GENERAL STATUTES OF NORTH CAROLINA

1980 INTERIM SUPPLEMENT

THE GENERAL STATUTES OF NORTH CAROLINA

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

UNDER THE DIRECTION OF
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Preface

This 1980 Interim Supplement to the General Statutes of North Carolina contains the general and permanent laws enacted at the Second 1979 Session of the General Assembly, which was held in 1980, annotations from cases decided since the preparation of the 1979 Cumulative Supplement and available in advance sheets on June 11, 1980, and references to opinions of the Attorney General. In addition, this Supplement contains: certain sections and parts of sections added or amended by 1979 acts with postponed effective dates, which were set out only in notes in the 1979 Cumulative Supplement; 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 1979 Cumulative Supplement or the replacement volumes.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1979 Second Session of the General Assembly affecting Chapters 1 through 168 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports through Volume 299, p. 546.
North Carolina Court of Appeals Reports through Volume 44, p. 732.
Federal Reporter 2nd Series through Volume 617, p. 295.
Federal Supplement through Volume 485, p. 1061.
Federal Rules Decisions through Volume 85, p. 486.
United States Reports through Volume 443.
Supreme Court Reporter through Volume 100, p. 1609.

The General Statutes of North Carolina
1980 Interim Supplement

Chapter 1.

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Quoted in In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

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Applied in Stanley v. Brown, 43 N.C. App. 503, 259 S.E.2d 408 (1979); Flippin v. Jarrell, 44 N.C. App. 518, 261 S.E.2d 257 (1980).

Cited in Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979).

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§ 1-21. Defendant out of State; when action begun or judgment enforced.

Cited in Joyner v. Lucas, 42 N.C. App. 541, 257 S.E.2d 105 (1979).

§ 1-23. Time of stay by injunction or prohibition.

Applied in First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

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

Effect of Partial Payment on Promissory Note by Co-defendant. — In an action to recover the balance due on a promissory note, a payment on the note by one defendant did not fix the date of payment as a new date from which the statute of limitations began to run against the second defendant, unless such partial payment was agreed to, authorized, or ratified by the second defendant. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

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§ 1-47. Ten years.

I. IN GENERAL.

Editor's Note. —

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

II. SUBDIVISION (1) — JUDGMENTS AND DECREES.

Issue Where Corporate Seal Appears, but No Seal after Names. — In an action to recover the balance due on a promissory note, where a corporate seal appeared but there was no seal after defendants' names, a material issue of fact was raised as to the intent of the parties to enter into a sealed instrument, and the statute of limitations of subdivision (2) of this section would not necessarily be applicable. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

§ 1-50. Six years.

I. IN GENERAL.

Restrictive Covenant Governed by Subdivision (3). — An action to enforce a restrictive covenant is governed by subdivision (3). A restrictive covenant is a servitude, commonly referred to as a negative easement, and an easement is an incorporeal hereditament. This section requires that an action for injury to any incorporeal hereditament be brought within six years. Hawthorne v. Realty Syndicate, Inc., 43 N.C. App. 436, 259 S.E.2d 591 (1979).

Cited in Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979).

§ 1-52. Three years.

I. IN GENERAL.

Editor's Note. —
For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

Effect of Rule 41 (a) (2) upon the statute of limitations where actions twice dismissed and recommenced in accordance with that rule. See Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

Applied in Johnson v. Podger, 43 N.C. App. 20, 257 S.E.2d 684 (1979); Brickell v. Collins, 44 N.C. App. 707, 262 S.E.2d 387 (1980).

Cited in Danielson v. Cummings, 43 N.C. App. 546, 259 S.E.2d 332 (1979); Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979); First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

II. SUBDIVISION (1) — CONTRACTS.

Accrual of Action against Guarantor. — A plaintiff's cause of action against a guarantor arises when the principal refuses to make further payments on the promissory note. If the guaranty of payment is absolute, the right to sue upon the guaranty accrues immediately upon the failure of the principal debtors to pay their debt at maturity. Better Adv., Inc. v. Peace, 43 N.C. App. 534, 259 S.E.2d 359 (1979).

Action for Treble Damages under Unfair Trade Practices Statutes. — An action under § 75-16 to recover treble damages for a violation of the unfair trade practices statute, § 75-1.1, instituted prior the enactment of the four-year statute of limitations of § 75-16.2 on June 12, 1979, is governed by the three-year limitation of subdivision (2), not the one-year limitation of § 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

IX. SUBDIVISION (9) — FRAUD OR MISTAKE.

When Statute Begins to Run. —
In accord with 3rd paragraph in 1979 Cum. Supp. See Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979).

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In accord with 1st paragraph in 1979 Cum. Supp. See Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979).

§ 1-53. Two years.

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

Applied in Wheeler v. Roberts, 45 N.C. App. 311, 262 S.E.2d 829 (1980).

Cited in Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980).

IV. SUBDIVISION (4) — DEATH BY WRONGFUL ACT.

Section Bars Remedy, Not Right. — The two-year limitation period for wrongful death actions is an ordinary statute of limitation, that bars the remedy and not the right. Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980).

§ 1-54. One year.

Action for Treble Damages under Unfair Trade Practices Statutes. — An action under § 75-16 to recover treble damages for a violation of the unfair trade practices statute, § 75-1.1, instituted prior to the enactment of the four-year statute of limitations of § 75-16.2 on June 12, 1979, is governed by the three-year limitation of § 1-52(2), not the one-year limitation of subdivision (2) of this section applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

Who May Assert Subdivision (6) as Bar. — The one year statute of limitations under subdivision (6) of this section is not available as a defense to a party liable as a maker on an underlying note who is not a mortgagor of the property on which the creditor has foreclosed. Only a party with an interest in mortgaged property may assert subdivision (6) of this section as a bar to an action for a deficiency judgment. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

Applied in Harris v. Atlantic-Richfield Co., 469 F. Supp. 759 (E.D.N.C. 1978).

Cited in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

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

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

Applied in Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F. Supp. 559 (M.D.N.C. 1979); In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

Cited in Broughton v. DuMont, 43 N.C. App. 512, 259 S.E.2d 361 (1979).

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

Appearance as Executor Was General Appearance. — Where plaintiff husband died prior to a hearing on defendant's motion to set aside a decree of absolute divorce, there was no merit to plaintiff executor's contention that he had not been served with process and was therefore not properly before the court, since his appearance, as executor, was a general appearance and accordingly the trial court properly obtained jurisdiction over his person. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Applied in Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

§ 1-75.8. Jurisdiction in rem or quasi in rem — grounds for generally.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

Subdivision (4) does not meet the due process standards, etc. —

Subdivision (4) does not meet the due process standards required by Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), and is unconstitutional. Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

But Subdivision (5) Supports Jurisdiction, etc. —

In accord with 1979 Cum. Supp. See Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Discretion of Court. —

The exercise of jurisdiction under this section is a matter for the discretion of the court. Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-77. Where cause of action arose.

Venue of Action against Municipality. —

An action against a municipality is governed by this statute where the cause of action is the factor controlling venue in such a case. Pitts Fire Safety Serv., Inc. v. City of Greensboro, 42 N.C. App. 79, 255 S.E.2d 615 (1979).

Proper venue in an action against a city to recover the price of equipment installed in its municipal building lies in the county in which the city is located, since the contract was performed and the failure to pay occurred in that county. Pitts Fire Safety Serv., Inc. v. City of Greensboro, 42 N.C. App. 79, 255 S.E.2d 615 (1979).

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

Applicable to All Actions against Administrators. —

In accord with 2nd paragraph in original. See Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

Representative Is Not Entitled to Removal, etc. —

In accord with original. See Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

Action for Account and Settlement. —

In an action against defendant executors, where it is apparent that the ultimate determination of the rights of the respective parties in a joint savings account must necessarily depend upon the proper settlement of the accounts of the defendant executors, the action is against the defendant executors in their representative capacity. Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

§ 1-82. Venue in all other cases.

Quoted in Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

Cited in Harrington Mfg. Co. v. Powell Mfg. Co., 44 N.C. App. 347, 260 S.E.2d 814 (1979).

§ 1-83. Change of venue.

I. IN GENERAL.

Applied in Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

II. THE APPLICATION FOR REMOVAL.

A. Time of Demand.

Where defendant's counterclaim is the only claim left to be adjudicated, defendant is not entitled under this section to a change of venue as a matter of right from the county of plaintiff's residence to the county of defendant's residence, since the county of plaintiff's residence is a proper venue under § 1-82. Harrington Mfg. Co. v. Powell Mfg. Co., 44 N.C. App. 347, 260 S.E.2d 814 (1979).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

Trial.

§ 1-181. Requests for special instructions.

Applied in State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 26.

Declaratory Judgments.

