally responsible for such child's maintenance and support.

A foster child is covered (i) if living in a regular parent-child relationship with the expectation that the employee will continue to rear the child into adulthood, (ii) if at the time of enrollment, or at the time a foster child relationship is established, whichever occurs first, the employee applies for coverage for such child and submits evidence of a bona fide foster child relationship, identifying the foster child by name and setting forth all relevant aspects of the relationship, (iii) if the Plan Administrator accepts the foster child as a participant through a separate written document identifying the foster child by name and specifically recognizing the foster child relationship, and (iv) if at the time a claim is incurred, the foster child relationship, as identified by the employee, continues to exist. Children placed in a home by a welfare agency which obtains control of, and provides for maintenance of, the child(ren), are not eligible participants.

Coverage may be extended beyond the 19th birthday under the following conditions:

a. If the dependent is a full-time student who is pursuing a course of study that represents at least the normal workload of a full-time student at a school or college accredited by the state of jurisdiction.

b. The dependent is physically or mentally incapacitated to the extent that he or she is incapable of earning a living.

(4) Doctor. — A doctor of medicine, a doctor of osteopathy licensed to practice medicine or surgery by the Board of Medical Examiners of the state in which he or she practices, a doctor of dentistry, a doctor of podiatry or surgical chiropody, a doctor of optometry, a doctor of chiropractic, or a doctor of psychology who is licensed or certified in the State and has a doctorate practice degree in psychology and at least two years' clinical experience in a recognized health setting or has met the standards of the National Register of Health Services provided in psychology, each of whom is licensed to practice by the state in which he or she performs any service covered by this Plan, and who regularly charges and collects fees in his or her own right.

(5) Employee. — Any permanent full-time or permanent part-time regular employee (designated as half-time or more) of of employing unit.

(6) Employing Unit. — A North Carolina School System; Technical Institute; Community College; State Department, Agency or Institution; Administrative Office of the Courts; or Association or Examining Board whose employees are eligible for membership in the Teachers' and State Employees' Retirement System.

(7) Enrollment. — New employees enroll themselves and their dependents when first eligible. Coverage may become effective on the first day of the month following date of entry on payroll or on the first day of the following month.

(8) Health Benefits Representative. — The employee designated by the employing unit to administer the Comprehensive Major Medical Plan for the unit and its employees. The HBR is responsible for enrolling new employees, reporting changes, explaining benefits, reconciling group statements and remitting group fees.

(9) Home Health Aide. — An individual who provides medical or therapeutic are and who reports to and is under the direct supervision of a Home Health Care Agency.

(10) Home Health Care Agency. — Agency which is constituted, licensed and operated in accordance with the laws pertaining to agencies providing home health care.

(11) Home Health Care Coverage. — Coverage for home care and treatment established and approved in writing by a physician who

certifies that continual hospital confinement would be required without the care and treatment specified by this coverage.

(12) Hospital. — An institution which meets fully all the following criteria:

a. A general medical and surgical hospital, including eye, ear, nose and throat, maternity, pediatric, tuberculosis, or mental hospital, licensed as such by the applicable State agency.

b. It is primarily engaged in providing — for compensation from its patients and on an inpatient basis — diagnostic and therapeutic facilities for the surgical and medical diagnosis, treatment and care of injured and sick persons by or under the supervision of the staff of physicians;

c. It continuously provides 24-hour-a-day nursing service by registered graduate nurses; and

d. It is not, other than incidentally, a place for rest, a place for the aged, a place for drug addicts, a place for alcoholics, a nursing home, a hotel, or the like. Hospitals classified and accredited as psychiatric hospitals by the Joint Commission on Accreditation of Hospitals will be deemed to be hospitals for the purpose of this Plan.

(13) Medicare. — The Health Insurance For the Aged and Disabled Program under Title XVIII of the Social Security Act as such act was amended by the Social Security Amendments of 1965 (Public Law 89-97), as such program is currently constituted and as it may be later amended.

(14) Predecessor Plan. — The Hospital and Medical Benefits for the Teachers' and State Employees' Retirement System of the State of North Carolina.

(15) Preexisting Condition. — A condition, disease, illness or injury which existed or had its beginning to any degree, whether diagnosed or not, prior to the effective date of coverage.

(16) Pregnancy. — Shall include resulting childbirth, miscarriage or abortion.

(17) Retired Employee. — Retired teachers and State employees who are receiving monthly retirement benefits from any retirement system supported in whole or in part by contribution of the State of North Carolina, so long as the retiree is enrolled.

(18) Skilled Nursing Facility. — An institution licensed under applicable State laws and primarily engaged in providing to inpatients, under the supervision of a doctor and a registered professional nurse, skilled nursing care and related services on a 24-hour basis, and rehabilitative services.

(19) Usual, Customary and Reasonable. — The meaning of the term "UCR" shall be developed from criteria used for determining reasonable charges for services, including usual preoperative examination and customary postoperative care and care of usual complications, and shall be based on the usual charge made by an individual doctor for his or her private patients for a particular service, or the customary charge within the range of usual fees charged by most doctors of similar skill and training in North Carolina for the comparable service, whichever is the lower. A fee is reasonable if it meets the above two criteria. In cases of unusual complexity and cases involving supplemental skills of two or more doctors, reasonable charges will be determined by the Plan Administrator upon advice of its medical advisors. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.2. Eligibility.

(a) The following persons are eligible for coverage under the Plan, on a noncontributory basis, subject to the provisions of G.S. 135-40.3:

(1) All permanent full-time employees of an employing unit who meet the following conditions:
   a. Paid from general or special State funds, or
   b. Paid from non-State funds and in a group for which his or her employing unit has agreed to provide coverage.

(2) Retired teachers and State employees.

(3) Surviving spouses of deceased retirees and surviving spouses (of deceased teachers and State employees), receiving a survivor's alternate benefit under G.S. 135-5(m).

(b) The following person shall be eligible for coverage under the Plan, in a full contributory basis, subject to the provisions of G.S. 135-40.3:

(1) Member of the General Assembly.

(2) Former members of the General Assembly.

(3) Surviving spouses of deceased former members of the General Assembly.

(4) All permanent part-time employees (designated as half-time or more) of an employing unit who meets the conditions outlined in subdivision (a)(1)a. above.

(5) The spouses and eligible dependents of enrolled employees, retirees and enrolled members and enrolled surviving spouses, as outlined in subdivisions (a)(1) through (a)(3) above.

(c) No person shall be eligible for coverage as an employee or retired employee and as a dependent of an employee or retired employee at the same time. In addition, no person shall be eligible for coverage as a dependent of more than one (1) employee or retired employee at the same time.

(d) Former employees who are receiving disability retirement benefits shall be eligible for the benefit provisions of this Plan, as set forth in this Part, on the same basis as a retired employee. Such coverage shall terminate as of the end of the month in which such former employee is no longer eligible for disability retirement benefits.

(e) Employees on official leave of absence without pay may elect to continue this group coverage at group cost provided that they pay the full employee and employer contribution through the employing unit during the leave period. (1981, (Reg. Sess., 1982) c. 1398, s. 6.)

§ 135-40.3. Effective dates of coverage.

(a) Employees and Retired Employees. —

(1) Employees and retired employees covered under the Predecessor Plan will continue to be covered, subject to the terms hereof.

(2) New employees may apply for coverage to be effective on the first day of the month following employment, or on a like date the following month if the employee has enrolled.

(3) Late entrants, employees not enrolling or not adding dependents when first eligible may enroll later of the first of any following month but will be subject to a 12-month waiting period for preexisting health conditions.

(b) Waiting Periods and Preexisting Conditions. — New employees and dependents enrolling when first eligible:

(1) Comprehensive Medical Coverage — no waiting periods for preexisting conditions.

(2) Employees not enrolling or not adding dependents when first eligible may enroll later on the first of any following month, but will be subject to the following:

(3) Comprehensive Medical Coverage — 12-month waiting period for preexisting conditions.

(c) Dependents of Employees and Retired Employees. —

(1) Dependents of employees and retired employees who have family coverage under the Predecessor Plan will continue to be covered subject to the terms hereof.

(2) Employees who have dependents may apply for family coverage at the time they enroll as provided in subdivisions (a)(2) and (a)(3) and such dependents will be covered under the Plan beginning the same date as such employees.

(3) Employees and retired employees may change from individual to family coverage upon written application at any time after acquiring a dependent, and such dependent will be covered under the Plan beginning the first of the next calendar month following receipt of such application by the Plan Administrator.

(4) Employees who wish to change from family coverage to individual coverage shall give written notice to the Plan Administrator within 31 days after any change in the status of dependents, (resulting from death, divorce, etc.) which requires a change from family coverage to individual coverage.

(5) Employees not adding dependents when first eligible may enroll later on the first of any following month, but dependents will be subject to a 12-month waiting period for preexisting health conditions.

(d) Types of Coverage Available. — There are five types of coverage which an employee or retiree may elect.

(1) Employee Only. — Covers enrolled employees only. Maternity benefits are provided to employee only.

(2) Employee and Child(ren). — Covers enrolled employee and all eligible dependent children. Maternity benefits are provided to the employee only.

(3) Employee and Family. — Covers employee and spouse, and all eligible dependent children. Maternity benefits are provided to employee or enrolled spouse.

(4) Split Coverage-Wife. — Covers female State employee whose husband is also employed by the State, and who enrolls in (5). Maternity benefits provided.

(5) Split Coverage-Husband. — Covers male State employee whose wife is also employed by the State, and who enrolls in (4). (Also covers dependent children). (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.4. Benefits in general.

In the event a covered person, as a result of accidental bodily injury, disease or pregnancy, incurs covered expenses, the Plan will pay benefits up to the amounts described in G.S. 135-40.5 through G.S. 135-40.9.

The Plan is divided into two parts. The first part includes certain benefits which are not subject to a deductible or coinsurance. The second part is a comprehensive plan and includes those benefits which are subject to both a one hundred dollar ($100.00) deductible for each covered individual to a maximum of three deductibles per family and coinsurance of 95%/5%. There is a limit on out-of-pocket expenses under the second part. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.5. Benefits not subject to deductible or coinsurance.

(a) Accidental Injury. — The Plan pays one hundred percent (100%) of services rendered in outpatient department of a hospital, in a doctor's office, in an ambulatory surgical facility or elsewhere and one hundred percent (100%) of reasonable and customary charges for doctor's services rendered in any of the above when such services are rendered within 30 days of the actual occurrence of injury and provided treatment is initiated within five days of injury occurrence. Dental services are excluded except as specifically included in G.S. 135-40.6(5)c. This benefit is subject to a three hundred dollar ($300.00) annual maximum per covered individual. Benefits in excess of three hundred dollars ($300.00) are covered under the comprehensive part of the Plan.

(b) Ambulatory (Outpatient) Surgery. — The Plan will pay one hundred percent (100%) of reasonable and customary charges for facility and surgeon's charges for surgery performed in an ambulatory surgical facility. Medical supplies, drugs, laboratory and other ancillary services and physicians' services will be covered under the comprehensive section of the Plan.

(c) Preadmission testing. — The Plan will pay one hundred percent (100%) of reasonable and customary charges for diagnostic, laboratory and x-ray examinations performed on an outpatient basis.

(d) Second Surgical Opinions. — The Plan will pay one hundred percent (100%) of reasonable and customary charges for one presurgical consultation by a second surgeon regarding the performance of nonemergency surgery. The Plan will also pay one hundred percent (100%) of the reasonable and customary charges for diagnostic, laboratory and x-ray examinations required by the second surgeon. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.6. Benefits subject to deductible and coinsurance (comprehensive benefits).

The following benefits are subject to a deductible of one hundred dollars ($100.00) per covered individual to a maximum of three per family and are payable on the basis of ninety-five percent (95%) by the Plan and five percent (5%) by the covered individual up to a maximum of one hundred dollars ($100.00) out-of-pocket per calendar year:

(1) In-hospital Benefits. — The Plan pays in-hospital benefits for each single confinement, when charged by a hospital, for room accommodation, including bed, board and general nursing care, but not to exceed the charge for semiprivate room or ward accommodations.

Successive admissions: While the covered individual is continuously covered under this Plan, shall be considered a single confinement for this purpose, if discharge and readmission to the same or any other hospital or skilled nursing facility shall occur within 90 days, whether or not benefits are paid for such admissions.

The Plan will pay the following covered charges, when charged by a hospital, for each confinement.

a. Intensive and cardiac nursing care.
b. All recognized drugs and medicines for use in the hospital.
c. Radiation services, including diagnostic x-rays, x-ray therapy, radiation therapy and treatment.
d. Clinical and pathological laboratory examinations.
e. Electrocardiograms and electroencephalograms.
f. Physical therapy.
g. Intravenous solutions.

h. Oxygen and oxygen therapy, plus the use of equipment.
i. Dressings, ordinary splints, plaster casts and sterile supplies.
j. Use of operating, delivery, recovery and treatment rooms and equipment.
k. Routine nursery charges, if the mother is eligible to receive maternity benefits.
l. Anesthetics and the administration thereof by the hospital's employee anesthesiologist.
m. Devices or appliances surgically inserted within the body.
n. Processing and administering of blood and blood plasma, but not including the supplying of blood or plasma.
o. Children who are born under the coverage type (2), (3), or (5), as outlined in G.S. 135-40.3(d), and who remain continuously covered are entitled to benefits for treatment of illnesses or congenital defect, incubation or isolette care, and treatment of prematurity or postmaturity.

If the mother is a covered individual, benefits are provided for the newborn's circumcision and routine nursery care.

p. When a covered individual is admitted to or transferred to a section of a hospital providing ambulant, convalescent, or rehabilitative care, benefits are provided up to the average number of days of service for treatment of the particular diagnosis or condition involved, or more if medical necessity requires.
q. The Plan pays benefits for laboratory testing and administration of blood provided to a covered individual. When a covered individual is the recipient of transplanted organs or bones, benefits are provided for services to the donor which are directly and specifically related to the transplantation.
r. Thirty days per calendar year are provided for inpatient treatment of mental illness, alcoholism and drug addiction, or any combination thereof. Readmission for any of these conditions within 365 days of last discharge shall be considered a single confinement. When furnished to a patient in a skilled nursing facility, 30 days less the days of care already provided for the same illness in a hospital are provided.

(2) Limitations and Exclusions to In-hospital Benefits. —
a. The services of physicians, surgeons and technicians not employed by or under contract to the hospital are not covered.
b Any admission for diagnostic tests or procedures which could be, and generally are, performed on an outpatient basis, if no hospitalization would have been required except for such diagnostic services is not covered. However, benefits are provided at ninety-five percent (95%) of Plan benefits for diagnostic tests and procedures consistent with the symptoms or diagnosis for which admitted.
c. The Plan will not cover any admission to a hospital prior to the effective date of coverage or beginning prior to the expiration of any waiting period so long as the individual remains continuously in a hospital.
d. Hospitalization for custodial, domiciliary or sanitarium care, or rest cures, is not covered.
e. Hospitalization for dental care and treatment is not covered, except when a hospital setting is medically necessary.

(3) Skilled Nursing Facility Benefits. — The Plan will pay benefits in a skilled nursing facility which qualifies for delivery of benefits under Title XVIII of the Social Security Act (Medicare), as follows:

After discharge from a hospital for which inpatient hospital benefits were provided by this Plan for a period of not less than three days, and treatment consistent with the same illness or condition for which the covered individual was hospitalized, the daily charges will be paid for room and board in a semiprivate room or any multibed unit up to the maximum benefit specified in subsection (1) of this section, less the days of care already provided for the same illness in a hospital.

Credit will be allowed toward private room charges in an amount equal to the facility's most prevalent charge for semiprivate accommodations. Charges will also be paid for general nursing care and other services which would ordinarily be covered in a general hospital. In order to be eligible for these benefits, admission must occur within 14 days of discharge from the hospital.

In order to qualify for benefits provided by a skilled nursing facility, the following stipulations apply:

a. The services are medically required to be given on an inpatient basis because of the covered individual's need for skilled nursing care on a continuing basis for any of the conditions for which he or she was receiving inpatient hospital services prior to transfer from a hospital to the skilled nursing facility or for a condition requiring such services which arose after such transfer and while he or she was still in the facility for treatment of the condition or conditions for which he or she was receiving inpatient hospital services, and

b. Only on prior referral by and so long as, the patient remains under the active care of an attending doctor.

(4) Outpatient Hospital Benefits. — The Plan pays for services rendered in the outpatient department of a hospital, in a doctor's office, in an ambulatory surgical facility, or elsewhere, as follows:

a. Accidental injury: When services are furnished within 30 days of the actual occurrence of injury and provided treatment is initiated within five days of injury occurrence. Dental services are excluded except for oral surgery specifically listed in subsection (5)c of this section. The first three hundred dollars ($300.00) of these charges are covered under the first dollar part of the Plan.

b. All hospital services for nonaccident operative procedures.

c. All hospital services for radiation therapy, treatment by use of x-rays, radium, cobalt and other radioactive substances.

d. All hospital services in connection with pathological examinations of tissue removed by resection or biopsy. Routine Pap smears are not covered.

e. Charges for diagnostic x-rays, clinical laboratory tests, and other diagnostic tests and procedures such as electrocardiograms and electroencephalograms.

No benefits are provided for screening examinations and routine physical examinations to assess general health status in the absence of specific symptoms of active illness, routine office visits or for doctor's services for diagnostic procedures covered under surgical benefits.

(5) Surgical Benefits. — The Plan pays the usual, customary and reasonable charges for covered surgical services as follows:

a. Surgery: Cutting procedures, treatment of fractures, transfusions, operative preparation for diagnostic x-ray examinations, surgical implantation radiation sources, major endoscopic examinations, biopsies, surgical sterilization, other standard services and operations.

b. Anesthesia: Administration of general, spinal block or local anesthesia. Covered services include pre- and postoperative visits, the administration of the anesthetic, fluids and/or blood provided by the anesthesiologist and incidental to the anesthesia, and necessary drugs and materials provided by the anesthesiologist. No benefits are provided for administration of local anesthesia or for anesthesia administered by the operating surgeon or surgical assistant(s).

c. Oral Surgery: Services which are within the scope of practice of both a doctor of medicine and a dentist, such as excision of tumors and lesions of the mouth, treatment of jaw fractures and surgery to correct injuries of the mouth structure other than teeth and their supporting structure.

d. Maternity Care: Independent operative procedures in connection with pregnancy, such as: manipulative obstetrical delivery, delivery by Caesarean section, removal of ectopic pregnancy, dilation and curettage. Benefits for manipulative obstetrical delivery include use of forceps and/or episiotomy. No benefits are provided for antepartum or postpartum care, except for direct surgical procedures of delivery and surgical treatment.

e. Surgical Assistants: Services of an assistant surgeon when medical judgment requires the services of an assistant surgeon and no hospital-employed doctor in training is available.

f. Multiple Procedures: When multiple or bilateral surgical procedures are performed by the same doctor through separate incisions or approaches during the same session, the surgical benefits will be the greater UCR allowance, plus fifty percent (50%) of the lesser UCR allowance. Anesthesia benefits will be the greater UCR allowance.

When multiple surgical procedures are performed by the same doctor through the same incision or operative approach, the surgical benefits are limited to the procedure which has the highest UCR allowance.

When a surgical procedure is performed in two or more stages, the surgical benefit for the entire procedure is the same as it would be were the procedure performed in one stage (except where otherwise provided in the benefit schedule). This limitation does not apply to anesthesia benefits.

(6) Limitations and Exclusions to Surgical Benefits. —

a. No benefits are provided for dental prostheses such as crowns, or dentures; orthodontic care; operative restoration of teeth (fillings); dental extractions (whether impacted or not impacted); apicoectomies; treatment of dental caries, gingivitis, or periodontal diseases by gingivectomies or other periodontal surgery; vestibuloplasties, alveoplasties, removal of exostosis and tori preparatory to fitting of dentures; correction of malocclusion by orthognathic surgery or other procedures by repositioning of bone tissue; removal of cysts incidental to apicoectomies or extraction of teeth.

b. Cosmetic surgery or surgery solely for beautifying purposes is not covered, except for procedures related to injury sustained while the individual is continuously covered under the Plan.

c. If a covered individual receives both medical and surgical treatment for the same condition, by the same doctor, either medical or surgical care may be paid, whichever is greater, but not both.

d. When a covered individual is admitted for medical treatment and during the hospital admission is subsequently referred to another doctor for surgery, medical benefits are provided for hospital days prior to the date of referral.

e. If during hospital admission for necessary medical treatment, surgery is provided for a wholly distinct and unrelated condition, both medical and surgical benefits are payable, however, the same doctor may not be paid both medical and surgical benefits provided on the same day.

f. If during hospital admission for necessary medical treatment, a covered individual receives related surgical procedures such as paracentesis, biopsy, endoscopy, operative preparation for x-ray examination, or other diagnostic procedures for which benefits are applicable under the surgical benefits section of the Plan, both medical and surgical benefits are payable.

g. No benefits are provided for concurrent co-attending medical and surgical care by two or more doctors for the same condition other than as provided above.

h. No benefits will be payable for surgical procedure specifically listed by the American Medical Association or the North Carolina Medical Association as having no medical value.

(7) Medical Benefits. —

a. Services of Doctors. — The Plan pays the usual, reasonable and customary charges for covered inpatient medical (nonsurgical) services. Services are covered if the individual is hospital-confined and is eligible for hospitalization benefits as described in this section. Benefits are provided for exactly the same number of days as the individual is entitled to under this section, except that medical benefits are provided on both the day of admission and the day of discharge.

In the event a covered individual is treated by two or more co-attending doctors during the same hospital confinement for a medical (nonsurgical) condition, benefits are limited to payment for services provided by the primary attending doctor, except where need is established for supplementary skills for treatment of separate and distinct diagnoses or conditions.

Home, office, and skilled nursing facility visits including (i) charges for injected medications, (ii) inpatient care by attending medical doctors, radiologists, pathologists, and consultants during such time as hospital benefits are paid under any section of this Plan, (iii) care in the outpatient department of a hospital, and (iv) administration of shock therapy (drug or electric) including the services of anesthesiologists provided on an office or hospital outpatient basis for treatment of acute psychotic reaction or severe depression.

b. Consultations. — Consultation services are provided when requested by the attending doctor and the consultation is necessary in conjunction with and directly related to care and treatment of the condition for which admitted. No benefits are provided for staff consultation required by hospital rules and regulations. When a covered individual is admitted for oral surgery, a single consultation allowance will be provided for medical examination and pre-anesthesia evaluation.

c. Newborn Care. — When a child is eligible at birth, benefits are provided for treatment of illness, injury, prematurity, or congenital condition as a registered inpatient. When delivery is by Caesarean section, a single consultation allowance will be

provided for standby, resuscitation, and infant care in the operating room provided by a doctor other than the operating surgeon.

When a mother receives maternity benefits under the Plan for a child's delivery, benefits are provided for examination and supervision of a normal newborn infant.

d. Outpatient Psychiatric Care. — The Plan will pay eighty percent (80%) UCR for outpatient psychiatric care, not to exceed 50 visits and two thousand two hundred dollars ($2,200) per calendar year. This benefit is subject to the one hundred dollar ($100.00) deductible. Payments made for this benefit are not eligible towards the maximum out-of-pocket expenditure.

(8) Other Covered Charges. —

a. Prescription Drugs: Prescription legend drugs for use outside of a hospital or skilled nursing facility. A prescription legend drug is defined as an article the label of which, under the Federal Food, Drug, and Cosmetic Act, is required to bear the legend: "Caution: Federal Law Prohibits Dispensing Without Prescription." Such articles may not be sold to or purchased by the public without a prescription order. Benefits are provided for insulin even though prescription is not required.

b. Private Duty Nursing: Services of licensed nurses (not immediate relatives or members of the participant's household or private duty nursing used in lieu of or as a substitute for hospital staff nurses) ordered by the attending doctor for a condition requiring skilled nursing services.

c. Visiting Nurse Association or Home Health Agency Services: Services provided in a covered individual's home by an association, agency, or other organization.

d. Licensed Ambulance Service. Local ambulance transportation:

To or from a hospital for inpatient care or outpatient accident care;

From a hospital to the nearest facility able to provide needed services not available at the transferring hospital; or

From a hospital to a skilled nursing facility.

The word "local" means ambulance transportation of not more than 50 miles unless the Administrator authorizes ambulance transportation beyond this distance.

e. Prosthetic and Orthopedic Appliances and Durable Medical Equipment: Appliances and equipment including corrective and supportive devices such as artificial limbs and eyes, wheelchairs, traction equipment, inhalation therapy and suction machines, hospital beds, braces, orthopedic corsets and trusses, and other prosthetic appliances or ambulatory apparatus which are provided solely for the use of the participant. Eligible charges include repair and replacement when medically necessary. Benefits will be provided on a rental or purchase basis at the sole discretion of the Administrator and agreements to rent or purchase shall be between the Administrator and the supplier of the appliance.

f. Dental Services: Dental surgery and appliances for mouth, jaw, and tooth restoration necessitated because of external violent and accidental means, such as the impact of moving body, vehicle collision, or fall occurring while an individual is covered under G.S. 135-40.3. No benefits are provided in connection with injury incurred in the act of chewing, nor for damage or breakage of an appliance such as bridge or denture being cleaned or otherwise not in normal mouth usage at the time of accident.

Benefits shall include extractions, fillings, crowns, bridges, or other necessary therapeutic and restorative techniques and appliances to reasonably restore condition and function to that existing immediately prior to the accident. Injury or breakage of existing appliances such as bridges and dentures is limited to repair of such appliances unless certified as damaged beyond repair.

g. Medical Supplies: Colostomy bags, catheters, dressings, oxygen, syringes and needles, and other similar supplies.

h. Blood: Transfusions including cost of blood, plasma, or blood plasma expanders.

i. Physical Therapy: Recognized forms of physical therapy for restoration of bodily function, provided by a doctor, hospital, or by a licensed professional physiotherapist. No benefits are provided for eye exercises or visual training.

j. Inhalation Therapy: When provided by a doctor, hospital, or other organization.

k. Speech Therapy: Speech therapy provided by certified speech therapist. Benefits are provided only in connection with a condition, illness, or injury arising while continuously covered under this Plan.

(9) Limitations and Exclusions to Other Covered Charges. — No benefits are available under this section of the Plan until full utilization is made of similar benefits available under other sections of this Plan. No benefits will be payable for:

a. Private duty nursing provided by an immediate relative or member of the covered individual's household; or private duty nursing used in lieu of or as a substitute for hospital staff nurses;

b. Dental care except as covered under subsection (2)f [subsection (8)f] and other dental services covered by the surgical benefits section of this Plan, subsection (5)c of this section;

c. Foot care except in connection with services covered by the surgical or inpatient medical benefits section of this Plan, subsections (1) and (5) of this section;

d. Immunizations for prevention of contagious diseases;

e. Expenses incurred in the event a covered individual is a bed patient in a hospital, or skilled nursing facility on the effective date of coverage, so long as the covered individual remains so confined;

f. Eyeglasses (corrective lenses), hearing aids, braces for teeth, dental plates or bridges or other dental prostheses, air-conditioners, vaporizers, humidifiers, nebulizers, mattresses (other than as supplied with a hospital bed) and specially built shoes (other than attached to artificial limbs or orthopedic braces);

g. The difference between charges made by doctors and the UCR allowance for covered benefits, and the coinsurance expenses required under this Plan;

h. Habit forming drugs to support drug dependency;

i. Any other services not specifically outlined in this Plan. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

Editor's Note. — "Subsection (8)f" has been inserted in brackets in paragraph (9)b to correct an erroneous reference in the paragraph as enacted.

§ 135-40.7. General limitations and exclusions.

The following shall in no event be considered covered expenses nor will benefits described in G.S. 135-40.5 through G.S. 135-40.11 be payable for:

(1) Charges for any services rendered to a person prior to the date coverage under this Plan becomes effective with respect to such person.

(2) Charges for care in a nursing home, home for the aged, or convalescent home for custodial or domiciliary care or for rest cures.

(3) Charges to the extent paid, or which the individual is entitled to have paid, or to obtain without cost, in accordance with any government laws or regulations except Medicare. If a charge is made to any such person which he or she is legally required to pay, any benefits under this Plan will be computed in accordance with its provisions, taking into account only such charge. "Any government" includes the federal, State, provincial or local government, or any political subdivision thereof, of the United States, Canada or any other country.

(4) Charges for services rendered in connection with any occupational injury or disease arising out of and in the course of employment with any employer, if (i) the employer furnishes, pays for or provides reimbursement for such charges, or (ii) the employer makes a settlement payment for such charges, or (iii) the person incurring such charges waives or fails to assert his or her rights respecting such charges.

(5) Charges for any care, treatment, services or supplies other than those which are certified by a physician who is attending the individual as being required for the necessary treatment of the injury or disease.

(6) Charges for any services rendered as a result of injury or sickness due to an act of war, declared or undeclared, which act shall have occurred after the effective date of a person's coverage under the Plan.

(7) Charges for personal services such as barber services, guest meals, radio and TV rentals, etc.

(8) Charges for any services with respect to which there is no legal obligation to pay. For the purposes of this item, any charge which exceeds the charge that would have been made if a person were not covered under this Plan shall, to the extent of such excess, be treated as a charge for which there is no legal obligation to pay; and any charge made by any person for anything which is normally or customarily furnished by such person without payment from the recipient or user thereof shall also be treated as a charge for which there is no legal obligation to pay.

(9) Charges during a continuous hospital confinement which commenced prior to the effective date of the person's coverage under this Plan.

(10) Charges in excess of either the usual, customary and reasonable charge for or the fair and reasonable value of the services or supply which gives rise to the expense; provided that in each instance the extent that a particular charge is usual, customary and reasonable or fair and reasonable shall be measured and determined by comparing the charge with charges made for similar things to individuals of similar age, sex, income and medical condition in the locality concerned, and the result of such determination shall constitute the maximum allowable as covered medical expenses unless the Plan Administrator finds that considerations of fairness and equity in a particular set of circumstances require that greater or lesser charges be considered as covered medical expenses in that set of circumstances.

(11) Charges for or in connection with any dental work or dental treatment except to the extent that such work or treatment is specifically provided for under the Plan. Excluded is payment for surgical benefits for tooth replacement, such as crowns, bridges or dentures; orthodontic care; filling of teeth; extraction of teeth (whether or not impacted); root canal therapy; removal of root tips

from teeth; treatment for tooth decay, inflammation of gingiva, or surgical procedures on diseased gingiva or other periodontal surgery; repositioning soft tissue, reshaping bone, and removal of bony projections from the ridges preparatory to fitting of dentures; removal of cysts incidental to removal of root tips from teeth and extraction of teeth; or other dental procedures involving teeth and their bones or tissue supporting structure. This exclusion also applies to any orthognathic procedures.

(12) Charges incurred for any medical observations or diagnostic study when no disease or injury is revealed, unless proof satisfactory to the Plan Administrator is furnished that (i) the claim is in order in all other respects, (ii) the covered individual had a definite symptomatic condition of disease or injury other than hypochondria, and (iii) the medical observation and diagnostic studies concerned were not undertaken as a matter of routine physical examination or health checkup.

(13) Charges for eyeglasses and hearing aids or examinations for the prescription or fitting thereof.

(14) Charges for cosmetic surgery or treatment except that charges for cosmetic surgery or treatment required for correction of damage caused by accidental injury sustained by the covered individual while this insurance or its predecessor plan is in force on his or her account or to correct congenital deformities or anomalies shall not be excluded if they otherwise qualify as covered medical expenses.

(15) Admissions for diagnostic tests or procedures which could be, and generally are, performed on an outpatient basis and inpatient services or supplies which are not consistent with the diagnosis, for which admitted.

(16) Costs denied by the Plan Administrator as part of its overall program of claim review and cost containment. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.8. Out-of-pocket expenditures.

For the balance of any calendar year after each eligible employee, retired employee, or dependent satisfies the cash deductible, the Plan pays ninety-five percent (95%) of the eligible expenses outlined in G.S. 135-40.6. The covered individual is then responsible for the remaining five percent (5%) until one hundred dollars ($100.00), in excess of the deductible, has been paid out-of-pocket. The Plan then pays one hundred percent (100%) of the remaining covered expenses. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.9. Maximum benefits.

The maximum lifetime benefit for each covered individual will be five hundred thousand dollars ($500,000). (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.10. Persons eligible for Medicare.

(a) Benefits payable for covered expenses under this Plan in G.S. 135-40.5 through G.S. 135-40.9 will be reduced by any benefits payable for the same covered expenses under Medicare, so that Medicare will be the primary carrier.

(b) For those participants eligible for Medicare, the State's new Plan will be administered on a "carve out" basis. The provisions of the new Plan are applied to the charges not paid by Medicare (Parts A & B). In other words, those charges not paid by Medicare would be subject to the deductible and coinsurance of the new Plan just as if the charges not paid by Medicare were the total bill.

All charges for outpatient surgery, preadmission testing and accidents are covered at one hundred percent (100%) subject to the Plan's provisions. Of course all payments are subject to usual, customary, and reasonable charges.

(c) For those individuals eligible for Part A (at no cost to them, benefits under this program will be reduced by the amounts to which the covered individuals would be entitled to under Parts A and B of Medicare, even if they choose not to enroll for Part B. (1981, (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.11. Cessation of coverage.

(a) Coverage under this Plan of an employee and his or her dependents or of a retired employee and his or her dependents shall cease on the earliest of the following dates:

(1) The day after the employee or retired employee dies. Any surviving dependents may then elect to continue the same coverage under the Plan by submitting written application within 30 days after the death of the employee or retired employee, to the Plan Administrator and by paying the cost for such coverage when due at the applicable fees. Such coverage shall cease on the last day of the month in which such surviving dependent dies.

(2) The last day of the month in which an employee's employment with the State is terminated as provided in subsection (c) of this section.

(3) The day a divorce becomes final.

(4) The last day of the month in which an employee or retired employee requests cancellation of coverage.

(5) The last day of the month in which a covered individual enters active military service.

(b) Coverage under this Plan as a dependent child shall cease as of the last day of the month in which such person marries, attains age 19 and is not a full-time student, ceases to be physically or mentally incapacitated after he or she was certified to be covered beyond age 19, or ceases to be a full-time student.

(c) Termination of employement shall mean termination for any reason, including layoff and leave of absence, except as provided in (a) (1) and (2) of this section, but shall not, for purposes of this Plan, include retirement upon which the employee is granted an immediate service or disability pension under and pursuant to the Teachers' and State Employees' Retirement System of North Carolina.

(1) In the event of termination for any reason, coverage under this Plan for an employee and his or her dependents may be continued for a period of not more than three months. The employee must have been covered under this Part for at least three months in order to be eligible for this extension. Also, the employee must pay in advance to the employer the total cost of the Plan for the length of the extension.

This provision will be preempted when the individual becomes eligible for any other group coverage.

(2) In the event of layoff, coverage under this Plan for an employee and his or her dependents may be continued for a period of not more than 12 months by the employee's paying one hundred percent (100%) of the cost.

(3) In the event of approval leave of absence without pay, other than for active duty in the armed forces of the United States, coverage under this Plan for an employee and his or her dependents may be continued during the period of such leave of absence by the employee's paying one hundred percent (100%) of the cost.

(4) If employment is terminated in the second half of a calendar month and the covered individual has made the required contribution for any

coverage in the following month, that coverage will be continued to the end of the calendar month following the month in which employment was terminated.

(5) Employees paid for less than 12 months in a year, who are terminated at the end of the work year and who have made contributions for the non-work months, will continue to be covered to the end of the period for which they have made contributions, with the understanding that if they are not employed by another State-covered employer under this Plan at the beginning of the next work year, the employee will refund to the ex-employer the amount of the employer's cost paid for them during the non-paycheck months.

(d) No benefits will be paid by this Plan for any expenses incurred or treatment received after cessation of coverage as provided in subsections (a) or (b) of this section, except that in the event of hospital confinement at that time, hospitalization benefits as described in G.S. 135-40.6 will continue to the extent provided therein. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.12. Conversion.

(a) Upon cessation of coverage due to termination of employment, an employee or dependent will be entitled to convert to nongroup coverage without the necessity of a physical examination, and on a fully contributory basis. Such coverage will include hospitalization, surgical and medical benefits similar in scope to those provided under the Plan. The Board of Trustees, after consultation with the Committee on Employee Hospital and Medical Benefits shall approve the conversion plan, which shall be administered by the Plan Administrator through an insurance contract arranged by the Plan Administrator, or administered as otherwise directed by the Board of Trustees. The eligible individual must apply for coverage within 30 days after termination of group eligibility.

(b) The Board of Trustees shall provide for the continuation of conversion privilege exercised under the predecessor plan, on a fully contributory basis. The Board of Trustees shall consult with the Committee on Employee Hospital and Medical Benefits before taking action under this subsection. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.13. Coordination of benefits.

(a) Benefits Subject to This Provision. — All of the benefits provided under this Comprehensive Major Medical Plan.

(b) Definitions. —

(1) "Plan" means any Plan providing benefits or services for or by reason of medical or dental care or treatment, which benefits or services are provided by (i) group, blanket or franchise insured or uninsured coverage, (ii) hospital services prepayment Plan on a group basis, medical service prepayment Plan on a group basis, group practice, or other prepayment coverage on a group basis, (iii) any coverage under labor-management trusteed plans, union welfare plans, employer organization plans, or employee benefit organization plans, and (iv) any coverage under governmental programs except Medicare, or any coverage required or provided by any statute, which coverage is not otherwise excluded from the calculation of benefits under this Plan, but the term "Plan" shall not include any individual policies.

The term "Plan" shall be construed separately with respect to each policy, contract, or other arrangement for benefits or services and separately with respect to that portion of any such policy, contract, or other arrangement which reserves the right to take the benefits or

services of other plans into consideration in determining its benefits and that portion which does not.

(2) "Covered services" means any necessary, reasonable and customary item of expense at least a portion of which is covered under at least one of the plans covering the person for whom claim is made. To the extent legally possible, it shall be synonymous with allowable expenses. When a Plan provides benefits in the form of services rather than cash payments, the reasonable cash value of each service rendered shall be deemed to be both an allowable expense and a benefit paid.

(3) "Claim determination period" means any period of time during which a person covered by this Plan is eligible to receive benefits.

(c) Effect on Benefits. —

(1) This provision shall apply in determining the benefits as to a person covered under this Plan for any claim determination period if, for the covered services incurred as to such a person during such claim determination period, the sum of:

a. The benefits that would be payable under this Plan in the absence of this provision, and

b. The benefits that would be payable under all other plans in the absence therein of provisions of similar purpose of this provision would exceed the usual and customary charges for such covered services.

(2) As to any claim determination period with respect to which this provision is applicable, the benefits that would be payable under this Plan in the absence of this provision for the covered services incurred as to such person during such claim determination period shall be reduced to the extent necessary so that the sum of such reduced benefit and all the benefits payable for such covered services under all other plans, except as provided in Item (3) immediately below, shall not exceed the total of such covered services. Benefits payable under another Plan include the benefits that would have been payable had claim been duly made therefor. In the case of another Plan which does not contain a provision coordinating its benefits, the benefits of such other Plan shall be determined before the benefits of this Plan. A Plan without a coordination of benefits provision shall be deemed to be the primary carrier within the meaning of this Plan.

(3) If:

a. Another Plan which is involved in Item (2) immediately above and which contains provisions coordinating its benefits with those of this Plan would, according to its rules, determine its benefits after the benefits of this Plan have been determined, and

b. The rules set forth in Item (4) immediately below would require this Plan to determine its benefits before such other Plan, then the benefits of such other plan will be ignored for the purposes of determining the benefits under this Plan.

(4) For the purposes of Item (3) immediately above, the rules establishing the order of benefit determination are:

a. The benefits of a Plan which covers the person on whose covered services claim is based other than as a dependent shall be determined before the benefits of a Plan which covers such person as a dependent;

b. The benefits of a Plan which covers the person on whose covered services claim is based as a dependent of a male person shall be determined before the benefits of a Plan which covers such person as a dependent of a female person;

c. When roles [rules] a and b immediately above do not establish an order of benefit determination, the benefits of a Plan which has

covered the person on whose covered services claim is based for the longer period of time shall be determined before the benefits of a Plan which had covered such person for the shorter period of time.

(5) When this provision operates to reduce the total amount of benefits otherwise payable as to a person covered under this Plan during any claim determination period, each benefit that would be payable in the absence of this provision shall be reduced proportionately, and such reduced amount shall be charged against any applicable benefit limit of this Plan.

(d) Medicare Participants' Eligibility. — For participants eligible for Medicare, Medicare benefits will be paid in coordination with benefits hereunder so that Medicare benefits will be primary.

(e) Right to Receive and Release Necessary Information. — For the purpose of determining the applicability of and implementing the terms of this provision of this Plan or any provision of similar purpose of any other Plan, the Plan Administrator may, without the consent of or notice to any person, release to or obtain from any insurance company or other organization or person any information, with respect to any person, which the Plan Administrator deems to be necessary for such purposes. Any person claiming benefits under this Plan shall furnish to the Plan Administrator such information as may be necessary to implement the provision.

(f) Facility of Payment. — Whenever payments which should have been made under this Plan, in accordance with this provision, have been made under any other plans, the Plan Administrator shall have the right, exercisable alone and in its sole discretion, to pay over to any organizations making such other payments any amounts it shall determine to be warranted in order to satisfy the intent of this provision, and amounts to be paid shall be deemed to be benefits paid under this Plan, and, to the extent of such payments, the Plan Administrator shall be fully discharged from liability under the Plan.

(g) Right of Recovery. — Whenever payments have been made by the Plan Administrator with respect to covered services in a total amount which is, at any time, in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, irrespective of to whom paid, the Plan Administrator shall have the right to recover such payments, to the extent of such excess, from among one or more of the following, as the Plan Administrator shall determine: any persons to or for or with respect to whom such payments were made, any insurance companies, or any other organizations. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§ 135-40.14. Right to amend.

The General Assembly reserves the right to alter, amend, or repeal this Part. (1981 (Reg. Sess., 1982), c. 1398, s. 6.)

§§ 135-41 to 135-49: Reserved for future codification purposes.

ARTICLE 4.

Uniform Judicial Retirement Act of 1973.

§ 135-72. Benefits of members appointed to serve in United States courts.

OPINIONS OF ATTORNEY GENERAL

Applicability. — This section is inapplicable to judges retired from the Uniform Judicial Retirement System and serving as judges in the United States Courts prior to October 9, 1981. See opinion of Attorney General to Mr. E.T. Barnes, Director, Retirement and Health Benefits Division, 51 N.C.A.G. 57 (1981).

Chapter 136.

Roads and Highways.

Article 11.

Outdoor Advertising Control Act.

Sec.

136-131.1. Just compensation required for the removal of billboards on federal-aid primary highways by local authorities.

Article 2A.

State Roads Generally.

§ 136-44.1. Statewide road system; policies.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

Article 3.

State Highway System.

Part 3. Power to Make Changes in Highway System.

§ 136-59. No court action against Board of Transportation.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

Article 6D.

Controlled-Access Facilities.

§ 136-89.53. New and existing facilities; grade crossing eliminations.

CASE NOTES

Applied in Department of Transp. v. Harkey, — N.C. App. —, 290 S.E.2d 773 (1982).

§ 136-89.55. Local service roads.

CASE NOTES

Quoted in Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

ARTICLE 7.

Miscellaneous Provisions.

§ 136-102.6. Compliance of subdivision streets with minimum standards of the Board of Transportation required of developers.

Cross References. — As to subdivision regulation in counties, see § 153A-330 et seq. As to subdivision regulation in cities, see § 160A-371.

ARTICLE 9.

Condemnation.

§ 136-103. Institution of action and deposit.

CASE NOTES

Stated in Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981); State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

§ 136-104. Vesting of title and right of possession; recording memorandum or supplemental memorandum of action.

CASE NOTES

Stated in Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

§ 136-105. Disbursement of deposit; serving copy of disbursing order on Department of Transportation.

CASE NOTES

Cited in Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

§ 136-107. Time for filing answer.

CASE NOTES

Court Has No Discretionary Power to Allow Extension, etc. —

The courts have no discretionary power to allow an extension of time for the filing of an answer under this section. Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

But Parties May Make Reasonable Stipulations. — A court has no authority to alter the requirements of this section but there is no reason why parties may not make reasonable stipulations concerning matters to which the section is addressed. Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

§ 136-112. Measure of damages.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in City of Winston-Salem v. Tickle, 53 N.C. App. 516, 281 S.E.2d 667 (1981).

ARTICLE 11.

Outdoor Advertising Control Act.

§ 136-131.1. Just compensation required for the removal of billboards on federal-aid primary highways by local authorities.

No municipality, county, local or regional zoning authority, or other political subdivision, shall, without the payment of just compensation in accordance with the provisions that are applicable to the Department of Transportation as provided in paragraphs 2, 3, and 4 of G.S. 136-131, remove or cause to be removed any outdoor advertising adjacent to a highway on the National System of Interstate and Defense Highways or a highway on the Federal-aid Primary Highway System for which there is in effect a valid permit issued by the Department of Transportation pursuant to the provisions of Article 11 of Chapter 136 of the General Statutes and regulations promulgated pursuant thereto. (1981 (Reg. Sess., 1982), c. 1147, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1147, s. 2, provides that this section shall expire June 30, 1984, and shall have no force or effect thereafter.

Chapter 139.

Soil and Water Conservation Districts.

Article 1.

General Provisions.

Sec.
139-6. District board of supervisors — elective members; certain duties.

Article 1.

General Provisions.

§ 139-6. District board of supervisors — elective members; certain duties.

After the issuance of the certificate of organization of the soil conservation district by the Secretary of State, an election shall be held in each county of the district to elect the members of the soil conservation district board of supervisors as herein provided.

The district board of supervisors shall consist of three elective members to be elected in each county of the district, and that number of appointive members as provided in G.S. 139-7. Upon the creation of a district, the first election of the members shall be held at the next succeeding election for county officers.

All elections for members of the district board of supervisors shall be held at the same time as the regular election for county officers beginning in November 1974. The election shall be nonpartisan and no primary election shall be held. The election shall be held and conducted by the county board of elections.

Candidates shall file their notice of candidacy on forms prescribed by the county board of elections. The notice of candidacy must be filed no later than 12:00 noon on the first Friday in July preceding the election. The candidate shall pay a filing fee of five dollars ($5.00) at the time he files the notice of candidacy.

Beginning with the election to be held in November 1974, the two candidates receiving the highest number of votes shall be elected for a term of four years, and the candidate receiving the next highest number of votes shall be elected for a term of two years; thereafter, as their terms expire, their successors shall be elected for terms of four years. If the position of district supervisor is not filled by failure to elect, then the office shall be deemed vacant upon the expiration of the term of the incumbent, and the office shall be filled as provided in G.S 139-7.

The persons elected in 1974 and thereafter shall take office on the first Monday in December following their election.

The terms of the present members of the soil conservation districts, both elective and appointive members, are hereby extended to or terminated on the first Monday in December 1974.

All qualified voters of the district shall be eligible to vote in the election. Except as provided in this Chapter, the election shall be held in accordance with the applicable provisions of Articles 23 and 24 of Chapter 163 of the General Statutes.

The district board of supervisors, after the appointment of the appointive members has been made, shall select from its members a chairman, a vice-chairman and a secretary. It shall be the duty of the district board of supervisors to perform those powers, duties and authority conferred upon

supervisors under this Chapter; to develop annual county and district goals and plans for soil conservation work therein; to request agencies, whose duties are such as to render assistance in soil and water conservation, to set forth in writing what assistance they may have available in the county and district. (1937, c. 393, s. 6; 1947, c. 131, s. 5; 1949, c. 268, s. 1; 1957, c. 1374, s. 2; 1963, c. 815; 1973, c. 502, s. 1; 1975, c. 798, s. 4; 1979, c. 519, s. 1; 1981, c. 560, s. 3.)

Editor's Note. — This section is set out in order to give effect to the 1981 amendment, which was omitted in the 1981 Cumulative Supplement.

Effect of Amendments. —

The 1981 amendment deleted the former last sentence of the third paragraph, which read: "No absentee ballots shall be permitted in the election."

Article 3.

Watershed Improvement Programs; Expenditure by Counties.

§ 139-40. Conduct of election.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

Chapter 140.

State Art Museum; Symphony and Art Societies.

Article 1B.

North Carolina Museum of Art.

Sec.

140-5.13. Board of Trustees — establishment; members; selection; quorum; compensation; officers; meetings.

Article 1B.

North Carolina Museum of Art.

§ 140-5.13. Board of Trustees — establishment; members; selection; quorum; compensation; officers; meetings.

(b) The Board of Trustees of the North Carolina Museum of Art shall consist of 22 members, chosen as follows:

(1) The Governor shall appoint eleven members, one from each congressional district in the State in accordance with G.S. 147-12(3)b;

(2) The North Carolina Art Society, Incorporated, shall elect three members;

(3) The North Carolina Museum of Art Foundation, Incorporated, shall elect three members;

(4) The Board of Trustees of the North Carolina Museum of Art shall elect three members;

(5) The General Assembly shall appoint two members, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121;

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 49.

All regular appointments or elections except those by the General Assembly shall be for terms of six years, except that each member shall serve until his successor is chosen and qualifies. No person may be appointed or elected to more than two consecutive terms of six years. All regular appointments by the General Assembly shall be for the then current legislative term, and no appointee of the General Assembly may be appointed to more than two consecutive terms of two years.

(c) Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. All other vacancies occurring in the regular membership of the Board of Trustees prior to the expiration of a term shall be filled by the same authority and in the same manner as the vacating member was chosen, and the successor member so chosen shall serve for the remainder of the unexpired term of the vacating member.

(d) All initial appointments and elections to the Board of Trustees shall be made on July 1, 1980, or as soon as feasible thereafter except as provided in this subsection, and the terms of all except the legislative appointees shall expire on June 30, 1983, or June 30, 1986, as the case may be. In order to establish regularly overlapping terms, initial appointments and elections to the Board of Trustees shall be made as follows:

(1) Four members at large shall be appointed by the Governor for initial terms of three years and four members at large shall be appointed by the Governor for initial terms of six years.

(2) One member shall be elected by the North Carolina Art Society, Incorporated, for an initial term of three years and two members shall be elected by that Society for initial terms of six years.

(3) One member shall be elected by the North Carolina Museum of Art Foundation, Incorporated, for an initial term of three years and two members shall be elected by that Foundation for initial terms of six years.

(4) One member shall be elected by the Art Commission prior to July 1, 1980, for an initial term of three years and two members shall be elected by that Commission for initial terms of six years. Upon the expiration of the terms of those three members, their successors shall be elected by the Board of Trustees of the North Carolina Museum of Art.

(5) Three members shall be elected by the State Art Museum Building Commission to serve until the termination of that Commission or until June 30, 1983, whichever shall first occur. Upon the termination of the terms of those three members, should such termination occur prior to June 30, 1983, their successors shall be elected as follows: one by the North Carolina Art Society, Incorporated, one by the North Carolina Museum of Art Foundation, Incorporated, and one by the Board of Trustees of the North Carolina Museum of Art; the terms of the successor members so elected shall expire on June 30, 1983. On July 1, 1983, or as soon as feasible thereafter, the successors of these three members shall be elected for terms of six years, as follows: one by the North Carolina Art Society, Incorporated, one by the North Carolina Museum of Art Foundation, Incorporated, and one by the Board of Trustees of the North Carolina Museum of Art.

(6) The initial appointments by the General Assembly shall serve until June 30, 1983. Subsequent appointments shall be for two-year terms commencing July 1, 1983, and biennially thereafter;

(7) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 51.

Every vacancy occurring in the initial membership of the Board of Trustees prior to the expiration of a term of office shall be filled by the same authority and in the same manner as the vacating member was chosen and the successor member so appointed shall serve for the remainder of the unexpired term of the vacating member.

(j) Members of the Board of Trustees who are officers or employees of State agencies or institutions shall receive from funds available to the Department of Cultural Resources subsistence and travel allowances at the rates authorized by G.S. 138-6. All other members of the Board of Trustees shall receive from funds available to the Department of Cultural Resources per diem and travel and subsistence allowances at the rates authorized by G.S. 138-5.

(1981 (Reg. Sess., 1982), c. 1191, ss. 49-52.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in subsection (b) rewrote subdivision (1), which read: "The Governor shall appoint eight members," substituted "three" for "four" in subdivisions (2), (3), and (4), rewrote subdivision (5), which read: "The President of the Senate shall appoint one member; and" deleted subdivision (6), which read "The Speaker of the House of Representatives shall appoint one member of the House of Representatives," and substituted "General Assembly" for references to the President of the Senate and/or the Speaker of the House in the last three sentences of the subsection. In subsection (c) the amendment substituted the first sentence and the language "All other vacancies" for "Every vacancy" at the beginning thereof. In the introductory language of subsection (d) the amendment substituted "legislative appointees" for "legislative members" in the first sentence, rewrote subdivision (6), which formerly provided for one member to be appointed by the President of the Senate to serve for the remainder of the then current legislative term, and deleted subdivision (7), which provided for one member of the House of Representatives to be appointed by the

Speaker thereof to serve for the remainder of his legislative term. The amendment also deleted the former second sentence of subsection (j), relating to subsistence and travel allowances for the legislative members of the Board of Trustees.

Session Laws 1981 (Reg. Sess., 1982), c. 1191, s. 53, provides: "The reduction of one each in appointees by the North Carolina Art Society, Incorporated, the North Carolina Museum of Art Foundation, Incorporated, and the Board of Trustees of the North Carolina Museum of Art shall be accomplished at the expiration of the terms of members expiring June 30, 1983. The Governor shall make three additional appointments effective that date to serve six-year terms."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (b), (c), (d) and (j) are set out.

Chapter 143.

State Departments, Institutions, and Commissions.

Article 1.

Executive Budget Act.

Sec.

143-27. Appropriations to educational, charitable and correctional institutions are in addition to receipts by them; annual report by Office of State Budget and Management.

Article 2C.

Limit on Number of State Employees.

143-47.16 to 143-47.20. [Reserved.]

Article 2D.

North Carolina Board for Need-Based Medical Student Loans.

143-47.21. Creation of board.
143-47.22. Program transfer.
143-47.23. Membership of board; structure.
143-47.24. Powers and duties.

Article 3.

Purchases and Contracts.

143-63.1. Sale, disposal and destruction of firearms.

Article 9.

Building Code Council and Building Code.

143-138. North Carolina State Building Code.

Article 12.

Law-Enforcement Officers' Benefit and Retirement Fund.

Sec.

143-166. Law-Enforcement Officers' Benefit and Retirement Fund.

Article 24.

Wildlife Resources Commission.

143-240. Creation of Wildlife Resources Commission; districts; qualifications of members.
143-241. Appointment and terms of office of Commission members; filling of vacancies.
143-242. Vacancies by death, resignation or otherwise.
143-250. Wildlife Resources Fund.

Article 36.

Department of Administration.

143-340. Powers and duties of Secretary.
143-341. Powers and duties of Department.

Article 47A.

Art Works in State Buildings.

143-408.1. Short title.
143-408.2. Declaration of policy and statement of purpose.
143-408.3. Definitions.
143-408.4. Procedures for inclusion of art works in State buildings.
143-408.5. Selection of artists and works of art.

Article 1.

Executive Budget Act.

§ 143-12. Bills containing proposed appropriations.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 68, provides: "Any program which receives funds for the first time in a special appropriations act shall be considered a one-time appropriation and shall not be included in the base budget for the succeeding fiscal biennium. If a program which is included in the base budget receives additional funds in a special appropriations act, the amount of the additional appropriation may not become part of the base budget unless the act so indicates.

"Any new program included in the budget submitted to the General Assembly by the Governor shall not become part of the base budget during the first fiscal biennium in which an appropriation to it is made. When a program that has not previously been included in the base budget is submitted to the General Assembly by the Governor for continued funding, it shall bear a designation that it is a pilot program."

§ 143-27. Appropriations to educational, charitable and correctional institutions are in addition to receipts by them; annual report by Office of State Budget and Management.

All appropriations now or hereafter made to the educational institutions, and to the charitable and correctional institutions, and to such other departments and agencies of the State as receive moneys available for expenditure by them are declared to be in addition to such receipts of said institutions, departments or agencies, and are to be available as and to the extent that such receipts are insufficient to meet the costs anticipated in the budget authorized by the General Assembly, of maintenance of such institutions, departments, and agencies; provided, however, that actual receipts, except federal receipts, in excess of the amounts budgeted may be expended only when justified by extenuating circumstances and authorized by the Director of the Budget.

The Office of State Budget and Management shall report to the Joint Legislative Commission on Governmental Operations the amount of receipts budgeted in General Fund codes compared to the amount actually collected in a fiscal year. This report shall apply to the previous fiscal year and shall be submitted by February 15 of each year. (1929, c. 100, s. 28; 1981 (Reg. Sess., 1982), c. 1282, s. 66.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, inserted "anticipated in the budget authorized by the General Assembly," preceding "of maintenance of such institutions" in the first paragraph, added the proviso at the end of the first paragraph, and added the second paragraph.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

§ 143-28.1. Highway Fund appropriation.

CASE NOTES

Constitutionality. — This section does not violate N.C. Const., Art. V, § 3. Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

Authorization by this section of construction and maintenance contracts by the Department of Transportation using "cash flow" financing does not violate the prohibition of N.C. Const., Art. III, § 5(3) against incurring a deficit; only actual expenditures in excess of receipts would violate the provision. Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

ARTICLE 2C.

Limit on Number of State Employees.

§§ 143-47.16 to 143-47.20: Reserved for future codification purposes.

ARTICLE 2D.

North Carolina Board for Need-Based Medical Student Loans.

§ 143-47.21. Creation of board.

The North Carolina Board for Need-Based Medical Student Loans, hereinafter referred to as the board, is established in the Office of State Budget and Management to provide financial assistance on the basis of demonstrated need as determined by the board to students who are residents of North Carolina and who are accepted in an accredited degree-granting program, in any school, college or university, leading to graduation as physicians, dentists, optometrists, pharmacists, nurses, nurse instructors, nurse anesthetists, medical technicians, social workers, psychologists or other health professionals as so determined by the board. (1981 (Reg. Sess., 1982, c. 1388, s. 4.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 7, makes this Article effective July 1, 1982. Section 7 provides, however, that appointments to the North Carolina Board for Need-Based Medical Student Loans may be made upon ratification of the act. The act was ratified June 23, 1982.

§ 143-47.22. Program transfer.

Effective July 1, 1982, all funds previously appropriated to the Department of Human Resources for student loans and scholarships pursuant to prior G.S. 131-121, G.S. 131-121.3, G.S. 131-124 and G.S. 131-125, and for the administration thereof shall be transferred to the Office of State Budget and Management to be administered by the board, including all loans or scholarships repaid to the Department of Human Resources pursuant to prior G.S. 131-121, G.S. 131-121.3, G.S. 131-124 and G.S. 131-125. (1981 (Reg. Sess., 1982), c. 1388, s. 4.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1388, s. 5, provides: "In effecting this transfer, the director of the program shall be transferred to the Office of State Budget and Management. In addition, other staff in the discretion of the State Budget Officer may be transferred."

§ 143-47.23. Membership of board; structure.

The board shall consist of nine nonlegislative members; three to be appointed by the Governor; three to be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121, and three to be appointed by the General Assembly upon the recommendation of the President of the Senate under G.S. 120-121.

Board members shall be appointed for four-year terms with the first appointments to expire July 1, 1986. Board members may be reappointed without limit.

In the event of a vacancy occurring for any reason, the vacancy shall be filled by the officer who made the particular appointment now vacant, except that

vacancies in appointments by the General Assembly shall be filled under G.S. 120-122. The new appointee shall serve for the duration of the term remaining to the prior appointment now vacant.

The board at its first meeting shall elect a chairman and vice-chairman who shall so serve for the four years of their terms on the board. New elections for chairman and vice-chairman shall be held at the first meeting following the next four-year appointments to the board.

The board shall meet regularly at such times and in such places as its chairman and vice-chairman deem necessary to accomplish its functions. The chairman and vice-chairman may call special meetings at any time and place.

The chairman and vice-chairman shall organize the work of the board and shall prepare rules of procedure governing the operation of the board.

The members of the board shall receive per diem and necessary travel and subsistence expenses in accordance with Chapter 138 of the General Statutes. (1981 (Reg. Sess., 1982), c. 1388, s. 4.)

§ 143-47.24. Powers and duties.

The board shall administer a program of student loans and scholarships to those students designated in G.S. 143-47.21 that it determines have demonstrated financial need and who otherwise qualify.

The board shall promulgate rules and regulations for the administering of the program.

The board shall prepare a written annual report giving an account of its proceedings, transactions and any recommendations it may have and shall submit this report to the Governor and the General Assembly.

All staff, clerical and other services required by the board shall be supplied by the Office of State Budget and Management. (1981 (Reg. Sess., 1982), c. 1388, s. 4.)

ARTICLE 3.

Purchases and Contracts.

§ 143-63.1. Sale, disposal and destruction of firearms.

(d) Notwithstanding the provisions of this section, but subject to the provisions of G.S. 20-187.2, the North Carolina State Highway Patrol, the North Carolina Department of Correction, and the North Carolina State Bureau of Investigation may sell, trade, or otherwise dispose of any or all surplus weapons they possess to any federally licensed firearm dealers. The sale, trade, or disposal of these weapons shall be in a manner prescribed by the Department of Administration. Any moneys or property obtained from the sale, trade, or disposal shall go to the general fund. (1973, c. 666, ss. 1-3; 1975, c. 879, s. 46; 1981, c. 604; 1981 (Reg. Sess., 1982), c. 1282, s. 52.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective June 22, 1982, inserted a reference to the North Carolina State Bureau of Investigation, substituted "may" for "are authorized to", and substituted "they possess" for "it possesses" in the first sentence of subsection (d).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

ARTICLE 3C.

Contracts to Obtain Consultant Services.

§ 143-64.24. Applicability of Article.

OPINIONS OF ATTORNEY GENERAL

Inappliability to Certain Contracts. — This section is inapplicable to contracts entered into by the Department of Administration with engineering or architectural firms for planning, design, construction and renovation services. See opinion of Attorney General to Mr. Ray DeBruhl, Construction Division, Department of Administration, 51 N.C.A.G. 35 (1981).

ARTICLE 8.

Public Building Contracts.

§ 143-129. Procedure for letting of public contracts; purchases from federal government by State, counties, etc.

Local Modification. — By virtue of Session Laws 1963, c. 47, the city of Kernersville should be stricken from the bound volume.

By virtue of Session Laws 1967, c. 780, the city of Henderson should be stricken from the bound volume.

By virtue of Session Laws 1975, c. 671, the city of Durham should be stricken from the bound volume.

By virtue of Session Laws 1981, c. 754, the following should be stricken from the bound volume: the counties of Forsyth and Guilford; the cities of Durham, Gastonia, Greensboro, Wilmington, Winston-Salem and Wrightsville Beach; and the Bessemer Sanitary District.

§ 143-131. When counties, cities, towns and other subdivisions may let contracts on informal bids.

Local Modification. — By virtue of Session Laws 1967, c. 780, the city of Henderson should be stricken from the bound volume.

By virtue of Session Laws 1975, c. 671, and Session Laws 1981, c. 754, the city of Durham should be stricken from the bound volume.

By virtue of Session Laws 1981, c. 754, Forsyth County and the cities of Wilmington and Wrightsville Beach should be stricken from the bound volume.

§ 143-135.1. State buildings exempt from county and municipal building requirements; consideration of recommendations by counties and municipalities.

CASE NOTES

Applied in Holcomb v. United States Fire Ins. Co., 52 N.C. App. 474, 279 S.E.2d 50 (1981).

ARTICLE 9.

Building Code Council and Building Code.

§ 143-136. Building Code Council created; membership.

CASE NOTES

Applied in Holcomb v. United States Fire Ins. Co., 52 N.C. App. 474, 279 S.E.2d 50 (1981).

§ 143-138. North Carolina State Building Code.

(g) Publication and Distribution of Code. — The Building Code Council shall cause to be printed, after adoption by the Council, the North Carolina State Building Code and each amendment thereto. It shall, at the State's expense, distribute copies of the Code and each amendment to State and local governmental officials, departments, agencies, and educational institutions, as is set out in the table below. (Those marked by an asterisk will receive copies only on written request to the Council.)

OFFICIAL OR AGENCY	NUMBER OF COPIES
State Departments and Officials	
Governor	
Lieutenant Governor	1
Auditor	1
Treasurer	1
Secretary of State	1
Superintendent of Public Instruction	3
State Board of Education	2
Attorney General	5
Commissioner of Agriculture	1
Commissioner of Labor	3
Commissioner of Insurance	5
Department of Human Resources [Commission for Health Services]	10
Department of Human Resources [Commission for Medical Facility Services and Licensure]	3
Board of Transportation	3
Adjutant General	1
Utilities Commission	1
Department of Administration	3
Department of Conservation and Development	3
Department of Human Resources [Social Services Commission]	7
Justices of the Supreme Court	1 each
Clerk of the Supreme Court	1
Judges of the Court of Appeals	1 each

OFFICIAL OR AGENCY	NUMBER OF COPIES
Clerk of the Court of Appeals	1
Judges of the Superior Court	* 1 each
Emergency Judges of the Superior Court	* 1 each
Special Judges of the Superior Court	* 1 each
Solicitors of the Superior Court	* 1 each
Department of Cultural Resources [State Library]	2
Supreme Court Library	2
State Senators	* 1 each
Representatives of General Assembly	* 1 each
Legislative Building Library	1
Other state-supported institutions, at the discretion of the Council	* 1 each
Schools	
University of North Carolina at Chapel Hill	* 25
North Carolina State University at Raleigh	* 15
North Carolina Agricultural and Technical State University	* 5 . *
All other state-supported colleges and universities in the State of North Carolina	* 1 each
Local Officials	
Clerks of the Superior Courts	1 each
Registers of Deeds of the Counties	* 1 each
Chairman of the Boards of County Commissioners	* 1 each
City Clerks of each incorporated municipality	1 each
Chief Building Inspector of each incorporated municipality or county	* 1

In addition, the Building Code Council shall make additional copies available at such price as it shall deem reasonable to members of the general public.

(k) For purposes of use in the Code, the term "Family Care Home" shall mean a domiciliary home having two to six residents. (1957, c. 1138; 1969, c. 567; c. 1229, ss. 2-6; 1971, c. 1100, ss. 1, 2; 1973, c. 476, ss. 84, 128, 138, 152; c. 507, s. 5; 1981, c. 677, s. 3; c. 713, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 20.2D; c. 1348, s. 1.)

Effect of Amendments. — The first 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (k). The amendatory act did not specify that the new language be designated (k), but it appeared from the terms and structure of the section that the new language should be a separate subsection.

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added "Legislative Building Library" to the list of agencies in the table in subsection (g) and the number "1" in the column "NUMBER OF COPIES" opposite that entry.

Session Laws 1981 (Reg. Sess. 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsections (g) and (k) are set out.

ARTICLE 12.

Law-Enforcement Officers' Benefit and Retirement Fund.

§ 143-166. Law-Enforcement Officers' Benefit and Retirement Fund.

(b) For the purpose of determining the recipients of benefits under this article and the amounts thereof to be disbursed and for formulating and making such rules and regulations as may be essential for the equitable and impartial distribution of such benefits to and among the persons entitled to such benefits, there is hereby created a board to be known as "The Board of Commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund." The membership of the Board of Commissioners shall consist of 10 members, as follows:

(1) The State Treasurer, who shall be chairman ex officio;

(2) The State Auditor, who shall be a member ex officio;

(3) The State Insurance Commissioner, who shall be a member ex officio;

(4) Five members to be appointed by the Governor and to serve at his will, one of whom shall be a sheriff, one a police officer, one a law-enforcement officer employed by the State, one a retired law-enforcement officer in receipt of an allowance from the Retirement Fund, and one representing the public at large;

(5) Two members to be appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Neither member appointed by the General Assembly may be an active or retired law-enforcement officer. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(1981 (Reg. Sess., 1982), c. 1191, s. 48.)

Effect of Amendments. —

Substitute the following for the last paragraph of the note in the 1981 Cumulative Supplement:

Session Laws 1981, c. 980, s. 6, effective July 1, 1982, substituted "the earliest date on which he would have qualified for an unreduced service retirement allowance" for "his fifty-fifth birthday" at the end of the sixth paragraph of subsection (y). The amendatory act purported to amend "G.S. 43-66(y)," but subsection (y) of this section was plainly intended.

The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote subdivision (5) of subsection (b), which formerly provided that one member of the Board be appointed by the Speaker of the House of Representatives from the membership of the House and one member to be appointed by the President of the Senate from the membership of the Senate.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 12A.

Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act.

§ 143-166.4. Funds; conclusiveness of award.

CASE NOTES

Commission's Decisions Conclusive and Not Appealable. — This section governs the administration of claims under Article 12A and by its specific terms, the decisions by the Industrial Commission are final and conclusive; appeal from its decisions is proscribed. In re Vandiford, — N.C. App. —, 287 S.E.2d 912 (1982).

This article is not a part of the North Carolina Workers' Compensation Act, and the methods of appellate review contained in the compensation act are not applicable to the Industrial Commission's function under Article 12A. In re Vandiford, — N.C. App. —, 287 S.E.2d 912 (1982).

ARTICLE 21.

Water and Air Resources.

Part 1. Organization and Powers Generally; Control of Pollution.

§ 143-215.3. General powers of Environmental Management Commission and Department of Natural Resources and Community Development; auxiliary powers.

CASE NOTES

Cited in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

§ 143-215.9. Restrictions on authority of the Environmental Management Commission.

CASE NOTES

Cited in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Part 2. Regulation of Use of Water Resources.

§ 143-215.13. Declaration of capacity use areas.

CASE NOTES

Discretion of Commission. — The Environmental Management Commission's determination of capacity use areas is discretionary. High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

Scope of Judicial Review. — The proper scope of judicial review for the Environmental Management Commission's determination that a given area should or should not be declared a capacity use area is whether the commission has abused its discretion. While under § 150A-51, this scope of review is not enumerated, the Administrative Procedure Act does not preclude review of agency decisions which are discretionary. High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

Refusal by commission to declare Yadkin River Basin a capacity use area held not arbitrary or capricious. See High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

§ 143-215.15. Permits for water use within capacity use areas — procedures.

CASE NOTES

Cited in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Part 3. Dam Safety Law.

§ 143-215.28. Action by Environmental Management Commission upon applications.

CASE NOTES

Cited in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

§ 143-215.29. Supervision by qualified engineers; reports and modification during work.

CASE NOTES

Cited in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

§ 143-215.31. Supervision over maintenance and operation of dams.

CASE NOTES

Cited in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Part 4. Federal Water Resources Development Projects.

§ 143-215.39. Public policy.

CASE NOTES

Cited in United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

ARTICLE 21B.

Air Pollution Control.

§ 143-215.107. Air quality standards and classifications.

CASE NOTES

Cited in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

ARTICLE 24.

Wildlife Resources Commission.

§ 143-240. Creation of Wildlife Resources Commission; districts; qualifications of members.

There is hereby created the Wildlife Resources Commission of the Department of Natural Resources and Community Development which shall consist of 13 citizens of North Carolina who shall be appointed as is hereinafter provided. The Governor shall appoint one member of the Commission from each of the following geographical districts:

First district to be composed of the following counties: Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Hyde, Martin, Pasquotank, Perquimans, Tyrrell, Washington.

Second district to be composed of the following counties: Beaufort, Carteret, Craven, Duplin, Greene, Jones, Lenoir, New Hanover, Onslow, Pamlico, Pender, Pitt.

Third district to be composed of the following counties: Edgecombe, Franklin, Halifax, Johnston, Nash, Northampton, Vance, Wake, Warren, Wayne, Wilson.

Fourth district to be composed of the following counties: Bladen, Brunswick, Columbus, Cumberland, Harnett, Hoke, Robeson, Sampson, Scotland.

Fifth district to be composed of the following counties: Alamance, Caswell, Chatham, Durham, Granville, Guilford, Lee, Orange, Person, Randolph, Rockingham.

Sixth district to be composed of the following counties: Anson, Cabarrus, Davidson, Mecklenburg, Montgomery, Moore, Richmond, Rowan, Stanly, Union.

Seventh district to be composed of the following counties: Alexander, Alleghany, Ashe, Davie, Forsyth, Iredell, Stokes, Surry, Watauga, Wilkes, Yadkin.

Eighth district to be composed of the following counties: Avery, Burke, Caldwell, Catawba, Cleveland, Gaston, Lincoln, McDowell, Mitchell, Rutherford, Yancey.

Ninth district to be composed of the following counties: Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, Polk, Swain, Transylvania.

The Governor shall appoint two members of the Commission from the State at large. The General Assembly shall appoint two members of the Commission, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President of the Senate, in accordance with G.S. 120-121.

Each member of the Commission shall be an experienced hunter, fisherman, farmer, or biologist, who shall be generally informed on wildlife conservation and restoration problems.

Members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 or 138-6 as the case may be, which shall be paid from the Wildlife Resources Commission Fund. (1947, c. 263, s. 4; 1961, c. 737, s. 1½; 1965, c. 859, s. 2; 1971, c. 285; 1977, c. 771, s. 4; c. 906, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 79.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers of 1982) substituted the present second sentence of the eleventh paragraph for the former last two sentences thereof, which provided for the appointment of one member of the Commission by the Lieutenant Governor from the membership of the Senate and one member of the Commission by the Speaker of the House of Representatives from the membership of the House.

§ 143-241. Appointment and terms of office of Commission members; filling of vacancies.

The terms of office of the members of the North Carolina Wildlife Resources Commission who are now serving as members from the State at large shall expire June 30, 1965. The terms of the remaining nine incumbent members of said Commission shall not expire until the end of the terms for which they were appointed.

On the first day of July, 1965 and thereafter, the Governor shall appoint members of the North Carolina Wildlife Resources Commission from the several geographical districts set forth in G.S. 143-240 as follows:

On July 1, 1965, one from each of districts two, five and eight to serve six years each;

On July 1, 1967, one member from each of districts three, six and nine, to serve terms of six years each;

On July 1, 1969, one member from each of districts one, four and seven, to serve terms of six years each.

Thereafter as the terms of office of the members of the Commission from the several districts expire, their successors shall be appointed for terms of six years each.

Vacancies among the membership of the Commission appointed by the Governor from the several districts occurring through expiration of terms of the members of the Commission shall be filled by appointment by the Governor from a list of five names from each wildlife district, recommended and submitted by the adult interested citizens of each respective district. When the term of a member expires, the Director or his designee shall call a meeting of the adult interested citizens in that district not later than 60 days prior to the expiration of such member's term. Such meetings shall be held as near to the geographic center of the district as possible and in a public building. Notice of the meeting shall be given by publication once each week for four successive weeks, the fourth notice appearing at least 10 days prior to the meeting, in a newspaper having general circulation in the district. In addition, notice of the meeting shall be posted at the courthouse door of each county in the district at least 30 days prior to said meeting. At such meeting, the adult interested citizens in attendance shall select, and the Director shall submit to the Governor, a list of five residents and citizens of the district who are well informed on the subject of wildlife conservation and restoration. The Governor shall appoint a successor to the member whose term is about to expire within 60 days following the submission to him by the Director of the list hereinabove referred to and in no event later than July 1.

Meetings of adult interested citizens held pursuant to this section shall be conducted pursuant to Robert's Rules of Order. When the meeting has been called to order, any adult interested citizen may place in nomination the name of an adult resident citizen of the respective district to be considered for nomination. After the nominations have ceased, each adult interested citizen present may vote for one of the nominees. The five receiving the most votes shall be submitted to the Governor.

"Adult interested citizen" as used in this section means any adult interested citizen who is a resident of any county within the district. All members appointed pursuant to this section shall serve until their successors are appointed and qualified.

Members of the Commission appointed from the State at large shall be appointed initially for terms expiring April 1, 1981, and thereafter for terms of four years. Initial members of the Commission appointed by the General Assembly shall serve until June 30, 1983, and subsequent appointees shall serve for a two-year term beginning July 1, 1983, and biennially thereafter. (1947, c. 263, s. 5; 1961, c. 737, s. 1; 1965, c. 859, s. 3; 1973, c. 825, s. 2; 1977, c. 906, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 80.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote the last sentence of the last paragraph, which formerly provided for the terms of the members of the Commission appointed by the Lieutenant Governor and the Speaker of the House.

§ 143-242. Vacancies by death, resignation or otherwise.

Appointments to fill vacancies of gubernatorial appointees on the Commission occurring by reason of death, disability, resignation or otherwise shall be made by the Governor for the balance of the unexpired terms by appointment of a member from the State at large, or from the appropriate district in accordance with the procedure set out in G.S. 143-241. Appointments to fill vacancies of those members of the Commission appointed by the General Assembly shall be made under G.S. 120-122. The Governor shall have the

power to remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance. (1947, c. 263, s. 6; 1973, c. 825, s. 3; 1977, c. 906, s. 3; 1981 (Reg. Sess., 1982), c. 1191, s. 81.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote the second sentence, which formerly provided for appointments to fill vacancies of those members of the Commission appointed by the Lieutenant Governor or the Speaker of the House.

§ 143-250. Wildlife Resources Fund.

All moneys in the game and fish fund or any similar State fund when this Article becomes effective shall be credited forthwith to a special fund in the office of the State Treasurer, and the State Treasurer shall deposit all such moneys in said special fund, which shall be known as the Wildlife Resources Fund.

All unexpended appropriations made to the Department of Conservation and Development, the Board of Conservation and Development, the Division of Game and Inland Fisheries or to any other State agency for any purpose pertaining to wildlife and wildlife resources shall also be transferred to the Wildlife Resources Fund.

Except as otherwise specifically provided by law, all moneys derived from hunting, fishing, trapping, and related license fees, exclusive of commercial fishing license fees, and all funds thereafter received from whatever sources shall be deposited to the credit of the Wildlife Resources Fund and made available to the Commission until expended subject to the provisions of this Article. The Wildlife Resources Fund herein created shall be subject to the provisions of the Executive Budget Act, Chapter 143, Article 1 of the General Statutes of North Carolina as amended, and the provisions of the General Statutes of North Carolina as amended, and the provisions of the Personnel Act, Chapter 143, Article 2 of the General Statutes of North Carolina as amended.

All moneys credited to the Wildlife Resources Fund shall be made available to carry out the intent and purposes of this Article in accordance with plans approved by the North Carolina Wildlife Resources Commission, and all such funds are hereby appropriated, reserved, set aside and made available until expended, for the enforcement and administration of this Article, Chapter 75A, Article 1, and Chapter 113, Subchapter IV of the General Statutes of North Carolina.

In the event any uncertainty should arise as to the funds to be turned over to the North Carolina Wildlife Resources Commission the Governor shall have full power and authority to determine the matter and his recommendation shall be final and binding to all parties concerned. (1947, c. 263, s. 14; 1965, c. 957, s. 16; 1981, c. 482, s. 2; 1981 (Reg. Sess., 1982), c. 1182, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added "Chapter 75A, Article 1, and Chapter 113, Subchapter IV of the General Statutes of North Carolina" at the end of the next-to-last paragraph.

ARTICLE 31.

Tort Claims against State Departments and Agencies.

§ 143-291. Industrial Commission constituted a court to hear and determine claims; damages.

Legal Periodicals. — For a comment on the need for reform in North Carolina of local government sovereign immunity, see 18 Wake Forest L. Rev. 43 (1982).

CASE NOTES

The North Carolina State Ports Authority is an agency of the State of North Carolina under the Tort Claims Act; its liability, if any, must be determined by the Industrial Commission. Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

Applied in Brown v. Vance, — N.C. App. —, 285 S.E.2d 333 (1982).

§ 143-293. Appeals to Court of Appeals.

CASE NOTES

Applied in Caviness v. Administrative Office of Courts, — N.C. App. —, 289 S.E.2d 853 (1982).

§ 143-299.1. Contributory negligence a matter of defense; burden of proof.

CASE NOTES

Stated in Caviness v. Administrative Office of Courts, — N.C. App. —, 289 S.E.2d 853 (1982).

ARTICLE 33C.

Meetings of Public Bodies.

§ 143-318.10. All official meetings of public bodies open to the public.

CASE NOTES

Wake County Hospital System. — By virtue of the definitions in subsection (b) of this section and § 159-39(a), the Wake County Hospital System is a "public body" that must, by law, record settlement terms considered in executive sessions; in addition, the public has the right to know the terms of settlements made by the system in actions for wrongful terminations of its agreements, since the funds from which the settlements were paid must be con-

sidered the county's funds. News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

§ 143-318.11. Executive sessions.

CASE NOTES

Wake County Hospital System. — By virtue of the definitions in §§ 143-318.10(b) and 159-39(a), the Wake County Hospital System is a "public body" that must, by law, record settlement terms considered in executive sessions; in addition, the public has the right to know the terms of settlements made by the system in actions for wrongful terminations of its agreements, since the funds from which the settlements were paid must be considered the county's funds. News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

ARTICLE 36.

Department of Administration.

§ 143-340. Powers and duties of Secretary.

The Secretary of Administration has the following powers and duties:

(19) Any motor vehicle parked in a state-owned parking lot, when such lot is clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto, in violation of the "Rules and Regulations Governing State-Owned Parking Lots" dated September, 1968 or as amended, may be removed from such lot to a place of storage subject to the lien creation, notice and hearing provisions of G.S. 20-161-2. No person shall be held to answer in any civil or criminal action to any owner, lienholder, or other person legally entitled to the possession of any motor vehicle removed from such lots pursuant to this section except where such motor vehicle is wilfully, maliciously or negligently damaged in the removal from aforesaid lot to place of storage. Any motor vehicle parked without authorization on state-owned public grounds within the City of Raleigh under the control of the Department of Administration other than a designated parking area may be removed from that property to a storage area and the registered owner of the vehicle shall be liable for removal and storage fees.

(1981 (Reg. Sess., 1982), c. 1239, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective August 1, 1982, substituted "subject to the lien creation, notice and hearing provisions of G.S. 20-161.2" for "and the registered owner of such vehicle shall become liable for removal and storage charges" at the end of the first sentence of subdivision (19). Session Laws 1981 (Reg. Sess., 1982), c. 1239, s. 5, provides that the act shall expire on July 1, 1983.

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (19) are set out.

§ 143-341. Powers and duties of Department.

The Department of Administration has the following powers and duties:

(8) General Services:

a. To locate, maintain and care for public buildings and grounds; to establish, locate, maintain, and care for walks, driveways, trees, shrubs, flowers, fountains, monuments, memorials, markers, and tablets on public grounds; and to beautify the public grounds.

b. To provide necessary and adequate cleaning and janitorial service, elevator operation service, and other operation or maintenance services for the public buildings and grounds.

c. To provide necessary night watchmen for the public buildings and grounds.

d. To make prompt repair of all public buildings and the equipment, furniture, and fixtures thereof; and to establish and operate shops for that purpose.

e. To keep in repair, out of funds appropriated for that purpose, the furniture of the halls of the Senate and House of Representatives and the rooms of the Capitol used by the officers, clerks, and other employees of the General Assembly.

f. Struck out by Session Laws 1959, c. 68, s. 3.

g. To establish and operate a central mailing system for all State agencies, and in connection therewith and in the discretion of the Secretary, to make application for and procure a post-office substation for that purpose, and to do all things necessary in connection with the maintenance of the central mailing system. The Secretary may allocate and charge against the respective departments and agencies their proportionate parts of the cost of the maintenance of the central mailing system.

h. To provide necessary and adequate messenger service for the State agencies served by the Department. However, this may not be construed as preventing the employment and control of messengers by any State agency when those messengers are compensated out of the funds of the employing agency.

i. To establish and operate a central motor pool and such subsidiary related facilities as the Secretary may deem necessary, and to that end:

1. To establish and operate central facilities for the maintenance, repair, and storage of state-owned passenger motor vehicles for the use of State agencies; to utilize any available State facilities for that purpose; and to establish such subsidiary facilities as the Secretary may deem necessary.

2. To acquire passenger motor vehicles by transfer from other State agencies and by purchase. All motor vehicles transferred to or purchased by the Department shall become part of a central motor pool.

3. To require on a schedule determined by the Department and the Advisory Budget Commission all State agencies to transfer ownership, custody or control of any or all passenger motor vehicles within the ownership, custody or control of that agency to the Department, except those motor vehicles under the ownership, custody or control of the Highway Patrol or the State Bureau of Investigation which are used primarily for law-enforcement purposes.

4. To maintain, store, repair, dispose of, and replace state-owned motor vehicles under the control of the Department.

5. Upon proper requisition and proper showing of need for use upon State business only, to assign suitable transportation, either on a temporary or permanent basis, to any State agency.

6. To allocate and charge against each State agency to which transportation is furnished, on a basis of mileage or of rental, its proportionate part of the cost of maintenance and operation of the motor pool.