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

In General. —

In accord with 2nd paragraph in original. See Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

For a discussion of principles concerning scope of Declaratory Judgment Act, see Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

Necessity for a Controversy. — In accord with 7th paragraph in 1979 Cum. Supp. See Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

When Motion to Dismiss under Rule 12(b)(6) proper. — When the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy, this may be taken advantage of by a Rule 12(b)(6) motion to dismiss. Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

Action to Determine Applicability of Administrative Procedure Act to Governor's Action. — A declaratory judgment action was appropriate to obtain a determination as to whether the Governor must follow the procedure set out in the Administrative Procedure Act in removing for cause a member of the North Carolina Cemetery Commission and whether Governor has authority to suspend a member of the commission pending final determination on the merits. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

§ 1-255. Who may apply for a declaration.

Applied in Wing v. Wachovia Bank & Trust Co., 44 N.C. App. 402, 261 S.E.2d 279 (1980).

§ 1-256. Enumeration of declarations not exclusive.

Applied in James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

Cited in Wing v. Wachovia Bank & Trust Co., 44 N.C. App. 402, 261 S.E.2d 279 (1980).

§ 1-264. Liberal construction and administration.

Applied in American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

Quoted in Wing v. Wachovia Bank & Trust Co., 44 N.C. App. 402, 261 S.E.2d 279 (1980).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-274. Duty of clerk on appeal.

What Statement Should Contain. — In accord with original. See Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225 (1979).

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

Applied in Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

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

I. EDITOR'S NOTE.

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

II. APPEAL IN GENERAL.

A. General Consideration.

Purpose of Subsection (b). — Subsection

(b) simply allows a defendant, when the trial court has denied his motion to dismiss on the ground that the court lacked jurisdiction over the defendant, a means of immediate appellate determination as to whether the trial court has jurisdiction so that it can then proceed to answer the questions raised by the lawsuit; subsection (b) was not enacted as a means of allowing litigants to seek advisory opinions from the appellate courts before necessary questions are resolved by the trial courts. Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Applied in Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980).

Quoted in North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979).

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

Interlocutory Orders. —

The effect of both this section and § 7A-27(d) is to provide that no appeal will lie to an appellate court from an interlocutory order or ruling of a trial court unless such order or ruling deprives the appellant of a substantial right which he will lose if the order or ruling is not reviewed before final judgment. Clark v. Clark, 42 N.C. App. 84, 255 S.E.2d 568 (1979).

III. APPEAL AS TO PARTICULAR SUBJECTS.

D. Injunction.

Question on Appeal of Order Granting Preliminary Injunction. — The threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

G. Appeals as to Miscellaneous Subjects.

Order Granting Claim for Alimony and Child Support. — An order granting a plaintiff-wife's claim for $4,225.00 in alimony and child-support arrearages and granting full faith and credit to a decree imposing a continuing support obligation affects a "substantial right" of defendant and is therefore reviewable by virtue of this section and § 7A-27(d), even though the trial court's order did not determine all the issues raised in the action. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Order with Regard to Interrogatories and Requested Admissions. — Trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and also denying defendant's motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal was fragmentary and premature. First Union Nat'l Bank v. Olive, 42 N.C. App. 574, 257 S.E.2d 100 (1979).

Order of the trial court that plaintiff not be required to answer certain interrogatories did not affect a substantial right of defendant where defendant had received answers to other interrogatories which gave it detailed information as to all written and oral transactions conducted by plaintiff in regard to the subject of the controversy and the information denied to the defendant was not crucial to its defense. Starmount Co. v. City of Greensboro, 41 N.C. App. 591, 255 S.E.2d 267, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

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

The provisions of this section are jurisdictional, etc. —

Where the appeal is taken more than ten days after the "entry" of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in §§ 1-279, 1A-1 and in Rule 3, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of both §§ 1-279, 1A-1 and Rules 3 and 26 are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979).

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

Applied in Nugent v. Beckham, 43 N.C. App. 703, 260 S.E.2d 172 (1979).

SUBCHAPTER X. EXECUTION.

ARTICLE 30.

Betterments.

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

The right under this section is a defensive right. —

This section does not create an independent cause of action. Rather, it embodies only a defensive right, declaring that an owner of land who seeks and obtains the aid of the court to enforce his right to possession has no just claim to anything but the land itself and a fair compensation for being kept out of possession. Clontz v. Clontz, 44 N.C. 573, 261 S.E.2d 695 (1980).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

ARTICLE 32.

Property Exempt from Execution.

§ 1-369. Property exempted.

I. GENERAL CONSIDERATION.

Editor's Note. —

For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

§ 1-372. Duty of appraisers; proceedings on return.

Applied in ITCO Corp. v. West, 44 N.C. App. 185, 260 S.E.2d 443 (1979).

§ 1-378. Personal property appraised on demand.

Editor's Note. —

For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

§ 1-381. Exceptions to valuation and allotment; procedure.

Applied in ITCO Corp. v. West, 44 N.C. App. 185, 260 S.E.2d 443 (1979).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-394. Contested special proceedings; commencement; summons.

Quoted in In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-410. In what cases arrest allowed.

Applications of Section. — A party's activities in adding "payment in full" language to a check after it had been cashed by another party, and then attempting to use the check to defeat the other party's claim, constituted fraud within the intent of subdivision (4) and within Art. I, § 28, the North Carolina constitutional exception permitting imprisonment in case of fraud. Koury v. Meyer, 44 N.C. App. 392, 261 S.E.2d 217 (1980).

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.2. Actions in which attachment may be had.

Cited in Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

§ 1-440.3. Grounds for attachment.

Cited in Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.

Instruction Directing Jury to Double Damages. — In an action for wrongful cuttings of timber on plaintiffs' land, it was not error for the court to instruct the jury that if they found

the plaintiffs had suffered damages, they should double the amount of damages in arriving at their verdict, rather than instructing the jury to determine the amount of damages and then doubling it himself. Pridgen v. Callaway, 44 N.C. App. 163, 260 S.E.2d 441 (1979).

ARTICLE 43C.

Actions Pertaining to Cities.

§ 1-539.15. Claims against cities arising in contract or tort.

Applied in Horne v. City of Charlotte, 41 N.C. App. 491, 255 S.E.2d 290 (1979).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

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

Applied in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

ARTICLE 45A.

Arbitration and Award.

§ 1-567.1. Short title.

Editor's Note. —
For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

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

Editor's Note. —
For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

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

Editor's Note. — For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

§ 1-567.13. Vacating an award.

Editor's Note. — For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

§ 1-567.14. Modification or correction of award.

Scope of Judicial Review. — Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Errors of Law or Fact Generally Insufficient to Invalidate Award. — Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts. The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

When Fairness or Regularity of Award May Be Impeached. — The purpose of arbitration is to settle matters in controversy and avoid litigation. It is well established that parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Subdivision (a) (1) Directed toward Mathematical Errors Only. — In providing in this section that awards could be modified or corrected for "evident miscalculation of figures," the legislature had reference only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court. This section is not an avenue for litigants to persuade courts to review the evidence and then reach a different result because it might be interpreted differently; such an interpretation of the statute would completely frustrate the underlying purposes of the arbitration process. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Court's Power under Subdivision (a) (3) Limited. — The provision of this section which allows courts to modify or correct an award which is "imperfect in a matter of form" does not permit the court to substitute its interpretation for that of the arbitrators. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

§ 1-567.15. Judgment or decree on award.

Cited in Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

§ 1-567.20. Uniformity of interpretation.

Editor's Note. — For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

ARTICLE 49.

Time.

§ 1-593. How computed.

Quoted in Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979).

§ 1-594. Computation in publication.

Cited in Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979).

Article 50.

General Provisions as to Legal Advertising.

§ 1-596. Charges for legal advertising.

Local Modification. — Mitchell: 1979, 2nd Sess., c. 1170.

Chapter 1A.

Rules of Civil Procedure.

§ 1A-1. Rules of Civil Procedure.

Application of Rules. —

The procedures prescribed by § 115-142 for the dismissal of a career teacher are essentially administrative rather than judicial. The board is not bound by the formal rules of evidence which would ordinarily obtain in a proceeding in a trial court; nor are the rules of civil procedure applicable. Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 298 N.C. 293, 259 S.E.2d 298 (1979).

Cited in Mack Fin. Corp. v. Harnett Transf., Inc., 42 N.C. App. 116, 256 S.E.2d 491 (1979).

ARTICLE 2.

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

Rule 3. Commencement of action.

Applied in In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

Cited in Hall v. Lassiter, 44 N.C. App. 23, 260 S.E.2d 155 (1979).

Rule 4. Process.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For note on Rule 4(b) and service of process on a corporate defendant, see 15 Wake Forest L. Rev. 105 (1979).

Summons delivered to each of two defendants directing the other defendant, rather than the defendant to whom delivered, to appear and answer was not service in accord with the statutory rules and as such was fatally defective, and no jurisdiction over defendants was obtained. Although both defendants may have had actual notice of the lawsuit, such notice cannot supply constitutional validity to service unless the service is in the manner prescribed by statute. Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318 (1980).