7. To adopt, with the approval of the Governor and Advisory Budget Commission, reasonable rules and regulations for the efficient and economical operation, maintenance, repair, and replacement of all state-owned motor vehicles under the control of the Department, and to enforce those rules and regulations; and to adopt, with the approval of the Governor and Advisory Budget Commission, reasonable rules and regulations regulating the use of private motor vehicles upon State business by the officers and employees of State agencies, and to enforce those rules and regulations. The Department, with the approval of the Governor and Advisory Budget Commission, may delegate to the respective heads of the agencies to which motor vehicles are permanently assigned by the Department the duty of enforcing the rules and regulations adopted by the Department pursuant to this paragraph. Any person who violates a rule or regulation adopted by the Department and approved by the Governor and Advisory Budget Commission is guilty of a misdemeanor, and upon conviction is punishable in the discretion of the court.

7a. To adopt with the approval of the Governor and the advice of the Advisory Budget Commission and to enforce rules, pursuant to Chapter 150A of the General Statutes, and to coordinate State policy regarding (i) the permanent assignment of State-owned passenger motor vehicles and (ii) the use of and reimbursement for those vehicles for commuting. For the purpose of this subdivision 7a, "State-owned passenger motor vehicle" includes any State-owned passenger motor vehicle, whether or not owned, maintained or controlled by the Department of Administration, and regardless of the source of the funds used to purchase it. Notwithstanding the provisions of G.S. 20-190 or any other provisions of law, all State-owned passenger motor vehicles are subject to the provisions of this subdivision 7a; no permanent assignment shall be made and no one shall be exempt from payment of reimbursement for commuting or from the other provisions of this subdivision 7a except as provided by this subdivision 7a.

A State-owned passenger motor vehicle shall not be permanently assigned to an individual who is likely to drive it on official business at a rate of less than 12,600 miles per year unless the individual's duties are (i) routinely related to public safety or (ii) are likely to expose him routinely to life threatening situations. The Department of Administration shall verify, on a quarterly basis, that each motor vehicle has been driven at the minimum allowable rate. If it has not and if the department by whom the individual is employed cannot justify the lower mileage for the quarter in view of the minimum annual rate, the permanent assignment shall be revoked immediately.

Every individual who is permanently assigned a State-owned passenger motor vehicle, pick-up truck or van, and who uses that vehicle to drive between his official work station and his home, shall reimburse the State for those trips

at the current motor pool rate established by the Department of Administration. If the round trip is 13 miles or less, reimbursement shall be for 13 miles times 20 work days per month; if the round trip is more than 13 miles, reimbursement shall be for the actual round trip mileage times 20 work days per month. Reimbursement shall be made by payroll deduction. Funds derived from reimbursements on vehicles owned by the Motor Fleet Management Division shall be deposited to the credit of the Division; funds derived from reimbursements on vehicles initially purchased with appropriations from the Highway Fund and not owned by the Division shall be deposited in a Special Depository Account in the Department of Transportation which shall revert to the Highway Fund; funds derived from reimbursement on all other vehicles shall be deposited in a Special Depository Account in the Department of Administration which shall revert to the general fund. This paragraph shall not apply to law-enforcement officers in the following agencies whose primary duties are not administrative: (i) State Bureau of Investigation, (ii) Alcohol law-enforcement agents of the Department of Crime Control and Public Safety, and (iii) the Butner Public Safety Department, probation and parole officers or to members of the Council of State. This paragraph also shall not apply to members of the Highway Patrol in Troops A through H or to other members of the Highway Patrol whose primary duties are not administrative as determined by the Highway Patrol Commander. This paragraph also shall not apply to up to 350 employees of the Division of Highways of the Department of Transportation who are subject to 24-hour emergency call in the performance of their official duties or to up to 400 employees of the Division of Highways, during the construction season, who are required to work abnormal hours and on weekends on highway construction contract work, in the discretion of the Secretary of the Department of Transportation. The Department of Administration, Motor Fleet Management Division shall report to the Joint Legislative Commission of Governmental Operations every 60 days on exemptions from the commuting fees granted under the provisions of this paragraph.

The Department of Administration shall revoke the assignment or require the Department owning the vehicle to revoke the assignment of a State-owned passenger motor vehicle, pick-up truck or van to any individual who:

I. Uses the vehicle for other than official business except in accordance with the commuting rules;

II. Fails to supply required reports to the Department of Administration, or supplies incomplete reports, or supplies reports in a form unacceptable to the Department of Administration and does not cure the deficiency within 30 days of receiving a request to do so;

III. Knowingly and willfully supplies false information to the Department of Administration on applications for permanent assignments, commuting reimbursement forms, or other required reports or forms;

IV. Does not personally sign all reports on forms submitted for vehicles permanently assigned to him and does not cure the deficiency within 30 days of receiving a request to do so;

V. Abuses the vehicle; or

VI. Violates other rule or policy promulgated by the Department of Administration not in conflict with this act.

A new requisition shall not be honored until the Secretary of the Department of Administration is assured that the violation for which a vehicle was previously revoked will not recur.

The Department of Administration, with the approval of the Governor and the advice of the Advisory Budget Commission, may delegate, or conditionally delegate, to the respective heads of agencies which own passenger motor vehicles or to which passenger motor vehicles are permanently assigned by the Department, the duty of enforcing all or part of the rules adopted by the Department of Administration pursuant to this subdivision 7a. The Department of Administration, with the approval of the Governor and the advice of the Advisory Budget Commission, may revoke this delegation of authority.

8. To adopt and administer rules and regulations for the control of all State-owned passenger motor vehicles and to require State agencies to keep all records and make all reports regarding motor vehicle use as the Secretary deems necessary.

9. To acquire motor vehicle liability insurance on all state-owned motor vehicles under the control of the Department.

10. To contract with the appropriate State prison authorities for the furnishing, upon such conditions as may be agreed upon from time to time between such State prison authorities and the Secretary, of prison labor for use in connection with the operation of a central motor pool and related activities.

j. To establish and operate a central telephone system, central mimeographing and duplicating services, central stenographical and clerical pools, and other central services, if the Governor after appropriate investigation deems it advisable from the standpoint of efficiency and economy in operation to establish any or all such services. The Secretary may allocate and charge against the respective agencies their proportionate part of the cost of maintenance and operation of the central services which are established, in accordance with the rules and regulations adopted by him and approved by the Governor and Council of State pursuant to paragraph k, below. Upon the establishment of central mimeographing and duplicating services, the Secretary may, with the approval of the Governor, require any State agency to be served by those central services to transfer to the Department ownership, custody, and control of any or all mimeographing and duplicating equipment and supplies within the ownership, custody, or control of such agency.

k. To require the State agencies and their officers and employees to utilize the central facilities and services which are established; and to adopt, with the approval of the Governor and Council of State, reasonable rules, regulations, and procedures requiring the utilization of such central facilities and services, and governing their operation and the charges to be made for their services.

l. To provide necessary information service for visitors to the Capitol.

m. To perform such additional duties and exercise such additional powers as may be assigned to it by statute or by the Governor.

(1981 (Reg. Sess., 1982), c. 1282, s. 62.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote subdivision (8)i7a to the extent that a detailed comparison is not possible.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (8) are set out.

Article 47A.

Art Works in State Buildings.

§ 143-408.1. Short title.

This Article shall be cited as "The Art Works in State Buildings Act." (1981 (Reg. Sess., 1982), c. 1384, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1384, s. 3 makes the Article effective July 1, 1982, but provides that appointments to the committee may be made at any time after ratification of the act. The act was ratified June 23, 1982.

§ 143-408.2. Declaration of policy and statement of purpose.

It is declared as a matter of public policy by the General Assembly of North Carolina that the State of North Carolina has a responsibility to its citizens to improve the quality of life and the public environment through art, and to promote the development of artists and craftsmen. It is, therefore, the purpose of the General Assembly to encourage the inclusion of art works in those State buildings which are either newly constructed, restored, or renovated and which are open to the public, except as hereinafter set out. (1981 (Reg. Sess., 1982), c. 1384, s. 1.)

143-408.3. Definitions.

As used in this Article:

(1) "Architect" means an architect licensed under the provisions of Chapter 83A of the General Statutes.

(2) "Artist" means a practitioner in the visual or plastic arts whose objective is to create original works of art, and who is generally recognized as accomplished by others in the field of art. The term "artist" includes artisans and craftspersons.

(3) "Art works" or "works of art" mean any form of visual art work that may be integrated into the design of the building or serve as an addition to it, including, but not limited to, paintings, sculptures, fountain sculptures, frescoes, mobiles, murals, collages, mosaics, bas-reliefs, tapestries, photographs, drawings, silk screens, etchings, and lithographs. "Art works" or "works of art" shall not include landscape architecture or gardening nor any reproductions of original art by mechanical means.

(4) "Principal user" means the head of the State agency which will be the principal occupant of the proposed State building. In cases where more than one agency will occupy such building, however, the term "principal user" means the Secretary of the Department of Administration. (1981 (Reg. Sess., 1982), c. 1384, s. 1.)

§ 143-408.4. Procedures for inclusion of art works in State buildings.

(a) A committee of six persons shall be established to receive applications from the principal users of State buildings and to determine their eligibility for the inclusion of a major work of art. The committee shall consist of the Secretary of the Department of Administration, the Secretary of the Department of Cultural Resources, and two members from the North Carolina Arts Council appointed by the council. The General Assembly shall appoint two members, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. This committee shall be designated as the Committee on Art in State Buildings. Appointments to the committee shall be for two-year terms beginning on July 1 of odd-numbered years.

(b) The Committee on Art in State Buildings will consider applications with priority being given first to newly constructed buildings, followed by restored buildings and then renovated buildings.

(c) The selection and commissioning of artists and the acquisition and execution of works of art for State buildings pursuant to this Article shall be exempt from the provisions of all competitive bidding requirements for State purchases. Expenditures for works of art as provided in this Article shall be contracted for separately from all other items in the construction, restoration, or renovation project.

(d) The provisions of this Article shall not apply to any construction project undertaken by the University of North Carolina. (1981 (Reg. Sess., 1982), c. 1384, s. 1.)

§ 143-408.5. Selection of artists and works of art.

(a) The selection of the artist and work of art for each eligible State building shall be the joint determination of a five-member panel of artists and architects appointed by the Committee on Art in State Buildings to make a recommendation appropriate for that particular State building.

(b) The recommendation of this panel will be presented together with an itemized cost and analysis for the project to the Committee on Art in State Buildings which will then either accept or reject the proposal. (1981 (Reg. Sess., 1982), c. 1384, s. 1.)

Chapter 143B.

Executive Organization Act of 1973.

Article 1.

General Provisions.

Sec.
143B-13. Appointment, qualifications, terms, and removal of members of commissions.

Article 2.

Department of Cultural Resources.

Part 6. Public Librarian Certification Commission.

143B-67. Public Librarian Certification Commission — creation; powers and duties.

Article 3.

Department of Human Resources.

Part 4. Commission for Mental Health, Mental Retardation and Substance Abuse Services.

143B-148. Commission for Mental Health, Mental Retardation and Substance Abuse Services — members; selection; quorum; compensation.

Part 6. Social Services Commission.

143B-153.1. (Effective July 1, 1983) Legislative enactment required.

143B-154. Social Services Commission — members; selection; quorum; compensation.

Part 10. North Carolina Medical Care Commission.

143B-165. North Carolina Medical Care Commission — creation; powers and duties.

Part 27. Governor's Waste Management Board.

143B-216.12. Creation; membership; terms; chairperson; vacancies; removal; compensation; quorum.

Article 4.

Department of Revenue.

Part 2. Property Tax Commission.

143B-223. Property Tax Commission — members; selection; quorum; compensation.

Article 7.

Department of Natural Resources and Community Development.

Part 4. Environmental Management Commission.

Sec.
143B-283. Environmental Management Commission — members; selection; removal; compensation; quorum; services.

Part 13. Parks and Recreation Council.

143B-312. Parks and Recreation Council — members; chairman; selection; removal; compensation; quorum; services.

Article 8.

Department of Transportation.

Part 2. Board of Transportation — Secondary Roads Council.

143B-350. Board of Transportation — organization; powers and duties, etc.

Article 9.

Department of Administration.

Part 3. North Carolina Capital Planning Commission.

143B-373. North Carolina Capital Planning Commission — creation; powers and duties.

Part 14A. Governor's Advocacy Council for Persons with Disabilities.

143B-403.2. Governor's Advocacy Council for Persons with Disabilities — members; selection; quorum; compensation.

Part 15. North Carolina State Commission of Indian Affairs.

143B-407. North Carolina State Commission of Indian Affairs — membership; term of office; chairman; compensation.

Part 17. Governor's Advocacy Council on Children and Youth.

143B-414. Governor's Advocacy Council on Children and Youth — creation; powers and duties.

143B-415. Governor's Advocacy Council on Children and Youth — members; selection; quorum; compensation.

Part 20. Public Officers and Employees Liability Insurance Commission.

Sec.
143B-422. Commission created; membership.
143B-423. Meetings of Commission; compensation.

Part 21. Child and Family Services Interagency Committees.

143B-426.4. Child and Family Services Interagency Committee — powers and duties.

Part 22. North Carolina Agency for Public Telecommunications.

143B-426.9. North Carolina Agency for Public Telecommunications — creation; membership; appointments, terms and vacancies; officers; meetings and quorum; compensation.

Article 10.

Department of Commerce.

Part 2. Economic Development.

143B-434. Economic Development Board — creation, duties, membership.

Part 5. North Carolina Board of Science and Technology.

143B-441. North Carolina Board of Science and Technology; membership; organization; compensation; staff services.

Part 10. North Carolina Ports Authority.

143B-452. Creation of authority — membership; appointment, terms and vacancies; officers; meetings and quorum; compensation.
143B-454. Powers of Authority.
143B-456. Issuance of bonds and notes.

Article 11.

Department of Crime Control and Public Safety.

Part 1. General Provisions.

143B-476. Department of Crime Control and Public Safety — head; powers and duties as to emergencies and disasters.

Part 3. Governor's Crime Commission.

143B-478. Governor's Crime Commission — creation; composition; terms; meetings, etc.
143B-479. Governor's Crime Commission — powers and duties.

Part 3A. Assistance Program for Victims of Rape and Sex Offenses.

143B-480.1. Assistance Program for Victims of Rape and Sex Offenses.
143B-480.2. Victim assistance.

Part 4. State Fire Commission.

143B-481. State Fire Commission created — membership.

ARTICLE 1.

General Provisions.

§ 143B-10. Powers and duties of heads of principal departments.

Legal Periodicals. — For a note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

§ 143B-13. Appointment, qualifications, terms, and removal of members of commissions.

(f) Whenever a statute requires that the Governor appoint at least one person from each congressional district to a board or commission, and due to congressional redistricting, two or more members of the board or commission shall reside in the same congressional district, then such members shall continue to serve as members of the board or commission for a period equal to the remainder of their unexpired terms, provided that upon the expiration of said

term or terms the Governor shall fill such vacancy or vacancies in such a manner as to insure that as expeditiously as possible there is one member of the board or commission who is a resident of each congressional district in the State. (1973, c. 476, s. 13; 1975, c. 879, s. 47; 1981, c. 520, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) added subsection (f).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (f) is set out.

Article 2.

Department of Cultural Resources.

Part 6. Public Librarian Certification Commission.

§ 143B-67. Public Librarian Certification Commission — creation; powers and duties.

There is hereby created the Public Librarian Certification Commission of the Department of Cultural Resources with the power and duty to adopt rules and regulations to be followed in the certification of public librarians. The Commission is authorized to establish and require written examinations for certified public librarian applicants.

The Commission shall adopt such rules and regulations consistent with the provisions of this Chapter. All rules and regulations consistent with the provisions of this Chapter heretofore adopted by the Library Certification Board shall remain in full force and effect unless and until repealed or superseded by action of the Public Librarian Certification Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Cultural Resources. (1973, c. 476, s. 49; 1981 (Reg. Sess., 1982), c. 1359, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the second sentence of the first paragraph.

Part 17. Roanoke Island Historical Association.

§ 143B-92. Roanoke Island Historical Association — creation, powers and duties.

Roanoke Voyages Corridor Commission. — As to the Roanoke Voyages Corridor Commission, see Session Laws 1981 (Reg. Sess., 1982), c. 1194.

ARTICLE 3.

Department of Human Resources.

Part 1. General Provisions.

§ 143B-137. Department of Human Resources — duties.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

Part 4. Commission for Mental Health, Mental Retardation and Substance Abuse Services.

§ 143B-148. Commission for Mental Health, Mental Retardation and Substance Abuse Services — members; selection; quorum; compensation.

(a) The Commission for Mental Health, Mental Retardation and Substance Abuse Services of the Department of Human Resources shall consist of 25 members:

(1) Four of whom shall be appointed by the General Assembly, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President of the Senate in accordance with G.S. 120-121. These members shall have concern for the problems of mental illness, mental retardation, alcohol and drug abuse. The initial members appointed to the Commission by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122;

(2) Twenty-one of whom shall be appointed by the Governor, one from each congressional district in the State in accordance with G.S. 147-12(3)b, and 10 at-large members.

a. Of these 21 members, three shall have a special interest in mental health, three shall have a special interest in mental retardation, three shall have a special interest in alcohol abuse and alcoholism and three shall have a special interest in drug abuse. Each group of three shall be made up of one member who is a consumer representative; one other who is a representative of a local or State citizen organization or association; and one other who is a professional in the field.

b. The remaining nine members shall be appointed from the general public, other citizen groups, area mental health, mental retardation, and substance abuse authorities, or from other related agencies.

c. Of these 21 appointments, at least one shall be a licensed physician and at least one other shall be a licensed attorney.

d. The Governor shall appoint members to the Commission in accordance with the foregoing provisions. At the initial formation of the Commission for Mental Health, Mental Retardation and Substance Abuse Services, the Governor shall designate seven of his appointees to serve for two years, seven to serve for three years

and seven to serve for four years, all to commence on July 1, 1981. Thereafter the terms of all Commission members appointed by the Governor shall be four years. All Commission members shall serve their designated terms and until their successors are duly appointed and qualified. All Commission members may succeed themselves.

(3) All appointments shall be made pursuant to current federal rules and regulations, when not inconsistent with State law, which prescribe the selection process and demographic characteristics as a necessary condition to the receipt of federal aid.

(b) Except as otherwise provided in this section, the provisions of G.S. 143B-13 through 143B-20 relating to appointment, qualifications, terms and removal of members shall apply to all members of the Commission for Mental Health, Mental Retardation and Substance Abuse Services.

(c) Commission members shall receive per diem, travel and subsistence allowances in accordance with G.S. 138-5 and G.S. 138-6, as appropriate.

(1981 (Reg. Sess., 1982), c. 1191, ss. 55.1-57.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in subsection (a) rewrote subdivision (1), to the extent that a detailed comparison is not possible, and rewrote the first sentence of subdivision (2), which formerly read: "Twenty-one of whom shall be citizens appointed by the Governor and shall represent all geographic regions of the State," and in subsection (b) deleted the former last sentence, which provided that G.S. 143B-13(c) should not apply to Commission members who were also members of the General Assembly. The amendment also rewrote subsection (c), which formerly provided for subsistence and travel allowances for Commission members who were members of the General Assembly, and travel allowances for Commission members who were State employees.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a), (b) and (c) are set out.

Part 6. Social Services Commission.

§ 143B-153. Social Services Commission — creation, powers and duties.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

§ 143B-153.1. (Effective July 1, 1983) Legislative enactment required.

Notwithstanding any provision of this Part or of Chapter 108A of the General Statutes, the setting of rates or fees for social services for services provided under this Part or that Chapter, or the setting of eligibility standards or the designation of services to be provided, if granted by this Part or that Chapter to the Social Services Commission, instead shall be done only by enactment of laws enacted by the General Assembly. This section applies only to the exercise of powers by the Social Services Commission. The Social Services Commission may adopt interim rules or regulations in those areas during any time the General Assembly is not in session or has recessed for more than 10 days, such rules or regulations to expire on the first day of July of the odd-numbered year following their effective date, unless earlier modified, amended, enacted, or repealed by the General Assembly. The Social Services

Commission shall report by May 1 of each year on any rules or regulations adopted under this section. This section is effective July 1, 1983. (1981 (Reg. Sess., 1982), c. 1191, s. 78.)

Editor's Note. — The last sentence of this section provides that this section becomes effective July 1, 1983.

Session Laws 1981 (Reg. Sess., 1982), c. 1191, which added this section and added and amended numerous other sections throughout the General Statutes; provides, in s. 1: "this act may be cited as the Separation of Powers Act of 1982."

§ 143B-154. Social Services Commission — members; selection; quorum; compensation.

The Social Services Commission of the Department of Human Resources shall consist of one member from each congressional district in the State, all of whom shall be appointed by the Governor for four-year terms.

The initial members of the Commission shall be the appointed members of the current Social Services Commission who shall serve for the remainder of their current terms and four additional members appointed by the Governor for terms expiring April 1, 1981. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, removal or disability of a member shall be for the balance of the unexpired term.

In the event that more than 11 congressional districts are established in the State, the Governor shall on July 1 following the establishment of such additional congressional districts appoint a member of the Commission from that congressional district.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Human Resources. (1973, c. 476, s. 135; 1977, c. 516; 1981 (Reg. Sess., 1982), c. 1191, s. 77.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) deleted the former fourth paragraph, relating to the case where due to congressional redistricting two or more members of the Social Services Commission might reside in the same congressional district.

Part 10. North Carolina Medical Care Commission.

§ 143B-165. North Carolina Medical Care Commission — creation; powers and duties.

There is hereby created the North Carolina Medical Care Commission of the Department of Human Resources with the power and duty to promulgate rules and regulations to be followed in the construction and maintenance of public and private hospitals, medical centers, and related facilities with the power and duty to adopt, amend and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article.

(5) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1388, s. 3. (1981 (Reg. Sess., 1982), c. 1388, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, deleted subdivision (5).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and the repeal line for subdivision (5) are set out.

Part 18. Council on Sickle Cell Syndrome.

§ 143B-188. Council on Sickle Cell Syndrome — appointment.

CASE NOTES

Cited in Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).

Part 27. Governor's Waste Management Board.

§ 143B-216.12. Creation; membership; terms; chairperson; vacancies; removal; compensation; quorum.

(a) There is hereby created the Governor's Waste Management Board to be located in the Department of Human Resources. The composition of the Board shall be as follows:

(1) Five members from State government: the Secretary or Commissioner of Human Resources, Natural Resources and Community Development, Commerce, Agriculture, and Crime Control and Public Safety. At the request of such Secretary or Commissioner, the Governor may appoint another official from the same department to serve in his stead.

(2) Eight members appointed by the Governor from the following categories: one from county government, one from municipal government, two from private industry, two from the field of higher education, research or technology, and two from the public at large interested in environmental matters.

(3) Two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121.

(b) The members appointed by the Governor shall serve three-year terms until they are reappointed or replaced, except that two of the original members shall serve terms of one year, three of the original members shall serve terms of two years and three of the original members shall serve terms of three years. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years.

(e) Any appointment to fill a vacancy on the Board created by resignation, dismissal, death, disability or any other cause shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(f) Any member of the Board, except legislative appointees, may be removed by the Governor for misfeasance, malfeasance, or nonfeasance. Members appointed by the General Assembly may be removed for these reasons only by the General Assembly.

(g) Members of the Board who are State employees shall receive travel expenses as set forth in G.S. 138-6. The other Board members shall receive per diem and travel expenses as set forth in G.S. 138-5.

(1981 (Reg. Sess., 1982), c. 1191, ss. 58-62.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote subdivision (3) of subsection (a), which formerly provided for the appointment of one member by the Speaker of the House from the House of Representatives and one member by the Lieutenant Governor from the Senate, in subsection (b) substituted the present second sentence for a former second sentence relating to the terms of service of members appointed from the General Assembly, added the second sentence in subsection (e), rewrote subsection (f), which formerly provided for removal of members of the Board by the Governor, except for those members from the House of Representatives and the Senate, who could be removed only by the Speaker of the House and the Lieutenant Governor, respectively, and deleted the former second sentence of subsection (g), relating to travel and subsistence allowances of board members who were legislators.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a), (b), (e), (f) and (g) are set out.

Article 4.

Department of Revenue.

Part 2. Property Tax Commission.

§ 143B-223. Property Tax Commission — members; selection; quorum; compensation.

The Property Tax Commission of the Department of Revenue shall consist of five members with three appointed by the Governor and two appointed by the General Assembly. The initial members of the Commission shall be the appointed members of the State Board of Assessment who shall serve for a period equal to the remainder of their current term on the State Board of Assessment, one of whose term expires July 1, 1973, and three of whose terms expire July 1, 1975. At the end of the respective terms of office of the initial members of the Commission, their successors shall be appointed for staggered terms for four years and until their successors are appointed and qualify. To achieve the staggered terms, the Governor shall make two appointments on July 1, 1973, each for four years and one appointment on July 1, 1975, for four years. Of the two appointments made by the General Assembly, one shall be made upon the recommendation of the Speaker, and one shall be upon recommendation of the President of the Senate. The initial appointments of the General Assembly shall be for terms to expire on June 30, 1983, and the appointment of their successors shall be for terms of two years for the person appointed by the General Assembly upon the recommendation of the Speaker and four years for the person appointed by the General Assembly upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be in accordance with G.S. 120-121 and vacancies shall be filled in accordance with G.S. 120-122.

Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the right to remove any member for misfeasance, malfeasance or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 and a salary of two hundred dollars ($200.00) per day when hearing cases.

The majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Revenue. (1973, c. 476, s. 190; 1979, 2nd Sess., c. 1241; 1981 (Reg. Sess., 1982), c. 1191, ss. 72, 73.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in the first paragraph substituted "two appointed by the General Assembly" for "one each appointed by the Lieutenant Governor and the Speaker of the House" in the first sentence and substituted the present last three sentences for the former last two sentences, which related to the terms of the members appointed by the Lieutenant Governor and the Speaker of the House.

ARTICLE 6.

Department of Correction.

Part 1. General Provisions.

§ 143B-261.1. Department of Correction — rules and regulations.

CASE NOTES

Rights and privileges of mental health patients who are in the custody of the Department of Corrections are determined by the rules and regulations adopted by the Department of Corrections pursuant to this section. Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

With respect to the rights of prisoners receiving care in Department of Human Resources-operated facilities, this section and the regulations adopted pursuant thereto apply, rather than §§ 122-36 and 122-55.2(d), as they do to those prisoners who remain in prison for their mental health care. Baugh v. Woodard, — N.C. App. —, 287 S.E.2d 412 (1982).

ARTICLE 7.

Department of Natural Resources and Community Development.

Part 4. Environmental Management Commission.

§ 143B-282. Environmental Management Commission — creation; powers and duties.

CASE NOTES

Duties Administrative or Executive. — The duties of the Environmental Management Commission are administrative or executive in character and have no relation to the function

of the legislative branch of government, which is to make laws. State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

§ 143B-283. Environmental Management Commission — members; selection; removal; compensation; quorum; services.

(d) In addition to the members designated by subsection (a), the General Assembly shall appoint four members, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of initial appointees by the General Assembly shall expire on June 30, 1983. Thereafter, these members shall serve two-year terms. (1973, c. 1262, s. 20; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1158, ss. 5, 6; 1981 (Reg. Sess., 1982), c. 1191, s. 19.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote subsection (d), which formerly provided for the appointment of four members of the General Assembly to the Commission.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

CASE NOTES

Constitutionality of Subsection (d). — Section 6 of Chapter 1158 of the 1979 Session Laws (codified as subsection (d) of this section) providing for the appointment of two representatives and two senators to membership on the Environmental Management Commission, violates N.C. Const., art. I, § 6, the separation of powers provision. State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

The legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality. State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Part 13. Parks and Recreation Council.

§ 143B-312. Parks and Recreation Council — members; chairman; selection; removal; compensation; quorum; services.

The Parks and Recreation Council shall be composed of 16 members appointed by the Governor. Four of the members must reside in the western part of the State, four must reside in the Piedmont, and four must reside in the eastern part of the State. The composition of the Council shall be as follows: one person who is an active professor in the area of parks and recreation; one person who is an active professor of biology; one local government official who is involved in recreation planning and is aware of the recreational needs of communities; one person who represents private recreational interests; one person who is the chairman of the Zoological Park Council; one person who is the chairman of one of the local federal reservoir advisory committees; two

persons who shall be under the age of 21 at the time of their appointment; and six person who are citizens of the State and have both knowledge and interest in parks and recreation management. The president of the North Carolina Recreation and Parks Society, Incorporated, and a representative of the Trails Committee, as selected by that Committee, shall serve as ex officio members of the Council.

The Governor shall designate one member of the Council to serve as chairman at his pleasure.

The members of the Council shall be appointed to terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Natural Resources and Community Development. (1973, c. 1262, s. 56; 1977, c. 771, s. 4; 1979, c. 42, s. 1; 1981 (Reg. Sess., 1982), c. 1189, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "16" for "14" in the first sentence of the first paragraph and inserted "two persons who shall be under the age of 21 at the time of their appointment;" in the third sentence of the first paragraph. The 1981 (Reg. Sess., 1982) amendatory act located the changes to be made in lines 3 and 11 of the sections. The changes fell in fact in lines 1 and 10 of the section in the 1981 Cumulative Supplement, but have been given effect according to their obvious intent in the section as set out above.

ARTICLE 8.

Department of Transportation.

Part 1. General Provisions.

§ 143B-346. Department of Transportation — purpose and functions.

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

Part 2. Board of Transportation — Secondary Roads Council.

§ 143B-350. Board of Transportation — organization; powers and duties, etc.

(d) The Board of Transportation shall have two members appointed by the General Assembly. One of these members shall be appointed upon the recommendation of the Speaker of the House of Representatives, and one shall be appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(e) The Board of Transportation shall meet once in each 60 days at such regular meeting times as the Board may by rule provide and at any place in the State as the Board may provide. The Board may hold special meetings at any time at the call of the chairman or any three members. The Board shall have the power to adopt and enforce rules and regulations for the government of its business and proceedings. The Board shall keep minutes of its meetings, which shall at all times be open to public inspection. The majority of the Board shall constitute a quorum for the transaction of business. Board members shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5 and G.S. 138-6, as appropriate.

(1981 (Reg. Sess., 1982), c. 1191, ss. 9, 10.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote subsection (d), which formerly provided for two members appointed from the membership of the General Assembly, and substituted the present last sentence in subsection (e) for the former last two sentences, which provided per diem and necessary travel and subsistence expenses for the members of the Board who were not members of the General Assembly and travel and subsistence expenses for the members of the Board who were members of the General Assembly.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

Article 9.

Department of Administration.

Part 3. North Carolina Capital Planning Commission.

§ 143B-373. North Carolina Capital Planning Commission — creation; powers and duties.

There is hereby recreated the North Carolina Capital Planning Commission of the Department of Administration.

(1) The Commission shall have the following powers and duties:

a. To obtain and maintain up-to-date building requirements for State governmental agencies in Wake County;
b. To formulate a long-range capital improvement program as required for State central governmental agencies in Wake County and maintain this program up-to-date;
c. To recommend the acquisition of land as required;
d. To recommend to the Governor the locations for State government buildings, monuments, memorials and improvements in Wake County, except for buildings occupied by the General Assembly; and
e. To recommend to the Governor the name for any new State government building or any building hereafter acquired by the State of North Carolina in Wake County, with the exception of buildings comprising a part of the North Carolina State University, the Dorothea Dix Hospital, the General Assembly or the Governor Morehead School;

(1981 (Reg. Sess., 1982), c. 1191, s. 66.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted "Wake County" for "the City of Raleigh and its environs" in subdivisions (1)a, (1)b, (1)d and (1)e, in subdivision (1)d substituted "To recommend to the Governor" for "To select" and inserted the language ", except for buildings occupied by the General Assembly" near the end thereof, and in subdivision (1)e substituted "To recommend to the Governor the name for" for "To name" and inserted "the General Assembly" near the end of subdivision (1)e.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (1) are set out.

Part 14A. Governor's Advocacy Council for Persons with Disabilities.

§ 143B-403.2. Governor's Advocacy Council for Persons with Disabilities — members; selection; quorum; compensation.

The Governor's Advocacy Council for Persons with Disabilities of the Department of Administration shall consist of 22 members. The composition of the Council shall be as follows: four "ex officio" members from State government agencies as follows: the Commissioner of Labor, the Commissioner of Insurance, the Secretary of the Department of Human Resources and the Chairman of the Employment Security Commission. The Governor shall appoint 16 members, at least eight shall be disabled persons or parents of disabled persons. The General Assembly shall appoint two members in accordance with G.S. 120-121, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. The Governor shall appoint at least one person from each congressional district in accordance with G.S. 147-12(3)b.

The initial term for one half of the members appointed by the Governor shall be two years. The initial term for the remaining members appointed by the Governor shall be four years. At the end of the respective terms of office of the initial members of the Council, the appointment of all members with the exception of those from State agencies, shall be for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a

member shall be for the balance of the unexpired term. The initial members appointed by the General Assembly shall serve for terms to expire June 30, 1983. Subsequently, members appointed by the General Assembly shall serve two-year terms beginning July 1, 1983, and biennially thereafter.

The Governor may remove any member of the Council appointed by the Governor.

The Governor shall designate one member of the Council to serve as chairman and one member to serve as vice-chairman at his pleasure.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1977, c. 822, s. 1; 1979, c. 575; 1981 (Reg. Sess., 1982), c. 1191, ss. 23, 23.1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in the first paragraph, rewrote the third sentence, which formerly provided for the appointment of 18 members by the Governor, and added the last three sentences, and in the second paragraph added the last two sentences.

Part 15. North Carolina State Commission of Indian Affairs.

§ 143B-407. North Carolina State Commission of Indian Affairs — membership; term of office; chairman; compensation.

(a) The State Commission of Indian Affairs shall consist of two persons appointed by the General Assembly, the Secretary of Human Resources, the Director of the State Employment Security Commission, the Secretary of Administration, the Secretary of Natural Resources and Community Development, the Commissioner of Labor or their designees and 15 representatives of the Indian community. These 15 Indian members shall be selected by tribal or community consent from the Indian groups that are recognized by the State of North Carolina and are principally geographically located as follows: the Coharie of Sampson and Harnett Counties; the Haliwa of Halifax, Warren, and adjoining counties; the Lumbees of Robeson, Hoke and Scotland Counties; the Waccamaw-Siouan from Columbus and Bladen Counties; and the Native Americans located in Cumberland, Guilford and Mecklenburg Counties. The Coharie shall have two members; the Haliwa, two; the Lumbees, three; the Waccamaw-Siouan, two; the Cumberland County Association for Indian People, two; the Guilford Native Americans, two; the Metrolian Native Americans, two. If the Eastern Band of Cherokees should choose to participate, then they shall have two members on the commission thereby bringing the total Indian membership to 17. Of the two appointments made by the General Assembly, one shall be made upon the recommendation of the Speaker, and one shall be made upon recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121 and vacancies shall be filled in accordance with G.S. 120-122.

(b) Members serving by virtue of their office within State government shall serve so long as they hold that office. Members representing Indian tribes and groups shall be elected by the tribe or group concerned and shall serve for three-year terms except that at the first election of Commission members by tribes and groups one member from each tribe or group shall be elected to a

one-year term, one member from each tribe or group to a two-year term, and one member from the Lumbees to a three-year term. Thereafter, all Commission members will be elected to three-year terms. All members shall hold their offices until their successors are appointed and qualified. Vacancies occurring on the Commission shall be filled by the tribal council or governing body concerned. Any member appointed to fill a vacancy shall be appointed for the remainder of the term of the member causing the vacancy. The Governor shall appoint a chairman of the Commission from among the Indian members of the Commission, subject to ratification by the full Commission. The initial appointments by the General Assembly shall expire on June 30, 1983. Thereafter, successors shall serve for terms of two years.

(1981 (Reg. Sess., 1982), c. 1191, ss. 74-76.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in subsection (a) substituted "two persons appointed by the General Assembly" for "the Speaker of the House of Representatives (or a person designated by the Speaker), the Lieutenant Governor (or a person designated by the Lieutenant Governor)" and added the last two sentences thereof, and in subsection (b) added the last two sentences.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a) and (b) are set out.

Part 17. Governor's Advocacy Council on Children and Youth.

§ 143B-414. Governor's Advocacy Council on Children and Youth — creation; powers and duties.

There is hereby created the Governor's Advocacy Council on Children and Youth of the Department of Administration. The Council shall have the following functions and duties:

(8) To perform other advisory functions assigned by the Secretary of Administration or a legislative committee. (1973, c. 476, s. 180; 1977, c. 872, s. 6; 1981 (Reg. Sess., 1982), c. 1191, s. 13.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote subdivision (8), which formerly read: "To perform such other functions as may be assigned to it by the Secretary of Administration or any legislative committee."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (8) are set out.

§ 143B-415. Governor's Advocacy Council on Children and Youth — members; selection; quorum; compensation.

The Governor's Advocacy Council on Children and Youth shall consist of 17 members. The composition of the Council shall be as follows: two members appointed by the President of the Senate from the membership of the Senate; two members selected by the Speaker of the House of Representatives from the membership of the House of Representatives; 13 members appointed by the Governor.

Of the members appointed by the Governor, at least one shall come from each congressional district in accordance with G.S. 147-12(3)b.

In selecting the 13 members of the Council, the Governor shall select nine public-spirited adult citizens who have an interest in and knowledge of children and youth, persons who work with children or representatives of organiza-

tions concerned with problems of children and youth. The remaining four members to be appointed by the Governor shall consist of two youths of each sex who are 18 years of age or under at the time of their appointments.

The initial members of the Council shall be the members of the former Governor's Advocacy Council on Children and Youth of the Department of Human Resources whose terms shall expire on the date they would have, had said Council of the Department of Human Resources not been transferred. At the end of the respective terms of office of the initial members of the Council, the appointment of all members shall be as provided in this section and for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, death, dismissal, or disability of a member shall be for the balance of the unexpired term.

The Governor may remove any member of the Council appointed by the Governor.

The Governor shall designate from the membership of the Council a chairman and a vice-chairman to serve at his pleasure.

The Council shall meet at least quarterly and upon the call of the chairman or upon written request of at least nine members.

The members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1973, c. 476, s. 181; 1977, c. 872, s. 6; 1981 (Reg. Sess., 1982), c. 1191, s. 14.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) added the second paragraph.

Part 20. Public Officers and Employees Liability Insurance Commission.

§ 143B-422. Commission created; membership.

There is hereby created within the Department of Administration a Public Officers and Employees Liability Insurance Commission. The Commission shall consist of 10 members who shall be appointed as follows: The Governor shall appoint six members as follows: two members who are members of the insurance industry who may be chosen from a list of three nominees submitted to the Governor by the Independent Insurance Agents of North Carolina, Inc., and a list of three nominees submitted by the Carolinas Association of Professional Insurance Agents, North Carolina Division; one member who is employed by a police department who may be chosen from a list of three nominees submitted to the Governor jointly by the North Carolina Police Chiefs Association and North Carolina Police Executives Association, and one member who is employed by a sheriff's department who may be chosen from a list of three nominees submitted to the Governor by the North Carolina Sheriff's Association; one member representing city government who may be chosen from a list of three nominees submitted to the Governor by the North Carolina League of Municipalities; and one member representing county government who may be chosen from a list of three nominees submitted to the Governor by the North Carolina Association of County Commissioners; and the General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Appointments by the General Assembly

shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. The Secretary of the Department of Crime Control and Public Safety or his designate shall be an ex officio member. The Attorney General or his designate shall be an ex officio member. One insurance industry member appointed by the Governor shall be appointed to a term of two years and one insurance industry member shall be appointed to a term of four years. The police department member shall be appointed to a term of two years and the sheriff's department member shall be appointed to a term of four years. The representative of county government shall be appointed to a term of two years and the representative of city government to a term of four years. Beginning July 1, 1983, the appointment made by the General Assembly upon the recommendation of the Speaker shall be for two years, and the appointment made by the General Assembly upon the recommendation of the President of the Senate shall be for four years. Except as provided in this section, if any vacancy occurs in the membership of the Commission, the appointing authority shall appoint another person to fill the unexpired term of the vacating member. After the initial terms established herein have expired, all appointees to the Commission shall be appointed to terms of four years.

The Commission members shall elect the chairman and vice-chairman of the Commission. The Commission may, by majority vote, remove any member of the Commission for chronic absenteeism, misfeasance, malfeasance or other good cause. (1979, c. 325, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 24-26.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in the first paragraph, substituted the language beginning "and the General Assembly" and ending "June 30, 1983" for "the Lieutenant Governor shall appoint one member who shall be a member of the North Carolina Senate; the Speaker of the House of Representatives shall appoint one member who shall be a member of the North Carolina House of Representatives" at the end of the second sentence, inserted the present third and fourth sentences, deleted the former eighth and ninth sentences, relating to the terms of the members appointed by the Lieutenant Governor and the Speaker of the House, inserted the present tenth sentence, beginning "Beginning July 1, 1983," and in the next-to-last sentence added "Except as provided in this section," at the beginning thereof.

§ 143B-423. Meetings of Commission; compensation.

The Commission shall meet at least four times per year, on or about January 15, April 15, July 15, October 15 and upon call of the chairman. The members shall receive no compensation for attendance at meetings, except a per diem expense reimbursement. Members of the Commission who are not officers or employees of the State shall receive reimbursement for subsistence and travel expenses at rates set out in G.S. 138-5 from funds made available to the Commission. Members of the Commission who are officers or employees of the State shall be reimbursed for travel and subsistence at the rates set out in G.S. 138-6 from funds made available to the Commission. (1979, c. 325, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 27.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) deleted the former third sentence, which related to reimbursement of legislative members of the Commission.

Part 21. Child and Family Services Interagency Committees.

§ 143B-426.4. Child and Family Services Interagency Committee — powers and duties.

The Child and Family Services Interagency Committee has the following powers and duties:

(7) To perform other advisory duties assigned by the governor for the purpose of effectuating the policies set out in this Part. (1979, c. 898, s. 1; 1981, c. 563, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 12.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted "other advisory duties" for "other duties" in subdivision (7).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (7) are set out.

Part 22. North Carolina Agency for Public Telecommunications.

§ 143B-426.9. North Carolina Agency for Public Telecommunications — creation; membership; appointments, terms and vacancies; officers; meetings and quorum; compensation.

The North Carolina Agency for Public Telecommunications is created. It is governed the Board of Public Telecommunications Commissioners, composed of 27 members as follows:

(1) A Chairman appointed by, and serving at the pleasure of, the Governor;

(2) Ten at-large members, appointed by the Governor from the general public;

(3) Two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121;

(4) Two members appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121;

(5) The Secretary of Administration, ex officio;

(6) The Chairman of the Board of Trustees of The University of North Carolina Center for Public Television (if and when established), ex officio;

(7) The Chairman of the State Board of Education, ex officio;

(8) The Chairman of the North Carolina Privacy and Freedom of Information Commission (if and when established), ex officio;

(9) The Chairman of the North Carolina Utilities Commission, ex officio;

(10) The Director of the Public Staff of the North Carolina Utilities Commission, ex officio;

(11) The Chairman of the Public Radio Advisory Committee of the North Carolina Agency for Public Telecommunications, ex officio;

(12) The Superintendent of Public Instruction, ex officio;

(13) The President of the University of North Carolina, ex officio;

(14) The President of the Department of Community Colleges, ex officio; and

(15) Two members ex officio who shall rotate from among the remaining heads of departments enumerated in G.S. 143A-11 or G.S. 143B-6, appointed by the Governor.

The 10 at-large members shall serve for terms staggered as follows: four terms shall expire on June 30, 1980; and three terms shall expire on June 30, 1982; and three terms shall expire on June 30, 1984. Thereafter, the members at large shall be appointed for full four-year terms and until their successors are appointed and qualified. In making appointments of members at large, the Governor shall seek to appoint persons from the various geographic areas of the State including both urban and rural areas; persons from various classifications as to sex, race, age, and handicapped persons; and persons who are representatives of the public broadcast, commercial broadcast, nonbroadcast distributive systems and private education communities of the State.

The terms of the ex officio members are coterminous with their respective terms of office. In the event that any of the offices represented on the Board ceases to exist, the successor officer to the designated member shall become an ex officio member of the Board; if there shall be no successor, then the position on the Board shall be filled by a member to be appointed by the Governor from the general public. The ex officio members shall have the right to vote.

The initial members appointed to the Board by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years.

The terms of the rotating ex officio members shall be of one-year duration, and the schedule of rotation is determined by the Governor.

Each State official who serves on the Board may designate a representative of his department, agency or institution to sit in his place on the Board and to exercise fully the official's privileges of membership.

The Secretary of Administration or his designee serves as secretary of the Board.

Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies shall be filled in the same manner as the original appointment.

The Governor may remove any member of the Board from office in accordance with the provisions of G.S. 143B-16.

The Board meets quarterly and at other times at the call of the chairman or upon written request of at least six members.

A majority of the Board members shall constitute a quorum for the transaction of business. (1979, c. 900, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 6-8.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote subdivision (3), which formerly read: "Two members of the North Carolina House of Representatives, appointed by the Speaker of the House of Representatives," and subdivision (4), which formerly read: "Two members of the North Carolina Senate, appointed by the President of the Senate," rewrote the fourth unnumbered paragraph, which formerly read: "The terms of the members of the North Carolina House of Representatives and the North Carolina Senate are coterminous with their terms in office and until their successors are appointed and qualified," and rewrote the eighth paragraph, which formerly read: "Ad interim appointments to fill vacancies on the Board are for the balance of the unexpired term and are made in the same manner as was the original appointment."

ARTICLE 10.

Department of Commerce.

Part 2. Economic Development.

§ 143B-434. Economic Development Board — creation, duties, membership.

(a) There is created within the Department of Commerce an Economic Development Board. The Board shall advise the Secretary of Commerce on:

(1) The formulation of a program for the economic development of the State of North Carolina; and

(2) The formulation of a budget and the hiring of the head of each division of the Department of Commerce concerned with the expansion of the travel and tourism industry.

The Secretary shall prepare the budget of the Department and shall hire the heads of the above-mentioned divisions who shall serve at his pleasure. The Board shall meet at least quarterly at the call of its chairman or the Secretary. Each quarter the Secretary shall report to the Board on the program and progress of this State's economic development.

The Economic Development Board shall consist of 25 members. The Secretary of Commerce, the President of the Senate or his appointee, and the Speaker of the House of Representatives or his appointee, shall be members of the Board. The Governor shall appoint 22 members of the Board. Of his appointees, the Governor shall appoint at least one member residing in each congressional district of the State.

The initial appointments by the Governor shall be made on or after the date of ratification, 11 terms to expire July 1, 1979, and 11 terms to expire on July 1, 1981. Thereafter, at the expiration of each stipulated term of office all appointments made by the Governor shall be for a term of four years. Any vacancy occurring in the membership of the Economic Development Board appointed by the Governor shall be filled by the Governor for the unexpired term. The Governor shall have the authority to remove any member of the Economic Development Board appointed by the Governor.

The Governor shall designate from among the members of the Economic Development Board a chairman and a vice-chairman. The Secretary of Commerce or his designee shall serve as Secretary of the Economic Development Board. If a vacancy occurs in the office of the Lieutenant Governor, the President pro tempore shall fill the vacancy. If a vacancy occurs in the office of the Speaker of the House of Representatives, the Speaker pro tempore shall fill the vacancy.

The members of the Economic Development Board appointed by the Governor shall receive per diem and necessary travel and subsistence expenses payable to members of State Boards and agencies generally pursuant to G.S. 138-5 and 138-6, as the case may be; provided, however, that the chairman of the Economic Development Board and the Lieutenant Governor shall not be entitled to receive per diem in addition to salary. The members of the Economic Development Board who are members of the General Assembly shall not receive per diem but shall receive necessary travel and subsistence expenses at rates prescribed by G.S. 120-3.1.

(1981 (Reg. Sess., 1982), c. 1191, s. 18.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) rewrote the first paragraph of subsection (a) to the extent that a detailed comparison is not possible. In the second paragraph of subsection (a), the

amendment substituted "the President of the Senate or his appointee" for "the Lieutenant Governor (or a person designated by the Lieutenant Governor)" and "or his appointee" for "(or a person designated by the Speaker)" and deleted "Economic Development" preceding "Board," in the second sentence, substituted "of" for "to" in the third sentence and added the last sentence.

Only Part of Section Set Out. — As the rest of the second was not changed by the amendment, only subsection (a) is set out.

Part 5. North Carolina Board of Science and Technology.

§ 143B-441. North Carolina Board of Science and Technology; membership; organization; compensation; staff services.

The North Carolina Board of Science and Technology consists of the Governor, the Science Advisor to the Governor, and 13 members appointed as follows: the Governor shall appoint one member from the University of North Carolina at Chapel Hill, one member from North Carolina State University at Raleigh, and two members from other components of the University of North Carolina, all nominated by the President of the University of North Carolina; one member from Duke University, nominated by the President of Duke University; one member from a private college or university, other than Duke University, in North Carolina, nominated by the President of the Association of Private Colleges and Universities; one member from the Research Triangle Institute, nominated by the executive committee of the board of that institute; two members from private industry in North Carolina; and two members from public agencies in North Carolina. Two members shall be appointed by the General Assembly, one shall be appointed upon the recommendation of the President of the Senate, and one shall be appointed upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. The nominating authority for any vacancy on the Board among members appointed by the Governor shall submit to the Governor two nominations for each position to be filled, and the persons so nominated shall represent different disciplines.

The initial members appointed to the Board by the General Assembly shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. The members from public agencies shall serve for terms expiring at the end of the term of the Governor appointing them. Of the remaining nine appointments by the Governor, five shall serve for four years expiring June 30, 1983, and four shall serve for two years expiring June 30, 1981; thereafter terms of all nine of these remaining members appointed by the Governor shall be for four years and until their successors are appointed and qualified. Any appointment to fill a vacancy on the Board created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall serve as chairman of the Board. The vice chairman of the Board shall be designated by the Governor from among the members of the Board. The Science Advisor to the Governor shall serve as executive director of the Board. The Secretary of Commerce or his designee shall serve as secretary to the Board.

The Governor may remove any member of the Board from office in accordance with the provisions of G.S. 143B-16.

Members of the Board who are employees of State agencies or institutions shall receive subsistence and travel allowances authorized by G.S. 138-6. Legislative members of the Board shall receive subsistance and travel allowances authorized by G.S. 120-3.1.

A majority of the Board constitutes a quorum for the transaction of business.

The Secretary of Commerce shall provide all clerical and other services required by the Board. (1979, c. 668, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 44-46.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in the first paragraph rewrote the second sentence, which formerly provided for one member to be appointed by the Lieutenant Governor from the membership of the Senate and one member to be appointed by the Speaker of the House from the membership of the House, in the second paragraph rewrote the first two sentences, which formerly provided for the terms of the members appointed from the Senate and House, and in the fifth paragraph deleted the former second sentence, which provided subsistence and travel allowances for the legislative members of the Board.

Part 10. North Carolina State Ports Authority.

§ 143B-452. Creation of Authority — membership; appointment, terms and vacancies; officers; meetings and quorum; compensation.

The North Carolina State Ports Authority is hereby created. It shall be governed by a board composed of nine members and hereby designated as the Authority. Effective July 1, 1983, it shall be governed by a board composed of 11 members and hereby designated as the Authority. Members of the General Assembly shall be eligible for appointment to the membership on the Authority. The General Assembly suggests and recommends that no person be appointed to the Authority who is domiciled in the district of the North Carolina House of Representatives or the North Carolina Senate in which a State port is located. The Governor shall appoint seven members to the Authority, and the General Assembly shall appoint two members of the Authority. Effective July 1, 1983, the Authority shall consist of seven persons appointed by the Governor, and four persons appointed by the General Assembly.

The initial appointments by the Governor shall be made on or after March 8, 1977, two terms to expire July 1, 1979; two terms to expire July 1, 1981; and three terms to expire July 1, 1983. Thereafter, at the expiration of each stipulated term of office all appointments made by the Governor shall be for a term of six years. The members of the Authority appointed by the Governor shall be selected from the state-at-large and insofar as practicable shall represent each section of the State in all of the business, agriculture, and industrial interests of the State. Any vacancy occurring in the membership of the Authority appointed by the Governor shall be filled by the Governor for the unexpired term. The Governor shall have the authority to remove any member appointed by the Governor.

The General Assembly shall appoint two persons to serve terms expiring June 30, 1983. The General Assembly shall appoint four persons to serve terms beginning July 1, 1983, to serve until June 30, 1985, and successors shall serve for two-year terms. Of the two appointments to be made in 1982, one shall be made upon the recommendation of the Speaker, and one shall be made upon the recommendation of the President of the Senate. Of the four appointments made in 1983 and biennially thereafter, two shall be made upon the recommendation of the President of the Senate, and two shall be made upon the recommendation of the Speaker. Appointments by the General Assembly shall be

made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122.

The Governor shall appoint from the members of the Authority the chairman and vice-chairman of the Authority. The Secretary of Commerce or his designee shall serve as secretary of the Authority. The members of the Authority shall appoint a treasurer of the Authority.

The Authority shall meet once in each 60 days at such regular meeting time as the Authority by rule may provide and at any place within the State as the Authority may provide, and shall also meet upon the call of its chairman or a majority of its members. A majority of its members shall constitute a quorum for the transaction of business. The members of the Authority shall not be entitled to compensation for their services, but they shall receive per diem and necessary travel and subsistence expense in accordance with G.S. 138-5. (1945, c. 1097, s. 1; 1949, c. 892, s. 1; 1953, c. 191, s. 1; 1959, c. 523, s. 1; 1961, c. 242; 1975, c. 716, s. 2; 1977, c. 65, s. 1; c. 198, s. 9; 1981 (Reg. Sess., 1982), c. 1191, ss. 69-71.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in the first paragraph inserted the present third sentence and substituted the present last two sentences for the former last sentence, which provided for appointment by the Governor of seven members to the Authority and by the Lieutenant Governor and Speaker of the House of one member each. The amendment substituted the present third paragraph for the former third and fourth paragraphs, which related to the appointment by the Speaker of the House of Representatives of one member to the Board from the membership of the House and the appointment by the Lieutenant Governor of one member from the membership of the Senate.

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

§ 143B-453. Purposes of Authority.

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

§ 143B-454. Powers of Authority.

In order to enable it to carry out the purposes of this Part, the said Authority shall:

(9) Be authorized and empowered to apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources available for any and all of the purposes authorized in this Article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the State of North Carolina, or any political subdivison thereof, or any public or private lender or donor, and to give vision thereof, or any public or private lender or donor, and to give such evidences of indebtedness as shall be required, provided,

however, that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State of North Carolina, or any political subdivisions thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina, or any political subdivision thereof: Provided, however, at no time may the total outstanding indebtedness of the Authority, excluding bond indebtedness exceed a total of five hundred thousand dollars ($500,000) without approval of the Governor, after receiving the advice of the Advisory Budget Commission;

(1981 (Reg. Sess., 1982), c. 1181, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "Governor, after receiving the advice of the Advisory Budget Commission" for "Advisory Budget Commission" at the end of subdivision (9).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (9) are set out.

CASE NOTES

Quoted in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

§ 143B-455. Approval of acquisition and disposition of real property.

CASE NOTES

Cited in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

§ 143B-456. Issuance of bonds and notes.

(b) Prior to the sale and delivery of any bonds or notes by the Authority, the Governor, after receiving the advice of the Advisory Budget Commission shall approve the general purposes of and the general security provisions for any such bonds or notes. Such bonds or notes may be sold in such manner, either at public or private sale, and for such price as the Authority shall determine. Bonds or notes may be issued under the provisions of this Part without obtaining, except as otherwise expressly provided in this Part, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Part and the provisions of the resolution authorizing the issuance of such bonds or notes or the trust agreement securing the same.

(1981 (Reg. Sess., 1982), c. 1181, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "Governor, after receiving the advice of the Advisory Budget Commission" for "Advisory Budget Commission" in the first sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

CASE NOTES

Cited in Guthrie v. North Carolina State Ports Auth., — N.C. App. —, 286 S.E.2d 823 (1982).

§ 143B-456.1. Bonds and notes for special user projects.

Editor's Note. —
This section, enacted by Session Laws 1981, c. 856, s. 2, was made effective upon there becoming effective a constitutional amendment authorizing the General Assembly to enact laws dealing with the subject matter of the section. Such an amendment was proposed by Session Laws 1981, c. 808, as amended by Session Laws 1981, c. 987, and submitted to the people at an election held June 29, 1982, and was defeated. This section, therefore, did not go into effect.

ARTICLE 11.

Department of Crime and Control and Public Safety.

Part 1. General Provisions.

§ 143B-476. Department of Crime Control and Public Safety — head; powers and duties as to emergencies and disasters.

(a) The head of the Department of Crime Control and Public Safety is the Secretary of Crime Control and Public Safety, who shall be known as the Secretary. The Secretary shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred on him by the Constitution and laws of this State. These powers and duties include:

(1) Accepting gifts, bequests, devises, grants, matching funds and other considerations from private or governmental sources for use in promoting the work of the Governor's Crime Commission;
(2) Making grants for use in pursuing the objectives of the Governor's Crime Commission;
(3) Adopting rules as may be required by the federal government for federal grants-in-aid for criminal justice purposes;
(4) Ascertaining the State's duties concerning grants to the State by the Law Enforcement Assistance Administration of the United States Department of Justice, and developing and administering a plan to ensure that the State fulfills its duties; and
(5) Administering the Assistance Program for Victims of Rape and Sex Offenses.

(1981 (Reg. Sess., 1982), c. 1191, s. 17.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) added the language beginning "These powers and duties include" at the end of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Part 3. Governor's Crime Commission.

§ 143B-478. Governor's Crime Commission — creation; composition; terms; meetings, etc.

(a) There is hereby created the Governor's Crime Commission of the Department of Crime Control and Public Safety. The Commission shall consist of 34 voting members and six nonvoting members. The composition of the Commission shall be as follows:

(1) The voting members shall be:

a. The Governor, the Chief Justice of the Supreme Court of North Carolina (or his alternate), the Attorney General, the Director of the Administrative Office of the Courts, the Secretary of the Department of Human Resources, the Secretary of the Department of Correction, and the Superintendent of Public Instruction;

b. A judge of superior court, a judge of district court specializing in juvenile matters, a chief district court judge, and a district attorney;

c. A defense attorney, three sheriffs (one of whom shall be from a "high crime area"), three police executives (one of whom shall be from a "high crime area"), six citizens (two with knowledge of juvenile delinquency and the public school system, two of whom shall be under the age of 21 at the time of their appointment, one representative of a "private juvenile delinquency program," and one in the discretion of the Governor), three county commissioners or county officials, and three mayors or municipal officials;

d. Two members of the North Carolina House of Representatives and two members of the North Carolina Senate.

(2) The nonvoting members shall be the Director of the State Bureau of Investigation, the Secretary of the Department of Crime Control and Public Safety, the Director of the Division of Youth Services of the Department of Human Resources, the Administrator for Juvenile Services of the Administrative Office of the Courts, the Director of the Division of Prisons and the Director of the Division of Adult Probation and Paroles.

(b) The membership of the Commission shall be selected as follows:

(1) The following members shall serve by virtue of their office: the Governor, the Chief Justice of the Supreme Court, the Attorney General, the Director of the Administrative Office of the Courts, the Secretary of the Department of Human Resources, the Secretary of the Department of Correction, the Director of the State Bureau of Investigation, the Secretary of the Department of Crime Control and Public Safety, the Director of the Division of Prisons, the Director of the Division of Adult Probation and Paroles, the Director of the Division of Youth Services, the Administrator for Juvenile Services of the Administrative Office of the Courts, and the Superintendent of Public Instruction. Should the Chief Justice of the Supreme Court choose not to serve, his alternate shall be selected by the Governor from a list submitted by the Chief Justice which list must contain no less than three nominees from the membership of the Supreme Court.

(2) The following members shall be appointed by the Governor: the district attorney, the defense attorney, the three sheriffs, the three police executives, the six citizens, the three county commissioners or county officials, the three mayors or municipal officials.

(3) The following members shall be appointed by the Governor from a list submitted by the Chief Justice of the Supreme Court, which list shall contain no less than three nominees for each position and which list must be submitted within 30 days after the occurrence of any vacancy in the judicial membership: the judge of superior court, the judge of district court specializing in juvenile matters, and the chief district court judge.

(4) The members of the House of Representatives shall be appointed by the Speaker of the House of Representatives and the members of the Senate shall be appointed by the Lieutenant Governor. These members shall perform the advisory review of the State plan for the General Assembly as permitted by section 206 of the Crime Control Act of 1976 (Public Law 94-503).

(5) The Governor may serve as chairman, designating a vice-chairman to serve at his pleasure, or he may designate a chairman and vice-chairman both of whom shall serve at his pleasure.

(1981 (Reg. Sess., 1982), c. 1189, s. 4.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment in the second sentence of the introductory paragraph of subsection (a) substituted "34" for "32," in subdivision (a)(1)c substituted "six" for "four" preceding "citizens" and inserted "two of whom shall be under the age of 21 at the time of their appointment," preceding "one representative" and in subdivision (b)(2) substituted "six" for "four" preceding "citizens."

Only Part of Section Set Out. — As the rest of section was not changed by the amendment, only subsections (a) and (b) are set out.

§ 143B-479. Governor's Crime Commission — powers and duties.

(a) The Governor's Crime Commission shall have the following powers and duties:

(1) To serve, along with its adjunct committees, as the chief advisory board to the Governor and to the Secretary of the Department of Crime Control and Public Safety on matters pertaining to the criminal justice system.

(2) To recommend a comprehensive statewide plan for the improvement of criminal justice throughout the State which is consistent with and serves to foster the following established goals of the criminal justice system:

a. To reduce crime,

b. To protect individual rights,

c. To achieve justice,

d. To increase efficiency in the criminal justice system,

e. To promote public safety,

f. To provide for the administration of a fair and humane system which offers reasonable opportunities for adjudicated offenders to develop progressively responsible behavior, and

g. To increase professional skills of criminal justice officers.

(3) To advise State and local law-enforcement agencies in improving law enforcement and the administration of criminal justice;

(4) To make studies and recommendations for the improvement of law enforcement and the administration of criminal justice;

(5) To encourage public support and respect for the criminal justice system in North Carolina;

(6) To seek ways to continue to make North Carolina a safe and secure State for its citizens;

(7) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 15.
(8) To recommend objectives and priorities for the improvement of law enforcement and criminal justice throughout the State;
(9) To recommend recipients of grants for use in pursuing its objectives, under such conditions as are deemed to be necessary;
(9a) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 15.
(10) To serve as a coordinating committee and forum for discussion of recommendations from its adjunct committees formed pursuant to G.S. 143B-480; and
(11) To serve as the primary channel through which local law-enforcement departments and citizens can lend their advice, and state their needs, to the Department of Crime Control and Public Safety.

(b) All directives of the Governor's Crime Commission shall be administered by the Director, Crime Control Division of the Department of Crime Control and Public Safety. (1975, c. 663; 1977, c. 11, s. 2; 1979, c. 107, s. 11; 1981, c. 931, s. 3; 1981 (Reg. Sess., 1982), c. 1191, s. 15.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) in subsection (a), substituted "To recommend" for "To develop" at the beginning of subdivision (2) and "To advise" for "To assist and participate with the" at the beginning of subdivision (3), deleted former subdivision (7), which formerly authorized the Commission to accept gifts, bequests, grants, etc. for use in promoting its work, substituted "To recommend" for "To set" at the beginning of subdivision (8), "To recommend recipients of" for "To make" at the beginning of subdivision (9) and deleted former subdivision (9a), which formerly authorized the Commission to administer the Assistance Program for Victims of Rape and Sex Offenses. In subsection (b) the amendment deleted the former first paragraph, authorizing the Commission to adopt rules and regulations for grants-in-aid for criminal justice purposes and making the Commission the single State agency responsible for establishing policy and carrying out the State's duties with respect to grants to the State by the Law Enforcement Assistance Administration, and deleted the first two sentences of the former last paragraph, relating to decisions and grants made by the former Governor's Law and Order Commission and terminating the said former Commission.

Part 3A. Assistance Program for Victims of Rape and Sex Offenses.

§ 143B-480.1. Assistance Program for Victims of Rape and Sex Offenses.

There is established an Assistance Program for Victims of Rape and Sex Offenses, hereinafter referred to as the "Program". The Secretary shall administer and implement the Program and shall have authority over all assistance awarded through the Program. The Secretary shall promulgate rules and guidelines for the Program. (1981, c. 931, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 16.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted "Secretary" for "Governor's Crime Commission" in the second and third sentences.

§ 143B-480.2. Victim assistance.

(b) Assistance for medical expenses authorized under this section is to be paid directly to the attending hospital and physicians upon the filing of the proper forms in the manner prescribed in the guidelines promulgated by the Secretary together with a certified copy of the police report.

(c) Assistance shall not be awarded unless the rape, attempted rape, sexual offense, or attempted sexual offense was reported to a law-enforcement officer within 72 hours after its occurrence or the Secretary finds there was good cause for the failure to report within that time.

(d) Upon an adverse determination by the Secretary on a claim for medical expenses, a victim is entitled to judicial review of that decision. The person seeking review shall file a petition in the Superior Court of Wake County. (1981, c. 931, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 16.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) substituted "Secretary" for "Governor's Crime Commission" in subsections (b), (c) and (d).

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

Part 4. State Fire Commission.

§ 143B-481. State Fire Commission created — membership.

There is hereby created the State Fire Commission of the Department of Crime Control and Public Safety which shall be composed of 12 voting members as follows: the Executive Secretary and the Legislative Chairman of the North Carolina State Firemen's Association, the Executive Secretary of the North Carolina Association of Fire Chiefs, the Director of the North Carolina Fire College and Pump School, a county fire marshal to be elected by the County Fire Marshal Administrative Association, one mayor or other elected city official appointed by the Governor after consulting with the President of the League of Municipalities, one county commissioner appointed by the Governor after consulting with the President of the Association of County Commissioners, the Director of Fire and Rescue Training for the North Carolina Department of Insurance, the Director of Fire Training for the North Carolina Department of Community Colleges, and one member appointed by the Governor from the public at large, not employed by government and not directly involved in fire fighting. The General Assembly shall appoint two members, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122.

The following State officials, or their designees, shall serve by virtue of their offices as nonvoting members of the Commission: the Commissioner of Insurance, the Commissioner of Labor, the State Auditor, the Attorney General, the Secretary of Crime Control and Public Safety, the Secretary of Natural Resources and Community Development, and the President of the Department of Community Colleges.

Of the members initially appointed by the Governor, the representative of the public at large shall serve for three years, the representative of the League of Municipalities shall serve for two years and the representative of the Association of County Commissioners shall serve for one year. At the end of their respective terms of office their successors shall be appointed for terms of three years and until their successors are appointed and qualified. The Governor

may make appointments to fill the unexpired portions of the appointed members of any term vacated by reason of the death, resignation or removal from office. In making such appointment he shall preserve the composition of the Commission required above. Vacancies caused by reason of the death or resignation of ex offico members shall be filled by their respective successors in office.

The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. Thereafter, these appointees shall serve two-year terms.

Members of the State Fire Commission shall receiver per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 or G.S. 138-6, as the case may be. (1977, c. 1064, s. 1; 1981, c. 791, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1191, ss. 21, 22.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) deleted "one member of the House of Representatives appointed by the Speaker of the House, one member of the Senate appointed by the President of the Senate" preceding "one mayor or other elected city official" in the first sentence of the first paragraph, added the last two sentences of the first paragraph, and rewrote the fourth paragraph, which formerly related to the legislative members of the Commission.

Chapter 146.

State Lands.

SUBCHAPTER II. ALLOCATED STATE LANDS.

Article 7.

Dispositions.

Sec.

146-30. Application of net proceeds.

SUBCHAPTER II. ALLOCATED STATE LANDS.

ARTICLE 6.

Acquisitions.

§ 146-22. All acquisitions to be made by Department of Administration.

CASE NOTES

Stated in State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

§ 146-22.1. Acquisition of property.

CASE NOTES

State has the right under this section to condemn property to expand a State park in order to protect a historic "swimming hole" and to assure the public of continued access to the site. State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

ARTICLE 7.

Dispositions.

§ 146-30. Application of net proceeds.

The net proceeds of any disposition made in accordance with this Subchapter shall be handled in accordance with the following priority: First, in accordance with the provisions of any trust or other instrument of title whereby title to such real property was heretofore acquired or is hereafter acquired; second, as provided by any other act of the General Assembly; third, the net proceeds shall be deposited with the State Treasurer. Provided, however, nothing herein shall be construed as prohibiting the disposition of any State lands by exchange for other lands.

For the purposes of this Subchapter, the term "net proceeds" means the gross amount received from the sale, lease, rental, or other disposition of any State lands, less

(1) Such expenses incurred incident to that sale, lease, rental, or other disposition as may be allowed under rules and regulations adopted by the Governor and approved by the Council of State;

(2) Amounts paid pursuant to G.S. 105-296.1, if any; and

(3) A service charge to be paid into the State Land Fund.

The amount or rate of such service charge shall be fixed by rules and regulations adopted by the Governor and approved by the Council of State, but as to any particular sale, lease, rental, or other disposition, it shall not exceed ten percent (10%) of the gross amount received from such sale, lease, rental, or other disposition. Notwithstanding any other provision of this Subchapter, the net proceeds derived from the sale of land or products of land owned by or under the supervision and control of the Wildlife Resources Commission, or acquired or purchased with funds of that Commission, shall be paid into the Wildlife Resources Fund. Provided, however, the net proceeds derived from the sale of land or timber from land owned by or under the supervision and control of the Department of Agriculture shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Agriculture, to be used for such specific capital improvement projects or other purposes as are approved by the Director of the Budget and the Advisory Budget Commission. Provided further, the net proceeds derived from the sale of park land owned by or under the supervision and control of the Department of Natural Resources and Community Development shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Administration to be used for the purpose of park land acquisition as approved by the Director of the Budget and the Advisory Budget Commission. Provided further, the net proceeds derived from the sale of any portion of the land in or around the unincorporated area known as Butner on or after July 1, 1980, shall be deposited with the State Treasurer in a capital improvement account to the credit of the Hospital to provide sewers and to bring those streets in the unincorporated area known as Butner not on the State highway system up to standards adequate for acceptance on the system, according to a plan adopted by the Department of Administration, Office of State Budget and Management and the Advisory Budget Commission, with the approval of the Board of County Commissioners of Granville County and to build industrial access roads to industries on the Butner lands. (1959, c. 683, s. 1; 1975, 2nd Sess., c. 983, s. 30; 1977, c. 771, s. 4; c. 1012; 1979, c. 608, s. 1; 1981, c. 859, s. 23.4; c. 1127, s. 33; 1981 (Reg. Sess., 1982), c. 1282, s. 24.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, inserted "to provide sewers and" following "to the credit of the Hospital" in the last sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Chapter 147.

State Officers.

Article 3.

The Governor.

Sec.

147-12. Powers and duties of Governor.

147-32. Compensation for surviving spouses of Governors.

Article 4.

Secretary of State.

147-45. Distribution of copies of State publications.

Article 5.

Auditor.

Sec.

147-62. Assignments of claims against State.

Article 6.

Treasurer.

147-68. To receive and disburse moneys; to make reports.

Article 1.

Classification and General Provisions.

§ 147-4. Executive officers — election; term; induction into office.

Effect of Amendments. —

The amendment to this section in Session Laws 1981, c. 504, s. 7, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section, therefore, never went into effect.

Article 3.

The Governor.

§ 147-12. Powers and duties of Governor.

In addition to the powers and duties prescribed by the Constitution, the Governor has the powers and duties prescribed in this and the following sections:

(3a) The Governor may make appointments to fill vacancies in offices subject to appointment by the General Assembly as provided in G.S. 120-122.

(3b) Whenever a statute calls for the Governor to appoint one person from each congressional district to a board or commission, and at the time of enactment of that statute, the gubernatorial appointments do not cover all of the congressional districts, then the Governor, in filling vacancies on that board or commission as they occur, shall make appointments to satisfy that requirement, but shall not be required to remove any person from office to satisfy the requirement.

(12) To name and locate State government buildings, monuments, memorials, and improvements, as provided by G.S. 143B-373(1). (1868-9, c. 270, s. 27; 1870-1, c. 111; 1883, c. 71; Code, s. 3320; 1895, c. 28, s. 5; 1905, c. 446; Rev., s. 5328; C. S., s. 7636; 1955, c. 910, s. 3; 1959, c. 285; 1967, c. 1253; 1973, c. 1148; 1981 (Reg. Sess., 1982), c. 1191, ss. 3, 4, 68.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) added subdivisions (3a), (3b) and (12).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivisions (3a), (3b) and (12) are set out.

§ 147-32. Compensation for surviving spouses of Governors.

All surviving spouses of Governors of the State of North Carolina, who make written request to the Director of the Budget, shall be paid the sum of six thousand dollars ($6,000) a year in equal monthly installments, out of the State Treasury upon warrants duly drawn thereon. This compensation shall terminate upon the subsequent remarriage of the surviving spouse. (1937, c. 416; 1947, c. 897, ss. 1, 2; 1955, c. 1314; 1977, c. 554; 1981 (Reg. Sess., 1982), c. 1282, s. 63.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, substituted "who made written request to" for "who shall make written request therefor to" and "six thousand dollars ($6,000) a year" for "three thousand dollars ($3,000) per annum" in the first sentence and substituted "This compensation" for "Provided, that such compensation" and "the surviving spouse" for "such person" in the second sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

ARTICLE 4.

Secretary of State.

§ 147-45. Distribution of copies of State publications.

The Secretary of State shall, at the State's expense, as soon as possible after publication, provide such number of copies of the Session Laws and Senate and House Journals to federal, State, and local governmental officials, departments and agencies, and to educational institutions of instruction and exchange use, as is set out in the table below:

Agency or Institution	Session Laws	Assembly Journals
Governor, Office of the	3	2
Lieutenant Governor, Office of the	1	1
Secretary of State, Department of the	3	3
Auditor, Department of the State	3	1
Treasurer, Department of the State	3	1
Local Government Commission	2	0
Public Education, Department of	1	0
Superintendent of Public Instruction	3	1
Controller	1	0
Division of Community Colleges	3	1
Regional Service Centers	1 ea.	0
Justice, Department of		
Office of the Attorney General	25	3
Budget Bureau (Administration)	1	0

Agency or Institution	Session Laws	Assemnly Journals
Property Control (Administration	1	1
State Bureau of Investigation	1	0
Agriculture, Department of	3	1
Labor, Department of	5	1
Insurance, Department of	5	1
Administration, Department of	1	1
Budget Bureau	2	1
Controller	1	0
Property Control	1	0
Purchase and Contract	2	0
Policy and Development	1	0
Veterans Affairs Commission	1	0
Natural Resources and Community Development, Department of	1	0
Division of Environmental Management	2	0
Board of Natural Resources and Community Development	1	0
Soil and Water Conservation Commission	1	0
Wildlife Resources Commission	2	0
Revenue, Department of	5	1
Human Resources, Department of	3	0
Board of Human Resources	1	0
Health Services, Division of	3	0
Mental Health, Mental Retardation, and Substance Abuse Services, Division of	1	0
Social Services, Division of	3	0
Facilities Services, Division of	1	0
Youth Services, Division of	1	0
Hospitals and Institutions	1 ea.	0
Transportation, Department of	1	0
Board of Transportation	3	0
Motor Vehicles, Division of	1	0
Commerce, Department of	1	0
Economic Development, Division of	2	0
State Ports Authority	1	0
Alcoholic Beverage Control Commission, North Carolina	2	0
Banking Commission	2	0
Utilities Commission	8	1
Industrial Commission	7	0
Labor Force Development Council	1	0
Milk Commission	5	0
Employment Security Commission	1	1
Correction, Department of	1	0
Department of Correction	2	0
Parole Commission	2	0
State Prison	1	0
Correctional Institutions	1 ea.	0
Cultural Resources, Department of	1	0
Archives and History, Division of	5	1
State Library	5	5

Agency or Institution	Session Laws	Assembly Journals
Publications Division	1	1
Crime Control and Public Safety, Department of	2	1
North Carolina Crime Commission	1	0
Adjutant General	2	0
Elections, State Board of	2	0
Legislative Branch		
State Senators	1 ea.	1 ea.
State Representatives	1 ea.	1 ea.
Principal Clerk — Senate	1	1
Principal Clerk — House	1	1
Reading Clerk — Senate	1	1
Reading Clerk — House	1	1
Sergeant at Arms — House	1	1
Sergeant at Arms — Senate	1	1
Enrolling Clerk	1	0
Engrossing Clerk	1	0
Indexer of the Laws	1	0
Legislative Building Library	35	15
Judicial System		
Justices of the Supreme Court	1 ea.	1 ea.
Judges of the Court of Appeals	1 ea.	1 ea.
Judges of the Superior Court	1 ea.	0
Emergency and Special Judges of the Superior Court	1 ea.	0
District Court Judges	1 ea.	0
District Attorneys	1 ea.	0
Clerk of the Supreme Court	1	1
Clerk of the Court of Appeals	1	1
Administrative Office of the Courts	4	1
Supreme Court Library	AS MANY AS REQUESTED	
Colleges and Universities		
The University North Carolina System Administrative Offices	3	0
University of North Carolina, Chapel Hill	65	25
University of North Carolina, Charlotte	3	1
University of North Carolina, Greensboro	3	1
University of North Carolina, Asheville	2	1
University of North Carolina, Wilmington	2	1
North Carolina State University, Raleigh	5	3
Appalachian State University	2	1
East Carolina University	3	2
Elizabeth City State University	2	1
Fayetteville State University	2	1
North Carolina Agricultural and Technical University	2	1

Agency or Institution	Session Laws	Assembly Journals
North Carolina Central University	5	5
Western Carolina University	2	1
Pembroke State University	2	1
Winston-Salem State University	2	1
North Carolina School of the Arts	1	1
Private Institutions		
Duke University	6	6
Davidson College	3	2
Wake Forest University	5	5
Lenoir Rhyne College	1	1
Elon College	1	1
Guilford College	1	1
Campbell College	5	5
Wingate College	1	1
Pfeiffer College	1	1
Barber Scotia College	1	1
Atlantic Christian College	1	1
Shaw University	1	1
St. Augustine's College	1	1
J. C. Smith University	1	1
County and Local Officials		
Clerks of the Superior Court	1 ea.	1 ea.
Register of Deeds	1 ea.	1 ea.
Federal, Out-of-State and Foreign		
Secretary to the President	1	0
Secretary of State	1	1
Secretary of Defense	1	0
Secretary of Agriculture	1	0
Secretary of the Interior	1	0
Secretary of Labor	1	1
Secretary of Commerce	1	1
Secretary of the Treasury	1	0
Secretary of Health, Education and Welfare	1	0
Secretary of Housing and Urban Development	1	0
Secretary of Transportation	1	0
Attorney General	1	0
Postmaster General	1	0
Bureau of Census	1	0
Bureau of Public Roads	1	0
Department of Justice	1	0
Department of Internal Revenue	1	0
Veterans' Administration	1	0
Farm Credit Administration	1	0
Securities and Exchange Commission	1	0
Social Security Board	1	0
Environmental Protection Agency	1	0
Library of Congress	8	2
Federal Judges resident in North Carolina	1 ea.	0

Agency or Institution	Session Laws	Assembly Journals
Federal District Attorneys resident in North Carolina	1 ea.	0
Marshal of the United States Supreme Court	1	0
Federal Clerks of Court resident in North Carolina	1 ea.	0
Supreme Court Library exchange list	1 ea.	0

One copy of the Session Laws shall be furnished the head of any department of State government created in the future.

State agencies, institutions, etc., not found in or covered by this list may, upon written request from their respective department head to the Secretary of State, and upon the discretion of the Secretary of State as to need, be issued copies of the Session Laws on a permanent loan basis with the understanding that should said copies be needed they will be recalled. (1941, c. 379, s. 1; 1943, c. 48, s. 4; 1945, c. 534; 1949, c. 1178; 1951, c. 287; 1953, cc. 245, 266; 1955, c. 505, s. 6; cc. 989, 990; 1957, c. 269, s. 1; cc. 1061, 1400; 1959, c. 215; c. 1028, s. 3; 1965, c. 503; 1967, c. 691, s. 54; cc. 695, 777, 1038, 1073, 1200; 1969, c. 355; c. 608, s. 1; c. 801, s. 2; c. 852, ss. 1, 2; c. 1190, s. 54; c. 1285; 1973, c. 476, ss. 48, 84, 128, 138, 143, 193; c. 507, s. 5; c. 731, s. 1; c. 762; c. 798, ss. 1, 2; c. 1262, ss. 10, 38; 1975, c. 19, s. 59; c. 879, s. 46; 1975, 2nd Sess., c. 983, s. 115; 1977, c. 379, s. 1; c. 679, s. 8; c. 771, s. 4; 1979, c. 358, s. 27; 1981, c. 412, ss. 4, 5; 1981 (Reg. Sess., 1982), c. 1348, s. 2.)

Effect of Amendments. — The 1979 amendment substituted "Mental Health, Mental Retardation, and Substance Abuse Services, Division of" for "Mental Health and Mental Retardation Services, Division of."

The 1981 amendment substituted "Alcoholic Beverage Control Commission, North Carolina" for "Alcoholic Beverage Control, State Board of."

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, substituted "35" for "25" in the "Session Laws" column of the table opposite the entry for the Legislative Building Library.

Article 5.

Auditor.

§ 147-62. Assignments of claims against State.

All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment of any such claim or any part or share thereof shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest therein: Provided that this section shall not apply to assignments made in favor of hospitals, building and loan associations, prepaid legal services, and life insurance companies: Provided further, that any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions, who is a member of any credit union organized pursuant to Chapter 54 of the North Carolina General Statutes having a membership at least one half of whom are employed by the State or its institutions, departments, bureaus, agencies or commissions, may authorize, in writing, the periodic deduction from his salary or wages as such employee of a designated lump sum, which shall be paid to such credit unions when said salaries or wages are payable, for deposit to such accounts, purchase of such shares or payment of such obligations as the

employee and the credit union may agree: Provided, further, that this section shall not apply to assignments made by members of the State Highway Patrol, agents of the State Bureau of Investigation, motor vehicle inspectors of the Revenue Department, and State prison guards, to the commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund in payment of dues due by such persons to such fund: Provided further, that any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions, who is a member of a domiciled State employees' association with a membership of not less than 5,000 members may authorize in writing the periodic deduction from his salary or wages a designated sum to be paid to the employees' association. This plan of payroll deductions for State employees and other association members shall become null and void at such time as the employee association engages in collective bargaining. Nothing in this last proviso shall apply to local boards of education, county or municipal governments or any local governmental units. Provided further, that subject to the rules and regulations adopted by the Director of the Budget, any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions may authorize in writing the withholding from his salary or wages an amount to satisfy his pledge to the State Employees Combined Campaign. Provided further, that subject to any rules and regulations adopted by the Director of the Budget, any employee of a local board of education or community college may authorize in writing the withholding from his salary or wages a periodic deduction of a designated sum to be paid to any organization which qualifies for recognition of exemption by the Internal Revenue Service as a charitable organization as defined in section 501(c)(3) of the Internal Revenue Code which has first been approved by his local board of education or community college board. (1925, c. 249; 1935, c. 19; 1939, c. 61; 1941, c. 128; 1965, c. 1179; 1969, c. 625; 1977, c. 88; 1981, c. 869; 1981 (Reg. Sess., 1982), c. 1282, ss. 14, 15.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added the last two provisos of the section.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

Article 6.
Treasurer.

§ 147-68. To receive and disburse moneys; to make reports.

(d1) The Treasurer shall report to the Joint Legislative Commission on Governmental Operations, to the Chairman, Appropriations Base Budget Committee and the Chairman, Appropriations Expansion Budget Committee of the House of Representatives, and to the Chairman, Committee on Appropriations and the Chairman, Committee on Base Budget of the Senate, on a quarterly basis, concerning all investments and deposits made by and through his office. The report shall include a listing of all investments with or on behalf of the State or any of its agencies or institutions and shall include the particular agency or institution, fund, rate of return, duration of the investment, and the amount of deposit on all noninterest bearing accounts. The first report is due 90 days after July 1, 1982, and shall include all investments and deposits made during the 1981-82 fiscal year and all investments made during the first quarter of the 1982-83 fiscal year; thereafter, reports shall be made on a quarterly basis including all investments and deposits made during that reporting period.

(1981 (Reg. Sess., 1982), c. 1282, s. 65.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added subsection (d1).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, c. 81, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d1) is set out.

Chapter 148.

State Prison System.

Article 3.

Labor of Prisoners.

Sec.
148-26. State policy on employment of prisoners.

Article 1.

Organization and Management.

§ 148-4. Control and custody of prisoners; authorizing prisoner to leave place of confinement.

CASE NOTES

Instruction on Willfulness under This Section Unnecessary in Prosecution under § 148-45. — In a prosecution for felonious escape under § 148-45, trial court was not required to instruct the jury pursuant to this section that one of the essential elements of felonious escape is that the failure to remain in or return to confinement must be willful, since defendant was not charged with escape while outside the place of his confinement pursuant to authorization by the Secretary of Correction under this section, but was charged under § 148-45, which establishes the general escape offense, and that section does not contain the word "willful." State v. Rose, 53 N.C. App. 608, 281 S.E.2d 404 (1981).

Article 3.

Labor of Prisoners.

§ 148-26. State policy on employment of prisoners.