Service on Division of Corporation Not Service on Corporation. — Complaint and summons directed to a defendant named as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation" is not service on the entity Ex-Cell-O Corporation even if the complaint and summons reach the hands of someone obligated to receive service in behalf of Ex-Cell-O, since Ex-Cell-O was not a named party defendant. Crawford v. Aetna Cas. & Sur. Co., 44 N.C. App. 368, 261 S.E.2d 25 (1979).

And Amendment Not Permissible. — Plaintiff could not amend his complaint, claiming that the words "Michigan Tool Company, A Division of," were a misnomer or mere surplusage since such amendment would, in effect, substitute a party defendant that had never been properly served. Crawford v. Aetna Cas. & Sur. Co., 44 N.C. App. 368, 261 S.E.2d 25 (1979).

Service on Thirty-first Day Insufficient under Section (c). — A pluries summons which was issued on June 16, 1977, and served on defendants on July 19, 1977, was insufficient to bring defendants into court and entry of default on them was therefore invalid, where service of summons was made on the thirty-first day, as computed under Rule 6 rather than within 30 days as required by section (c) of this rule. Carolina Narrow Fabric Co. v. Alexandria Spinning Mills, Inc., 42 N.C. App. 722, 257 S.E.2d 654 (1979).

An attempted service on a defendant made at a hospital rather than his dwelling house or usual place of abode fails to comply with section (j)(1)a of this rule and is invalid. Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318 (1980).

Delivery to Relation of Defendants at Their Business. — Delivery of summons to a person who was the son of one defendant and brother of the other at defendants' place of business instead of defendants' respective residences was not in compliance with section (j)(1)a, and jurisdiction over defendants was not thereby obtained. Hall v. Lassiter, 44 N.C. App. 23, 260 S.E.2d 155 (1979).

Contempt Statute Requirement Satisfied by Order under Section (j)(1)c. — Where the court issued an order pursuant to section (j)(1)c notifying a foreign attorney of the contempt charges and allowing him 60 days to respond to the charges, which order was mailed to the attorney at the address he gave the court in a motion to be admitted in a case pro hac vice, this method of service was proper to comply with the requirement of § 5A-15(a) that "[a] copy of the order must be furnished to the person charged" where the court had personal jurisdiction as provided in § 1-75.4. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

Divorce Decree Invalid for Violation of Section (j)(9)c. — In an action to set aside a divorce decree, where the record before the court of the divorce action indicates that plaintiff failed to mail defendant a copy of the notice of service by publication to the defendant at her Virginia residence, plaintiff violated the technical requirements of section (j)(9)c and this defect is itself sufficient to render the resulting divorce decree invalid. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Service by publication held void where the addresses of the defendants were available to the plaintiff and the plaintiff did not use diligence to ascertain the addresses. See Fountain v. Patrick, 44 N.C. App. 584, 261 S.E.2d 514 (1980).

Applied in Broughton v. DuMont, 43 N.C. App. 512, 259 S.E.2d 361 (1979); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); Wheeler v. Roberts, 45 N.C. App. 311, 262 S.E.2d 829 (1980).

Cited in Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979); Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980); Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979); Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F. Supp. 559 (M.D.N.C. 1979).

Rule 6. Time.

Documentation of Summary Judgment Order after Term. — Where the trial judge denied defendant's motion for summary judgment during term, the court under section (c) of this rule could thereafter simply document his decision by signing the order and mailing it to the clerk of court after the term had expired. Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979).

Applied in Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979); Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638, cert. granted, 297 N.C. 698, 259 S.E.2d 295 (1979); Alexandria Spinning Mills, Inc., 42 N.C. App. 722, 257 S.E.2d 654 (1979).

Article 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

"Counterclaim" Merely Asserting Affirmative Defense Requires No Reply. — Plaintiff's failure to file a reply to defendant's purported "counterclaim" did not operate as an admission of the facts alleged therein where defendant's pleading did nothing more than raise an affirmative defense to plaintiff's cause of action to which a reply was neither required nor permitted by section (a). Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979).

Applied in Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843 (1979).

Cited in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Rule 8. General rules of pleadings.

"Short and Plain Statement of the Claim". — Even construing pleadings liberally, the "short and plain statement of the claim" required by section (a)(1) requires more than a general statement that a notice for relief has been filed pursuant to some statute. Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979).

Fraud Exception to Notice Pleading Approach. — Rule 9(b) is in contrast to the notice pleading approach adopted upon the enactment of section (a) of this rule and is

essentially a codification of former case law of this state with respect to pleading fraud. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

The provision that pleadings are to be liberally construed under the notice theory of pleadings does not apply to fraud cases. In a fraud case the plaintiff must allege all material facts and circumstances constituting the fraud with particularity. Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

Laches is an affirmative defense which must be pleaded, and the party pleading it bears the burden of proof. Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979).

Privilege against Self-incrimination Applies at Pleading Stage. — A defendant may plead his privilege against self-incrimination in a civil action where the plaintiff asks for punitive damages, and the privilege applies to protect a party from self-incrimination at the pleadings stage of an action. Bryd v. Hodges, 44 N.C. 509, 261 S.E.2d 269 (1980).

Thus, Allegations Not Admitted Where Privilege Asserted. — In an action to recover compensatory and punitive damages for alienation of affections and criminal conversation where defendant refused to answer the allegations of plaintiff's complaint claiming his constitutional privilege against self-incrimination, the trial court erred in deeming the allegations as admitted pursuant to section (d). Bryd v. Hodges, 44 N.C. 509, 261 S.E.2d 269 (1980).

Allegations Not Admitted Where Reply Not Required. — Plaintiff's failure to file a reply to defendant's purported "counterclaim" did not operate as an admission of the facts alleged therein where defendant's pleading did nothing more than raise an affirmative defense to plaintiff's cause of action to which a reply was neither required nor permitted by Rule 7(a). Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979).

Applied in Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979); Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843 (1979); Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979); Angel v. Ward, 43 N.C. App. 288, 258 S.E.2d 788 (1979); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979); Patrick v. Mitchell, 44 N.C. App. 357, 260 S.E.2d 809 (1979); Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260 (1980); First Peoples Sav. & Loan Ass'n v. Cogdell, 44 N.C. App. 511, 261 S.E.2d 259 (1980); Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980).

Quoted in Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

Cited in Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

Rule 9. Pleading special matters.

Section (b) is in contrast to the notice pleading approach adopted upon the enactment of Rule 8(a), and is essentially a codification of former case law of this state with respect to pleading fraud. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

The Rule 8 provision that pleadings are to be liberally construed under the notice theory of pleadings does not apply to fraud cases. In a fraud case, the plaintiff must allege all material facts and circumstances constituting the fraud with particularity. Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

The purpose of the prior case law and present section (b) is to require pleading of the facts upon which the plaintiff relies to establish the essential elements of fraud; the facts alleged must be sufficient to support a finding of the intent to deceive, the specific false representations that were made, and that the defrauded party relied upon the misrepresentations to his detriment. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

Applied in Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979).

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

A ruling on the merits cannot be made on a motion to dismiss. Wilkes v. North Carolina State Bd. of Alcoholic Control, 44 N.C. App. 495, 261 S.E.2d 205 (1980).

And ordinarily no appeal lies, etc. — Ordinarily, a denial of a motion to dismiss under section (b)(6) of this rule merely serves to continue the action then pending. No final

judgment is involved, and the disappointed movant is generally not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits. Thus, an adverse ruling on a motion under section (b)(6) is in most cases an interlocutory order from which no direct appeal may be taken. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

Motion to Dismiss under Section (b)(6) Performs Same Function as Demurrer. —

In accord with 1st paragraph in 1979 Cum. Supp. See Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320 (1980).

The function of a motion to dismiss, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320 (1980).

The test on a motion to dismiss, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

Allegations Treated as True. —

In accord with 1st paragraph in 1979 Cum. Supp. See Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

Sufficiency of Complaint. —

In accord with 1st paragraph in 1979 Cum. Supp. See Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

Claim should not be dismissed unless, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).

In accord with 2nd paragraph in 1979 Cum. Supp. See Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979); Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

But Not to Defective Statement of Good Claim. —

If a complaint amounts to what was formerly called a "defective statement" of a good cause of action, a motion to dismiss under section (b)(6) of this rule should not be allowed. Other provisions of this rule, the rules governing discovery and the motion for summary judgment, provide adequate procedure to obtain details not set out in a complaint. Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

Complaint without Merit May Be Dismissed. —

In accord with 1st paragraph in 1979 Cum. Supp. See Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 259 S.E.2d 552 (1979); GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

In accord with 5th paragraph in 1979 Cum. Supp. See Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979); Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320 (1980).

The sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief. If it appears to a certainty that no state of facts which could be proved in support of the claim would so entitle plaintiff, the complaint should be dismissed. Carolina Bldrs. Corp. v. AAA Dry Wall, Inc., 43 N.C. App. 444, 259 S.E.2d 364 (1979).