(b) As many minimum custody prisoners as are available and fit for road work, who cannot appropriately be placed on work release, study release, or other full-time programs, and as many medium custody prisoners as are available, fit for road work and can be adequately guarded during such work without reducing security levels at prison units, shall be employed in the maintenance and construction of public roads of the State. The number and location of prisoners to be kept available for work on the public roads shall be agreed upon by the governing authorities of the Department of Transportation and the State Department of Correction far enough in advance of each budget to permit proper provisions to be made in the request for appropriations submitted by the Department of Transportation. Any dispute between the Departments will be resolved by the Governor. Prisoners so employed shall be compensated, at rates fixed by the Department of Correction's rules and regulations for work performed; provided, that no prisoner working on the public roads under the provisions of this section shall be paid more than one dollar ($1.00) per day from funds provided by the Department of Transportation to the Department of Correction for this purpose. The Department of Correction and the Department of Transportation shall develop a program to be implemented no later than July 1, 1982, to the extent money is herein appropriated, which shall include:

(1) The use of portable toilets for inmate road crews.
(1981 (Reg. Sess., 1982), c. 1400.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added the last sentence and subdivision (1) to subsection (b).

Session Laws 1981 (Reg. Sess., 1982), c. 1400, s. 2, provides: "There is appropriated from the Highway Fund to the Department of Transportation the sum of three thousand dollars ($3,000) for fiscal year 1982-83 to implement this act."

Only Part of Section Set Out. — As the rest of the section was not changed by amendment, only subsection (b) is set out.

§ 148-33.1. Sentencing, quartering, and control of prisoners with work-release privileges.

Legal Periodicals. —
For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Cited in State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

§ 148-33.2. Restitution by prisoners with work-release privileges.

CASE NOTES

Constitutionality. —
The requirement that a defendant pay restitution under subsection (c) of this section or § 148-57.1(c) as a condition of obtaining work-release or parole is not inherently unconstitutional. Whether the restitution requirement is unconstitutional as applied to a particular defendant may only be determined by considering the defendant's financial status and other relevant circumstances at the time when the restitution must be paid, that is, after a defendant becomes eligible for work-release privileges or parole. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

§ 148-45. Escaping or attempting escape from State prison system; failure of conditionally and temporarily released prisoners and certain youthful offenders to return to custody of Department of Correction.

CASE NOTES

Instruction on Willfulness Unnecessary. — In a prosecution for felonious escape under this section, trial court was not required to instruct the jury pursuant to § 148-4 that one of the essential elements of felonious escape is that the failure to remain in or return to confinement must be willful, since defendant was not charged with escape while outside the place of his confinement pursuant to authorization by the Secretary of Correction under § 148-4, but was charged under this section, which establishes the general escape offense, and does not contain the word willful. State v. Rose, 53 N.C. App. 608, 281 S.E.2d 404 (1981).

Cited in State v. Watson, 51 N.C. App. 369, 276 S.E.2d 732 (1981); State v. Parnell, 53 N.C.

App. 793, 281 S.E.2d 732 (1981); State v. Washington, 54 N.C. App. 683, 284 S.E.2d 330 (1981).

ARTICLE 3B.

Facilities and Programs for Youthful Offenders.

§ 148-49.10. Purposes of Article.

Legal Periodicals. — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

§ 148-49.14. Sentencing committed youthful offenders.

CASE NOTES

Ambiguous Benefit Finding Requires New Hearing. — A judgment stating that the 18-year-old defendant "would benefit as a committed youthful offender but that society would not" is ambiguous and requires a new sentencing hearing, since the language employed does not reveal whether defendant was found by the trial judge to be eligible or ineligible for the benefits of youthful offender status as required by this section. State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

ARTICLE 4.

Paroles.

§ 148-57.1. Restitution as a condition of parole.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Constitutionality. —

The requirement that a defendant pay restitution under § 148-33.2(c) or subsection (c) of this section as a condition of obtaining work-release or parole is not inherently unconstitutional. Whether the restitution requirement is unconstitutional as applied to a particular defendant may only be determined by considering the defendant's financial status and other relevant circumstances at the time when the restitution must be paid, that is, at the time he becomes eligible for parole or work-release privileges. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Law Enforcement Agencies Not Victims for Restitution Purposes. — North Carolina statutes authorize the imposition of a condition upon parole eligibility of restitution to victims of crime who have suffered economic loss as a result of that crime, but law enforcement agencies are not within the class of such victims. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

Quoted in State v. McNeill, 54 N.C. App. 454, 283 S.E.2d 565 (1981).

Chapter 150A.

Administrative Procedure Act.

Article 2.

Rule Making.

Sec.
150A-13. Temporary rules.
150A-14. Adoption by reference.

Article 5.

Publication of Administrative Rules.

150A-59. Filing of rules.
Sec.
150A-63. Publication of rules.
150A-63.1. Administrative Rules Review Committee reports.

Article 1.

General Provisions.

§ 150A-1. Scope and policy.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

CASE NOTES

Stated in Harrell v. J.P. Stevens & Co., 54 N.C. App. 582, 284 S.E.2d 343 (1981); In re Vandiford, — N.C. App. —, 287 S.E.2d 912 (1982).

Cited in In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981); Buck v. Procter & Gamble Mfg. Co., 52 N.C. App. 88, 278 S.E.2d 268 (1981); In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

§ 150A-2. Definitions.

Legal Periodicals. —
For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

County had standing to challenge establishment of toxic waste site within its borders under this Chapter because of the effect on its tax base and planning jurisdiction, because of the final agency determination upon issuance of an environmental impact statement, and because the Environmental Policy Act (Art. 1 of Chap. 113A) includes the right to judicial review of an issue which involves a contested case. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

Applied in Dyer v. Bradshaw, 54 N.C. App. 136, 282 S.E.2d 548 (1981); In re Wilkesboro, Ltd., — N.C. App. —, 285 S.E.2d 626 (1982).

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981); In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981); In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981); In re Wilkesboro, Ltd., — N.C. App. —, 285 S.E.2d 626 (1982).

ARTICLE 2.

Rule Making.

§ 150A-10. Definition.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

§ 150A-11. Special requirements.

Legal Periodicals. — For a note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

§ 150A-13. Temporary rules.

(a) If an agency which is not exempted from the notice and hearing requirements of this Article by G.S. 150A-1 determines in writing that:

(1) Adherence to the notice and hearing requirements of this Article would be contrary to the public interest; and that

(2) The immediate adoption, amendment, or repeal of a rule is necessitated by:

a. The public health, safety, or welfare; or

b. The effective date of a recent act of the General Assembly or the United States Congress; or

c. A federal regulation; or

d. A court order,

the agency may adopt, amend, or repeal the rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practicable. The agency must accompany its rule filing with the Attorney General and the Legislative Research Commission's Administrative Rules Review Committee with the agency's written certification of the finding of need for the temporary rule, together with the reasons for that finding and a copy of the notice of hearing on the proposed permanent rule.

(b) If the Department of Transportation, Revenue, or Correction determines in writing that the immediate adoption, amendment, or repeal of a rule is necessitated by:

(1) The public health, safety, or welfare; or

(2) The effective date of a recent act of the General Assembly or the United States Congress; or

(3) A federal regulation; or

(4) A court order,

the agency may adopt, amend, or repeal the rule. The agency must accompany its rule filing with the Attorney General and the Legislative Research Commission's Administrative Rules Review Committee with the agency's written certification of the finding of need for the temporary rule together with the reasons for that finding. In the case of the Department of Correction, in addition to the reasons set forth in subdivisions (1) through (4) of this subsection, the Department may file a temporary rule when necessary for the management and control of persons under the custody or supervision of the Department in extraordinary circumstances as certified by the Secretary. The Department shall file any temporary rule within two working days of its adoption by the Secretary under G.S. 148-11.

(c) Rules filed under subsections (a) and (b) may be effective for a period of not longer than 120 days. An agency adopting a temporary rule shall begin normal rule-making procedures on the permanent rule under this Article at the same time the temporary rule is adopted. (1973, c. 1331, s. 1; 1981, c. 688, s. 12; 1981 (Reg. Sess., 1982), c. 1232, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

§ 150A-14. Adoption by reference.

An agency may adopt by reference in its rules, without publishing the adopted matter in full:

(1) All or any part of a code, standard, or regulation which has been adopted by any other agency of this State or any agency of the United States or by a generally recognized organization or association; or

(2) Any plan or material which is adopted to meet the requirements of any agency of the United States and approved by that agency but which does not include any State policy or State rule as defined in G.S. 150A-10.

The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule, it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and the rules shall state where copies of the adopted matter can be obtained and any charge therefor as of the time the rule is adopted. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 64; 1981 (Reg. Sess., 1982), c. 1359, s. 5.)

Effect of amendments. — The 1981 (Reg. Sess., 1982) amendment substituted the present first paragraph of the section, containing subdivisions (1) and (2), for the former first sentence, which read: "An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by any other agency of this State or any agency of the United States or by a generally recognized organization or association."

§ 150A-16. Petition for adoption of rules.

CASE NOTES

Stated in In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981).

§ 150A-17. Declaratory rulings.

CASE NOTES

Evidentiary Proceeding Not Contemplated. — This section clearly does not contemplate an evidentiary proceeding. If evidence were required to establish the facts, then the proper procedure would have been to hold a contested case hearing. In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981).

Judicial Review Generally. — A declaratory ruling by an administrative agency is subject to judicial review as though it were an agency final decision or order in a contested case. High Rock Lake Ass'n v. North Carolina

Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

ARTICLE 3.

Administrative Hearings.

§ 150A-23. Hearing required; notice; intervention.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Notice Held Insufficient to Support Suspension of License. — Notice to professional engineer that charges against him involved gross negligence, incompetence or misconduct resulting from his noncompliance with certain statutes and administrative regulations in the preparation and sealing of certain plans was insufficient to support suspension of his license for misconduct in placing his seal on engineering work not prepared under his direction and for gross negligence in sealing the work of another in order to procure planning board approval when he knew that the plans did not conform to the State Building Code. In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

§ 150A-29. Rules of evidence.

CASE NOTES

Stated in Overton v. Goldsboro City Bd. of Educ., 51 N.C. App. 303, 276 S.E.2d 458 (1981).

§ 150A-30. Official notice.

CASE NOTES

Stated in Overton v. Goldsboro City Bd. of Educ., 51 N.C. App. 303, 276 S.E.2d 458 (1981).

§ 150A-36. Final agency decision.

CASE NOTES

Final agency decision in writing envisioned by this section is not merely a memorialization of the decision, but is the decision itself, without which agency action does not become final. In re Alamance Sav. & Loan Ass'n, 53 N.C. App. 326, 280 S.E.2d 748 (1981).

Administrative agencies should be encouraged to continue cases under active deliberation until rendition of a final decision, to assure that that decision is the product of adequate, sound deliberation. In re Alamance Sav. & Loan Ass'n, 53 N.C. App. 326, 280 S.E.2d 748 (1981).

§ 150A-37. Official record.

CASE NOTES

Quoted in In re Willett, — N.C. App. —, 289 S.E.2d 576 (1982).

Stated in In re Alamance Sav. & Loan Ass'n, 53 N.C. App. 326, 280 S.E.2d 748 (1981).

ARTICLE 4.

Judicial Review.

§ 150A-43. Right to judicial review.

Legal Periodicals. —
For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

There are five requirements under this statute: (1) plaintiff must be an aggrieved person; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) plaintiff must have exhausted administrative remedies; and (5) there must be no other adequate procedure for judicial review. Dyer v. Bradshaw, 54 N.C. App. 136, 282 S.E.2d 548 (1981).

This section requires a four-part test for standing: an aggrieved party, a final agency decision, a contested case, and exhaustion of administrative remedies. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

County had standing to challenge establishment of toxic waste site within its borders under this Chapter because of the effect on its tax base and planning jurisdiction, because of the final agency determination upon issuance of an environmental impact statement, and because the Environmental Policy Act (Art. 1 of Chap. 113A) includes the right to judicial review of an issue which involves a contested case. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

Necessity for Exhaustion of Administrative Remedies. —
The Administrative Procedure Act allows judicial review of a final agency decision in a contested case when all relevant administrative remedies have been exhausted and there is no adequate judicial review provided under any other statute. In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

Upon review pursuant to this section, etc. —
The clear intent of the legislature is to make the "whole record" test the principle standard of judicial review of administrative findings in this State. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Applied in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); In re Wilkesboro, Ltd., — N.C. App. —, 285 S.E.2d 626 (1982).

Stated in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); North Carolina Real Estate Licensing Bd. v. Gallman, 52 N.C. App. 118, 277 S.E.2d 853 (1981); Lackey v. N.C. Dep't of Human Resources, 54 N.C. App. 57, 283 S.E.2d 377 (1981).

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981); High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981); In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505 (1981); In re Alamance Sav. & Loan Ass'n, 53 N.C. App. 326, 280 S.E.2d 748 (1981); State ex rel. Lee v. Williams, — N.C. App. —, 284 S.E.2d 572 (1981); Pie in the Sky, Ltd. v. North Carolina Bd. of Alcoholic Control, — N.C. App. —, 286 S.E.2d 649 (1982).

§ 150A-44. Right to judicial intervention when agency unreasonably delays decision.

CASE NOTES

Protection from Unreasonable Delay Afforded by Section. — Parties are protected from unreasonable delay on the part of agencies in reaching final decisions by this section, which allows a party adversely affected by such delay to seek a court order compelling action by the agency. In re Alamance Sav. & Loan Ass'n, 53 N.C. App. 326, 280 S.E.2d 748 (1981).

§ 150A-45. Manner of seeking review; time for filing petition; waiver.

CASE NOTES

This section confers exclusive jurisdiction for judicial review of final agency decisions on the Superior Court of Wake County when a state rather than a local agency made the initial determination. State ex rel. Lee v. Williams, — N.C. App. —, 284 S.E.2d 572 (1981).

Quoted in Nova Univ. v. Board of Governors, — N.C. —, 287 S.E.2d 872 (1982).

Cited in In re Alamance Sav. & Loan Ass'n, 53 N.C. App. 326, 280 S.E.2d 748 (1981); In re Cleveland County Comm'rs, — N.C. App. —, 287 S.E.2d 451 (1982).

§ 150A-50. Review by court without jury on the record.

Legal Periodicals. —

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Applied in Pie in the Sky, Ltd. v. North Carolina Bd. of Alcoholic Control, — N.C. App. —, 286 S.E.2d 649 (1982).

§ 150A-51. Scope of review; power of court in disposing of case.

CASE NOTES

Review of Discretionary Agency Decisions. — The Administrative Procedure Act does not preclude judicial review of agency decisions which are discretionary. High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

The standard of judicial review, etc. —

In accord with original. See Overton v. Goldsboro City Bd. of Educ., 51 N.C. App. 303, 276 S.E.2d 458, aff'd, — N.C. —, 283 S.E.2d 495 (1981).

Application of "Whole Record" Test. —

In accord with 2nd paragraph in original. See Overton v. Goldsboro City Bd. of Educ., 51 N.C. App. 303, 276 S.E.2d 458, aff'd, — N.C. —, 283 S.E.2d 495 (1981).

In accord with 3rd paragraph in original. See Overton v. Goldsboro City Bd. of Educ., 51 N.C. App. 303, 276 S.E.2d 458, aff'd, — N.C. —, 283 S.E.2d 495 (1981).

The "whole record" test properly takes into account the specialized expertise of the staff of

an administrative agency, and, thus, does not allow the reviewing court to substitute its own judgment for that of the agency. It does require, however, that the court take into account evidence in the record which fairly detracts from the weight of the evidence the agency relied upon to make its decision. High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

Under the whole record test, judge reviewing an administrative decision must consider the complete testimony of all the witnesses. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

Applied in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981); In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981); Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); Lackey v. N.C. Dep't of Human Resources, 54 N.C. App. 57, 283 S.E.2d 377 (1981); In re Brown, — N.C. App. —, 289 S.E.2d 626 (1982).

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 54 N.C. App. 601, 284 S.E.2d 339 (1981); In re Cleveland County Comm'rs, — N.C. App. —, 287 S.E.2d 451 (1982).

Cited in State ex rel. Lee v. Williams, — N.C. App. —, 284 S.E.2d 572 (1981); Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

§ 150A-52. Appeal to appellate division; obtaining stay of court's decision.

CASE NOTES

Quoted in In re Cleveland County Comm'rs, — N.C. App. —, 287 S.E.2d 451 (1982).

ARTICLE 5.

Publication of Administrative Rules.

§ 150A-59. Filing of rules.

(a) Rules adopted by an agency on or after February 1, 1976, shall be filed with the Attorney General. No rule, except temporary rules adopted under the provisions of G.S. 150A-13 or curative rules adopted pursuant to G.S. 120-30.28, shall become effective earlier than the first day of the second calendar month after that filing.

(1981 (Reg. Sess., 1982), c. 1233, s. 6.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subsection (a), inserted "or curative rules adopted pursuant to G.S. 120-30.28" in the second sentence and deleted a former third sentence, relating to the delay of effectiveness of a rule.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 150A-63. Publication of rules.

(e) Reference copies of the compilation, supplements, and recompilations shall be distributed by the Attorney General as soon after publication as practicable, without charge, to the following officials and departments in the following quantities:

(1) One copy to each county of the State, which may be maintained for public inspection in the county in a place determined by the county commissioners; one copy each to the clerk of the Supreme Court of North Carolina and the clerk of the North Carolina Court of Appeals;

one copy each to the libraries of the Supreme Court of North Carolina and the North Carolina Court of Appeals; one copy for the office of the Governor; and two copies to the Legislative Research Commission for the use of the General Assembly;

(2) Five copies to the Division of State Library of the Department of Cultural Resources, pursuant to G.S. 147-50.1.

(1981 (Reg. Sess., 1982), c. 1359, s. 6.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment substituted "two copies" for "one copy" following "Governor; and" near the end of subdivision (1) of subsection (e).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Legal Periodicals. —

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

§ 150A-63.1. Administrative Rules Review Committee reports.

The Attorney General shall retain any reports of the Legislative Research Commission's Administrative Rules Review Committee's objection to a rule. He shall append to any compilation, publication, or summation of that rule a notation that it has been objected to pursuant to Article 6C of Chapter 120 of the General Statutes and, where applicable, that the objection has been removed. (1981, c. 688, s. 15; 1981 (Reg. Sess., 1982), c. 1233, s. 7.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "Committee's objection to a rule" for "Committee objecting to the rule and delaying the effectiveness of the rule, and any order ending the delay" at the end of the first sentence, in the second sentence deleted "and delayed" following "objected to" and substituted "objection has been removed" for "delay has been ended" at the end of the section.

§ 150A-64. Judicial and official notice.

CASE NOTES

Stated in Employment Sec. Comm'n v. Lachman, — N.C. —, 290 S.E.2d 616 (1982).

Chapter 152.

Coroners.

§ 152-1. Election; vacancies in office; appointment by clerk in special cases.

Local Modification. — Harnett (office of coroner abolished): 1981 (Reg. Sess., 1982), c. 1144; Jackson (office of coroner abolished): 1981 (Reg. Sess., 1982), c. 1132; Sampson (office of coroner abolished): 1981 (Reg. Sess., 1982), c. 1190.

Effect of Amendments. —

The amendment to this section in Session Laws 1981, c. 504, s. 8, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section, therefore, never went into effect.

Chapter 153A.

Counties.

Article 6.
Delegation and Exercise of the General Police Power.

Sec.
153A-140. Abatement of public health nuisances.
153A-141 to 153A-145. [Reserved.]

Article 2.

Corporate Powers.

§ 153A-11. Corporate powers.

CASE NOTES

Stated in Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).

Article 6.

Delegation and Exercise of the General Police Power.

§ 153A-140. Abatement of public health nuisances.

A county shall have authority, subject to the provisions of Article 57 of Chapter 106 of the General Statutes, to remove, abate, or remedy everything that is dangerous or prejudicial to the public health. The expense of the action shall be paid by the person in default, and, if not paid, shall be a lien upon the land or premises where the nuisance arose, and shall be collected as unpaid taxes. The authority granted by this section may only be exercised upon adequate notice, the right to a hearing, and the right to appeal to the General Court of Justice. Nothing in this section shall be deemed to restrict or repeal the authority of any municipality to abate or remedy health nusiances pursuant to G.S. 160A-174, 160A-193, or any other general or local law. This section shall not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to this section. (1981 (Reg. Sess., 1982), c. 1314, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1314, s. 2, makes this section effective July 1, 1982.

§§ 153A-141 to 153A-145: Reserved for future codification purposes.

ARTICLE 7.

Taxation.

§ 153A-146. General power to impose taxes.

CASE NOTES

Power Derived from Legislature. — A sovereign state possesses the inherent power of taxation, but counties must derive that power as well as all others from the legislature. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

And Grant of Power Strictly Construed. — A grant to a county of the power to levy taxes must be strictly construed. It is an established rule that the authority of municipalities to levy a tax must be made clearly to appear, and that doubts, if any, as to the power sought to be exercised, must be resolved against the municipality. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

Acts Beyond Power Granted Void. — Counties must derive the power of taxation from the legislature, and any attempt to exercise the taxing power which is found not to be within the powers granted to the county is ultra vires and void. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

§ 153A-149. Property taxes; authorized purposes; rate limitation.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Levy to Fund Medically Unnecessary Abortions. — Section 153A-255 does not give counties the underlying authority to levy taxes pursuant to subdivision (c)(30) of this section to fund medically unnecessary abortions, since the authority conferred upon counties to provide social services pursuant to § 153A-255 is limited to providing the poor with the basic necessities of life and a medically unnecessary abortion is not a basic necessity of life; therefore, a county exceeds its statutorily conferred power in levying a tax to fund medically unnecessary abortions and the tax levy is ultra vires and void. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

ARTICLE 10.

Law Enforcement and Confinement Facilities.

Part 2. Local Confinement Facilities.

§ 153A-222. Inspections of local confinement facilities.

OPINIONS OF ATTORNEY GENERAL

Posting of sign concerning right to object to release of information is insufficient notice. — See Opinion of Attorney General to Mr. I.O. Wilkerson, Jr., Director Division of Facility Services, 51 N.C.A.G. 17 (1981).

ARTICLE 13.

Health and Social Services.

Part 2. Social Service Provisions.

§ 153A-255. Authority to provide social service programs.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Tax Levy to Fund Medically Unnecessary Abortions Void. — This section does not give counties the underlying authority to levy taxes pursuant to § 153A-149(c)(30) to fund medically unnecessary abortions, since the authority conferred upon counties to provide social services pursuant to this section is limited to providing the poor with the basic necessities of life and a medically unnecessary abortion is not a basic necessity of life; therefore, a county exceeds its statutorily conferred power in levying a tax to fund medically unnecessary abortions and the tax levy is ultra vires and void. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

ARTICLE 14.

Libraries.

§ 153A-265. Library board of trustees.

Local Modification. — Burke: 1977, 2nd Sess., c. 1168; 1981 (Reg. Sess., 1982), c. 1141.

ARTICLE 18.

Planning and Regulation of Development.

Part 2. Subdivision Regulation.

§ 153A-330. Subdivision regulation.

Cross References. — As to compliance of subdivision streets with minimum standards of the Board of Transportation required of developers, see § 136-102.6. As to subdivision regulation in cities, see § 160A-371 et seq.

Part 3. Zoning.

§ 153A-345. Board of adjustment.

CASE NOTES

Quoted in Atkins v. Zoning Bd. of Adjustment, 53 N.C. App. 723, 281 S.E.2d 756 (1981).

Article 23.

Miscellaneous Provisions.

§ 153A-435. Liability insurance; damage suits against a county involving governmental functions.

Legal Periodicals. — For a comment on the need for reform in North Carolina of local government sovereign immunity, see 18 Wake Forest L. Rev. 43 (1982).

§ 153A-437. Assistance to historical organizations.

Legal Periodicals. — For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

Chapter 157.

Housing Authorities and Projects.

ARTICLE 1.

Housing Authorities Law.

§ 157-2. Finding and declaration of necessity.

CASE NOTES

Applied in Housing Auth. v. Montgomery, — N.C. App. —, 286 S.E.2d 114 (1982).

§ 157-9. Powers of authority.

CASE NOTES

Applied in Housing Auth. v. Montgomery, — N.C. App. —, 286 S.E.2d 114 (1982).

§ 157-11. Eminent domain.

CASE NOTES

Applied in Housing Auth. v. Montgomery, — N.C. App. —, 286 S.E.2d 114 (1982).

Chapter 159.

Local Government Finance.

SUBCHAPTER II. LOCAL GOVERNMENT COMMISSION.

Article 2.

Local Government Commission.

Sec.

159-6. Fees of the Commission.

SUBCHAPTER IV. LONG-TERM FINANCING.

Article 4.

Local Government Bond Act.

Part 2. Procedure for Issuing Bonds.

159-55. (Effective upon certification of approval of constitutional amendment) Sworn statement of debt; debt limitation.

Article 5.

Revenue Bonds.

159-98 to 159-100. [Reserved.]

Article 6.

Tax Increment Financing Act.

(Effective upon Certification of Approval of Constitutional Amendment.)

159-101. Short title.
159-102. Definitions.
159-103. Authorization of tax increment bonds; purposes.
159-104. Application to Commission for approval of tax increment bond issue; preliminary conference; acceptance of application.
159-105. Approval of application by Commission.
159-106. Order approving or denying the application.
159-107. Determination of incremental valuation; use of taxes levied on incremental valuation; duration of the district.
159-108. Special covenants.
159-109. Security of tax increment bonds.
159-110. Limitations on details of bonds.
159-111. Annual report.
159-112 to 159-119. [Reserved.]

Article 7.

Issuance and Sale of Bonds.

159-120. (Effective upon certification of approval of constitutional amendment) "Unit" defined.
159-122. (Effective upon certification of approval of constitutional amendment) Maturities of bonds.
159-123. (Effective upon certification of approval of constitutional amendment) Sale of bonds by sealed bids; private sales.
159-125. (Effective upon certification of approval of constitutional amendment) Bid instructions; bid deposit.
159-129. (Effective upon certification of approval of constitutional amendment) Obligations of units certified by Commission.
159-132. (Effective upon certification of approval of constitutional amendment) State Treasurer to deliver bonds and remit proceeds.

Article 9.

Bond Anticipation, Tax, Revenue and Grant Anticipation Notes.

Part 1. Bond Anticipation Notes.

159-160. (Effective upon certification of approval of constitutional amendment) "Unit" defined.
159-163.1. (Effective upon certification of approval of constitutional amendment) Security of tax increment bond anticipation notes.
159-165. (Effective upon certification of approval of constitutional amendment) Sale and delivery of bond anticipation notes.

Article 10.

Assistance for Defaulting Units in Refinancing Debt.

159-176. (Effective upon certification of approval of constitutional amendment) Commission to aid defaulting units in developing refinancing plans.
159-177. (Effective upon certification of approval of constitutional amendment) Power to require reports and approve budgets.
159-178. (Effective upon certification of approval of constitutional amendment) Duration of Commission's powers.

SUBCHAPTER II. LOCAL GOVERNMENT COMMISSION.

ARTICLE 2.

Local Government Commission.

§ 159-6. Fees of the Commission.

(a) The Commission may charge and collect fees for services rendered and for all expenses incurred by the Commission in connection with approving or denying an application for an issue of other than general obligation bonds or notes, participating in the sale, award or delivery of such issue or carrying out any other of its powers and duties with respect to such issue or the issuer thereof, pursuant to the laws of the State of North Carolina.

(b) The Commission shall establish rules and regulations concerning the setting and collection of such fees. In establishing the amount of or method of determining such fees, the Commission shall take into account, among other things, the scope of its statutory responsibilities and the nature and extent of its services for such issue or issuer or class thereof.

(c) Such fees collected by the Commission shall be incorporated into the budget of the State Treasurer and shall be expended for costs incurred by the Commission in carrying out its statutory responsibilities in the issuance of revenue bonds.

(d) Apart from the above fees, the Commission is authorized to receive reimbursement for all expenses incurred in the sale or issuance of general obligation bonds and notes by assessing and collecting fees. (1981 (Reg. Sess., 1982), c. 1175.)

SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

ARTICLE 3.

The Local Government Budget and Fiscal Control Act.

Part 4. Public Hospitals.

§ 159-39. Special regulations pertaining to public hospitals.

CASE NOTES

Cited in News & Observer Publishing Co. v. Wake County Hosp. Sys., — N.C. App. —, 284 S.E.2d 542 (1981).

SUBCHAPTER IV. LONG-TERM FINANCING.

ARTICLE 4.

Local Government Bond Act.

Part 2. Procedure for Issuing Bonds.

§ 159-55. (Effective upon certification of approval of constitutional amendment) Sworn statement of debt; debt limitation.

(a) After the bond order has been introduced and before the public hearing thereon, the finance officer (or some other officer designated by the governing board for this purpose) shall file with the clerk a statement showing the following:

(1) The gross debt of the unit, excluding therefrom debt incurred or to be incurred in anticipation of the collection of taxes or other revenues or in anticipation of the sale of bonds other than funding and refunding bonds. The gross debt (after exclusions) is the sum of (i) outstanding debt evidenced by bonds, (ii) bonds authorized by orders introduced but not yet adopted, (iii) unissued bonds authorized by adopted orders, and (iv) outstanding debt not evidenced by bonds. However, for purposes of the sworn statement of debt and the debt limitation, revenue bonds and tax increment bonds shall not be considered debt, and such bonds shall not be included in gross debt nor deducted from gross debt.

(2) The deductions to be made from gross debt in computing net debt. The following deductions are allowed:

a. Funding and refunding bonds authorized by orders introduced but not yet adopted.

b. Funding and refunding bonds authorized but not yet issued.

c. The amount of money held in sinking funds or otherwise for the payment of any part of the principal of gross debt other than debt incurred for water, gas, electric light or power purposes, or sanitary sewer purposes (to the extent that the bonds are deductible under subsection (b) of this section), or two or more of these purposes.

d. The amount of bonded debt included in gross debt and incurred, or to be incurred, for water, gas, or electric light or power purposes, or any two or more of these purposes.

e. The amount of bonded debt included in the gross debt and incurred, or to be incurred, for sanitary sewer system purposes to the extent that the debt is made deductible by subsection (b) of this section.

f. The amount of uncollected special assessments theretofore levied for local improvements for which any part of the gross debt (that is not otherwise deducted) was or is to be incurred, to the extent that the assessments will be applied, when collected, to the payment of any part of the gross debt.

g. The amount, as estimated by the governing board of the issuing unit or an officer designated by the board for this purpose, of special assessments to be levied for local improvements for which any part of the gross debt (that is not otherwise deducted) was or is to be incurred, to the extent that the special assessments, when collected, will be applied to the payment of any part of the gross debt.

(3) The net debt of the issuing unit, being the difference between the gross debt and deductions.

(4) The appraised value of property subject to taxation by the issuing unit before the application of any assessment ratio. The appraised value of property subject to taxation by the issuing unit is the value from which the assessed value last fixed for taxation by the issuing unit was computed, as revealed by the county tax records and certified to the issuing unit by the county tax supervisor. In calculating the appraised value, the incremental valuation of any tax increment district located in the unit, as determined pursuant to G.S. 159-107, shall not be included.

(5) The percentage that the net debt bears to the appraised value of property subject to taxation by the issuing unit.

(1981 (Reg. Sess., 1982), c. 1276, s. 2.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "and tax increment bonds" in the last sentence of subdivision (a)(1) and added the last sentence of subdivision (a)(4).

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, makes the act effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 159-61. Bond referenda; majority required; notice of referendum; form of ballot; canvass.

Editor's Note. — Session Laws 1982, 2nd Ex. Sess., c. 3, s. 19.2, provides that in the case of any local election to be held under G.S. 163-287 or G.S. 159-61 on June 10, 1982, first notice shall be published at least seven days before registration books are to close, rather than 20 or 14 days, respectively, and that the registration books for all elections to be held on June 10, 1982, shall close on May 17, 1982.

§ 159-62. Limitation on actions contesting validity of bond referenda.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

ARTICLE 5.

Revenue Bonds.

§§ 159-98 to 159-100: Reserved for future codification purposes.

ARTICLE 6.

Tax Increment Financing Act.

(Effective upon Certification of Approval of Constitutional Amendment.)

§ 159-101. Short title.

This Article may be cited as the "North Carolina Tax Increment Financing Act." (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, makes this Article effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

§ 159-102. Definitions.

As used in this Article:

(1) "Bonds" or "tax increment bonds" means tax increment bonds issued pursuant to this Article.

(2) "City" means cities, towns, and incorporated villages.

(3) "Costs" means "capital costs" as defined in G.S. 159-48(h), except that "costs" also include (i) interest on the bonds being issued or on notes issued in anticipation thereof during construction and for a period not exceeding four years after the estimated date of completion of construction and (ii) the establishment of debt service reserves. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-103. Authorization of tax increment bonds; purposes.

Each city may issue tax increment bonds pursuant to this Article and use the proceeds to finance the following public activities as part of one or more downtown development projects to meet the costs of one or more redevelopment projects, as defined in G.S. 160A-503, or for any one or more of the purposes for which a city may issue general obligation bonds pursuant to G.S. 159-48, or both. However, the proceeds of such bonds may be used only in the tax increment district the tax increment of which is pledged as security for the bonds.

Subject to agreement with the holders of its tax increment bonds and the limitation on duration of tax increment districts set out in this Article, each city may issue further tax increment bonds and bonds to refund outstanding

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tax increment bonds of any one or more series whether or not they have matured. Tax increment bonds may be issued partly for the purpose of refunding outstanding tax increment bonds and partly for any other purpose under this Article. Tax increment bonds issued to refund outstanding tax increment bonds shall be issued under this Article and not under Article 4 of this Chapter. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-104. Application to Commission for approval of tax increment bond issue; preliminary conference; acceptance of application.

A city may not issue tax increment bonds under this Article unless the issue is approved by the Local Government Commission. The council of the issuing city, or its duly authorized agent, shall file an application for Commission approval of the issue with the secretary of the Commission. The application shall state such facts and have attached to it such documents concerning the proposed tax increment bonds, tax increment district, and tax increment plan and the financial condition of the city as the secretary may require. The Commission may prescribe the form of the application.

Before he accepts the application, the secretary may require the council or its representatives to attend a preliminary conference at which time the secretary and his deputies may informally discuss the proposed issue, district, and plan and the timing of the steps to be taken in issuing the bonds. The tax increment district need not be defined and the tax increment plan need not be adopted by the city council at the time it files the application with the secretary. However, before the Commission may enter its order approving the bonds, the council shall have defined the district and adopted the plan.

After an application in proper form and order has been filed, and after a preliminary conference if one is required, the secretary shall notify the city in writing that the application has been filed and accepted for submission to the Commission. The secretary's statement is conclusive evidence that the city has complied with this section. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-105. Approval of application by Commission.

(a) In determining whether a proposed tax increment bond issue shall be approved, the Commission may consider:

(1) Whether the project or projects to be financed from the proceeds of the tax increment bond issue are necessary or expedient;
(2) Whether the proposed project or projects are feasible;
(3) The city's debt management procedures and policies;
(4) Whether the city is in default in any of its debt service obligations;
(5) Whether the private development forecast in the tax increment plan would be likely to occur without the public project or projects to be financed by the tax increment bonds;
(6) Whether taxes on the incremental valuation accruing to the tax increment district, together with any other revenues available, will be sufficient to service the proposed tax increment bonds;
(7) The ability of the Commission to market the proposed tax increment bonds at reasonable rates of interest.

The Commission may inquire into and give consideration to any other matters that it may believe to have a bearing on whether the issue should be approved.

(b) The Commission shall approve the application if, upon the information and evidence it receives, it finds and determines:

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(1) That the proposed tax increment bond issue is necessary or expedient;
(2) That the amount proposed is adequate and not excessive for the proposed purpose of the issue;
(3) That the proposed project or projects are feasible;
(4) That the city's debt management procedures and policies are good, or that reasonable assurances have been given that its debt will henceforth be managed in strict compliance with law;
(5) That the private development forecast in the tax increment plan would not be likely to occur without the public project or projects to be financed by the tax increment bonds;
(6) That the proposed tax increment bonds can be marketed at reasonable interest cost to the issuing city;
(7) That the issuing city has, pursuant to G.S. 160A-515.1, adopted a tax increment plan for the tax increment district for which the bonds are issued. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-106. Order approving or denying the application.

(a) After considering an application the Commission shall enter its order either approving or denying the application. An order approving an issue shall not be regarded as an approval of the legality of the bonds in any respect.

(b) Unless the bonds are to be issued for a tax increment district for which a tax increment bond issue has already been approved, the day upon which the Commission enters its order approving an application for tax increment bonds is also the effective date of the tax increment district for which the bonds are issued.

(c) If the Commission enters an order denying the application, the proceedings under this Article are at an end. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-107. Determination of incremental valuation; use of taxes levied on incremental valuation; duration of the district.

(a) Base Valuation in the Tax Increment District. — Once the Local Government Commission has entered its order approving a city's application for tax increment bonds, the city shall forth with notify the tax supervisor of the county in which the tax increment district is located of the existence of the tax increment district. Upon receiving this notice, the tax supervisor shall determine the base valuation of the district, which is the assessed value of taxable property situated in the district on the January 1 immediately preceding the effective date of the district. If the city or a city agency acquired property within the district within one year before the effective date of the district, the tax supervisor shall presume, subject to rebuttal, that the property was acquired in contemplation of establishment of the district and shall include the value of the property so acquired in determining the base valuation of the district. The city may rebut this presumption by showing that the property was acquired primarily for a purpose other than to reduce the tax incremental base. Once he has determined the base valuation of the district, the tax supervisor shall certify this amount to the city and to the county in which the district is located.

(b) Adjustments to the Base Valuation. — During the lifetime of the tax increment district, the base valuation shall be adjusted as follows:

(1) If the city amends its tax increment plan, pursuant to G.S. 160A-515.1, to remove property from the tax increment district, on the succeeding

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January 1, that property shall be removed from the district and the base valuation reduced accordingly.

(2) If the city amends its tax increment plan, pursuant to G.S. 160A-515.1, to expand the district, the new property shall be added to the district immediately. The base valuation of the district shall be increased by the assessed value of the taxable property situated in the added territory on the January 1 immediately preceding the effective date of the district.

(3) If at the time of a revaluation of property in the county in which the district is located, conducted pursuant to G.S. 105-286, it appears that, based on the schedule of values, standards, and rules approved by the board of county commissioners pursuant to G.S. 105-317, the property values of the district as they existed on the January 1 immediately preceding the effective date of the district would be increased because of the revaluation, then the base valuation shall be increased accordingly.

Any time the base valuation is adjusted, the tax supervisor shall forthwith certify the new base valuation to the city and to the county.

(c) Tax Increment Fund. — When a city has established a tax increment district, and the tax increment bonds for that district are approved by the Commission, the city shall establish a separate fund to account for the proceeds paid to the city from taxes levied on the incremental valuation of the district.

(d) Levy of Property Taxes within the District. — Each year the tax increment district is in existence, the tax supervisor shall determine the current assessed value of taxable property situated in the district. He shall also compute the difference between this current value and the base valuation of the district, by subtracting the base valuation from the current value. That difference, if positive, is the incremental valuation of the district. In each year the district is in existence, the city and the county shall levy taxes against property in the district in the same manner as taxes are levied against other property in the city or county. The proceeds from ad valorem taxes levied on property in the district shall be distributed as follows:

(1) In any year in which there is no incremental valuation in the district, all the proceeds of the taxes shall be retained by the city and county, as if there were no district in existence.

(2) In any year in which there is an incremental valuation in the district, the amount of tax due from each taxpayer on property in the district (except for taxes levied to service and repay debt secured by a pledge of the faith and credit, nonschool taxes levied pursuant to a vote of the people, and taxes levied for a municipal or county service district) shall be multiplied by a fraction, the numerator of which is the base valuation for the district and the denominator of which is the current valuation for the district. The amount shown as the product of this multiplication shall, when paid by the taxpayer, be retained by the city and county, as if there were no district in existence. The net proceeds of the remaining amount shall, when paid by the taxpayer, be turned over to the city finance officer, who shall place this amount in the special tax increment fund required by subsection (c) of this section. The net proceeds of each debt service tax, each voted tax, and each service district tax shall be paid to the government levying the tax. "Net proceeds" is gross proceeds minus refunds, releases and any collection fee paid by the levying government to the collecting government.

(e) Use of Moneys in the Tax Increment Fund. — Moneys placed in the tax increment fund may be used for any of these purposes, without priority, except as may be imposed by the bond order authorizing the tax increment bonds: (i)

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to finance city activities in the tax increment district pursuant to the tax increment plan; (ii) to meet principal and interest requirements on tax increment bonds and bond anticipation notes issued for the district; and (iii) to meet any other requirements imposed by the bond order authorizing the tax increment bonds. If in any year there is any money remaining in the tax increment fund after these purposes have been satisfied, the excess shall be paid to the city's and county's general funds, in proportion to their rates of ad valorem tax on taxable property situated in the tax increment district.

(f) Duration of District. — A tax increment district shall terminate at the earlier of (i) the end of the twentieth year after the effective date of the district or (ii) the date on which all tax increment bonds issued for the district have been fully retired or sufficient funds have been set aside, pursuant to the bond order authorizing the bonds, to meet all future principal and interest requirements on the bonds. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-108. Special covenants.

A tax increment bond order or a trust agreement securing tax increment bonds may contain covenants as to:

(1) The pledge of all or any part of the taxes received or to be received on the incremental valuation in the tax increment district during the life of the bonds;

(2) Rates, fees, rentals, tolls, or other charges to be established, maintained, and collected, and the use and disposal of revenues, gifts, grants, and funds received or to be received;

(3) The setting aside of debt service reserves and the regulation and disposition thereof;

(4) The custody, collection, securing, investment, and payment of any moneys held for the payment of tax increment bonds;

(5) Limitations or restrictions on the purposes to which the proceeds of sale of tax increment bonds may be applied;

(6) Limitations or restrictions on the issuance of additional tax increment bonds or notes for the same tax increment district; the terms upon which such additional tax increment bonds or notes may be issued or secured; or the refunding of outstanding tax increment bonds or notes;

(7) The acquisition and disposal of property for tax increment bond projects;

(8) Provision for insurance and for accounting reports and the inspection and audit thereof;

(9) The continuing operation and maintenance of any project financed with the proceeds of the tax increment bonds. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-109. Security of tax increment bonds.

Tax increment bonds are special obligations of the issuing city. The city may pledge the following sources of funds to the payment of the bonds, and no other sources: All or a portion of the moneys in the special tax increment fund required by G.S. 159-107(c); proceeds from the sale of property in the tax increment district; net revenues from any public facilities (other than portions of public utility systems) in the tax increment district financed with the proceeds of the tax increment bonds; and, subject to G.S. 159-47, net revenues from any other public facilities (other than portions of public utility systems) in the tax increment district constructed or improved pursuant to the tax increment plan.