Motion under Section (b)(6) Available in Declaratory Judgment Action. — When the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy, this may be taken advantage of by section (b)(6) motion to dismiss. Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

Section (b)(6) Compared with Rule 56. — For a discussion of the similarities and differences between a motion for failure to state a claim upon which relief can be granted under section (b)(6) of this rule and a Rule 56 motion for summary judgment, see Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

Motions under sections (b)(6) and (c) of this rule, etc. —

In accord with 3rd paragraph in 1979 Cum. Supp. See Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

A motion to dismiss under Rule 12(b)(6) should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56, where the court considered matters outside the pleadings. Roach v. City of Lenoir, 44 N.C. App. 608, 261 S.E.2d 299 (1980).

Motions Considered as Though Made under Section (c). —

In accord with 1979 Cum. Supp. See Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260 (1980).

Function of section (c), etc. —
In accord with 1979 Cum. Supp. See High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979).

When Judgment on Pleadings Error. — Where there is no showing on the face of the pleadings that they lack merit or fail to present any controversy of fact, the trial court erred in the granting of the motion for judgment on the pleadings. High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979).

Applied in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 259 S.E.2d 552 (1979); Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638, cert. granted, 297 N.C. 698, 259 S.E.2d 295 (1979); Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979); Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979); Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843 (1979); High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979); Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979); Southern v. Southern, 43 N.C. App. 159, 258 S.E.2d 422 (1979); Golden v. Golden, 43 N.C. App. 393, 258 S.E.2d 809 (1979); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979); Boone v. Boone, 44 N.C. App. 79, 259 S.E.2d 921 (1979); Henry v. North Carolina Dept. of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979); Crawford v. Aetna Cas. & Sur. Co., 44 N.C. App. 368, 261 S.E.2d 25 (1979); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); Thompson v. Northwestern Security Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980).

Cited in Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979); Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980); Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430 (1979); Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979); Craver v. Craver, 41 N.C. App. 606, 255 S.E.2d 253 (1979); Oglesby v. McCoy, 41 N.C. App. 735, 255 S.E.2d 773 (1979); Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979); Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979); Harrington Mfg. Co. v. Powell Mfg. Co., 44 N.C. App. 347, 260 S.E.2d 814 (1979); Koury v. Meyer, 44 N.C. App. 392, 261 S.E.2d 217 (1980); Fountain v. Patrick, 44 N.C. App. 584, 261 S.E.2d 514 (1980); Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

Rule 13. Counterclaim and crossclaim.

Plaintiff's action for absolute divorce on the ground of one year's separation was not such a claim as to compel him by this rule to file the claim in his prior pending action for divorce from bed and board since the earlier action, based on allegations that defendant had offered such indignities as to render plaintiff's condition intolerable and his life burdensome, was filed one day after the parties separated. When plaintiff instituted the prior action and when he was called upon to plead in response to his wife's counterclaim for alimony, the grounds upon which he based his subsequent action for absolute divorce did not exist. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Allegations in Divorce Action Held Recrimination, Not Counterclaim. — In an action for divorce, defendant's allegations that plaintiff secured a deed of separation from the defendant by fraud by misrepresentation to his wife that he had not been seeing another woman during the course of their marriage when in fact he was regularly committing adultery with another woman do not state or constitute a counterclaim for alimony or for child custody or support which may be asserted in an action for absolute divorce; the alleged misconduct set forth in defendant's defense falls clearly within the doctrine of recrimination and is therefore not available to defendant as a defense to plaintiff's action for divorce. Edwards v. Edwards, 43 N.C. App. 296, 259 S.E.2d 11 (1979).

Rule 15. Amended and supplemental pleadings.

Editor's Note. —
For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

Amendments should always be freely, etc. —
Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

The judge, etc. —
While the burden is on the party objecting to the amendment to show that he would be

prejudiced thereby, a motion under subsection (a) is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion. Where the record before the appellate court fails to indicate the content of defendant's proposed amendment and the circumstances surrounding the court's denial of her motion, that court cannot say that the trial court has abused its discretion. Edwards v. Edwards, 43 N.C. App. 296, 259 S.E.2d 11 (1979).

Amendment Properly Denied When Summary Judgment Granted. — The trial court did not abuse its discretion in denying defendant's motion to amend his answer to "elaborate on his expenses as a setoff to any amount that may be due Plaintiff" since, at the same time the court denied the motion to amend, it granted summary judgment rejecting defendant's setoff theory, which was raised, perhaps improperly, but nevertheless considered by the trial court, in his affidavits, answers to interrogatories, and prayer for relief in his answer to the complaint. Amendment of the complaint at the time would have been futile. Olive v. Williams, 42 N.C. App. 380, 257 S.E.2d 90 (1979).

Defendants Cannot Complain of Amendment in Response to Objection. — Defendants cannot complain of the amendment of plaintiff's motion at the hearing to reflect the procedural rule followed by the court, where defendants in their response to the motion for a new trial had raised the failure to state the rule number as a ground for opposition and it was in response to this that the amendment was made. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Applied in Smith v. Staton, 41 N.C. App. 395, 255 S.E.2d 310 (1979); Lewis v. Boling, 42 N.C. App. 597, 257 S.E.2d 486 (1979); Coker v. Stevens, 43 N.C. App. 352, 258 S.E.2d 794 (1979); Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979); Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979).

Cited in Thompson v. Northwestern Security Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980).

Rule 16. Pretrial procedure; formulating issues.

Admissions or Stipulations Not to Be Forced. — Although the pretrial conference is a mechanism intended to resolve those issues which are not genuinely in dispute, nothing in the rule affords a basis for forcing the parties into admissions or stipulations where there is a genuine dispute. Amick v. Shipley, 43 N.C. App. 507, 259 S.E.2d 329 (1979).

Admissions, Agreements, or Stipulations Should Be in Signed Writing. — While this rule allows the court to enter an order reciting action taken at the conference, present custom and better practice require that admissions, agreements, or stipulations entered into by counsel at the pretrial stage be evidenced by a signed writing. Amick v. Shipley, 43 N.C. App. 507, 259 S.E.2d 329 (1979).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

Defendant could not collaterally attack a competency hearing and appointment of a general guardian for plaintiff where the defendant's intention obviously was to avoid the substitution of the real party in interest, the general guardian, by attacking the validity of the proceeding in which the general guardian was appointed. Hearon v. Hearon, 44 N.C. App. 361, 261 S.E.2d 9 (1979).

Applied in Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979); Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281 (4th Cir. 1979).

Rule 19. Necessary joinder of parties.

The heart of this rule lies in the proposition that all parties should be joined whose presence is necessary to a complete determination of the controversy. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Former § 1-73 Compared. — The

enactment of this rule has not changed the essence of law, as found by the courts of this State in cases decided under the former § 1-73. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Necessary Parties in Divorce Action. — There are but two necessary parties to an action for divorce; husband and wife. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Children Not Proper Parties in Divorce Action. — Where there are children born to a marriage it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Action to Set Aside Divorce Decree after Husband's Death. — The only necessary parties in an action to set aside an absolute divorce decree after the husband's death are the surviving spouse and the personal representative of the deceased spouse. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Rule 20. Permissive joinder of parties.

The purposes of the joinder provisions of this rule are manifold. One significant purpose of the rule is to provide for joinder of defendants in the alternative. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

When Need for Joinder of Defendants Arises. — The need for joinder of defendants in the alternative most often arises when the substance of plaintiff's claim indicates that he is entitled to relief from someone, but he does not know which of two or more defendants is liable under the circumstances set forth in the complaint. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

A classic example of the need for joinder of defendants in the alternative is where plaintiff was injured as a result of a sudden and unanticipated collision between the car driven by one defendant in which she was riding as a passenger and the car driven by another defendant, and where, because of the split-second nature of the accident, she is uncertain whether her injuries were caused by the negligence of one defendant or the negligence of the other defendant or the negligence of both, but it is clear from the allegations that the negligence of one of the two or both was the proximate cause of her injuries. The alternative joinder provisions of this rule were drafted for the express purpose of allowing a plaintiff who is faced with such uncertainty as to the cause of her injuries to present her alternative theories to a jury, which must then decide from the evidence whether liability exists and if so which of the two or more defendants joined is liable to the plaintiff. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Alternative Fact Allegations Not Admissions. — Application of the general rule that "a party is bound by his pleadings and, unless withdrawn, amended, or, otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader" to situations in which a plaintiff alleges claims in the alternative against two or more defendants could well defeat the salutary purposes of the joinder provisions of this rule. Alternative fact allegations made in good faith and based on genuine doubt are not admissions against interest so as to be admissible in evidence against the pleader. The pleader states the facts in the alternative because he is uncertain as to the true facts. Therefore, he is not "admitting" anything other than his uncertainty. An essential objective of alternative pleading is to relieve the pleader of the necessity and therefore the risk of making a binding choice, which is no more than to say that he is relieved of making an admission. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Evidence Admissible in Support of Alternative Claims. — A plaintiff, who pleads claims in the alternative against two or more defendants when she is uncertain as to the true facts but believes she is entitled to recover from at least one of the defendants, is entitled to present evidence at trial to support both claims, and if she does, to submit both claims to the jury for decision. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Alternative Defendant's Admission Not Binding Where Negligence Imputed to Plaintiff. — The allegation of negligence against one defendant in the complaint of a plaintiff who joins two defendants asserting claims of negligence against them in the alternative, when admitted by the second defendant in his answer, is not a binding judicial admission entitling the second defendant to summary judgment when the negligence of the first defendant is, as a matter of law, imputed to the plaintiff. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Section (b) authorizes the judge, etc. — In accord with 2nd paragraph in 1979 Cum. Supp. See Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

Rule 23. Class actions.

Applied in State, Child Day-Care Licensing Comm'n ex rel. Edmisten v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E.2d 459 (1979).

Rule 24. Intervention.

Applied in Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

Effect of Section (c). — Section (c) does not provide for substitution, but provides a method by which a party may place a time limitation on the right to substitution. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

Section (c) Order Intended for Use Prior to Substitution. — The order provided for in section (c) is intended to be used prior to any substitution of parties, since it provides for notice to "such person as [the court] directs," which has been correctly viewed as requiring notice to those who "would reasonably be expected to represent most closely the interest of the deceased." It is then up to the persons interested in the estate of the deceased to arrange for substitution of the appropriate party. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

Burden on Party Seeking Order of Abatement. — There is no burden on a party seeking an order of abatement to make any showing that the plaintiff's failure to actively prosecute the lawsuit was without excuse. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

Action to Collect Debt Survives Death of Plaintiff. — There was no merit to defendant's contention that an action abated because he had not been served with process at the time of the death of plaintiff, since plaintiff's cause of action in the present case was simply an action to collect a debt, that debt being a foreign judgment, and a cause of action based upon the collection of a debt survives the death of a plaintiff. Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843, cert. denied, 298 N.C. 298, 259 S.E.2d 300 (1979).

Applied in Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Cited in Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979).

Article 5.

Depositions and Discovery.

Rule 26. Depositions in a pending action.

Cited in Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500 (1979).

Rule 28. Persons before whom depositions maybe taken.

Cited in Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Rule 30. Depositions upon oral examinations.

Effect of Adverse Testimony in Deposition Generally. — When a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Exceptions. — Two exceptions to the general rule regarding the effect of adverse testimony in a deposition should be noted: (1) When a party gives deliberate, unequivocal and repeated testimony which is diammetrically opposed to the essential allegations of the complaint, destroying the theory of the action, which testimony is intentionally given and unremedied by any further testimony, the testimony should be treated as binding judicial admissions rather than evidential admissions; (2) When a party gives adverse testimony, and there is insufficient evidence to the contrary presented to support the allegations of the complaint, summary judgment or a directed verdict would in most cases properly be granted. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Cited in Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500 (1979).

Rule 32. Use of depositions in court proceedings.

Continuous Search for Witness Unnecessary. — Nothing in the plain language of this rule indicates that an attorney must maintain a continuous search for a witness until either the witness is found or the deposition is used. Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979).

Effect of Adverse Testimony in Deposition Generally. — When a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

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Rule 36. Requests for admission; effect of admission.

Applied in Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979).

Cited in Emerson v. Great Atl. & Pac. Tea Co., 41 N.C. App. 715, 255 S.E.2d 768 (1979).

Rule 37. Failure to make discovery; sanctions.

Burden on Noncomplying Party of Show Justification. — This rule sets out possible consequences of a party's failure "without good cause" to comply with the court's order to answer interrogatories. If a noncomplying party wishes to avoid court-imposed sanctions for his failure, the burden is upon him to show that there is justification for his noncompliance. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

Sanction Overturned Only for Abuse of Discretion. — The choice of sanctions to be imposed in the case of a failure to comply with an order to answer interrogatories having been left by the rule in the court's discretion, the decision will not be overturned unless an abuse of that discretion is shown. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

Default Judgment after Failure to Respond Held Proper. — Where default judgment was entered by the trial judge upon a motion by plaintiff for judgment following defendant's failure to respond to a request for admissions or to answer interrogatories duly served upon him, and where defendant had been duly served with notice that plaintiff was seeking judgment against him and that the motion was scheduled for hearing on a certain date, and the matter was not heard on that date and defendant was duly served with notice that it would be heard on a later date, the defendant had adequate notice and ample time to respond. Under such circumstances, plaintiff was not required to obtain prior entry of default before the clerk. Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979).

Cited in Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500 (1979).

Article 6.

Trials.

Rule 38. Jury trial of right.

Failure to Appear at Trial Not Withdrawal of Demand. — Taken together, Section (d) of this rule and Rule 39(a) provide that once any party to an action makes a timely demand for a jury trial, the trial of all issues so demanded shall be by jury unless all parties who have pleaded or otherwise appeared in the action, or their attorneys of record, affirmatively consent by oral or written stipulation to trial by the court without a jury or the court finds that no jury trial right exists as to some or all of the issues. These rules do not provide that failure to appear at the trial constitutes consent to a withdrawal of a valid jury trial demand. Heidler v. Heidler, 42 N.C. App. 481, 256 S.E.3d 833 (1979).

Applied in Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979); Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

Rule 39. Trial by jury or by the court.

Failure to Appear at Trial Not Withdrawal of Demand. — Taken together, Rule 38(d) and Section (a) of this rule provide that once any party to an action makes a timely demand for a jury trial, the trial of all issues so demanded shall be by jury unless all parties who have pleaded or otherwise appeared in the action, or their attorneys of record, affirmatively consent by oral or written stipulation to trial by the court without a jury or the court finds that no jury trial right exists as to some or all of the issues. These rules do not provide that failure to appear at the trial constitutes consent to a withdrawal of a valid jury trial demand. Heidler v. Heidler, 42 N.C. App. 481, 256 S.E.2d 833 (1979).

Applied in Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

Rule 41. Dismissal of actions.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

Motion for Nonsuit Replaced by Motion for Dismissal. —

In accord with 7th paragraph in 1979 Cum.

Supp. See Phillips v. Woxman, 43 N.C. App. 739, 260 S.E.2d 97 (1979).

Common-Law Rule Changed. — Section (a)(1) had the effect of changing this State's former practice with respect to voluntary nonsuits only to the extent that the plaintiff desiring to take a voluntary dismissal must, under section (a)(1) act before he rests his case. In other respects former practice was not expressly changed by the rule. Danielson v. Cummings, 43 N.C. Supp. 546, 259 S.E.2d 332 (1979).

Attempt at Voluntary Dismissal Ineffectual Where Summons Never Served. — Plaintiff's prior wrongful death action against defendants was discontinued where the original summons in plaintiff's prior action was never served on defendants and no alias or pulries summons was issued or endorsement made within the time specified in Rule 4(d), and plaintiff's attempt to dismiss her prior action voluntarily pursuant to section (a)(1) was ineffectual to bring the provisions of this rule into play. Wheeler v. Roberts, 45 N.C. App. 311, 262 S.E.2d 829 (1980).

Application of "Second Dismissal" Rule under Section (a) (1). — The "second dismissal" rule does not apply to make voluntary dismissals by stipulation or by order of court "on the merits," through preceded by a prior voluntary dismissal; although, of course, the stipulation itself or the order of the judge can provide that the dismissal is with prejudice, whether or not there has been a prior dismissal effected by the filing of a notice. Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

Where a plaintiff obtained a voluntary dismissal of a first action by electing to dismiss without prejudice and so informing the court, which then ordered the case dismissed without prejudice, and obtained a voluntary dismissal of a second action by making an oral motion to the court to be allowed to take a voluntary dismissal without prejudice, which motion was allowed by an order entered "in the Court's discretion and in the interest of justice," while each dismissal was obtained at plaintiff's instance, neither was effected by the plaintiff filing a notice of dismissal as authorized by section (a)(1)(i), to which alone the "second dismissal" rule applies. Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

Failure to Refer to Rule Inconsequential. — There is no merit to defendant's contention that a voluntary dismissal taken by plaintiff in an earlier action without prejudice must refer to this rule in order to gain the rule's benefit of a one year extension within which to file the same lawsuit. The fact that plaintiff's notice of dismissal did not refer to the specific rule of its origin would appear to have no legal significance. As this rule is the only procedural rule which addresses voluntary dismissals, no confusion as to the effect of the dismissal could possibly have resulted from this omission. Bradley Freight Lines v. Pope, Flynn & Co., 42 N.C. App. 285, 256 S.E.2d 522, cert. denied, 298 N.C. 295, 259 S.E.2d 299 (1979).

One-year Period Began after Announcement in Court. — The one-year period for commencing another action after the taking of a voluntary dismissal began to run when plaintiff's counsel announced in open court the submission of a voluntary dismissal, the proceedings thereupon being stopped, and not when the written notice of dismissal was thereafter filed. Danielson v. Cummings, 43 N.C. App. 546, 259 S.E.2d 332 (1979).