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The principal and interest on tax increment bonds are not payable from the general funds of the city, nor do the bonds constitute a legal or equitable pledge, charge, lien, or encumbrance upon any of the city's property or upon any of its income, receipts or revenues, except as may be provided pursuant to this section. Except as provided in G.S. 159-107, neither the credit nor the taxing power of the city are pledged for the payment of the principal or interest of tax increment bonds; and no holder of tax increment bonds has the right to compel the exercise of the taxing power by the city or the forfeiture of any of its property in connection with any default thereon. Every tax increment bond shall contain such recitals as are necessary to show the limited nature of the security for the bond's payment and that it is not secured by the full faith and credit of the city. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-110. Limitations on details of bonds.

In fixing the details of tax increment bonds, the city council is subject to these restrictions and directions:

(1) The maturity date shall not exceed the shorter of (i) the longest of the various maximum periods of usefulness for the projects to be financed with bond proceeds, as prescribed by the Commission pursuant to G.S. 159-122, or (ii) the end of the twentieth year after the effective date of the tax increment district.

(2) The first payment of principal shall be payable not more than four years after the date of the bonds.

(3) No bonds may be made payable on demand, but any bond may be made subject to redemption prior to maturity, with or without premium, on such notice and at such time or times and with such redemption provisions as may be stated. When any such bonds shall have been validly called for redemption and provision shall have been made for the payment of the principal thereof, any redemption premium, and the interest thereon accrued to the date of redemption, interest thereon shall cease.

(4) The bonds may bear interest as [at] such rate or rates, payable semiannually or otherwise, may be in such denominations, and may be payable in such kind of money and in such place or places within or without the State of North Carolina, as the issuing city may determine. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§ 159-111. Annual report.

Each year, in July, each city with outstanding tax increment bonds shall make a report to the county in which the tax increment district for which the bonds were issued is located, setting out the base valuation for the district, the current valuation for the district, the amount of remaining tax increment debt for the district, and the city's estimate of when the debt will be retired. (1981 (Reg. Sess., 1982), c. 1276, s. 1.)

§§ 159-112 to 159-119: Reserved for future codification purposes.

Article 7.

Issuance and Sale of Bonds.

§ 159-120. (Effective upon certification of approval of constitutional amendment) "Unit" defined.

As used in this Article, unless the context clearly requires another meaning,

the words "unit" or "issuing unit" mean "unit of local government" as defined in G.S. 159-44, "municipality" as defined in G.S. 159-81, and "city" as defined in G.S. 159-102. (1973, c. 494, s. 30; 1981, (Reg. Sess., 1982), c. 1276, s. 3.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added "and 'city' as defined in G.S. 159-102" at the end of the section.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, makes the act effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

§ 159-122. (Effective upon certification of approval of constitutional amendment) Maturities of bonds.

(a) Except as provided in this subsection, the last installment of each bond issue shall mature not later than the date of expiration of the period of usefulness of the capital project to be financed by the bond issue, computed from the date of the bonds. The last installment of a refunding bond issue issued pursuant to G.S. 159-48(a)(4) or (5) shall mature not later than either (i) the shortest period, but not more than 40 years, in which the debt to be refunded can be finally paid without making it unduly burdensome on the taxpayers of the issuing unit, as determined by the Commission, computed from the date of the bonds, or (ii) the end of the unexpired period of usefulness of the capital project financed by the debt to be refunded. The last installment of bonds issued pursuant to G.S. 159-48(a)(1), (2), (3), (6), or (7) shall mature not later than 10 years after the date of the bonds, as determined by the Commission. The last installment of bonds issued pursuant to G.S. 159-48(c)(5) shall mature not later than eight years after the date of the bonds, as determined by the Commission. The last installment of tax increment bonds shall mature on the earlier of 20 years after the effective date of the tax increment district for which the bonds are issued or the longest of the various maximum periods of usefulness for the projects to be financed with bond proceeds, as prescribed by the Commission pursuant to this section.

(1981 (Reg. Sess., 1982), c. 1276, s. 4.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the last sentence of subsection (a).

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 159-123. (Effective upon certification of approval of constitutional amendment) Sale of bonds by sealed bids; private sales.

(b) The following classes of bonds may be sold at private sale:

(1) Bonds that a State or federal agency has previously agreed to purchase.

(2) Any bonds for which no legal bid is received within the time allowed for submission of bids.

(3) Revenue bonds, including any refunding bonds issued pursuant to G.S. 159-84.

(4) Refunding bonds issued pursuant to G.S. 159-78.

(5) Refunding bonds issued pursuant to G.S. 159-72 if the Local Government Commission determines that a private sale is in the best interest of the issuing unit.

(6) Tax increment bonds.

(1977, c. 201, s. 4; 1981 (Reg. Sess., 1982), c. 1276, s. 5.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the 1981 Cumulative Supplement.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment added subdivision (6) to subsection (b).

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 159-125. (Effective upon certification of approval of constitutional amendment) Bid instructions; bid deposit.

(a) Except for revenue bonds and tax increment bonds, no bid for less than the face value of the bonds plus accrued interest may be entertained.

(1981 (Reg. Sess., 1982), c. 1276, s. 6.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "and tax increment bonds" in subsection (a) and deleted a former second paragraph thereof, which read: "Different rates of interest may be bid for bonds maturing in different years, but different rates of interest may not be bid for bonds maturing in the same year."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 159-129. (Effective upon certification of approval of constitutional amendment) Obligations of units certified by Commission.

Each bond or bond anticipation note shall bear on its face or reverse a certificate signed by the secretary of the Commission or an assistant designated by him that the issuance of the bonds or notes has been approved under the provisions of the Local Government Bond Act, the Local Government Revenue Bond Act, or the North Carolina Tax Increment Financing Act. The certificate shall be conclusive evidence that the requirements of this Subchapter have been observed, and no bond or note without the Commission's certificate shall be valid. (1931, c. 60, s. 22; c. 296, s. 2; 1971, c. 780, s. 1; 1973, c. 494, s. 24; 1981 (Reg. Sess., 1982), c. 1276, s. 7.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted "or" preceding "the Local Government Revenue Bond Act" and added "or the North Carolina Tax Increment Financing Act" thereafter. The amendment also substituted "bonds or notes" for "bond or note" preceding "has been approved."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

§ 159-132. (Effective upon certification of approval of constitutional amendment) State Treasurer to deliver bonds and remit proceeds.

When the bonds are executed, they shall be delivered to the State Treasurer who shall deliver them to the order of the purchaser and collect the purchase price or proceeds. The Treasurer shall then pay from the proceeds any notes issued in anticipation of the sale of the bonds, deduct from the proceeds the Commission's expense in connection with the issue, and remit the net proceeds to the official depository of the unit after assurance that the deposit will be adequately secured as required by law. The proceeds of funding or refunding bonds may be deposited at the place of payment of the indebtedness to be refunded or funded for use solely in the payment of such indebtedness. The proceeds of revenue bonds shall be remitted to the trustee or other depository specified in the trust agreement or resolution securing them. Unless otherwise provided in the trust agreement or resolution securing the bonds, the proceeds of tax increment bonds shall be remitted in the manner provided by this section for the remission of the proceeds of general obligation bonds. (1931, c. 60, s. 25; 1935, c. 356, s. 2; 1971, c. 780, s. 1; 1981 (Reg. Sess., 1982), c. 1276, s. 8.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the last sentence of the section.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

ARTICLE 9.

Bond Anticipation, Tax, Revenue and Grant Anticipation Notes.

Part 1. Bond Anticipation Notes.

§ 159-160. (Effective upon certification of approval of constitutional amendment) "Unit" defined.

As used in this Part, the words "unit" or "issuing unit" mean "unit of local government" as defined in G.S. 159-44, "municipality" as defined in G.S. 159-81, and "city" as defined in G.S. 159-102. (1973, c. 494, s. 36; 1981 (Reg. Sess., 1982), c. 1276, s. 9.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added "and 'city' as defined in G.S. 159-102" at the end of the section.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

§ 159-163.1. (Effective upon certification of approval of constitutional amendment) Security of tax increment bond anticipation notes.

Notes issued in anticipation of the sale of tax increment bonds are special obligations of the issuing unit. Except as provided in G.S. 159-107, neither the credit nor the taxing power of the issuing unit may be pledged for the payment of notes issued in anticipation of the sale of tax increment bonds; and no holder of a tax increment bond anticipation note shall have the right to compel the exercise of the taxing power by the issuing unit or the forfeiture of any of its property in connection with any default thereon. Notes issued in anticipation of the sale of tax increment bonds may be secured by the same pledges, charges, liens, covenants, and agreements made to secure the tax increment bonds. In addition, the proceeds of each tax increment bond issue are pledged for the

payment of any notes issued in anticipation of the sale thereof, and any such notes shall be retired from the proceeds of the sale as the first priority. (1981 (Reg. Sess., 1982), c. 1276, s. 10.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, makes this section effective upon certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

§ 159-165. (Effective upon certification of approval of constitutional amendment) Sale and delivery of bond anticipation notes.

(b) When the bond anticipation notes are executed, they shall be delivered to the State Treasurer who shall deliver them to the order of the purchaser and collect the purchase price or proceeds. The Treasurer shall then deduct from the proceeds the Commission's expense in connection with the issue, and remit the net proceeds to the official depository of the unit after assurance that the deposit will be adequately secured as required by law. The net proceeds of revenue bond anticipation notes shall be remitted to the trustee or other depository specified in the trust agreement or resolution securing them. Unless provided otherwise in the trust agreement or resolution securing the notes, the net proceeds of tax increment bond anticipation notes shall be remitted in the manner provided by this subsection for the remission of the proceeds of general obligation bond anticipation notes. If the notes have been issued to renew outstanding notes, the Treasurer, in lieu of collecting the purchase price or proceeds, may provide for the exchange of the newly issued notes for the notes to be renewed. (1917, c. 138, s. 14; 1919, c. 178, s. 3(14); C. S., s. 2935; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 39; 1931, c. 293; 1939, c. 231, s. 1; 1953, c. 693, s. 2; 1969, c. 687, s. 3; 1971, c. 780, s. 1; 1973, c. 494, s. 35; 1981 (Reg. Sess., 1982), c. 1276, s. 11.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted the next-to-last sentence in subsection (b).

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 10.

Assistance for Defaulting Units in Refinancing Debt.

§ 159-176. (Effective upon certification of approval of constitutional amendment) Commission to aid defaulting units in developing refinancing plans.

If a unit of local government, a municipality, or a city (as respectively defined in G.S. 159-44, G.S. 159-81, and G.S. 159-102) fails to pay any installment of principal or interest on its outstanding debt on or before the due date (whether the debt is evidenced by general obligation bonds, revenue bonds, tax increment bonds, bond anticipation notes, tax anticipation notes, revenue anticipation notes, or grant anticipation notes) and remains in default for 90 days, the Commission may take such action as it deems advisable to investigate the unit's, municipality's, or city's fiscal affairs, consult with its governing board, and negotiate with its creditors in order to assist the unit, the municipality, or the city in working out a plan for refinancing, adjusting, or compromising the debt. When a plan is developed that the Commission finds to be fair and equitable and reasonably within the ability of the unit, municipality, or city to meet, the Commission shall enter an order finding that it is fair, equitable, and within the ability of the unit, municipality, or city to meet. The Commission shall then advise the governing board to take the necessary steps to implement it. If the governing board declines or refuses to do so within 90 days after receiving the Commission's advice, the Commission may enter an order directing the governing board to implement the plan. When this order is entered, the members of the governing board and all officers and employees of the unit, municipality, or city shall be under an affirmative duty to do all things necessary to implement the plan. The Commission may apply to the appropriate division of the General Court of Justice for a court order to the governing board and other officers and employees of the unit, municipality or city to enforce the Commission's order. (1935, c. 124, ss. 1, 2; 1971, c. 780, s. 1; 1973, c. 494, s. 41; 1981 (Reg. Sess., 1982), c. 1276, s. 12.)

Cross References. —

For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in the first sentence, substituted "local government, a municipality, or a city (as respectively defined in G.S. 159-44, G.S. 159-81, and G.S. 159-102)" for "government or municipality (as defined in G.S. 159-44 or 159-81)" and inserted "tax increment bonds", "or grant anticipation notes", "or city's" and "or the city" in the first sentence. The amendment also substituted "unit, municipality, or city" for "unit or municipality" in two places in the second sentence, once in the fifth sentence, and once in the last sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

§ 159-177. (Effective upon certification of approval of constitutional amendment) Power to require reports and approve budgets.

When a refinancing plan has been put into effect pursuant to G.S. 159-176, the Commission shall have authority to require any periodic reports on the unit's, municipality's, or city's financial affairs (in addition to those otherwise required by law) that the secretary deems necessary, and to approve or reject the unit's, municipality's, or city's annual budget ordinance. The governing board of the unit, municipality, or city shall obtain the approval of the secretary before adopting the annual budget ordinance. If the Commission recommends modifications in the budget, the governing board shall be under an affirmative duty to make the modifications before adopting the budget ordinance. (1935, c. 124, ss. 3, 4; 1971, c. 780, s. 1; 1973, c. 494, ss. 41, 42; 1981 (Reg. Sess., 1982), c. 1276, s. 12.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "unit's, municipality's, or city's" for "unit's or municipality's" in two places in the first sentence and "unit, municipality, or city" for "unit or municipality" in the second sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

§ 159-178. (Effective upon certification of approval of constitutional amendment) Duration of Commission's powers.

The power and authority granted to the Commission in this Article shall continue with respect to a defaulting unit, municipality, or city until the Commission is satisfied that the unit, municipality, or city has performed or will perform the duties required of it in the refinancing plan, and until agreements made with the unit's, municipality's, or city's creditors have been performed in accordance with the plan. (1935, c. 124, s. 5; 1971, c. 780, s. 1; 1973, c. 494, s. 41; 1975, c. 19, s. 62; 1981 (Reg. Sess., 1982), c. 1276, s. 12.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "unit, municipality, or city" for "unit of local government or municipality" preceding "until the Commission is satisfied that the" and for "unit or municipality" thereafter, and substituted "unit's, municipality's, or city's" for "unit's or municipality's."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Chapter 159C.

Industrial and Pollution Control Facilities Financing Act.

§ 159C-7. Approval of project.

Editor's Note. — In the second sentence of the third unnumbered paragraph of this section as set out in the 1981 Cumulative Supplement, the reference to "subdivision (3)" should be to "subdivision (2a)."

Chapter 160A.

Cities and Towns.

Article 1A.

Municipality Board of Control.

Sec.
160A-6 to 160A-10. [Repealed.]

Article 11.

Eminent Domain.

160A-264. [Reserved.]

Article 12.

Sale and Disposition of Property.

160A-265. Use and disposal of property.

Article 19.

Planning and Regulation of Development.

Part 3A. Historic Districts.

160A-398.1. Applicability of Part.

Part 3B. Historic Properties Commissions.
160A-399.1. Legislative findings.
Sec.
160A-399.4. Adoption of an ordinance; criteria for designation.

Article 22.

Urban Redevelopment Law.

160A-505. (Effective upon certification of approval of constitutional amendment) Alternative organization.
16A-512. (Effective upon certification of approval of constitutional amendment) Powers of commission.
160A-515.1. (Effective upon certification of approval of constitutional amendment) Tax increment financing.

Article 1.

Definitions and Statutory Construction.

§ 160A-4. Broad construction.

CASE NOTES

Municipal corporations have no inherent police powers, etc. —

The municipality may not exercise any power not granted to it, and possesses no inherent authority to exercise powers either expressly or impliedly prohibited by statute. Porsh Bldrs., Inc. v. City of Winston-Salem, 302 N.C. 550, 276 S.E.2d 443 (1981).

Their Powers Must Be Expressly Granted, etc. —

Municipal corporations are created by legislative enactment and possess only those powers conferred in the express language of a statute and those necessarily implied by law therefrom. Porsh Bldrs., Inc. v. City of Winston-Salem, 302 N.C. 550, 276 S.E.2d 443 (1981).

Doubt Concerning Powers, etc. —

Statutory delegations of power to municipalities should be strictly construed, resolving any ambiguity against the corporation's authority to exercise the power. Porsh Bldrs., Inc. v. City of Winston-Salem, 302 N.C. 550, 276 S.E.2d 443 (1981).

Article 1A.

Municipal Board of Control.

§§ 160A-6 to 160A-10: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 63.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1191, s. 64, provides that the repeal of this Article does not effect the validity of any corporate charter issued by the Municipal Board of Control prior to the effective date thereof. Section 65 of the act provides that the repeal shall become effective October 1, 1982, except that an order incorporating a city which is entered prior to October 1, 1982, but subject to a referendum to be held under G.S. 160A-9.3 between October 1, 1982, and January 1, 1983, shall be valid notwithstanding the abolition of the Municipal Board of Control.

Article 4.

Corporate Limits.

Part 1. General Provisions.

§ 160A-21. Existing boundaries.

CASE NOTES

Constitutionality of Annexation by Local Act. — Annexation to a municipality by a local act of the General Assembly is not invalid constitutionally where the municipality fails to provide one of the many essential services to the newly acquired territory. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Contiguity and cohesiveness were not constitutionally required in an annexation proceeding under this section. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Legislature Has Power to Regulate Annexation. — Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

But Power Not Unlimited. — The power of the legislature to expand the boundaries of cities, towns, or other local units, though great, is not unlimited. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Scope of Legislative Discretion. — The enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Judicial Review of Local Annexation Act. — A local annexation act is not insulated from judicial review when it is an instrument for circumventing a constitutionally protected right. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Article 4A.

Extension of Corporate Limits.

Part 1. Extension by Referendum or Petition.

§ 160A-24. Procedure for adoption of ordinance extending limits; effect of adoption when no election required; public hearing and notice thereof.

Application of Part 1. — Part 1 of Article 4A is repealed, as to cities of less than 5,000 population, and subject to certain exceptions, by § 160A-43. Section 160A-31 is excepted from the repeal, and, in addition, Part 1 is continued in effect as to certain named counties and towns by § 160A-44.

Part 1 of Article 4A is likewise repealed, as to cities of 5,000 population or more, and subject to certain exceptions, by § 160A-55. Section

160A-31 is excepted from the repeal, and, in addition, certain named counties are excepted from the repeal and Part 1 of Article 4A is continued in effect as to those counties by § 160A-56.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

For note on North Carolina's annexation referendum procedure in light of Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980), see 17 Wake Forest L. Rev. 765 (1981).

CASE NOTES

Cited in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

§ 160A-25. Referendum on question of extension.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

For note on North Carolina's annexation referendum procedure in light of Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980), see 17 Wake Forest L. Rev. 765 (1981).

§ 160A-30. Surveys of proposed new areas.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

§ 160A-31. Annexation by petition.

Cross References. — As to application of this section, see the note to § 160A-24.

CASE NOTES

Cited in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Part 2. Annexation by Cities of Less than 5,000.

§ 160A-33. Declaration of policy.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

CASE NOTES

Cited in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

§ 160A-35. Prerequisites to annexation; ability to serve; report and plans.

CASE NOTES

Stated in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Part 3. Annexation by Cities of 5,000 or More.

§ 160A-45. Declaration of policy.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

CASE NOTES

The provisions of this section are merely statements of policy. —
In accord with 1st paragraph in 1981 Cum. Supp. See In re Annexation Ordinance No. D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981).

In accord with 2nd paragraph in 1981 Cum. Supp. See In re Annexation Ordinance No. D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981).

And Are Not Part of § 160A-50 "Procedure." — The statement of State policy with regard to annexation set forth in this section is not part of the "procedure" of annexation under § 160A-50. In re Annexation Ordinance No. D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981).

Cited in In re Annexation Ordinance No. 300-X, N.C. , 284 S.E.2d 470 (1981); In re Annexation Ordinance No. 301-X, N.C. , 284 S.E.2d 475 (1981).

§ 160A-47. Prerequisites to annexation; ability to serve; report and plans.

CASE NOTES

The use of the word "substantially" in paragraph (3) a does not render the section vague and ambiguous. In re Annexation Ordinance No. D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981).

The minimum requirements of subdivision (3) are that the city provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services. In re Annexation Ordinance No. 300-X, N.C. , 284 S.E.2d 470 (1981).

The report need contain only the following: (1) information on the level of services then available in the city, (2) a commitment by the city to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the city will finance the extension of these services. In re Annexation Ordinance No. 300-X, N.C. , 284 S.E.2d 470 (1981).

Paragraph (3)d requires only that the method of financing be disclosed, not only that the precise source of each dollar be pinpointed. In re Annexation Ordinance No. 300-X, N.C. , 284 S.E.2d 470 (1981).

Burden of Showing Noncompliance. — The burden is on petitioner to establish by competent and substantial evidence the city's noncompliance with subdivision (3). In re Annexation Ordinance No. 300-X, N.C. , 284 S.E.2d 470 (1981).

Cited in In re Annexation Ordinance No. 301-X, N.C. , 284 S.E.2d 475 (1981).

§ 160A-48. Character of area to be annexed.

CASE NOTES

Only One of Subdivisions (c)(1) or (c)(2) Standards Need Be Met. — This section's requirement that the area to be annexed must be developed for urban purposes is satisfied if either the standard of subdivision (c)(1) or the standard of subdivision (c)(2) is met. It is not required that both standards be satisfied. In re Annexation Ordinance No. 301-X, N.C. , 284 S.E.2d 475 (1981).

To perform the computations required by the "subdivision test" under subdivision (c)(2) of this section, two figures are needed: the total acreage and the subdivided acreage. In re Annexation Ordinance No. 301-X, N.C. , 284 S.E.2d 475 (1981).

Applied in Food Town Stores, Inc. v. City of Salisbury, 303 N.C. 539, 279 S.E.2d 557 (1981).

Cited in In re Annexation Ordinance No. 300-X, N.C. , 284 S.E.2d 470 (1981).

§ 160A-50. Appeal.

CASE NOTES

Constitutionality. — Annexation statutes are not unconstitutional because they provide that the review by the superior court is without a jury. In re Annexation Ordinance No. D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981).

Section 160A-45 Policy Not Part of "Procedure". — The statement of State policy with regard to annexation set forth in § 160A-45 is not part of the "procedure" of annexation under subsection (a) and subdivision (f) (1) of this section. In re Annexation Ordinance No. D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981).

There is no test of "reasonableness" which must be considered upon judicial review of an annexation proceeding. In re Annexation Ordinance No. D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981).

Cited in Food Town Stores v. City of Salisbury, 303 N.C. 539, 279 S.E.2d 557 (1981).

Part 4. Annexation of Noncontiguous Areas.

§ 160A-58.1. Petition for annexation; standards.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

CASE NOTES

Absence of County's Signature on Petition. — Where a county was the sole property owner of an area which the town sought to annex, the absence of the county's signature on a petition under this section rendered the annexation illegal, null, and void despite the fact that the county is not required to sign the petition as it is a tax-exempt property owner. County of Brunswick v. Town of Bolivia, N.C. App. , 289 S.E.2d 569 (1982).

Noncontiguous satellite annexation is specifically authorized pursuant to this section. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

ARTICLE 7.

Administrative Offices.

Part 4. Personnel.

§ 160A-167. Defense of employees and officers; payment of judgments.

Legal Periodicals. — For a comment on the need for reform in North Carolina of local government sovereign immunity, see 18 Wake Forest L. Rev. 43 (1982).

ARTICLE 9.

Taxation.

§ 160A-213. Motor vehicle taxes.

Cross References. — For further provisions as to motor vehicle license or privilege taxes in counties or municipalities, see § 20-97.

ARTICLE 10.

Special Assessments.

§ 160A-216. Authority to make special assessments.

CASE NOTES

Applied in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

§ 160A-237. Authority to hold water and sewer assessments in abeyance.

CASE NOTES

Applied in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

ARTICLE 11.

Eminent Domain.

§ 160A-264: Reserved for future codification purposes.

ARTICLE 12.

Sale and Disposition of Property.

§ 160A-265. Use and disposal of property.

In the discretion of the council, a city may: (i) hold, use, change the use thereof to other uses, or (ii) sell or dispose of real and personal property, without regard to the method or purpose of its acquisition or to its intended or actual governmental or other prior use. (1981 (Reg. Sess., 1982), c. 1236.)

§ 160A-266. Methods of sale; limitation.

Local Modification. — Ashe, Brunswick: 1981, c. 283; 1981, (Reg. Sess., 1982), c. 1150.

ARTICLE 15.

Streets, Traffic and Parking.

§ 160A-300. Traffic control.

CASE NOTES

Ordinances under this section are presumed to be valid and the courts will not declare them invalid unless clearly shown to be so. Wenco Mgt. Co. v. Town of Carrboro, 53 N.C. App. 480, 281 S.E.2d 74 (1981).

ARTICLE 16.

Public Enterprises.

Part 1. General Provisions.

§ 160A-311. Public enterprise defined.

CASE NOTES

Cited in Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

§ 160A-312. Authority to operate public enterprises.

CASE NOTES

Cited in Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

§ 160A-314. Authority to fix and enforce rates.

CASE NOTES

Setting of Rates for Water and Sewerage as Proprietary Function. — Setting of rates and charges for water and sewer services furnished by a municipality to its customers is a proprietary function, subject only to limitations imposed upon such action by statute or contractual obligation assumed in such actions. Town of Spring Hope v. Bissette, 53 N.C. App. 210, 280 S.E.2d 490 (1981).

And Subject to Judgment and Discretion of Municipal Authorities. — Setting of rates and charges for water and sewer services furnished by a municipality is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the courts absent some showing of arbitrary or discriminatory action. Town of Spring Hope v. Bissette, 53 N.C. App. 210, 280 S.E.2d 490 (1981).

Test of Arbitrariness. — Test is not whether any particular customer has directly benefited from the use of a discrete or particular component of the utility plant, but whether the municipal authority has acted arbitrarily in establishing its rates. Town of Spring Hope v. Bissette, 53 N.C. App. 210, 280 S.E.2d 490 (1981).

Inclusion in Rates of Capital Costs of Improvement. — Great weight of authority is to the effect that in the setting of rates and charges for water and sewer services a municipal body may include not only operating expenses and depreciation, but also capital cost associated with actual or anticipated growth or improvement of the facilities required for the furnishing of such services. Town of Spring Hope v. Bissette, 53 N.C. App. 210, 280 S.E.2d 490 (1981).

Propriety of Rates Calculated to Recoup Costs of New Facilities Not Yet in Use. — Where the cost of necessary new facilities constructed to serve municipality's customers are known or are predictable, rates calculated to begin recoupment of those costs are not unlawful or illegal merely because the new facilities have not yet been put into actual use. Town of Spring Hope v. Bissette, 53 N.C. App. 210, 280 S.E.2d 490 (1981).

ARTICLE 19.

Planning and Regulation of Development.

Part 2. Subdivision Regulation.

§ 160A-371. Subdivision regulation.

Cross References. — As to compliance of subdivision streets with minimum standards of the Board of Transportation required of developers, see § 136-102.6. As to subdivision regulation in counties, see § 153A-330, et seq.

Part 3. Zoning.

§ 160A-381. Grant of power.

CASE NOTES

Stated in Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

Cited in Wenco Mgt. Co. v. Town of Carrboro, 53 N.C. App. 480, 281 S.E.2d 74 (1981).

§ 160A-382. Districts.

CASE NOTES

Stated in Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

Cited in Wenco Mgt. Co. v. Town of Carrboro, 53 N.C. App. 480, 281 S.E.2d 74 (1981).

§ 160A-383. Purposes in view.

CASE NOTES

The concept of zoning, etc. —
In accord with 1st paragraph in original. See Graham Court Assocs. v. Town Council, 53 N.C. App. 543, 281 S.E.2d 418 (1981).

Zoning ordinance deals basically with use, not ownership, of property. Graham Court Assocs. v. Town Council, 53 N.C. App. 543, 281 S.E.2d 418 (1981).

Zoning is the regulation by a municipality of the use of land within that municipality, and of the buildings and structures thereon, and is not regulation of the ownership of the land or structures. Graham Court Assocs. v. Town Council, 53 N.C. App. 543, 281 S.E.2d 418 (1981).

Applied in Graham v. City of Raleigh, — N.C. App. —, 284 S.E.2d 742 (1981).

§ 160A-385. Changes.

CASE NOTES

But Power Is Subject to Limitations. —
Towns exercising authority pursuant to this section are subject to constitutional limitations against arbitrary and unduly discriminatory interference with the rights of property owners. Wenco Mgt. Co. v. Town of Carrboro, 53 N.C. App. 480, 281 S.E.2d 74 (1981).

Ordinances enacted under this section must relate rationally to valid police power objective of promoting the health, safety, morals, or general welfare of the public. Wenco Mgt. Co. v. Town of Carrboro, 53 N.C. App. 480, 281 S.E.2d 74 (1981).

No Authority to Regulate Change in Ownership to Condominiums. — Contemplated change in ownership to condominiums does not constitute a change in use which a town may regulate by its zoning ordinance. Graham Court Assocs. v. Town Council, 53 N.C. App. 543, 281 S.E.2d 418 (1981).

Where petitioner's apartment complex property did not comply with zoning ordinance requirements for multi-family housing, but its continued use as multi-family housing was permitted as a prior nonconforming use under the zoning ordinance of respondent town, contemplated change in ownership to condominiums did not constitute a change in use which respondent town could regulate by a zoning ordinance, and respondent lacked the right or legal authority to require petitioner to apply for or receive a special use permit as a prerequisite to its right to sell the apartments as condominiums. Graham Court Assocs. v.

Town Council, 53 N.C. App. 543, 281 S.E.2d 418 (1981).

Part 3A. Historic Districts.

§ 160A-395. Exercise of powers under this Part by counties as well as cities; designation of historic districts.

Legal Periodicals. —
For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

160A-398.1. Applicability of Part.

All of the provisions of this Part are hereby made applicable to the construction, alteration, moving and demolition of buildings by the State of North Carolina, its political subdivisions, agencies and instrumentalities.

The State shall have a right of appeal to the North Carolina Historical Commission from any decision of a local historic district commission. The North Carolina Historical Commission shall render its decision within 30 days from the date that the notice of appeal by the State is received by the Commission. The decision of the Commission shall be final and binding upon both the State and the historic district commission.

The Secretary of the Interior's Standards for Rehabilitation and Guideline for Rehabilitating Historic Buildings shall be the sole principles and guidelines used in reviewing applications of the State for certificates of appropriateness.

No provision of this Part shall be applicable to the construction, use, alteration, moving or demolition of buildings of the University of North Carolina, or any of its constituent institutions or agencies. (1979, c. 646; 1981 (Reg. Sess., 1982), c. 1185, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment rewrote this section, which formerly provided that no provision of this Part should be applicable to the construction, use, alteration, moving or demolition of buildings by the State, its agencies and instrumentalities, or institutions of higher education, and that this Part should apply to counties and municipalities.

Part 3B. Historic Properties Commissions.

§ 160A-399.1. Legislative findings.

(b) Exercise of powers under this Part by counties as well as cities. The term "municipality" as used in Part 3B of Chapter 160A shall be deemed to include the county or its governing board or legislative board, to the end that counties may exercise the same powers as cities with respect to the designation of historic properties. (1971, c. 885, s. 1; 1973, c. 426, s. 62; 1979, c. 644; 1981 (Reg. Sess., 1982), c. 1185, s. 2.)

Effect of Amendments. —
The 1981 (Reg. Sess., 1982) amendment, in the second sentence of subsection (b), substituted "Part 3B of Chapter 160A" for "G.S. 160A-399.1 through 160A-399.13" and "designation of historic properties" for "establishment of historic districts."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Legal Periodicals. —
For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

§ 160A-399.4. Adoption of an ordinance; criteria for designation.

Upon complying with G.S. 160A-399.5, the governing board may adopt and from time to time amend or repeal an ordinance designating one or more historic properties. No property shall be recommended for designation as a historic property unless it is deemed and found by the properties commission to be of special significance in terms of its history, architecture, and/or cultural importance, and to possess integrity of design, setting, workmanship, materials, feeling and/or association.

The ordinance shall describe each property designated in the ordinance, the name or names of the owner or owners of the property, those elements of the property that are integral to its historical, architectural, and/or archaeological value, including the approximate area of the property so designated, and any other information the governing board deems necessary. For each building, structure, site, area or object so designated as a historic property, the ordinance shall require that the waiting period set forth in this Part be observed prior to its demolition. For each designated historic property, the ordinance may also provide for a suitable sign on the property indicating that the property has been so designated. If the owner consents, the sign shall be placed upon the property. If the owner objects, the sign shall be placed on a nearby public right-of-way. (1971, c. 885, s. 4; 1973, c. 426, s. 62; 1977, c. 869, s. 3; 1979, c. 644; 1981 (Reg. Sess., 1982), c. 1185, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted "alteration, remodeling or removal" at the end of the second sentence of the second paragraph.

Part 5. Building Inspection.

§ 160A-415. Conflicts of interest.

OPINIONS OF ATTORNEY GENERAL

Inspector Prohibited From Furnishing Labor and Materials Within City. — This section prohibits plumbing and mechanical inspector from furnishing labor and materials for installation and repair of garage doors and electric door openers within city's jurisdiction. See opinion of Attorney General to Mr. David A. Holec, Lumberton City Attorney, 51 N.C.A.G. 7 (1981).

Part 6. Minimum Housing Standards.

§ 160A-441. Exercise of police power authorized.

CASE NOTES

Purpose. — In accord with 1st paragraph in original. See Farmers Bank v. City of Elizabeth City, 54 N.C. App. 110, 282 S.E.2d 580 (1981).

§ 160A-442. Definitions.

CASE NOTES

Quoted in Farmers Bank v. City of Elizabeth City, 54 N.C. App. 110, 282 S.E.2d 580 (1981).

§ 160A-443. Ordinance authorized as to repair, closing and demolition; order of public officer.

CASE NOTES

Summary Judgment for City Not Authorized Where Question of Reasonable Diligence Raised. — In an action to recover damages from defendant city for destruction of a residence on property held under a deed of trust to one plaintiff and secured under a promissory note held by the other plaintiff, summary judgment was improperly granted for defendant where one of the questions raised by defendant's motion was whether its building inspector used "reasonable diligence" in attempting to locate plaintiff and others connected with the property. Farmers Bank v. City of Elizabeth City, 54 N.C. App. 110, 282 S.E.2d 580 (1981).

§ 160A-445. Service of complaints and orders.

CASE NOTES

Summary Judgment for City Not Authorized Where Question of Reasonable Diligence Raised. — In an action to recover damages from defendant city for destruction of a residence on property held under a deed of trust to one plaintiff and secured under a promissory note held by the other plaintiff, summary judgment was improperly granted for defendant where one of the questions raised by defendant's motion was whether its building inspector used "reasonable diligence" in attempting to locate plaintiff and others connected with the property. Farmers Bank v. City of Elizabeth City, 54 N.C. App. 110, 282 S.E.2d 580 (1981).

Part 7. Community Appearance Commissions.

§ 160A-451. Membership and appointment of commission; joint commission.

Legal Periodicals. —

For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

Part 8. Miscellaneous Powers.

§ 160A-457. Acquisition and disposition of property for redevelopment.

Local Modification. — City of Wilmington: 1981 (Reg. Sess., 1982), c. 1162.

ARTICLE 21.

Miscellaneous.

§ 160A-485. Waiver of immunity through insurance purchase.

Cross References. — For provision that no local act, including city charters, shall require notice to a local unit of government of any claim against it and prohibit suit if such notice is not given, see § 1-539.16.

Legal Periodicals. — For a comment on the need for reform in North Carolina of local government sovereign immunity, see 18 Wake Forest L. Rev. 43 (1982).

CASE NOTES

Stated in Edwards v. Akion, 52 N.C. App. 688, 279 S.E.2d 894 (1981).

ARTICLE 22.

Urban Redevelopment Law.

§ 160A-505. (Effective upon certification of approval of constitutional amendment) Alternative organization.

(a) In lieu of creating a redevelopment commission as authorized herein, the governing body of any municipality may, if it deems wise, either designate a housing authority created under the provisions of Chapter 157 of the General Statutes to exercise the powers, duties, and responsibilities of a redevelopment commission as prescribed herein, or undertake to exercise such powers, duties, and responsibilities itself. Any such designation shall be by passage of a resolution adopted in accordance with the procedure and pursuant to the findings specified in G.S. 160A-504(a) and (b). In the event a governing body designates itself to perform the powers, duties, and responsibilities of a redevelopment commission under this subsection, or exercises those powers, duties, and responsibilities pursuant to G.S. 153A-376 or G.S. 160A-456, then where any act or proceeding is required to be done, recommended, or approved both by a redevelopment commission and by the municipal governing body, then the performance, recommendation, or approval thereof once by the municipal governing body shall be sufficient to make such performance, recommendation, or approval valid and legal. In the event a municipal governing body designates itself to exercise the powers, duties, and responsibilities of a redevelopment commission, it may assign the administration of redevelopment policies, programs and plans to any existing or new department of the municipality.

(1981 (Reg. Sess., 1982), c. 1276, s. 13.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "under this subsection, or exercises those powers, duties, and responsibilities pursuant to G.S. 153A-376 or G.S. 160A-456," in the third sentence of subsection (a).

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 160A-512. (Effective upon certification of approval of constitutional amendment) Powers of commission.

A commission shall constitute a public body, corporate and politic, exercising public and essential governmental powers, which powers shall include all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this Article, including the following powers in addition to those herein otherwise granted:

(6) Within its area of operation, to purchase, obtain options upon, acquire by gift, grant, bequest, devise, eminent domain or otherwise, any real or personal property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment project; to hold, improve, clear or prepare for redevelopment any such property, and notwithstanding the provisions of G.S. 160-59 but subject to the provisions of G.S. 160A-514, and with the approval of the local governing body sell, exchange, transfer, assign, subdivide, retain for its own use, mortgage, pledge, hypothecate or otherwise encumber or dispose of any real or personal property or any interest therein, either as an entirety to a single "redeveloper" or in parts to several redevelopers; provided that the commission finds that the sale or other transfer of any such part will not be prejudicial to the sale of other parts of the redevelopment area, nor in any other way prejudicial to the realization of the redevelopment plan approved by the governing body; to enter into contracts, either before or after the real property that is the subject of the contract is acquired by the commission (although disposition of the property is still subject to G.S. 160A-514), with "redevelopers" of property containing covenants, restrictions, and conditions regarding the use of such property for residential, commercial, industrial, or recreational purposes or for public purposes in accordance with the redevelopment plan and such other covenants, restrictions, and conditions as the commission may deem necessary to prevent a recurrence of blighted areas or to effectuate the purposes of this Article; to make any of the covenants, restrictions or conditions of the foregoing contracts covenants running with the land, and to provide appropriate remedies for any breach of any such covenants or conditions, including the right to terminate such contracts and any interest in the property created pursuant thereto; to borrow money and issue bonds therefor and provide security for bonds; to insure or provide for the insurance of any real or personal property or oper-

ations of the commission against any risks or hazards, including the power to pay premiums on any such insurance; and to enter into any contracts necessary to effectuate the purposes of this Article;

(1981 (Reg. Sess., 1982), c. 1276, s. 14.)

Cross References. — For this section as in effect until certification of approval of constitutional amendment, see the bound volume.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted "either before or after the real property that is the subject of the contract is acquired by the commission (although disposition of the property is still subject to G.S. 160A-514)," and "or" preceding "recreational purposes or for public purposes" in subdivision (6).

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18, provides that the act becomes effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (6) are set out.

§ 160A-514. Required procedures for contracts, purchases and sales; powers of commission in carrying out redevelopment project.

CASE NOTES

Limits of Municipal Governing Body's Discretion under Subsection (d). — The provision of subsection (d) of this section making sales of municipal redevelopment commission property subject to the approval of the governing body of the municipality merely places final authority in the board to determine whether all submitted bids satisfy the zoning requirements of the district and are in general conformity with the redevelopment plan and does not give the board authority to determine which bid "more nearly" complies with the redevelopment plan. Porsh Bldrs., Inc. v. City of Winston-Salem, 302 N.C. 550, 276 S.E.2d 443 (1981).

In selling the property of a municipal redevelopment commission to private developers, the municipal board of aldermen is required to accept the "highest responsible bid," if any, where that bid complies with the applicable zoning restrictions and the redevelopment plan for the property to be sold. Porsh Bldrs., Inc. v. City of Winston-Salem, 302 N.C. 550, 276 S.E.2d 443 (1981).

In this section, which provides for sale of municipal redevelopment commission property to the "highest responsible bidder," the term "responsible" was intended to give the municipality power to use its discretion only to the extent of determining whether a bidder had the resources and financial ability to complete the project set forth in his proposal for the development of the property and does not allow the municipality to consider which bid best complies with the redevelopment plan. Porsh Bldrs., Inc. v. City of Winston-Salem, 302 N.C. 550, 276 S.E.2d 443 (1981).

Discretion to Accept Lower Bid. — The provision of subsection (d) of this section giving the governing board of a municipality the power to reject all bids for redevelopment commission property does not impliedly authorize the board to reject the highest bid if a lower bid "more nearly" complies with the redevelopment plan. Porsh Bldrs., Inc. v. City of Winston-Salem, 302 N.C. 550, 276 S.E.2d 443 (1981).

Applied in Campbell v. First Baptist Church, 51 N.C. App. 393, 276 S.E.2d 712 (1981).

§ 160A-515.1. (Effective upon certification of approval of constitutional amendment) Tax increment financing.

(a) Authorization. — As part of a downtown development project, a city may finance a redevelopment project and any related public improvements with the proceeds of tax increment bonds, issued pursuant to Article 6, G.S. Chapter 159, together with any other revenues that are available to the city. Before it receives the approval of the Local Government Commission for issuance of tax increment bonds, the city's governing body must define a tax increment district and adopt a tax increment plan for the district.

(b) Tax Increment District. — A tax increment district shall comprise all or portions of one or more redevelopment areas defined pursuant to this Article. The total land area within tax increment districts in a city may not exceed five per cent (5%) of the total land area of the city; and any such district must be located in or near the central business district of the city.

(c) Tax Increment Plan. — The tax increment plan shall be compatible with the redevelopment plan or plans for the redevelopment area or areas included within the district. The tax increment plan shall include:

(1) A description of the boundaries of the tax increment district;
(2) A description of the proposed development of the district, both public and private;
(3) The costs of the proposed public activities;
(4) The sources and amounts of funds to pay for the proposed public activities;
(5) The base valuation of the tax increment district;
(6) The projected incremental valuation of the tax increment district;
(7) The estimated duration of the tax increment district.

(d) Plan Adoption. — Before adopting a plan for a tax increment district, the city council shall hold a public hearing on the plan. The council shall, no more than 30 days and no less than 14 days before the day of the hearing, cause notice of the hearing to be published once and shall cause notice of the hearing to be mailed, by first class mail, to the board of county commissioners of the county in which the district is located. The notice shall state the time and place of the hearing, shall specify its purpose, and shall state that a copy of the proposed plan is available for public inspection in the office of the city clerk. At the public hearing, the council shall hear anyone who wishes to speak with respect to the proposed district and proposed plan. The council may adopt the plan, with or without amendment, at any time after the public hearing. However, the plan and the district do not become effective until the city's application to issue tax increment bonds has been approved by the Local Government Commission, pursuant to G.S. Chapter 159, Article 6.

(e) Plan Modification. — Subject to the limitations of this subsection, a city council may amend a tax increment plan adopted for a tax increment district after the effective date of the district. Before making any amendment, the city council shall hold a public hearing, following the notice requirements set out in subsection (d) of this section. The boundaries of the district may be enlarged only during the first five years after the effective date of the district and only if the area to be added has been or is about to be developed and the development is primarily attributable to development that has occurred within the district, as certified by the Local Government Commission. The boundaries of the district may be reduced at any time, but the city may agree with the holders of any tax increment bonds to restrict its power to reduce district boundaries.

(f) Plan Implementation. — In implementing a tax increment plan, a city may act directly, through a redevelopment commission, through one or more contracts with private agencies, or by any combination thereof. (1981 (Reg. Sess., 1982), c. 1276, s. 15.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 18 makes this section effective upon the certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act has been approved by the people of the State. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, and will be submitted to the people on Nov. 2, 1982. See the note to N.C. Const., Art. V, § 10.

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 16, provides: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof."

Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 17, contains a severability clause.

Chapter 161.

Register of Deeds.

ARTICLE 1.

The Office.

§ 161-1. Election and term of office.

Effect of Amendments. —

The amendment to this section in Session Laws 1981, c. 504, s. 9, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

Chapter 162.

Sheriff.

ARTICLE 1.

The Office.

§ 162-1. Election and term of office.

Effect of Amendments. —

The amendment to this section in Session Laws 1981, c. 504, s. 10, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

Chapter 162A.

Water and Sewer Systems.

ARTICLE 1.

Water and Sewer Authorities.

§ 162A-7. Prerequisites to acquisition of water, etc., by eminent domain.

CASE NOTES

Considerations on Issuance of Certificates. — Legislature, in granting the Environmental Management Commission authority to issue certificates authorizing land and water rights acquisition, intended that the Commission consider carefully not only the development of water resources but also the effect of that development on present beneficial users within the watershed. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

§ 162A-9. Rates and charges; contracts for water or services; deposits; delinquent charges.

CASE NOTES

Cited in Town of Spring Hope v. Bissette, — N.C. —, 287 S.E.2d 851 (1982).

Chapter 163.

Elections and Election Laws.

SUBCHAPTER I. TIME OF PRIMARIES AND ELECTIONS.

Article 2.

Time of Elections to Fill Vacancies.

Sec.

163-11. Filling vacancies in the General Assembly.

SUBCHAPTER II. ELECTION OFFICERS.

Article 3.

State Board of Elections.

163-22.2. Power of State Board to promulgate temporary rules and regulations.

Article 5.

Precinct Election Officials.

163-41. Precinct registrars and judges of election; special registration commissioners; appointment; terms of office; qualifications; vacancies; oaths of office.

SUBCHAPTER III. QUALIFYING TO VOTE.

Article 7.

Registration of Voters.

Sec.

163-67. Full-time registration; application to register.

SUBCHAPTER V. NOMINATION OF CANDIDATES.

Article 10.

Primary Elections.

163-114. Filling vacancies among party nominees occurring after nomination and before election.

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

Article 17.

Members of United States House of Representatives.

163-201. Congressional districts specified.

SUBCHAPTER I. TIME OF PRIMARIES AND ELECTIONS.

ARTICLE 1.

Time of Primaries and Elections.

§ 163-1. Time of regular elections and primaries.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

Effect of Amendments. —

The amendment to this section in Session Laws 1981, c. 504, ss. 11-13, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

ARTICLE 2.

Time of Elections to Fill Vacancies.

§ 163-8. Filling vacancies in State executive offices.

Effect of Amendments. —
The amendment to this section in Session Laws 1981, c. 504, s. 14, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

Interpretation of Statutes Referring to Next Election for Members of General Assembly, etc. —
The constitutional amendments proposed by Session Laws 1981, c. 504, ss. 1-3, upon which the effectiveness of the remainder of that act were made conditional, were submitted to the people at an election held June 29, 1982 and were defeated. Therefore, s. 19 of Session Laws 1981, c. 504, quoted under this catchline in the 1981 Cumulative Supplement, never went into effect.

§ 163-9. Filling vacancies in State and district judicial offices.

Effect of Amendments. —
The amendment to this section in Session Laws 1981, c. 504, s. 15, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

§ 163-10. Filling vacancy in office of the district attorney.

Effect of Amendments. —
The amendment to this section in Session Laws 1981, c. 504, s. 16, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

§ 163-11. Filling vacancies in the General Assembly.

(a) If a vacancy shall occur in the General Assembly by death, resignation, or otherwise than by expiration of term, the Governor shall immediately appoint for the unexpired part of the term the person recommended by the political party executive committee provided by this section. The Governor shall make the appointment within seven days of receiving the recommendation of the appropriate committee. If the Governor fails to make the appointment within the required period, he shall be presumed to have made the appointment and the legislative body to which the appointee was recommended is directed to seat the appointee as a member in good standing for the duration of the unexpired term.

(b) If the district consists solely of one county and includes all of that county, the Governor shall appoint the person recommended by the county executive committee of the political party with which the vacating member was affiliated when elected, it being the party executive committee of the county which the vacating member was resident.

(c) If the district consists solely of one county but includes less than all of the county, the Governor shall appoint the person recommended by the county executive committee of the political party with which the vacating member was

affiliated when elected, it being the county executive committee of the county which the vacating member was resident, provided that in voting only those county executive committee members who reside in the district shall be eligible to vote.

(d) If the district consists of more than one county, the Governor shall appoint for the unexpired portion of the term the person recommended by the State House of Representatives district committee or the Senatorial district committee of the political party with which the vacating member was affiliated when elected. In the case where all of a county is included within a district, the county convention or county executive committee of that political party shall elect or appoint at least one member from that county to serve on the State House of Representatives district executive committee or State Senatorial district executive committee. In the case where only part of a county is included within a district, the county convention or county executive committee of that political party shall elect or appoint at least one member from that county to serve on the State House of Representatives district committee or the State Senatorial district committee, but only the delegates to the county convention or the members of the county executive committee who reside in the district may vote in electing the district committee member. When the State House of Representatives district committee or the State Senatorial district committee meets, a member shall be entitled to cast for his county (or the part of his county within the district) one vote for each 300 persons or major fraction thereof residing within that county, or in the case where less than the whole county is in the district one vote for each 300 persons or major fraction thereof residing in that part of the district within the county.

A county convention or county executive committee may elect more than one member to the district committee but in the event that more than one member is selected from that county, then each member shall cast an equal share of the votes allotted to the county. (1901, c. 89, s. 74; Rev., s. 4298; C.S., s. 5919; 1947, c. 505, s. 1; 1953, c. 1191, s. 1; 1967, c. 775, s. 1; 1973, c. 35; 1981 (Reg. Sess., 1982), c. 1265, s. 3.)

Effect of Amendments. —

The amendment to this section in Session Laws 1981, c. 504, s. 17, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

§ 163-12. Filling vacancy in United States Senate.

Effect of Amendments. —

The amendment to this section in Session Laws 1981, c. 504, s. 18, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

SUBCHAPTER II. ELECTION OFFICERS.

ARTICLE 3.

State Board of Elections.

§ 163-22.2. Power of State Board to promulgate temporary rules and regulations.

In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners is held unconstitutional or invalid by a State or Federal Court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of Chapter 163 of the General Statutes and such rules and regulations shall become null and void upon the convening of the next session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes. (1981, c. 741; 1982, 2nd Ex. Sess., c. 3, s. 19.1.)

Effect of Amendments. — The 1982 2nd Ex. Sess. amendment inserted "or any State election law or form of election of any county board of commissioners" and "or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act" near the beginning of the first sentence. Session Laws 1981 (Reg. Sess., 1982), c. 1265, s. 2, amends Session Laws 1982 (2nd Ex. Sess.), c. 3, s. 18, by adding a proviso to the effect that the amendment to this section in s. 19.1 of the 1982, 2nd Ex. Sess., act shall expire March 1, 1983.

§ 163-26. Executive Secretary-Director of State Board of Elections.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

§ 163-27. Executive Secretary-Director to be appointed by Board.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

§ 163-28. State Board of Elections independent agency.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

ARTICLE 5.

Precinct Election Officials.

§ 163-41. Precinct registrars and judges of election; special registration commissioners; appointment; terms of office; qualifications; vacancies; oaths of office.

(b1) At any time after the expiration of the period stated in subsection (b) for the appointment of special registration commissioners the county board of elections may appoint additional commissioners, as follows:

(1) Within the period of the two-year term prescribed in subsection (b) for special registration commissioners, no more than ten additional may be appointed under this subsection;

(2) The county board of elections shall specify the terms of commissioners appointed under this subsection, but in no event shall the end of a term extend beyond the expiration of the two-year term prescribed in subsection (b) for commissioners appointed under that subsection;

(3) In its discretion the board of elections may terminate, at any time and without cause, the authority of commissioners appointed under this subsection; and

(4) The qualifications for special registration commissioners appointed under this subsection shall be the same as for commissioners appointed under subsection (b).

(1981 (Reg. Sess., 1982), c. 1265, s. 7.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, added subsection (b1).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b1) is set out.

SUBCHAPTER III. QUALIFYING TO VOTE.

ARTICLE 7.

Registration of Voters.

§ 163-67. Full-time registration; application to register.

(a) The county boards of elections shall establish, prior to January 1, 1971, a full-time system of registration, as prescribed by the State Board of Elections, under which the registration books, process, and records shall be open continuously for the acceptance of registration applications and for the registration of voters at all reasonable hours and time consistent with the daily function of all other county offices. In such counties no registration shall entitle a registrant to vote in any primary, general or special election unless the registrant shall have made application not later than the twenty-first day, excluding Saturdays and Sundays, immediately preceding such primary, general or special election, provided that nothing shall prohibit registrants from registering to vote in future elections during such period.

When full-time registration has been established in a county, the official record of registration shall be made and kept in the form of an application to register which, as prescribed by the State Board of Elections, shall contain all information necessary to show the applicant's qualifications to register. In such a county, no person shall be registered to vote without first making a written,

sworn, and signed application to register upon the form prescribed by the State Board of Elections. If the applicant cannot write because of physical disability, his name shall be written on the application for him by the election official to whom he makes application, but the specific reason for the applicant's failure to sign shall be clearly stated upon the face of the application.

Registrars and special registration commissioners appointed under the provisions of G.S. 163-41 may take registration applications from and administer registration oaths to qualified applicants without regard to the precinct residence of the registrar, special registration commissioner, or applicant.

Applications to register which have been completed by persons who have taken the required oath shall be forwarded promptly to the county board of elections. An application to register shall constitute a valid registration unless the county board of elections shall notify the applicant of its rejection within 30 days after its completion; provided that where the application is completed during the last 51 days prior to the election but at least 21 days, excluding Saturdays and Sundays, prior to the election, the notification of rejection shall be made no less than 14 days prior to the election or the application shall constitute a valid registration. If the application is rejected after the close of the registration books as provided in G.S. 163-67(a) the board shall notify the applicant at least 14 days before the election that it has rejected his application. The applicant may appear before the board and, if he establishes his qualifications to register prior to the election, he shall be permitted to vote. The loose-leaf binders containing the precinct records and the duplicate registration record, required by G.S. 163-65(a), shall be kept at all times in a safe place.

For the purpose of receiving registration applications, registrars shall attend the voting places in their precincts only on such days and at such hours as may be fixed by the county board of elections: Provided, the county board of elections shall not require registrars to be present at the voting places for this purpose on any day later than the twenty-first day, excluding Saturdays and Sundays, prior to a primary or election. In its discretion, the county board of elections may require no attendance by registrars at the voting places for the purpose of receiving registration applications.

The county board of elections is authorized to make reasonable rules and regulations, not inconsistent with law and State Board regulations, to insure full-time registration as provided in this section.

(1981 (Reg. Sess., 1982), c. 1265, s. 6.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, deleted a former proviso in the third paragraph of subsection (a), which read: "Provided, however, the county board of elections shall have power to limit the areas in which registrars and special registration commissioners may exercise the authority conferred in this paragraph."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 163-74. Record of political party affiliation or unaffiliated status; changing recorded affiliation; correcting erroneous record.

Cross References. — As to special provision applicable to primary elections in the year 1982, see the note to § 163-104.

SUBCHAPTER V. NOMINATION OF CANDIDATES.

ARTICLE 10.

Primary Elections.

§ 163-104. Primaries governed by general election laws; authority of State Board of Elections to modify time schedule.

Special Provisions for 1982 Primary Elections. — Session Laws 1982, 2nd Ex. Sess., c. 3, ss. 1 through 19, as amended by Session Laws 1981 (Reg. Sess., 1982), c. 1265, s. 1, provides:

"Section 1. Notwithstanding any other provisions of law to the contrary, the primary election schedule, pursuant to G.S. 163-1(b), to be conducted in North Carolina in 1982 only, shall be postponed and conducted on Thursday, June 10, 1982, with a second primary, if necessary, to be conducted on Thursday, July 8, 1982, consistent with the schedule hereinafter prescribed.

"Sec. 2. The primary elections in 1982 for all offices scheduled to be nominated in North Carolina shall be ordered by the State Board of Elections and all county boards of elections in accordance with the primary election dates specified in Section 1 herein and in accordance with the attendant dates set forth below:

Friday, April 30, 1982 — At 12:00 noon candidates for U.S. House of Representatives, State Senate and State House of Representatives may commence filing for office.

Friday, May 7, 1982 — At 12:00 noon the filing period for candidates for U.S. House of Representatives, State Senate and State House of Representatives shall expire.

Each county board of elections shall publish notice of the date of the primary election and other elections to be held on that date as well as the opening and closing dates for filing for the offices of U.S. House of Representatives, State Senate and State House of Representatives as quickly as possible following the ratification of this act. This act does not reopen the filing period for any other office.

"Sec. 3. [Repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1265, s. 1.]

"Sec. 4. The State Board of Elections is hereby authorized, consistent with provisions in G.S. 163-188, to set the dates on which it shall conduct the canvass and issue its certification of the results of the 1982 primary elections.

"Sec. 5. The county boards of elections shall conduct the canvass of the results of the 1982 primary elections at 11:00 a.m. on the Saturday following the Thursday on which the first and second primaries are conducted and are hereby authorized to utilize the necessary county government facilities and accommodations in order to complete said responsibilities.

"Sec. 6. The State Board of Elections shall prepare and distribute to the county boards of elections a Revised Primary Election Timetable 1982, setting out the applicable filing period for candidates for U.S. House of Representatives, State Senate and State House of Representatives along with all other pertinent dates relative to the primary election timetable as required by provisions specified in this act. Each county board of elections shall make a copy of the timetable available to the news media.

"Sec. 7. The State Board of Elections shall implement the provisions of this act and shall be authorized to assign responsibilities attendant thereto pursuant to provisions contained in G.S. 163-26 and G.S. 163-27.

"Sec. 8. Applications for absentee ballots shall be received consistent with the schedule specified in G.S. 163-109(b), G.S. 163-227.2(b) and G.S. 163-227, and absentee ballots for all offices except North Carolina State Senate and North Carolina State House of Representatives shall be issued promptly consistent with statutory requirements. The State Board of Elections shall instruct all county boards of elections to the end that all requirements contained in this act are adhered to.

Sec. 9. Absentee ballots are authorized for the office of U.S. House of Representatives and shall be issued as quickly as the ballots can be made available. The requirement that absentee ballots shall be available for voting at least 60 days prior to the date of the primary shall not apply with regard to the 1982 primary elections only. The State Board of Elections shall instruct the county boards of elections on the procedure to follow to ensure expeditious supplemental issuance by mail to each voter

who previously was issued absentee ballots, as promptly as possible after the ballots for U.S. House of Representatives are available if those ballots are not yet available when the voter applies. No additional application shall be required from any voter whose application was approved and to whom all other ballots available were previously mailed or otherwise issued.

"Sec. 10. Absentee ballots shall be authorized for the offices of North Carolina State Senate and North Carolina House of Representatives for the 1982 primary, and for the first primary shall be issued supplementally to all persons who were previously issued ballots as soon as the ballots for those offices are prepared.

"Sec. 11. No person shall be permitted to file as a candidate in the primary for U.S. House of Representatives, North Carolina State Senate or North Carolina House of Representatives who has changed his political party affiliation or who has changed from unaffiliated status to party affiliation as permitted in G.S. 163-74(b) unless such person shall have affiliated with the political party in which he seeks to be a candidate for at least three months prior to the filing deadline specified in G.S. 163-106(c) as was applicable to all candidates for State and district judicial offices and all county offices which filing period expired at 12:00 noon on February 1, 1982.

"Sec. 12. Whenever in accordance with the provisions of any local or general law a primary or election for a board of education or other office is to be held on the date of the primary election, or it is set to be on the Tuesday after the first Monday in May in 1982, it shall be held on the date provided in Section 1 of this act, and any election or runoff scheduled for four weeks later shall be held on the date specified in Section 1 for the second primary.

"Sec. 13. Whenever in any apportionment plan for the U.S. House of Representatives, North Carolina Senate or North Carolina House of Representatives, a precinct is placed in two or more districts, and there is a primary, then the county board of elections, with the approval of the State Board of Elections may, for the 1982 primary election:

(1) Divide the precinct into two or more precincts.

(2) Change with precinct lines to place part of the precinct with a precinct which has the same election district.

(3) Keep the same precinct but ascertain either in advance or on the date of the primary which district the voter resides in, and if a primary is being held in that district, give the voter the ballots for the appropriate district. This may be accomplished by a paper ballot for the office even if a machine is used for other offices or other voters.

(4) Provide some other procedure to ensure that each voter does not cast ballots in more than one district.

In adopting a procedure under this section, the Board shall attempt to use the method which is least disruptive to the voter, and any action to change precinct lines shall be taken in accordance with G.S. 163-28 except that notice shall be given not less than 15 days prior to the primary election instead of 20 days prior to the close of registration.

"Sec. 14. In case the area in any military reservation has been placed in several precincts without definite lines having been drawn, the county board of elections may provide for the entire military reservation to be in one election precinct, irrespective of township lines in accordance with Section 13 of this act, or it may use an alternative stated in Section 13 of this act. Any action under this section must be approved by the State Board of Elections.

"Sec. 15. [Repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1265, s. 1.]

"Sec. 16. For the 1982 primary election only, G.S. 163-112 shall be applied by substituting "10 days" for "30 days" wherever it appears, insofar as the offices of U.S. House of Representatives, North Carolina Senate, or North Carolina House are concerned.

"Sec. 17. In the event of any delay in the conduct of the primary election in 1982 for the offices of State Senate or State House of Representatives by order of any court of competent jurisdiction or because either or both plans of apportionment have not been approved under the Voting Rights Act, then the primary for North Carolina House or North Carolina Senate, as appropriate, shall not be held on June 10, 1982, but shall be held on a date ordered by the General Assembly or by a court of competent jurisdiction. A delay in the primary for one house does not automatically delay the primary for the other house.

"Sec. 18. The provisions of this act shall be temporary and shall apply only to the 1982 primary elections conducted in North Carolina and its provisions shall expire on September 1, 1982; however, its provisions shall temporarily suspend all requirements in law to the contrary until the date of expiration.

"Sec. 19. A copy of this act shall be mailed to each county board of elections by the Legislative Services Office immediately upon ratification."

Session Laws 1981, c. 1130, s. 3, and Session Laws 1982, Ex. Sess., c. 3, which also provided for the primary elections in 1982, were repealed by Session Laws 1982, 2nd Ex. Sess., c. 3, s. 20. Session Laws 1982, 2nd Ex. Sess., c. 3, s. 19.3, relating to the deadline for issuance of absentee ballot applications and one-stop absentee voting in 1982, was repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1265, s. 1.

§ 163-106. Notices of candidacy; pledge; with whom filed; date for filing; withdrawal.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

§ 163-109. Primary ballots; printing and distribution.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

§ 163-112. Death of candidate before primary; vacancy in single office.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

§ 163-114. Filling vacancies among party nominees occurring after nomination and before election.

If any person nominated as a candidate of a political party for one of the offices listed below (either in a primary or convention or by virtue of having no opposition in a primary) dies, resigns, or for any reason becomes ineligible or disqualified before the date of the ensuing general election, the vacancy shall be filled by appointment according to the following instructions:

Position	Vacancy is to be filled by appointment of
Any elective State office	State executive committee of political party in which vacancy occurs
United States Senator	
A district office, including:	Appropriate district executive committee of political party in which vacancy occurs
Member of the United States House of Representatives	
Judge of superior court	
Judge of district court	
Solicitor	
State Senator in a multi-county senatorial district	
Member of State House of Representatives in a multi-county representative district	
State Senator in a single-county senatorial district	County executive committee of political party in which vacancy occurs, but if the vacancy arises from a cause other than death, the vacancy shall not be filled unless the board of elections in the county in which the vacancy occurs issues an order to that effect, provided, in the case of the State Senator or State Representative in a single-county district where not all the county is located in that district, then in voting, only those members of the county executive committee who reside within the district shall vote
Member of State House of Representatives in a single-county representative district	
Any elective county office	

The party executive making a nomination in accordance with the provisions of this section shall certify the name of its nominee to the chairman of the board of elections, State or county, charged with the duty of printing the ballots on which the name is to appear. If at the time a nomination is made under this section the general election ballots have already been printed, the provisions of G.S. 163-139 shall apply.

In a county not all of which is located in one congressional district, in choosing the congressional district executive committee member or members from that area of the county, only the county convention delegates or county executive committee members who reside within the area of the county which is within the congressional district may vote.

In a county which is partly in a multi-county senatorial district or which is partly in a multi-county House of Representatives district, in choosing that county's member or members of the senatorial district executive committee or House of Representatives district executive committee for the multi-county district, only the county convention delegates or county executive committee members who reside within the area of the county which is within that multi-county district may vote. (1929, c. 164, s. 19; 1967, c. 775, s. 1; 1973, c. 793, s. 45; 1981 (Reg. Sess., 1982), c. 1265, ss. 4, 5.)

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the proviso following "order to that effect" in the last paragraph in the second column of "instructions." The amendment also added the last two paragraphs of the section.

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

ARTICLE 13.

General Instructions.

§ 163-140. Kinds of ballots; what they shall contain; arrangement.

CASE NOTES

A violation of the "sufficient ballot space" portion of this section would not vitiate an election unless the violation altered the outcome of the election. In re Cleveland County Comm'rs, — N.C. App. —, 287 S.E.2d 451 (1982).

ARTICLE 15.

Counting Ballots, Canvassing Votes, and Certifying Results in Precinct and County.

§ 163-170. Rules for counting ballots.

CASE NOTES

Applied in In re Cleveland County Comm'rs, — N.C. App. —, 287 S.E.2d 451 (1982).

ARTICLE 16.

Canvass of Returns for Higher Offices and Preparation of State Abstracts.

§ 163-188. Meeting of State Board of Elections to canvass returns of primary and election.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

ARTICLE 17.

Members of United States House of Representatives.

§ 163-201. Congressional districts specified.

(a) For the purpose of nominating and electing members of the House of Representatives of the Congress of the United States in 1982 and every two years thereafter, the State of North Carolina shall be divided into 11 districts as follows:

FIRST DISTRICT: Beaufort, Bertie, Camden, Carteret, Chowan, Craven, Currituck, Dare, Gates, Greene, Hertford, Hyde, Lenoir, Martin, Northampton, Pamlico, Pasquotank, Perquimans, Pitt, Tyrrell, and Washington Counties.

SECOND DISTRICT: Caswell, Durham, Edgecombe, Granville, Halifax, Nash, Person, Vance, Warren, and Wilson Counties; and the O'Neals Township in Johnston County.

THIRD DISTRICT: Bladen, Duplin, Harnett, Jones, Lee, Onslow, Pender, Sampson, and Wayne Counties; the following townships of Johnston County: Banner, Bentonsville, Beulah, Boon Hill, Clayton, Cleveland, Elevation, Ingrams, Meadow, Micro, Pine Level, Pleasant Grove, Selma, Smithfield, Wilders, and Wilson Mills; and the following townships of Moore County: 1 (Carthage), 4 (Ritters), 5 (Deep River), 6 (Greenwood), and 10 (Little River).

FOURTH DISTRICT: Chatham, Franklin, Orange, Randolph, and Wake Counties.

FIFTH DISTRICT: Alexander, Alleghany, Ashe, Forsyth, Rockingham, Stokes, Surry, and Wilkes Counties.

SIXTH DISTRICT: Alamance, Davidson, and Guilford Counties.

SEVENTH DISTRICT: Brunswick, Columbus, Cumberland, New Hanover, and Robeson Counties.

EIGHTH DISTRICT: Anson, Cabarrus, Davie, Hoke, Montgomery, Richmond, Rowan, Scotland, Stanly, and Union Counties; and the following townships of Moore County: 2 (Bensalem), 3 (Sheffields), 7 (McNeills), 8 (Sand Hill), and 9 (Mineral Springs); and the following townships of Yadkin County: Boonville, East Bend, Fall Creek, Forbush, Knobs, and Liberty.

NINTH DISTRICT: Iredell, Lincoln, and Mecklenburg Counties; and the following townships of Yadkin County: Buck Shoal and Deep Creek.

TENTH DISTRICT: Burke, Caldwell, Catawba, Cleveland, Gaston, and Watauga Counties; and the following townships of Avery County: Banner Elk, Beech Mountain, Cranberry, Linville, and Wilsons Creek.

ELEVENTH DISTRICT: Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, McDowell, Macon, Madison, Mitchell, Polk, Rutherford, Swain, Transylvania, and Yancey Counties; and the following townships of Avery County: Altamont, Roaring Creek, and Toe River.

(b) The name and boundaries of townships specified in this section are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 United States Census. (Rev., s. 4366; 1911, c. 97; C. S., s. 6004; 1931, c. 216; 1941, c. 3; 1961, c. 864; 1966, Ex. Sess., c. 7, s. 1; 1967, c. 775, s. 1; c. 1109; 1971, c. 257; 1981, c. 894; 1982, Ex. Sess., c. 7.)

Effect of Amendments. — The 1982, Ex. Sess., amendment redefined the Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Districts.

SUBCHAPTER VII. ABSENTEE VOTING.

ARTICLE 20.

Absentee Ballot.

§ 163-227. State Board to prescribe forms of applications for absentee ballots; county to secure.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

§ 163-227.2. Alternate procedures for requesting application for absentee ballot; "one-stop" voting procedure in board office.

Cross References. — As to special provisions applicable to primary elections in the year 1982, see the note to § 163-104.

SUBCHAPTER IX. MUNICIPAL ELECTIONS.

ARTICLE 23.

Municipal Election Procedure.

§ 163-279. Time of municipal primaries and elections.

CASE NOTES

Stated in McDowell v. Edmisten, 523 F. Supp. 416 (E.D.N.C. 1981).

§ 163-287. Special elections; procedure for calling.

Editor's Note. — Session Laws 1982, 2nd Ex. Sess., c. 3, s. 19.2, provides that in the case of any local election to be held under G.S. 163-287 or G.S. 159-61 on June 10, 1982, first notice shall be published at least seven days before registration books are to close, rather than 20 or 14 days, respectively, and that the registration books for all elections to be held on June 10, 1982, shall close on May 17, 1982.

§ 163-290. Alternative methods of determining the results of municipal elections.

CASE NOTES

Stated in McDowell v. Edmisten, 523 F. Supp. 416 (E.D.N.C. 1981).

Chapter 166A.

North Carolina Emergency Management Act.

Sec.

166A-10. Establishment of mutual aid agreements.

§ 166A-10. Establishment of mutual aid agreements.

(a) The Governor may establish mutual aid agreements with other states and with the federal government provided that any special agreements so negotiated are within the Governor's authority.

(b) The chief executive of each political subdivision, with the concurrence of the subdivision's governing body, may develop mutual aid agreements for reciprocal emergency management aid and assistance. Such agreements shall be consistent with the State emergency management program and plans.

(c) The chief executive officer of each political subdivision, with the concurrence of the governing body and subject to the approval of the Governor, may enter into mutual aid agreements with local chief executive officers in other states for reciprocal emergency management aid and assistance.

(d) Mutual aid agreements may include but are not limited to the furnishing or exchange of such supplies, equipment, facilities, personnel and services as may be needed; the reimbursement of costs and expenses for equipment, supplies, personnel and similar items; and on such terms and conditions as deemed necessary. (1951, c. 1016, s. 7; 1975, c. 734, ss. 14, 16; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — This section is set out in full above because subsections (a) and (d) and the complete historical citation were inadvertently omitted in the 1981 Cumulative Supplement.

Chapter 168.

Handicapped Persons.

Article 1.

Rights.

Sec.

168-4.1. May be accompanied by hearing-ear dog.
168-7.1. Hearing-ear dogs.

Article 1.

Rights.

§ 168-4.1. May be accompanied by hearing-ear dog.

Every hearing impaired person as defined in G.S. 8B-1(2) has the right to be accompanied by a hearing-ear dog, especially trained for the purpose and designated as such by the North Carolina Council for the Hearing Impaired, in any of the places listed in G.S. 168-3. Any hearing impaired person using a hearing-ear dog in any of these places is liable for any damage the dog does to the premises or facilities. The hearing impaired person qualifies for this right upon the showing of a card issued by the North Carolina Council for the Hearing Impaired designating the holder as the user of a trained hearing-ear dog. (1981 (Reg. Sess., 1982), c. 1177, s. 3.)

§ 168-7.1. Hearing-ear dogs.

Every hearing impaired person as defined in G.S. 8B-1(2) who has a hearing-ear dog especially trained for the purpose and designated as such by the North Carolina Council for the Hearing Impaired, or who obtains such a hearing-ear dog, may keep the dog on premises the person leases, rents or uses. He is not required to pay extra compensation for the dog but is liable for any damages done by the dog to the premises. No person, firm or corporation shall refuse to sell, rent, lease or otherwise disallow a hearing impaired person to use any premises for the reason that the person has or will obtain a hearing-ear dog. The hearing impaired person qualifies for this right upon the showing of a card issued by the North Carolina Council for the Hearing Impaired designating the holder as the user of a trained hearing-ear dog. (1981 (Reg. Sess., 1982), c. 1177, s. 4.)

Constitution of North Carolina

Article IV.

Judicial.

Sec.

8. Retirement of Justices and Judges.

Sec.

12. Jurisdiction of the General Court of Justice.

ARTICLE I

DECLARATION OF RIGHTS

Section 1. The equality and rights of persons.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Human fetus is not a "person," etc. — A human fetus is not a "person" within the protection guaranteed by this section and Art. I, § 19, of the Constitution of North Carolina and State funding of elective abortions does not violate Art. V, § 5. Stam v. State, 302 N.C. 357, 275 S.W.2d 439 (1981).

Sec. 6. Separation of powers.

CASE NOTES

Applied in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Cited in State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981).

Sec. 14. Freedom of speech and press.

CASE NOTES

Balance Between Freedom of Press and Fair Trial Right. — The framers of the federal and state constitutions gave no priorities to the fundamental guarantees of freedom of speech and of the press and the guarantee that every criminal defendant shall receive a fair trial, but left to the courts the delicate task of balancing the defendant's constitutionally guaranteed right to a fair trial against the constitutional guarantees of freedom of speech and freedom of the press. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Burden of Justifying "Gag" Rule. — Even pervasive, adverse publicity does not inevitably lead to an unfair trial, and any prior restraint on expression comes to the courts with a heavy presumption against its constitutional validity; thus, one seeking to impose a "gag" rule carries a heavy burden of showing justification for the imposition of such a rule. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Cited in State v. Johnson, — N.C. —, 285 S.E.2d 792 (1982).

Sec. 15. Education.

CASE NOTES

Cited Poovey v. Edmisten, 526 F. Supp. 759 (E.D.N.C. 1981).

Sec. 16. Ex post facto laws.

CASE NOTES

Section Applies to Legislative, Not Judicial Action. —

In accord with 1981 Cum. Supp. See State v. Funderburk, — N.C. App. —, 286 S.E.2d 884 (1982).

Applies Only to Criminal Statutes. —

Constitutional prohibitions of ex post facto legislation apply only to criminal proceedings. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, — N.C. —, 286 S.E.2d 89 (1982).

Doctrine Inapplicable to Attorney Disciplinary Proceedings. — The doctrine of ex post facto laws does not apply to attorney disciplinary proceedings. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, — N.C. —, 286 S.E.2d 89 (1982).

Applied in In re Stedman, — N.C. —, 286 S.E.2d 527 (1982); Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

Sec. 18. Courts shall be open.

CASE NOTES

Scope and Effect. —

This section guarantees access to the courts to those who have claims but it does not in all cases forbid the General Assembly from defining or abolishing claims which arise under the common law. Lamb v. Wedgewood S. Corp., — N.C. App. —, 286 S.E.2d 876 (1982).

This section guarantees access to the courts for redress of injuries. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981).

This section guarantees to those who suffer injury to their persons, property, or reputation, the right to seek redress therefor in the courts of this State; any law which attempts to deny that right runs afoul of this guarantee. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981).

Waiver. — This right is not absolute. While every reasonable presumption will be indulged against a waiver of fundamental constitutional rights by a defendant in a criminal prosecution, a defendant may waive the benefit of constitutional guarantees by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Clearing Courtroom During Testimony of Child Rape Victim. — In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order entered pursuant to § 15-166 that, during the testimony of the seven-year-old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the state's witnesses, officers of the court, members of the jury, and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

Quoted in Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981).

Sec. 19. Law of the land; equal protection of the laws.

Legal Periodicals. —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Two-tiered Equal Protection Analysis. — Courts employ a two-tiered scheme of analysis when an equal protection claim is made. When a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny," this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest. When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Human fetus is not a "person," etc. — A human fetus is not a "person" within the protection guaranteed by Art. I, § 1 and this section, of the Constitution of North Carolina and State funding of elective abortions does not violate Art. V, § 5, of the Constitution of North Carolina. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

There exists no constitutional right to trial by jury in proceedings to terminate parental rights. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

The practice of law is a property right requiring due process of law before it may be impaired. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827, cert. granted, 303 N.C. 319, 281 S.E.2d 652 (1981).

Applied in State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981); State v. Williams, — N.C. —, 284 S.E.2d 437 (1981); State v. Maher, 54 N.C. App. 639, 284 S.E.2d 351 (1981); Lamb v. Wedgewood S. Corp., — N.C. App. —, 286 S.E.2d 876 (1982).

Stated in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

Cited in State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31 (1981); Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981).

II. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

No Limit to Number of Mistrials. — There is no specific limit to the number of times a defendant may be retried after a mistrial has been properly declared. State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981).

If a criminal conviction is reversed on appeal for insufficiency of the evidence, double jeopardy precludes remanding the case for a new trial even if the State has evidence which it could offer at a new trial but did not offer at the trial from which the appeal was taken; however, there is no such impediment in ordering a new trial when the first trial was tainted by mere "trial error." State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

If a life sentence is imposed following conviction for a capital crime, double jeopardy considerations prohibit an appeal by the State or the ordering of a new sentencing hearing on defendant's appeal of his conviction even if the life sentence was the result of trial error favorable to defendant. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

New Sentencing Hearing after Defendant's Appeal of Death Sentence. — If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the State from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

The test under the due process clause as to pretrial identification procedures, etc. — In accord with 1981 Cum. Supp. See State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, — N.C. —, 281 S.E.2d 390 (1981).

Factors to be considered in evaluating the likelihood of mistaken identification for due process pretrial identification purposes include (1) the opportunity of the witness to observe the defendant at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' description of the defendant, (4) the level of certainty demonstrated by the witness, and (5) the length of time between the crime and the confrontation. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, — N.C. —, 281 S.E.2d 390 (1981).

III. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

Regulation of Property Based on Aesthetic Considerations Permitted. — Reasonable regulation of property based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case. Previous cases are overruled to the extent that they prohibited regulation based upon aesthetic considerations alone. State v. Jones, — N.C. —, 290 S.E.2d 675 (1982).

But Power Not Delegable to Subordinate Groups. — Local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of property regulations based solely upon aesthetic considerations should not delegate such responsibility to subordinate groups or organizations which are not authorized by the General Assembly to exercise the police power. State v. Jones, — N.C. —, 290 S.E.2d 675 (1982).

Test for Regulation of Property Based on Aesthetic Considerations. — The diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation. Some of the factors which should be considered and weighed in applying such a balancing test include such private concerns such as whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner in achieving a permitted purpose. State v. Jones, — N.C. —, 290 S.E.2d 675 (1982).

Aesthetic regulations may provide corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents. Such corollary community benefits would be factors to be considered in balancing the public interests in regulation against the individual property owner's interest in the use of his property free from regulation. The test focuses on the reasonableness of the regulation by determining whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation. State v. Jones, — N.C. —, 290 S.E.2d 675 (1982).

Statutes destroying or diminishing contingent interests, etc. —

In accord with 1st paragraph in 1981 Cum. Supp. See Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Right to Court-Appointed Counsel in Paternity Suit. — An indigent defendant in a paternity suit instituted by the State has a right to court-appointed counsel pursuant to the due process requirements of this section. Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

V. ILLUSTRATIVE CASES.

Exemption under § 20-288(e). — The exemption of manufacturers and dealers of trailers of less than 4,000 pounds empty weight from the bonding requirement of § 20-288(e) does not deny plaintiff equal protection of the law, since, under North Carolina law, trailers weighing less than 4,000 pounds are exempt from brake requirements, directional signals, lighting requirements, and clearance lamps; smaller trailers cost less, are of simpler construction, and involve warranty problems of less magnitude; and the difference in treatment between trailers over 4,000 pounds and trailers less than 4,000 pounds therefore has a reasonable basis in relation to the purpose of the statute in question. Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283, appeal dismissed, 303 N.C. 543, 281 S.E.2d 391 (1981).

The amendment to § 50-6 abolishing the defense of recrimination in a divorce action based on a year's separation does not deprive a party who was married before the amendment of a vested property right under the due process clause of the United States Constitution, Fourteenth Amendment, or the "law of the land clause" of this section. Sawyer v. Sawyer, 54 N.C. App. 141, 282 S.E.2d 527 (1981).

Sec. 22. Modes of prosecution.

CASE NOTES

Valid Indictment Necessary. —

In a criminal prosecution where no presentment or impeachment is involved and no waiver of indictment has been made, a valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

An indictment must clearly and positively identify the person charged with the commission of the offense; the name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment; and the omission of his name, or a sufficient description if his name is unknown, is a fatal and incurable defect. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

Cited in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

Sec. 23. Rights of accused.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

When Motion for Continuance, etc. —
In accord with 4th paragraph in 1981 Cum. Supp. See State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Applied in State v. Maher, 54 N.C. App. 639, 284 S.E.2d 351 (1981); Stone v. Martin, — N.C. App. —, 289 S.E.2d 898 (1982).

Stated in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981); State v. Williams, 304 N.C. 394, — S.E.2d — (1981); State v. Brock, — N.C. —, 290 S.E.2d 566 (1982).

Cited in State v. Sturdivant, 304 N.C. 293, — S.E.2d — (1981).

III. RIGHT OF CONFRONTATION.

Scope of cross-examination, etc. —
In accord with 1981 Cum. Supp. See State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, — N.C. —, 281 S.E.2d 390 (1981).

Burden of Showing Denial of Right. — It is true that the constitutional right of confrontation includes the right to face the accusers and witnesses with other testimony, but the burden is on defendant to show a clear denial of this right. State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981).

IV. RIGHT TO COUNSEL.

Counsel Must Have Opportunity, etc. —
It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusors and witnesses against him that an accused and his counsel shall have reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case. State v. Poole, — N.C. —, 289 S.E.2d 335 (1982).

A defendant's right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same. State v. Poole, — N.C. —, 289 S.E.2d 335 (1982).

The guarantee of counsel only applies to "critical stages", etc. —
Although a defendant is granted a general right to counsel to assist in his or her defense, that right does not attach to all events leading to trial. The right attaches only to "critical" stages of the proceedings, those proceedings where the presence of counsel is necessary to assure a meaningful defense. State v. Odom, 303 N.C. 163, 277 S.E.2d 352 (1981).

Determining When Proceeding Is Critical Stage. — In deciding whether a particular proceeding constitutes a critical stage, courts must focus their inquiry on whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. State v. Odom, 303 N.C. 163, 277 S.E.2d 352 (1981).

The administration of a gunshot residue test is not a critical stage of the criminal proceedings to which the constitutional right to counsel attaches. State v. Odom, 303 N.C. 163, 277 S.E.2d 352 (1981).

V. SELF-INCRIMINATION.

Refusal to Answer Interrogatories in Civil Action. — A defendant has the right to refuse to answer interrogatories and requests for admission in a civil case on the ground that to answer may tend to incriminate him. Invocation of this constitutional privilege may legitimately serve as a shield, with potential to protect the defendant from criminal responsibility which may ensue from the acts and omissions alleged. It is not an abuse of discretion, however, to refuse to allow that privilege to serve also as a sword, with potential to defeat civil actions which may likewise ensue from those acts and omissions. Stone v. Martin, 53 N.C. App. 600, 281 S.E.2d 402 (1981).

Sec. 24. Right of jury trial in criminal cases.

CASE NOTES

Unanimous Verdict Required. —
To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged. State v. Jordan, — N.C. —, 287 S.E.2d 827 (1982).

Clearing Courtroom During Testimony of Child Rape Victim. — In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order entered pursuant to § 15-166 that, during the testimony of the seven-year-old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the State's witnesses, officers of the court, members of the jury, and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

Quoted in State v. Hall, — N.C. —, 286 S.E.2d 552 (1982).

Stated in State v. Williams, 304 N.C. 394, — S.E.2d — (1981); State v. Davis, — N.C. —, 290 S.E.2d 574 (1982).

Sec. 25. Right of jury trial in civil cases.

CASE NOTES

Common Law. — This section preserves intact the right to trial by jury in all cases where the prerogative existed at common law or by statute at the time the 1868 Constitution was adopted. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

The relevant date for determining the scope of the constitutional right to jury trial in civil cases is the date of adoption of the 1868 Constitution. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

No Right to Jury Trial in Proceeding to Discipline Attorney. —
The legislature in 1969 had absolutely no intention of providing a constitutional right to jury trial for attorneys in disciplinary proceedings when it submitted this section, to the people. North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Proceeding to Terminate Parental Rights. — The North Carolina constitutional requirement of trial by jury is not applicable to a proceeding for termination of parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

Sec. 27. Bail, fines, and punishments.