The significance of the motion to dismiss under section (b), etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

Judge May Sustain Motion to Dismiss at Close of Plaintiff's Evidence. —

In accord with 1st paragraph in 1979 Cum. Supp. See Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

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

In accord with 1st paragraph in 1979 Cum. Supp. See Bank of N.C. v. Investors Title Ins. Co., 42 N.C. App. 616, 257 S.E.2d 453 (1979).

In accord with 2nd paragraph in 1979 Cum. Supp. See Phillips v. Woxman, 43 N.C. App. 739, 260 S.E.2d 97 (1979).

When Involuntary Dismissal Should Be Granted. — An involuntary dismissal under this rule is to be granted if the plaintiff has shown no right to relief or if she has shown a right to relief but the trial court as trier of fact determines that defendant is entitled to a judgment on the merits. Jones v. Nationwide Mut. Ins. Co., 42 N.C. App. 43, 255 S.E.2d 617 (1979).

Applied in Stillwell Enterprises, Inc. v. Interstate Equip. Co., 41 N.C. App. 204, 254 S.E.2d 770 (1979); Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397 (1979); Benfield v. First Fed. Sav. & Loan Ass'n, 44 N.C. App. 371, 261 S.E.2d 150 (1979); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); Thompson v. Northwestern Security Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980); Greenhill v. Crabtree, 45 N.C. App. 49, 262 S.E.2d 315 (1980).

Cited in Harrell v. W.B. Lloyd Constr. Co., 41 N.C. App. 593, 255 S.E.2d 280 (1979); Hall v. Lassiter, 44 N.C. App. 23, 260 S.E.2d 155 (1979); Caison v. Nationwide Ins. Co., 45 N.C. App. 30, 262 S.E.2d 296 (1980).

Rule 42. Consolidation; separate trials.

Rule 20(b) Confers Same Power as Section (b). —

In accord with 2nd paragraph in 1979 Cum. Supp. See Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

Applied in Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980).

Rule 43. Evidence.

Admissibility of Oral Testimony on Motions. —

While oral testimony is permissible on a motion for summary judgment, the admission of such testimony is in the court's discretion. Pearce Young Angel Co. v. Don Becker Enterprises, Inc., 43 N.C. App. 690, 260 S.E.2d 104 (1979).

Cited in Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979); State v. Austin, 299 N.C. 537, 263 S.E.2d 574 (1980).

Rule 44. Proof of official record.

Cited in Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

Rule 46. Objections and exceptions.

Applied in Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979).

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

Motion for Directed Verdict and Motion for Nonsuit Compared. —

In accord with 6th paragraph in 1979 Cum. Supp. See Stallings v. Purvis, 42 N.C. App. 690, 257 S.E.2d 664 (1979).

Question Presented by Motion for Directed Verdict. —

In accord with 1st paragraph in 1979 Cum. Supp. See Southern Ry. v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979).

In accord with 2nd paragraph in 1979 Cum. Supp. See Thompson v. Soles, 42 N.C. App. 462, 257 S.E.2d 59 (1979).

In accord with 12th paragraph in 1979 Cum. Supp. See Snow v. Duke Power Co., 297 N.C. 591, 256 S.E.2d 227 (1979).

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

In accord with 1st paragraph in 1979 Cum. Supp. See Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

In accord with 2nd paragraph in 1979 Cum. Supp. See Bost v. Riley, 44 N.C. App. 638, 262 S.E.2d 391 (1980).

It is only when the evidence is insufficient to support a verdict in the nonmovant's favor that the motion should be granted. Snow v. Duke Power Co., 297 N.C. 591, 256 S.E.2d 227 (1979).

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

In accord with 3rd paragraph in 1979 Cum. Supp. See Hecht Realty, Inc. v. Whisnant, 41 N.C. App. 702, 255 S.E.2d 647, cert. denied, 298 N.C. 299, 259 S.E.2d 912 (1979).

In accord with 4th paragraph in 1979 Cum. Supp. See Thompson v. Soles, 42 N.C. App. 462, 257 S.E.2d 59 (1979).

In accord with 5th paragraph in 1979 Cum. Supp. See Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

In accord with 18th paragraph in 1979 Cum. Supp. See Stallings v. Purvis, 42 N.C. App. 690, 257 S.E.2d 664 (1979).

Upon a motion for directed verdict made by defendant, all the evidence which supports the plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn from plaintiff's evidence. Southern Ry. v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979).

Conflicts Resolved in Opposing Party's Favor on Motion. —

In accord with 2nd paragraph in 1979 Cum. Supp. See Snow v. Duke Power Co., 297 N.C. 591, 256 S.E.2d 227 (1979).

If Credibility of Movant's Evidence Manifest. — There are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where the credibility of movant's evidence is manifest as a matter of law. Review of the modern cases indicates three recurrent situations where credibility is manifest: (1) Where nonmovant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests; (2) where the controlling evidence is documentary and nonmovant does not deny the authenticity or correctness of the documents; (3) where there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

The court can always direct a verdict against the party with the burden of proof, etc. —

Neither the right to jury trial nor the procedural rule prohibiting the trial judge in his charge from expressing an opinion is an impediment to directing a verdict for the party with the burden of proof where the credibility of the movant's evidence is manifest as a matter of law. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

In a personal injury action, etc. —

In an action for personal injury arising out of an automobile accident, the defendants' motion for a directed verdict should be allowed if the jury could draw no conclusion from the evidence but that either the collision was not proximately caused by the negligence of defendant, or that the contributory negligence of the plaintiff was a proximate cause of the collision. Shay v. Nixon, 45 N.C. App. 108, 262 S.E.2d 294 (1980).

When Directed Verdict May Be Entered on Basis of Adverse Testimony in Deposition. — See Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Appropriate Motion for Directed Verdict Is Prerequisite, etc. —

This rule contemplates that any party may move for a directed verdict at the close of all the evidence. When such motion is made by any party and denied, or for any reason not granted, and the jury returns a verdict for the nonmovant, the movant may make a motion for judgment notwithstanding the verdict. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Standards for Determination of Judgment Notwithstanding Verdict. —

The propriety of granting a motion for judgment notwithstanding verdict is determined by the same considerations as that of a motion for directed verdict. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Applied in Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979); State v. Dancy, 43 N.C. App. 208, 258 S.E.2d 494 (1979); Karriker v. Sigmon, 43 N.C. App. 224, 258 S.E.2d 473 (1979); Woodard v. North Carolina Farm Bureau Mut. Inc. Co., 44 N.C. App. 282, 261 S.E.2d 43 (1979); Benfield v. First Fed. Sav. & Loan Ass'n, 44 N.C. App. 371, 261 S.E.2d 150 (1979); Bost v. Riley, 44 N.C. App. 638, 262 S.E.2d 391 (1980); Keels v. Turner, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

Cited in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784 (1979); Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979); Thompson v. Soles, 299 N.C. 484, 263 S.E.2d 599 (1980); Chris v. Hill, 45 N.C. App. 287, 262 S.E.2d 716 (1980); Skinner v. Piggly Wiggly of LaGrange, Inc., 45 N.C. App. 301, 262 S.E.2d 709 (1980).

Rule 51. Instructions to jury.

Paraphrase of Law in Condemnation Action Insufficient. — Where, in a highway condemnation action, plaintiff's witness, an expert real estate appraiser, testified that the value of defendant's land was increased by the taking because a roadway fronting the property was paved, a paraphrase of the law of benefits contained in the trial court's statement to the jury of the plaintiff's contentions was not adequate to satisfy the mandate of section (a) of this rule. North Carolina Bd. of Transp. v. Rand, 299 N.C. 476, 263 S.E.2d 565 (1980).

A party who is dissatisfied with the form of the issues or who desires an additional issue should raise the question at once, by objecting or by presenting the additional issue. If a party consents to the issues submitted, or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal. Hendrix v. All American Life & Cas. Co., 44 N.C. App. 464, 261 S.E.2d 270 (1980).

Statement of Contentions of the Parties. —

In accord with 1st paragraph in 1979 Cum. Supp. See Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979); Daniels v. Jones, 42 N.C. App. 555, 257 S.E.2d 120 (1979).

In accord with 2nd paragraph in 1979 Cum. Supp. See Daniels v. Jones, 42 N.C. App. 555, 257 S.E.2d 120 (1979).

Order in Stating Contentions. — Just as the length of the statement of contentions does not have to be exactly equal, the order of stating the contentions of each party does not have to follow any precise sequence. Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

Objections to the statement of contentions must ordinarily be brought to the attention of the court before verdict, otherwise they are deemed to be waived. Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

When the evidence is susceptible of several interpretations, etc. —

In accord with 1979 Cum. Supp. See Williamson v. Vann, 42 N.C. App. 569, 259 S.E.2d 102 (1979).

Applied in Owens v. Harnett Transf., Inc., 42 N.C. App. 532, 257 S.E.2d 136 (1979); Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

Cited in North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); Chris v. Hill, 45 N.C. App. 287, 262 S.E.2d 716 (1980).