CASE NOTES

Punishment Is Province of Legislature. In accord with 4th paragraph in 1981 Cum. Supp. See State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981).

Sec. 28. Imprisonment for debt.

Legal Periodicals. —
For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Provisions in probationary judgments which require restitution are constitutionally permissible if they are related to the criminal act for which the defendant is convicted. See State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Stated in Cobb v. Cobb, 54 N.C. App. 230, 282 S.E.2d 591 (1981).

Cited in Northwestern Bank v. Moretz, — N.C. App. —, 289 S.E.2d 614 (1982).

Sec. 32. Exclusive emoluments.

CASE NOTES

Applied in Lamb v. Wedgewood S. Corp., — N.C. App. —, 286 S.E.2d 876 (1982).

ARTICLE II
LEGISLATIVE

Section 1. Legislative power.

CASE NOTES

Delegation of Authority To Test Applicants to Bar. — There is no more appropriate delegation of authority than that of testing to determine a capability to practice law. The legislative goal being the protection of the public interest by the maintenance of a competent bar, the determination of proficiency becomes a ministerial function, not a matter of managing public affairs. The Board of Law Examiners is, therefore, not required to make important policy choices which might just as easily be made by the elected representatives in the Legislature, but merely to compile and administer examinations. Form, grading and logistics only are left to the Board, which does no violence to constitutional principle. Bowens v. Board of Law Exmrs., — N.C. App. —, 291 S.E.2d 170 (1982).

Quoted in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Cited in Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

Sec. 2. Number of Senators.

Proposed Amendment. —
The amendment proposed by Session Laws 1981, c. 504, s. 1, referred to under this section in the 1981 Cumulative Supplement, was defeated at the election held June 29, 1982.

Sec. 4. Number of Representatives.

Proposed Amendment. —
The amendment proposed by Session Laws 1981, c. 504, s. 1, referred to under this section in the 1981 Cumulative Supplement, was defeated at the election held June 29, 1982.

Sec. 8. Elections.

Proposed Amendment. —
The amendment proposed by Session Laws 1981, c. 504, s. 1, referred to under this section in the 1981 Cumulative Supplement, was defeated at the election held June 29, 1982.

Sec. 9. Term of office.

Proposed Amendment. — Session Laws 1981 (Reg. Sess., 1982), c. 1241, s. 1, proposes to rewrite this section to read as follows:

"Sec. 9. Term of office. The term of office of Senators and Representatives shall commence on the first day of January next after their election."

Session Laws 1981 (Reg. Sess., 1982), c. 1241, s. 2, provides that the amendment "shall be submitted to the qualified voters of the State at the statewide general election to be held on Tuesday, November 2, 1982, which election shall be conducted under the laws then governing elections in the State," and provides for the form of the ballot and for the use of voting machines in accordance with the rules and regulations prescribed by the State Board of Elections.

Session Laws 1981 (Reg. Sess., 1982), c. 1241, s. 3, provides:

"If a majority of votes cast thereon are in favor of the amendment, the State Board of Elections shall certify the amendment to the Secretary of State who shall enroll the amendment so certified among the permanent records of his office. The amendment shall become effective upopn certification and shall apply to members of the General Assembly elected in the 1982 general election so that their terms shall begin on January 1, 1983."

Sec. 11. Sessions.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

Sec. 20. Powers of the General Assembly.

CASE NOTES

Quoted in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

ARTICLE III
EXECUTIVE

Section 1. Executive power.

CASE NOTES

Quoted in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Sec. 5. Duties of Governor.

CASE NOTES

When Expenditure under Subsection (3) Occurs. — An expenditure occurs only when funds are disbursed. Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

The incurring of a contractual obligation does not constitute an expenditure within the meaning of subsection (3). Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

ARTICLE IV
JUDICIAL

Section 1. Judicial Power.

Legal Periodicals. —
For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

Quoted in State ex rel. Wallace v. Bone, — N.C. —, 286 S.E.2d 79 (1982).

Sec. 8. Retirement of Justices and Judges.

The General Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice, and may provide for the temporary recall of any retired Justice or Judge to serve on the court or courts of the division from which he he was retired. The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge. (1971, c. 451, s. 1; 1981, c. 513, s. 1.)

Effect of Amendments. — The amendment adopted by the vote of the people at the election held June 29, 1982, inserted "or courts of the division" in the first sentence.

Sec. 11. Assignment of Judges.

CASE NOTES

Validity, etc. —
The system of rotating superior court judges does not deny a defendant due process of law because in a protracted trial, more than one judge might rule on the many motions. State v. Williams, 304 N.C. 394, — S.E.2d — (1981).

Sec. 12. Jurisdiction of the General Court of Justice.

(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.

(1981, c. 803, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people of the general election held June 29, 1982, added the last sentence of subsection (1).

Only Part of Section Set Out. — As subsections (2) through (6) were not changed by the amendment, they are not set out.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in In re Wharton, — N.C. —, 290 S.E.2d 688 (1982).

Cited in In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

II. SUPREME COURT.

A. In General.

Section 15A-2000(d) is not unconstitutional as an impermissible expansion of the Supreme Court's jurisdiction. State v. Williams, — N.C. —, 284 S.E.2d 437 (1981).

Sec. 22. Qualification of Justices and Judges.

OPINIONS OF ATTORNEY GENERAL

A layman serving as a District Court Judge on and prior to January 1, 1981, may resign or not seek reelection and still be qualified as a candidate for judge in a subsequent election under this section. See opinion of Attorney General to Honorable Arnold O. Jones, District Court Judge, Eighth District, 50 N.C.A.G. 107 (1981).

ARTICLE V

FINANCE

Sec. 2. State and local taxation.

Legal Periodicals. —

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

CASE NOTES

I. POWER OF TAXATION GENERALLY; CLASSIFICATION.

A. General Consideration.

Stated in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

Sec. 3. Limitations upon the increase of State debt.

Legal Periodicals. —

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Power to Enter into Long-Term Contracts Not Restricted. — The intent of the provision of this section which prohibits the General Assembly from contracting debt without voter approval is to restrict the State's power to borrow money, not its power to enter into long-term contracts. Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

Sec. 4. Limitations upon the increase of local government debt.

CASE NOTES

II. PURPOSES; TWO-THIRDS LIMITATION.

Effect of 1973 Amendment. — The 1973 amendment to this section is designed to narrow the provision's restriction on the local government's contracting powers. The previously effective language was held to require submission to the voters of a wide variety of contract obligations. United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

The 1973 amendment to this section specifically defined "debt" to mean the borrowing of money by the local government, thereby excluding most general contractual obligations from the requirement of submission to the voters. United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

Sec. 5. Acts levying taxes to state objects.

Legal Periodicals. —

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Appropriation and Expenditure of State Tax Money for Elective Abortions Valid. — A human fetus is not a "person" within the protection guaranteed by Art. I, §§ 1 and 19, of the Constitution of North Carolina and State funding of elective abortions does not violate this section, of the Constitution of North Carolina. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

Sec. 10. Joint ownership of generation and transmission facilities.

Proposed New Section 11. —

The amendment proposed by Session Laws 1981, c. 808, s. 1, as amended by Session Laws 1981, c. 987, s. 1, and the amendment proposed by Session Laws 1981, c. 887, s. 1, both of which would have added new sections designated § 11 to this Article, and both of which are quoted under this catchline in the 1981 Cumulative Supplement, were defeated at the election held June 29, 1982.

Proposed Amendment. — Session Laws 1981 (Reg. Sess., 1982), c. 1247, s. 1, proposes to add a new § 11 to this Article to read as follows:

"Sec. 11. Notwithstanding Section 4 of this Article or any other provision of this Constitution, the General Assembly may enact general laws authorizing any city or town to define territorial areas in or near the central business district of the city or town and borrow money, without need of voter approval, to be used to finance public activities in downtown development projects within such territorial areas. When a territorial area is defined pursuant to this paragraph, the current assessed value of taxable property situated in the area shall be determined. Thereafter, property situated in the territorial area continues to be sub-

ject to taxation to the same extent and in like manner as property not situated in such a territorial area; but the net proceeds of those taxes that are levied on the difference, if any, between the assessed value of taxable property situated in the district at the time the taxes are levied and the assessed value of taxable property situated in the district at the time the area was defined shall be set aside. Those set aside proceeds and any other revenues arising from the public activities undertaken in the territorial area and pledged in the bond order authorizing the bonds shall be the sole security for any bonds issued pursuant to this section."

Session Laws 1981 (Reg. Sess., 1982), c. 1247, s. 1.1 provides: "If either or both of the constitutional amendments provided by Chapters 808 and 987 and Chapter 887 of the 1981 Session Laws is approved by the voters, the amendment proposed by this act shall be renumbered appropriately."

Session Laws 1981 (Reg. Sess., 1982), c. 1247, s. 2, provides that the amendment "shall be submitted to the qualified voters of the State for their ratification or rejection at the general election on November 2, 1982." This section also provides for the form of ballot, and authorizes the use of voting machines in accordance with rules and regulations prescribed by the State Board of Elections.

Session Laws 1981 (Reg. Sess., 1982), c. 1247, s. 3, provides: "If a majority of votes cast thereon are in favor of the amendment, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of his office, and the amendment shall become effective upon such certification."

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Sec. 2. Qualifications of voter.

CASE NOTES

United States Const., Amend. XIV, § 2, Expressly Allows Exclusion of Felons. — Provisions in State statutes and constitutions which deny convicted felons the right to vote and hold office do not violate the various rights guaranteed by the Constitution of the United States. Wilson v. Goodwyn, 522 F. Supp. 1214 (E.D.N.C. 1981).

ARTICLE VII

LOCAL GOVERNMENT

Section 1. General Assembly to provide for local government.

CASE NOTES

Annexation within Legislature's Power. — Annexation by a municipal corporation is a political question which is within the power of the State legislature to regulate. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

The enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature. With its wisdom, propriety or justice have naught to do. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

But Power Not Unlimited. — The power of the legislature to expand the boundaries of cities, towns, or other local units, though great, is not unlimited. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Review of Local Annexation Act. — A local annexation act is not insulated from judicial review when it is an instrument for circumventing a constitutionally protected right. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

ARTICLE IX
EDUCATION

Section 1. Education encouraged.

CASE NOTES

Cited in Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

Sec. 2. Uniform system of schools.

Legal Periodicals. —
For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Day-Care Program in Elementary School. — A local school board permitting a day-care program for "latch key" children to be operated in an elementary school is not in violation of this section. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

The legislature may constitutionally delegate to the school board the power or authority to maintain a day-care program. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

Tuition paid by students enrolled in day-care program is not violative of this section where the tuition is for a supplemental program, not for the students' basic education. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

Sec. 4. State Board of Education.

CASE NOTES

Cited in Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

Sec. 7. County school fund.

CASE NOTES

Cited in Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 285 S.E.2d 110 (1981).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

Section 1. Personal property exemptions.

Legal Periodicals. —
For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

Sec. 5. Insurance.

Legal Periodicals. —
For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

Appendix I. Rules of Practice in the General Court of Justice

(2A) NORTH CAROLINA RULES OF APPELLATE PROCEDURE

(Adopted June 13, 1975.)

Article II. Appeals from Judgments and Orders of Superior Courts and District Courts

Rule

9. The Record on Appeal — Function, Composition, and Form.
   (c) Form — General Provisions.
      (1) Evidence — How Set Out.
      (2) Exhibits.
      (3) Filing Dates and Signatures on Papers.
      (4) Pagination; Counsel Identified.

Article III. Review by Supreme Court of Appeals Originally Docketed in Court of Appeals: Appeals of Right; Discretionary Review

15. Discretionary Review on Certification by Supreme Court Under G.S. § 7A-31.
   (a) Petition of Party.

Article V. Extraordinary Writs

Rule

21. Certiorari.
   (a) Scope of the Writ.
   (e) Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.

Article VI. General Provisions

26. Filing and Service.
   (c) Manner of Service.
28. Briefs; Function and Content.
   (b) Content of Appellant's Brief.
29. Sessions of Courts; Calendar for Hearings.
   (a) Sessions of Court.
      (1) Supreme Court.
      (2) Court of Appeals.

ARTICLE I. APPLICABILITY OF RULES

Rule 1

Scope of Rules: Trial Tribunal Defined

CASE NOTES

Mandatory. — In accord with 2nd paragraph in 1981 Cum. Supp. See State v. Puckett, 54 N.C. App. 576, 284 S.E.2d 326 (1981).

Rule 2

Suspension of Rules

CASE NOTES

Applied in State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981).

Quoted in Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981).

Stated in Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981).

Cited in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3

Appeal in Civil Cases — How and When Taken

CASE NOTES

Letter to Clerk Not Written Notice of Appeal. — In an action challenging a divorce judgment where the defendant wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, the letter was not a written notice of appeal of a divorce judgment showing that the defendant sought a review by the Court of Appeals but was a § 1A-1, Rule 59 motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

Applied in Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981).

Cited in Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

Rule 8

Stay Pending Appeal in Civil Actions

CASE NOTES

Cited in In re Burgess, — N.C. App. —, 291 S.E.2d 323 (1982).

Rule 9

The Record on Appeal — Function, Composition, and Form

(c) **Form — General Provisions.**

(1) **Evidence — How Set Out.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(b) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form.

Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

As an alternative to narrating the testimonial evidence as a part of the record on appeal, the appellant may cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposing party or parties or as settled by the trial tribunal as the case may be, to be filed with the clerk of the court in which the appeal is docketed. This alternative also may be used to present voir dire, jury instructions or other trial proceedings where those proceedings are the basis for one or more assignments of error and a stenographic transcript of those proceedings has been made. If this alternative is selected, the briefs of the parties must comport with Rule 28(b)(4) and 28(c); and, in criminal appeals, the District Attorney upon certification of the record shall forward one copy of the settled, certified transcript to the Attorney General of North Carolina.

(2) **Exhibits.** (i) Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by stipulation of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(ii) Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed as part of the record on appeal. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the court to which appeal is taken. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the record on appeal.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively. At the end shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

Effect of Amendments. —

The amendment adopted Jan. 12, 1982, and effective for all appeals docketed after March 15, 1982, added the second sentence to the third paragraph of subdivision (c)(1) and added at the end of the present third sentence of that paragraph the language beginning "and, in criminal appeals."

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only subsection (c) is set out.

CASE NOTES

Items Arranged Chronologically. — Each item in the record on appeal should be arranged chronologically, in the same order in which it occurred at trial. State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied, 303 N.C. 183, 280 S.E.2d 455 (1981).

Discretion to Permit Leading Questions. — The trial judge has discretionary authority to permit leading questions in proper instances, and such discretionary action on the part of the trial judge will not be disturbed absent a showing of abuse of discretion. State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

When Leading Questions Permitted. — Two well-recognized exceptions to the rule against leading questions are when the witness has difficulty in understanding the question because of age or immaturity, or where "the inquiry is into a subject of delicate nature such as sexual matters." State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

Applied in State v. Washington, 51 N.C. App. 458, 276 S.E.2d 470 (1981); Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982).

Quoted in State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981).

Stated in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981); State v. Earnhardt, — N.C. App. —, 290 S.E.2d 376 (1982).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

Legal Periodicals. —
For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

CASE NOTES

Purpose of Section (d). —
In accord with 1981 Cum. Supp. See Carawan v. Tate, — N.C. —, 286 S.E.2d 99 (1982).

Failure to object to the introduction of evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

An objection to testimony not taken in apt time is waived. —
When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost. Unless objection is made at the proper time, it is waived. State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327, cert. denied, 303 N.C. 548, 281 S.E.2d 398 (1981).

Applied in State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981); Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., — N.C. —, 291 S.E.2d 137 (1982).

Quoted in Norwood v. Sherwin-Williams Co., 303 N.C. 462, 279 S.E.2d 559 (1981); Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Stated in State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981).

Cited in Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897 (1981); Housing, Inc. v. Weaver, 52 N.C. App. 662, 280 S.E.2d 191 (1981); Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981).

Rule 11

Settling the Record on Appeal; Certification

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

Rule 12

Filing the Record: Docketing the Appeal: Copies of Record

Legal Periodicals. — For a survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

Applied in In re Farmer, 52 N.C. App. 97, 277 S.E.2d 880 (1981); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981).

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14

Appeals of Right from Court of Appeals to Supreme Court Under G.S. § 7A-30

CASE NOTES

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981).

Rule 15

Discretionary Review on Certification by Supreme Court Under G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, the North Carolina State Bar, the Property Tax Commission, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89.

Effect of Amendments. — The amendment adopted Nov. 18, 1981, inserted "the North Carolina State Bar, the Property Tax Commission," near the middle of subsection (a) and substituted "G.S. Chap. 15A, Art. 89" for "G.S. Chap. 15, Art. 22" at the end of subsection (a).

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981).

Rule 16

Scope of Review of Decisions of Court of Appeals

CASE NOTES

Applied in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981).

Cited in Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO THE COURT OF APPEALS

Rule 18

Taking Appeal; Record on Appeal — Composition and Settlement

CASE NOTES

Applied in Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Stated in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

ARTICLE V. EXTRAORDINARY WRITS

Rule 21

Certiorari

(a) **Scope of the Writ.**

(1) **Review of the Judgments and Orders of Trial Tribunals.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of decisions

of the Court of Appeals in cases appealed from the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar, the Property Tax Commission, or the Commissioner of Insurance.

(e) **Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been sentenced to life imprisonment or death shall be filed in and determined by the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

Effect of Amendments. — The amendment adopted Nov. 18, 1981, rewrote subsection (a), dividing it into subdivisions (1) and (2) and adding the provision for review pursuant to G.S. 15A-1422(c)(3) in present subdivision (1) and the provision for review of decisions of the Court of Appeals in cases appealed from the Utilities Commission, the Industrial Commission, the State Bar, the Property Tax Commission or the Commissioner of Insurance in present subdivision (2), and added subsection (e).

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only subsections (a) and (e) are set out.

CASE NOTES

Applied in Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981).

Cited in Moore v. Moody, — N.C. —, 285 S.E.2d 811 (1982); Smith v. American & Efird Mills, — N.C. —, 290 S.E.2d 634 (1982).

Rule 23

Supersedeas

CASE NOTES

Cited in Green v. Duke Power Co., — N.C. —, 290 S.E.2d 593 (1982); In re Burgess, — N.C. App. —, 291 S.E.2d 323 (1982).

ARTICLE VI. GENERAL PROVISIONS

Rule 26

Filing and Service

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those

having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

Effect of Amendments. — The amendment adopted Feb. 11, 1982, and effective upon adoption added, at the end of subsection (c), "or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail."

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only subsection (c) is set out.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

Rule 27

Computation and Extension of Time

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

Applied in Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981).

Cited in Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981).

Rule 28

Briefs; Function and Content

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate hearings, and in the following order:

(1) A statement of the questions presented for review.

(2) A concise statement of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking to the appeal before the court.

(3) A full statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the stenographic transcript, or the record on appeal, or both, as the case may be.

(4) If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, and if there are portions of the transcript which must be reproduced verbatim in order to understand a question presented in the brief and if, because of length, a verbatim reproduction is not contained in the body of the brief itself, such verbatim portions of the transcript shall be attached as appendixes to the brief. Reference may then be made in the argument of the question presented to the relevant appendix. It is not intended that an appendix be compiled to show the general nature of evidence or the absence of evidence relating to a particular question presented in the brief.

(5) An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's

brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

(6) A short conclusion stating the precise relief sought.

Effect of Amendments. —

The amendment adopted Jan. 12, 1982, and effective for all appeals docketed after March 15, 1982, rewrote the first sentence and added the second and third sentences in subdivision (4) of subsection (b).

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only subsection (b) is set out.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

Under this Rule, appellate review is limited, etc. —

In accord with 2nd paragraph in 1981 Cum. Supp. See Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, — U.S. —, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

Failure to refer to the assignments of error or exceptions following the statement of the questions presented could result in abandonment of all of appellant's questions on appeal and consequently result in dismissal of the appeal. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981).

Applied in State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981); McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981); Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981); Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Quoted in Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981).

Stated in State v. Oliver, 52 N.C. App. 483, 279 S.E.2d 19 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981).

Cited in State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981); State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766 (1981); State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981); State v. Luckey, 54 N.C. App. 178, 282 S.E.2d 490 (1981); State v. Locklear, 54 N.C. App. 235, 282 S.E.2d 485 (1981); Coleman v. City of Winston-Salem, — N.C. App. —, 291 S.E.2d 155 (1982).

Rule 29

Sessions of Courts; Calendar for Hearings

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Hearings in appeals will be held generally during the week beginning the Monday following the first Tuesday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

Effect of Amendments. — The amendment adopted March 3, 1982, and effective upon adoption rewrote subdivision (1) of subsection (a), which formerly provided for two terms of the Supreme Court each year.

Only Part of Rule Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

Rule 31

Petition for Rehearing

CASE NOTES

Cited in Housing, Inc. v. Weaver, — N.C. —, 290 S.E.2d 642 (1982).

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule
21. Jury Instruction Conference.
22. Local Court Rules.

6. Motions in Civil Actions.

CASE NOTES

A motion which did not comply, etc. — In a child custody proceeding where the defendant filed a motion for modification of a child visitation order, the plaintiff was not prejudiced by failure of the defendant to state the number of the rule under which he was proceeding as required by this rule since the written motion fully informed the plaintiff of the relief he was seeking and his reasons therefor. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Cited in Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263 (1981); Nickels v. Nickels, 51 N.C. App. 690, 277 S.E.2d 577 (1981).

16. Withdrawal of Appearance.

CASE NOTES

No more than adequate or reasonable notice is required for an attorney to withdraw as attorney of record. Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

21. Jury Instruction Conference.

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.[1]

[1] In criminal cases, the provisions of G.S. 15A-1231 are also applicable.

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted.

Editor's Note. — This rule was adopted Sept. 15, 1981.

22. Local Court Rules.

In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge assigned to hold a session of court in his district is furnished with a copy of the local court rules at or before the commencement of his assignment.

Editor's Note. — This rule was adopted Sept. 21, 1981.

Appendix II. Rules of Practice in United States District Courts

(2) United States District Court for the Eastern District of North Carolina

Local Rules of Practice and Procedure of the United States District Court for the Eastern District of North Carolina

Effective August 1, 1980

I. General Rules

Rules of Court

I. General Rules

Rule
3.00. Court Schedule and Conduct of Business.
3.09. Discovery Materials Not to be Filed Unless Ordered or Needed.

I. General Rules

Rule 3.00 Court Schedule and Conduct of Business.

3.09: *Discovery Materials Not to Be Filed Unless Ordered or Needed.* Depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed unless on order of the Court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the Clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

Effect of Amendments. — The amendment effective July 1, 1982, filed May 11, 1982, added section 3.09.

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only section 3.09 is set out.

(3) United States District Court for the Western District of North Carolina

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Rules of Court

I. General Rules

Rule
2. Sessions.
12. Forfeiture of Collateral Security in Lieu of Appearance.

I. General Rules

Rule 2. Sessions.

The court shall be in continuous session in all divisions of the district, and all matters, criminal and civil, shall be subject to being called for hearing and trial at any time upon reasonable notice to the parties.

Regular terms for the disposition of criminal cases shall be as follows:
Charlotte Division:

First Monday, February, April, June, August, October, December
Statesville Division:

Third Monday, February, April, June, August, October, December
Asheville Division:

First Monday, January, March, May, July, September, November

Shelby Division (Rutherfordton):
First Monday, February, April, June, August, October, December
Bryson City Division:
Third Monday, January, March, May, July, September, November
(When the first day of any scheduled term falls on a legal holiday, court will convene the following day.)

Additional criminal sessions will be scheduled from time to time in all divisions as may be required to dispose of the criminal dockets promptly.

Trial calendars in civil cases will be prepared by the court, usually at the time of the Motion, Pre-trial and Settlement conference, or soon thereafter. Civil sessions of court will be held as often as necessary to accomplish, insofar as possible and except in the unusual cases, the following *illustrative* schedule of disposition of cases.

(a) In the unusual case where *both* sides press for trial and *both* counsel are diligent in preparation — not more, and usually less, than six months should elapse between filing of complaint and trial.

(b) When *one* side presses for an early trial, the time lapse from filing complaint to trial should not exceed nine months.

(c) Where neither side presses for an early trial, the time lapse from filing complaint to trial should not exceed fifteen months.

(d) If any case becomes two years old — regardless of its difficulty — it will be treated as a judicial emergency, unless, for good cause, an order is entered putting the case on the inactive docket.

If necessary to promote the efficient administration of justice, all hearings and trials of civil cases may be transferred from any division to any other division within the district. With the consent of the parties, the judges may conduct hearings and trials at any place within the district.

Effect of Amendments. — The amendment adopted Jan. 1, 1982, rewrote the second paragraph, changing the dates of the terms and providing for additional terms in all five divisions.

Rule 12. Forfeiture of Collateral Security in Lieu of Appearance.

NATIONAL PARK SERVICE VIOLATIONS

Title 36, Chapter I, Code of Federal Regulations

Section Number	*Offense*	*Collateral*
2.1(a)	Abandonment of vehicle or other property	$ 25.00
2.1(b)	Unauthorized leaving of vehicle or other property unattended more than 24 hours	25.00
2.2	Unauthorized or prohibited use of aircraft, and parachute deliveries, except in emergencies	25.00
2.3(a)	Prohibited use of an audio or noise-producing device	25.00
2.3(b)	Unauthorized use of public address system	25.00
2.3(c)	Unauthorized installation of aerials and other special radio, telephone, and television equipment	25.00
2.4	Begging; hitchhiking; soliciting without permit	25.00
2.5	Unauthorized camping; violation of camping regulations	25.00
2.6	Failure to abide by posted signs regarding closed areas and visiting hours	25.00
2.8(a) (b) (c)	Failure to restrain or keeping dogs, cats, and other pets in place where prohibited	25.00

Section Number	*Offense*	*Collateral*
2.9(b)	Unauthorized use or possession of fireworks and firecrackers	15.00
2.10	Giving false report regarding accident or law violation	25.00
2.11	Unauthorized possession of firearms, traps, seines, weapons for destroying animal life	25.00
2.12(a) (c)	Unauthorized or unsafe kindling of fire; leaving fire not completely extinguished or unattended	25.00
2.13(a)	Violation of any fishing laws and regulations of State or legal subdivision	25.00
2.13(c-k)	Violation of general fishing regulations	25.00
2.16(c)	Possession of intoxicants by minors	25.00
2.17	Failure of finder to turn in lost articles	15.00
2.18	Unauthorized picnicking	15.00
2.19	Unauthorized operation or use of portable engine or motor driven equipment	25.00
2.20	Minor violations (such as flower picking) of regulations for preservation of public property, natural features, curiosities, and resources	15.00
2.21	Holding public meeting, assembly, gathering, demonstration, or parade without permit or in violation of conditions stated therein	50.00
2.22	Failure to report incidents resulting in personal injury or property damage	25.00
2.23	Use of horses and other saddle or pack animals at places or in manner not permitted by regulations	25.00
2.24	Disposal of garbage, waste, and rubbish, and other conduct in violation of sanitary regulations	25.00
2.25	Collecting scientific specimens without permit	25.00
2.26	Use of roller skates and skateboards except in places designated by signs	25.00
2.27	Conducting sports events, entertainment and other public spectator attractions without permit or in violation of conditions in permit	25.00
2.28	Swimming, bathing, and use of certain water sports equipment where prohibited	25.00
2.29	Tampering with personal property not under one's lawful control without theft or damage	50.00
2.30	Travel on national scenic trails by use of prohibited vehicles or by horseback when trails closed	50.00
2.31	Water skiing where prohibited or in violation of regulations	25.00
2.32(a) (2)	Feeding or molesting wildlife	25.00
2.33	Engaging in winter sports activity where prohibited	25.00
2.34	Violation of regulations governing use of snowmobiles	25.00
2.39(d) (1-4)	Sale and distribution of printed matter in other than designated areas	25.00
2.39(h)	Sale or distribution of printed matter without a permit, or in violation of terms or conditions of a permit is prohibited	25.00
4.1	State Laws applicable:	
	Improper passing	20.00
	Failure to dim lights	25.00
	Illegal transportation one (1) quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle	25.00
	Violation of required lighting statutes	15.00
	Failure to yield right of way	30.00
	Obstructed windshield	15.00
	Exceeding safe speed	25.00
	Failure to slow to avoid collision	25.00
	Unsafe tires	15.00
	Expired inspection sticker	15.00
	Violation of safety helmet requirement for operators and passengers of motorcycles (NCGS 20-140.4)	25.00
	Violation of required headlight for motorcycles statute (NCGS 20-129(c))	25.00
	Violation of required lighted taillight for motorcycles statute (NCGS 20-129(d))	25.00

Section Number	*Offense*	*Collateral*
4.3	Violation of regulations governing use of bicycles	25.00
4.4	Failure to give notice of commercial towing service	25.00
4.5	Driving or permitting another to drive vehicle without license, and failure to display license upon request by authorized person	40.00
4.7	Entering or leaving park by vehicle at other than established places and designated hours	25.00
4.8	Excessive acceleration of motor vehicle engine when stopped or approaching or leaving stopping place	25.00
4.9	Making false report to authorized investigator of accident or violation	25.00
4.10	Following a vehicle closer than is reasonable and prudent	15.00
4.11	Violation of vehicle load, weight, length, and width limitations	25.00
4.12	Use of defective muffler, muffler cut-out, or similar device	25.00
4.13(a)	Obstructing traffic by stopping or leaving vehicle unattended	50.00
4.13(b)	Obstructing traffic by improper driving	15.00
4.16	Failure to yield right-of-way	50.00
4.17	Exceeding speed limits:	
	1. 0-5 m.p.h. over applicable limit	15.00
	2. 6-10 m.p.h. over applicable limit	20.00
	3. 11-15 m.p.h. over applicable limit	25.00
	4. 16-20 m.p.h. over applicable limit	35.00
4.18(a)	Failure to comply with signs regulating parking	15.00
4.18(b)	Failure to comply with other traffic control signs	25.00
4.18(c)	Failure to obey order by authorized person directing traffic	50.00
4.19	Violation of regulation prohibiting use of motor vehicle outside established public roads or parking areas	25.00
4.20	Operation of unregistered vehicle without valid license plates; failure to display valid proof of ownership upon request of any authorized person	15.00
4.21	Operation of vehicle with unsafe brakes	25.00
5.1	Advertising within park area without permit	75.00
5.2	Sale of alcoholic beverages or intoxicants in violation of law	75.00
5.3	Unauthorized soliciting or engaging in business	25.00
5.5	Commercial photography, motion picture filming, and television or sound track production, without permit	100.00
5.6	Unauthorized use of commercial vehicles on government park area roads:	
	a. Pickup trucks, station wagons, vans and cars	25.00
	b. Trucks over one and one-half tons and semi-trailers	100.00
5.7	Constructing buildings or any public or private facilities without permit or agreement with United States	50.00
5.8	Discrimination in employment practices; failure to post notice	50.00
5.9	Discrimination in furnishing public accommodations and transportation services; failure to post notice	50.00
5.12	Installation of monument or memorial in park area without permission	25.00
5.13	Creation or maintenance of a nuisance within park area	25.00
5.14	Prospecting, mining, locating mining claims, and leasing in park areas, except as authorized by law	50.00
5.15	Residing in park areas without permit	50.00
5.16	Unauthorized use of park land for agricultural purposes or for grazing or herding of animals	50.00
6.5	Wrongful entry into areas or use of facilities without paying fee and obtaining permit when required	10.00
7.14(a)	Fishing within the Smoky Mountain National Park in violation of regulations as to places, times, bait, creel, and size limits	25.00
	Each fish in excess of creel limit	10.00
7.14(b) (1)	Possession of open beer or alcoholic beverages in undesignated areas	25.00
7.14(b) (2)	Possession of open beer or alcoholic beverages in motor vehicle in park areas	50.00

Section Number	*Offense*	*Collateral*
7.14(c)	Leave food, materials, containers, etc., not properly secured from wildlife	25.00
7.34(b)	Fishing within Blue Ridge Parkway area in violation of regulations as to places, times, bait, creel and size limits	25.00
	Each fish in excess of creel limit	10.00
7.34(d)	Unauthorized parking of vehicles and crossing and use of Blue Ridge Parkway by hunters	25.00
7.34(f)	Commercial hauling on Blue Ridge Parkway without special permit, or violation of restrictions in such permit	25.00
7.34(g)	Use of commercial passenger-carrying buses on Blue Ridge Parkway without special written permit	25.00
7.34(k)	Use of bicycles on Blue Ridge Parkway except on designated and posted trails	15.00
7.34(l)	Use of boats or vessels on waters of Blue Ridge Parkway	25.00

Effect of Amendments.—
The amendment filed May 10, 1982, and effective for all offenses listed which arise on or after June 1, 1982, added to § 4.1 under National Park Service Violations the provisions for violation of safety helmet requirement, violation of required headlight for motorcycles statute and violation of required lighted taillight for motorcycles statute.

Only Part of Rule Set Out. — As the rest of this rule was not changed by the amendment, only the schedule of collateral for National Park Service Violations is set out.

Appendix III. Removal of Causes

(Removal from State Courts to District Courts of the United States. Title 28, U.S. Code, §§ 1441-1451, and Rule 81(c) of Federal Rules of Civil Procedure.)

Chapter 89.

District Courts; Removal of Cases from State Courts.

Sec.
1441. Actions removable generally.
1445. Nonremovable actions.
1446. Procedure for removal.
1451. Definitions.

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and

the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown. (June 25, 1948, ch. 646, § 1, 62 Stat. 937; Oct. 21, 1976, Pub. L. 94-583, § 6, 90 Stat. 2898.)

§ 1445. Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; July 25, 1958, Pub. L. 85-554, § 5, 72 Stat. 415; Oct. 17, 1978, Pub. L. 95-473, § 2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub. L. 95-486, § 9(b), 92 Stat. 1634.)

§ 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; September 29, 1965, Pub. L. 89-215, 79 Stat. 887; July 30, 1977, Pub. L. 95-78, § 3, 91 Stat. 321.)

§ 1451. Definitions.

For purposes of this chapter—

(1) The term "State court" includes the Superior Court of the District of Columbia.

(2) The term "State" includes the District of Columbia. (July 29, 1970, Pub.L. 91-358, Title I, § 172(d)(1), 84 Stat. 591.)

Appendix IV. Authentication of Records

(Title 28, U.S. Code, §§ 1738-1741, and Rule 44 of Federal Rules of Civil Procedure.)

Sec.

1738A. Full faith and credit given to child custody determinations.

§ 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term —

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the Child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii)

it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination. (Dec. 28, 1980, Pub. L. 96-611, § 8(a), 94 Stat. 3569.)

Appendix VI. Rules, Regulations and Organization of The North Carolina State Bar

Article IX.

Discipline and Disbarment of Attorneys.

Determination of Disability.

§ 1. General Provisions.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 8. Chairman of the Hearing Commission — Powers and Duties.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 9. Hearing Committee — Powers and Duties.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 12. Investigation; Initial Determination.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 13. Preliminary Hearing.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 14. Formal Hearing.

CASE NOTES

Applied in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

Appendix VII. Code of Professional Responsibility of The North Carolina State Bar

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

DISCIPLINARY RULES

DR2-102 Professional Notices, Letterheads, Offices, and Law Lists.

CASE NOTES

Cited in Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981).

CANON 7

A Lawyer Should Represent a Client Zealously within the Bounds of the Law

DISCIPLINARY RULES

DR7-102 Representing a Client within the Bounds of the Law.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, — N.C. —, 286 S.E.2d 89 (1982).

DR7-104 Communicating with One of Adverse Interest.

CASE NOTES

Inculpatory Statements by One in Custody. — This rule proscribes only certain conduct by members of the legal profession during the course of representation and does not prevent persons in custody from making inculpatory statements upon waiver of the right to counsel. State v. Romero, — N.C. App. —, 286 S.E.2d 903 (1982).

DR7-105 Threatening Criminal Prosecution.

CASE NOTES

Cited in Northwestern Bank v. Moretz, — N.C. App. —, 289 S.E.2d 614 (1982).

Appendix X. North Carolina Supreme Court Library Rules

Hours and Use of Library

Rule

5. Use after Hours.

Hours and Use of Library

5. Use after Hours.

Only members and employees of the Supreme Court and the Court of Appeals may enter the Library or use the material or facilities of the Library when the Library is not open for public use.

Effect of Amendments.— The amendment effective Sept. 1, 1982, rewrote this rule so as to eliminate provisions for use of the Library by members of North Carolina State Bar at certain times.

Appendix XI. Comparative Tables

(4) TABLE OF LAWS CODIFIED SUBSEQUENT TO 1919

SESSION LAWS 1963

Ch.	Sec.	General Statutes
47	. .	143-129 L.M.

SESSION LAWS 1967

Ch.	Sec.	General Statutes
780	. .	143-129 L.M., 143-131 L.M.

SESSION LAWS 1975

Ch.	Sec.	General Statutes
671	. .	143-129 L.M., 143-131 L.M.

SESSION LAWS 1979

Ch.	Sec.	General Statutes
343	1, 2	1-42.7

SESSION LAWS 1979, 2ND SESSION

Ch.	Sec.	General Statutes
1184	1, 2	17C-6

SESSION LAWS 1981

Ch.	Sec.	General Statutes
75	4	143-129 L.M.
412	4	20-140, 95-25.5
504	1-3	163-8 note
	7	147-4 note
	8	152-1 note
	9	161-1 note
504	10	162-1 note
	11-13	163-1 note
	14	163-8 note
	15	163-9 note
	16	163-10 note
	17	163-11 note

Ch.	Sec.	General Statutes
504	18	163-12 note
	19	163-8 note
747	66	20-140
754	. .	143-131 L.M.
784	1	116-198.6 note
808	. .	143B-456.1 note
856	2	143B-456.1 note
987	. .	143B-456.1 note
1127	89	131-175 note
1130	3	120-2 note, 163-104 note

SESSION LAWS OF 1982

Ch.	Sec.	1982 General Statutes
859	97	135-38 note
	98	135-38 note
1130	1, 3	120-2
1131	1	7A-289.31
	2	7A-289.35
	3	7A-289.29
	4	7A-289.35
1132	. .	152-1 L.M.
1141	. .	153A-265 L.M.
1142	. .	18B-600 L.M.
1144	. .	152-1 L.M.
1147	1	136-131.1
	2	136-131.1 note
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This table lists the sections of the General Statutes of North Carolina which were added, amended or repealed during the 1981 Session of the General Assembly after October 10, 1981, at the First and Second 1982 Extra Sessions and at the 1981 (Regular Session, 1982) Session.

In instances where the effective date of an act has been postponed beyond January 1, 1983, the effective date of such act is indicated in the right-hand column.

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1C-1603	Amended	1224	9-14	
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7A-31	Amended	1224	17	
7A-31	Amended	1253	1	
7A-39.3	Amended	1253	2	
7A-41	Amended	1282	71.2	
7A-52	Amended	1253	3	
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7A-289.29	Amended	1131	3	
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7A-289.35	Added	1131	2	
7A-465	Amended	1282	72	6/1/83
7A-466	Amended	1282	73	6/1/83
7A-506	Amended	1253	4	
7A-740	Amended	1189	1	
9-2	Amended	1226	1	
14-34.3	Added	1272	1	
14-250	Amended	1282	59, 60	
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14-403	Amended	1395	3	
14-404	Amended	1395	1	
14-409.2	Amended	1395	4	
14-409.3	Amended	1395	2	
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18B-101	Amended	1262	2	
18B-101	Amended	1285	1	
18B-103	Amended	1262	3	
18B-111	Added	1262	4	
18B-203	Amended	1285	2	
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18B-403	Amended	1262	6-8	
18B-602	Amended	1262	9	
18B-603	Amended	1240		
18B-700	Amended	1262	10	
18B-702	Amended	1262	11	
18B-803	Amended	1262	12	
18B-804	Amended	1285	5	
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18B-1006	Amended	1262	23	
18B-1007	Amended	1262	20	
18B-1112	Amended	1262	21	
20-7	Amended	1257	1	
20-11	Amended	1257	2	
20-16	Amended	1256		
20-37.7	Amended	1257	3	
20-51	Amended	1286		
20-66	Amended	1258	1	
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20-84	Amended	1159		
20-87	Amended	1255		
20-97	Amended	1202		
20-97	Amended	1250		
20-118.1	Amended	1259	2	
20-118.3	Added	1259	1	
20-123	Amended	1195		
20-161.2	Added	1239	1	
20-183.3	Amended	1261	1	
20-183.7	Amended	1261	2	
20-219.2	Amended	1251	3	
20-348	Amended	1280	1	
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36A-59.3	Added	1252	2	
39-13.6	Added	1245	1	
40A-40	Amended	1243	3	
44A-2	Amended	1275	2	
44A-40 to 44A-46	Added	1275	1	
54B-4	Amended	1238	1	
54B-20	Amended	1238	4	

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54B-35	Amended	1238	8	
54B-39	Amended	1238	10	
54B-44	Amended	1238	11	
54B-102	Amended	1238	22	
54B-121	Amended	1238	12	
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54B-147	Added	1238	14	
54B-160	Amended	1238	15	
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54B-194	Amended	1238	20	
54B-210	Amended	1238	21	
54B-216	Amended	1238	2	
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62-3	Amended	1186	2	
62-52	Added	1186	1	
62-133	Amended	1197	6	
62-133.2	Added	1197	1	
62-134	Amended	1197	2	
65-36.2	Amended	1336	1	
65-36.3	Amended	1336	2	
65-53	Amended	1153	. .	
65-36.3	Amended	1336	2	
72-7	Amended	1177	1	
74C-5	Amended	1359	3	
75A-3	Amended	1182	2	
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76A-31 to 76A.36	Added	1176	1	
76A-42 to 76A-48	Added	1176	1	
76A-54	Added	1176	1	
78A-17	Amended	1263	1, 2	
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90-85.1	Repealed	1188	5	
90-85.2 to 90-85.23	Added	1188	1	
90-85.24	Added	1188	2	
90-85.25, 90-85.26	Added	1188	1	
90-85.27 to 90-85.31	Added	1188	3	
90-85.32 to 90-85.40	Added	1188	1	
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90-278	Amended	1234	2	
90-280	Amended	1234	4	
90-285	Amended	1234	3	
90A-1 to 90A-13	Repealed	1274	1	
90A-50 to 90A-66	Added	1274	2	
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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

August 25, 1982

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1982 Interim Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN

Attorney General of North Carolina

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