Rule 52. Findings by the court.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

Waiver of a jury trial, etc. —

In accord with 4th paragraph in original. See General Specialties Co. v. Nello L. Teer Co., 41 N.C. App. 273, 254 S.E.2d 658 (1979).

The judge who tries, etc. —

Trial judge has the duty to find facts, state separately his conclusions of law and enter judgment. General Specialties Co. v. Nello L. Teer Co., 41 N.C. App. 273, 254 S.E.2d 658 (1979).

The trial judge passes upon, etc. —

In accord with original. See General Specialties Co. v. Nello L. Teer Co., 41 N.C. App. 273, 254 S.E.2d 658 (1979).

Judge's Findings of Fact, etc. —

In accord with 4th paragraph in 1979 Cum. Supp. See Wurlitzer Distrib. Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688 (1980).

The trial judge's findings of fact in custody orders are binding on the appellate courts if supported by competent evidence. Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

But Sufficiency of Evidence to Support Judge's, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Wurlitzer Distrib. Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688 (1980).

Applied in Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Cited in Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979); Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318 (1980).

Article 7.

Judgment.

Rule 54. Judgments.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

Rule 55. Default.

"Sum Certain". — The mere demand for judgment of a specified dollar amount by a plaintiff does not suffice to make plaintiff's claim one for "a sum certain" as contemplated by section (b) of this rule. Such a demand is normally included in the prayer for relief in every complaint in which monetary damages are sought, including complaints alleging

claims for damages for bodily injuries caused by defendant's negligence. Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

Where a plaintiff's complaint alleged a breach of contract by the defendant, but nothing in the allegations of the complaint makes it possible to compute the amount of damages to which plaintiff is entitled by reason of the breach, then the allegations of the complaint were not sufficient to state a claim "for a sum certain or a sum which can by computation be made certain" within section (b)(1) of this rule. Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

Effect of Failure to Give Notice under Section (b)(2). — The failure to give notice under section (b)(2) of this rule constitutes a mere procedural irregularity subjecting a resulting judgment to direct but not collateral attack. Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

Failure to give notice under section (b)(2) of this rule would not make a resulting default judgment void therefore subject to collateral attack. Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

To set aside a default all that need be shown is good cause, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

There is no necessity for a finding of excuable neglect, etc. —

In accord with 2nd paragraph in 1979 Cum. Supp. See Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E2d 858 (1980).

Applied in Quis v. Griffin, 42 N.C. App. 477, 256 S.E.2d 846 (1979).

Cited in Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979).

Rule 56. Summary judgment.

Motion for Directed Verdict Similar. —

For a comparison of and distinctions drawn between a Rule 12 (b)(6) motion for failure to state a claim upon which relief can be granted and a Rule 56 motion for summary judgment, see Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

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

In accord with 1st paragraph in 1979 Cum. Supp. See Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

A motion to dismiss under Rule 12(b)(6) should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in this rule, where the court considers matters outside the pleadings. Roach v. City of Lenoir, 44 N.C. App. 608, 261 S.E.2d 299 (1980).

Motions Considered as Though Made under Rule 12(c). —

In accord with 1979 Cum. Supp. See Town of Bladenboro v. McKeithan, 44 N.C. 459, 261 S.E.2d 260 (1980).

Motion While Pre-answer Rule 12(b) Motion Pending. — Where plaintiff filed a motion for summary judgment nearly two months after commencement of the action and one month after defendant's motion to dismiss, plaintiff was acting within the guidelines of section (a) of this rule; in fact, the purpose of the 1946 amendments to Rule 56(a) of the Federal Rules of Civil Procedure, now identical to section (a) of this rule in all respects except for the enlargement of the time period for filing from 20 to 30 days, was to permit a plaintiff to move for summary judgment while a pre-answer Rule 12(b) motion was pending. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638, cert. granted, 297 N.C. 698, 259 S.E.2d 295 (1979).

Rule Must Be Used Cautiously. —

Summary judgment is a rather drastic remedy and one to be granted cautiously. This is particularly true in actions alleging negligence as a basis for recovery. Willis v. Duke Power Co., 42 N.C. App. 582, 257 S.E.2d 471 (1979).

Motion May Be Granted before Responsive Pleading.— Section (a) of this rule allows summary judgment to be entered for plaintiff before defendants have filed a responsive pleading. Even if defendants had filed their answer, they could not rest on that responsive pleading when the party moving for summary judgment has prima facie established that he is entitled to it. The party opposing the motion must come forward with additional evidence in opposition to the motion. Defendants could come forward with this evidence, e.g., in the form of affidavits, even though they had filed no answer. Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980).

Summary judgment may be granted in favor of a nonmoving, etc. —

Summary judgment in favor of the nonmovant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the nonmovant is entitled to entry of judgment as a matter of law. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Summary judgment for the nonmoving party should be granted only when the moving party

has been given adequate opportunity to show in opposition that there is a genuine issue of fact to be resolved. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

But It Is Proper in Declaratory Judgment Action. —

Summary judgment is an appropriate procedure in a declaratory judgment action. Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

Two types of cases are involved, etc. —

In accord with 1979 Cum. Supp. See Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

Lack of Cause of Action or Defense Supports Grant of Judgment. —

In accord with 2nd paragraph in 1979 Cum. Supp. See Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980).

Where the pleadings or proof discloses that no cause of action exists, summary judgment may be granted. Williams v. Congdon, 43 N.C. App. 53, 257 S.E.2d 677 (1979).

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

While the motion for summary judgment will receive stricter application in negligence cases, summary judgment is available in all types of litigation to both plaintiff and defendant. Emerson v. Great Atl. & Pac. Tea Co., 41 N.C. App. 715, 255 S.E.2d 768 (1979).

The rules for determining whether summary judgment is appropriate in negligence actions are the same as those in non-negligence actions. The nature of a negligence action is simply such that only the exceptional case will lend itself to a motion under this rule. Emerson v. Great Atl. & Pac. Tea Co., 41 N.C. App. 715, 255 S.E.2d 768 (1979).

When Summary Judgment for Defendant Proper in Negligence Action. —

In accord with 3rd paragraph in 1979 Cum. Supp. See Letchworth v. Town of Ayden, 44 N.C. App. 1, 260 S.E.2d 143 (1979).

The purpose of the summary judgment rule, etc. —

In accord with 6th paragraph in 1979 Cum. Supp. See Phillips v. Universal Underwriters Ins. Co., 43 N.C. App. 56, 257 S.E.2d 671 (1979); Poindexter v. Sanco Corp., 44 N.C. App. 694, 626 S.E.2d 333 (1980).

In accord with 16th paragraph in 1979 Cum. Supp. See Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Thompson v. Northwestern Security Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980).

The purpose of the rule is not, etc. —

In accord with 4th paragraph in 1979 Cum. Supp. See Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

Court's Function, etc. —

In accord with 6th paragraph in 1979 Cum. Supp. See Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979); Reed's Jewelers, Inc. v. ADT Co., 43 N.C. App. 744, 260 S.E.2d 107 (1979).

The court is not authorized by this rule to decide an issue of fact. It is authorized to determine whether a genuine issue of fact exists. Thompson v. Northwestern Security Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980).

Test Is Whether, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Lowe v. Murchison, 44 N.C. App. 488, 261 S.E.2d 255 (1980).

Motion Granted Only Where No Such Issue Appears. —

In accord with 1st paragraph in 1979 Cum. Supp. See Neihage v. Kittrell Auto Parts, Inc., 41 N.C. App. 538, 255 S.E.2d 315, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979); Stillwell Enterprises, Inc. v. Interstate Equip. Co., 41 N.C. App. 204, 254 S.E.2d 770 (1979); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979); Wells v. North Carolina Nat'l Bank, 44 N.C. App. 592, 261 S.E.2d 296 (1980); Thompson v. Northwestern Security Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980); Econo-Travel Motor Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

In accord with 2nd paragraph in 1979 Cum. Supp. See Willis v. Duke Power Co., 42 N.C. App. 582, 257 S.E.2d 471 (1979); Williams v. Congdon, 43 N.C. App. 53, 257 S.E.2d 677 (1979).

In accord with 3rd paragraph in 1979 Cum. Supp. See Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979); Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325, cert. denied, 298 N.C. 304, 259 S.E.2d 917 (1979).

In accord with 14th paragraph in 1979 Cum. Supp. See First Citizens Bank & Trust Co. v. Northwestern Ins. Co., 44 N.C. App. 414, 261 S.E.2d 242 (1980).

If the pleadings, deposition and affidavit show that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law, the trial court does not err in granting summary judgment in favor of the defendant. Jenkins v. Stewart & Everett Theatres, Inc., 41 N.C. App. 262, 254 S.E.2d 776, cert. denied, 297 N.C. 698, 259 S.E.2d 295 (1979).

When Defendant Entitled, etc. —

If defendants clearly establish that there is no genuine issue as to the nonexistence of

material facts which are necessary as an essential element of any cause of action against them, then they are entitled to summary judgment on that action. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979).

In order to bear its burden of showing that it was entitled to summary judgment, a defendant is required to present a forecast of the evidence which is available at trial and which shows that there is no material issue of fact concerning an essential element of the plaintiff's claim and that such element could not be proved by the plaintiff through the presentation of substantial evidence. Jenkins v. Stewart & Everett Theatres, Inc., 41 N.C. App. 262, 254 S.E.2d 776, cert. denied, 297 N.C. 698, 259 S.E.2d 295 (1979).

When Issue Is Material. —

In accord with 1st paragraph in 1979 Cum. Supp. See First Citizens Bank & Trust Co. v. Northwestern Ins. Co., 44 N.C. App. 414, 261 S.E.2d 242 (1980).

The burden is on the moving party, etc. —

In accord with 1st paragraph in 1977 Cum. Supp. See Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979).

In accord with 2nd paragraph in 1979 Cum. Supp. See Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651 (1980).

In accord with 8th paragraph in 1979 Cum. Supp. See Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651 (1980).

In accord with 12th paragraph in 1979 Cum. Supp. See Williams v. Congdon, 43 N.C. App. 53, 257 S.E.2d 677 (1979); Reed's Jewelers, Inc. v. ADT Co., 43 N.C. App. 744, 260 S.E.2d 107 (1979).

In accord with 16th paragraph in 1979 Cum. Supp. See Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

In accord with 25th paragraph in 1979 Cum. Supp. See Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980).

And Court Must View Record in Light, etc. —

In accord with 2nd paragraph in 1979 Cum. Supp. See Neihage v. Kittrell Auto Parts, Inc., 41 N.C. App. 538, 255 S.E.2d 315, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979).

In accord with 4th paragraph in 1979 Cum. Supp. See Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979); Neihage v. Kittrell Auto Parts, Inc., 41 N.C. App. 538, 255 S.E.2d 315, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979).

In accord with 10th paragraph in 1979 Cum. Supp. See Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

Summary judgment should be granted with caution and only where the movant has established the nonexistence of any genuine issue of fact; that showing must be made in the light most favorable to the party opposing the summary judgment and that party should be accorded all favorable inferences that may be deduced from the showing for the reason that a party should not be deprived of an adequate opportunity fully to develop his case by witnesses in a trial where the issues involved make such procedure the appropriate one. Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979).

Burden on Defendant Moving for Summary Judgment. — If a defendant moves for summary judgment, he assumes the burden of producing evidence of the necessary certitude which negatives plaintiff's claim. The burden of proof is reversed from what it would be if the case were at the trial stage. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979).

Defendants, where moving for summary judgment, must show: (1) there is no genuine issue as to any material fact, and (2) the movant is entitled to judgment as a matter of law. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979).

Failure to Respond Not Always Fatal. —

Under some circumstances the trial judge may properly deny the motion for summary judgment even when the nonmoving party fails to offer competent counter-affidavits or other evidence as provided by the statute. Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

Motion Granted on Basis of Party's Own Affidavits. —

In accord with 1st paragraph in 1979 Cum. Supp. See Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979).

When Nonmovant Must Come Forward, etc. —

If the moving party forecasts such evidence as would require a directed verdict for the movant at trial, the party opposing the motion must file papers which forecast evidence which would prevent a directed verdict at trial in order to prevent summary judgment in favor of the movant. Buck v. Tweetsie R.R., Inc., 44 N.C. App. 588, 261 S.E.2d 517 (1980).

Party Opposing, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651 (1980).

Once plaintiff has made and supported its motion for summary judgment, under section (e), the burden is on the defendant to introduce evidence in opposition to the motion setting forth "specific facts showing that there is a genuine issue for trial." An answer filed by defendant which only generally denies the allegations of the complaint fails to do this. Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979).

But Must Set Forth Specific Facts, etc. —

In accord with 1st paragraph in 1979 Cum.

Supp. See Neihage v. Kittrell Auto Parts, Inc., 41 N.C. App. 538, 255 S.E.2d 315, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651 (1980).

In a suit against defendant as guarantor of payment on a promissory note, where defendant filed an affidavit in opposition to plaintiff's motion for summary judgment, but in it merely referred to the question of a material change made in the terms of the note which had been raised in his answer and realleged the matters raised therein, and the affidavit did not set forth any specific facts to support defendant's allegation of material alteration of the note, his response to plaintiff's motion for summary judgment was inadequate. Better Adv., Inc. v. Peace, 43 N.C. App. 534, 259 S.E.2d 359 (1979).

Statements in Affidavit Made "to the Best of My Knowledge". — What an affiant thinks are facts, unless it is a situation proper for opinion evidence, is not information made on personal knowledge proper for consideration on a summary judgment motion. However, where an affiant couches a statement in the affidavit by the phrase "to the best of my knowledge" this is not a situation of manufactured fact but merely a self-imposed limitation to the affiant's personal knowledge which is all section (e) of this rule requires. Faulk v. Dellinger, 44 N.C. App. 39, 259 S.E.2d 782 (1979).

Findings of Fact on Motion. —

In accord with 6th paragraph in 1979 Cum. Supp. See Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325, cert. denied, 298 N.C. 304, 259 S.E.2d 917 (1979).

Denial of Motion Not Ordinarily Appealable. —

Denial of a motion for summary judgment is not immediately appealable, because it affects no substantial right, the movant being allowed to preserve his exception to the denial of the motion for consideration on appeal from the final judgment. The denial of a motion for summary judgment can be reviewed on appeal from the final judgment without substantial harm to the movant. Golden v. Golden, 43 N.C. App. 393, 258 S.E.2d 809 (1979).

Summary Judgment Where Deposition Repudiates Allegations of Complaint. — Contention that statements in a deposition relied on to support a motion for summary judgment should be treated differently from testimony at trial is not tenable. Should a party in her deposition repudiate the allegations of her complaint in an unequivocal manner, the court should grant a motion for summary judgment in the defendant's favor, since a directed verdict in defendant's favor would be called for at trial on the basis of the party's testimony. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Summary judgment is generally inappropriate in an action for fraud, as the existence of fraud necessarily involves a question concerning the existence of a fraudulent intent on the part of the party accused of such fraud, and the intent of a party is a state of mind generally within the exclusive knowledge of that party and, by necessity, must be proved by circumstantial evidence. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

Summary Judgment for Defendant in Fraud Cases. —

In order for a defendant in an action for fraud to prevail on its motion for summary judgment, he must show that there is not available to the plaintiff evidence of one or more of the elements of fraud and that there be a material misrepresentation that: (1) relates to a past or existing fact; (2) is definite and specific; (3) was made with knowledge of its falsity or culpable ignorance of its truth; (4) was made with the intention that it should be acted upon; and (5) causes reasonable reliance on the part of the recipient of the misrepresentation to his detriment. Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979).

A summary judgment may not be entered granting an absolute divorce in this State. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

A summary judgment should be entered only where it is shown that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. By virtue of § 50-10 the material facts in a divorce action are "deemed denied by the defendant, whether the same shall actually be denied by pleading or not." Thus, in a divorce action the statute creates a genuine issue as to the material facts whether or not the parties raise such an issue and even where they attempt to admit or stipulate the facts. If it is necessary for the court or the jury to find the material facts, as § 50-10 makes mandatory in a divorce action, summary judgment may not be entered. Therefore, a divorce decree may not be granted by way of a summary judgment. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Actions to Establish Paternity. — In an action for judicial determination that defendant was the father of plaintiff's illegitimate child, and asking for custody and child support for said child, defendant's argument that summary judgment is improper under the peculiar requirement of § 49-14(b) that a plaintiff must prove paternity of the defendant beyond a reasonable doubt could not succeed where defendant failed to deny the basic, essential allegation of paternity set out in the complaint,

since that fact stands admitted and the trial court was therefore under no obligation to travel any farther along the evidentiary trail. Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979).

Applied in Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979); Middleton v. Myers, 41 N.C. App. 543, 255 S.E.2d 255, cert. granted, 298 N.C. 298, 259 S.E.2d 914 (1979); Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979); Cox v. Funk, 42 N.C. App. 32, 255 S.E.2d 600 (1979); Hendrix v. Guin, 42 N.C. App. 36, 255 S.E.2d 604 (1979); Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979); Beverly v. Beverly, 43 N.C. App. 60, 257 S.E.2d 682 (1979); Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979); Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979); Hooks v. Colonial Life & Accident Ins. Co., 43 N.C. App. 606, 259 S.E.2d 567 (1979); Pearce Young Angel Co. v. Don Becker Enterprises, Inc., 43 N.C. App. 690, 260 S.E.2d 104 (1979); Smith v. Taylor, 44 N.C. App. 363, 261 S.E.2d 19 (1979); Middleton v. Myers, 299 N.C. 42, 261 S.E.2d 108 (1980); Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980); Ragland v. Moore, 299 N.C. 360, 261 S.E.2d 666 (1980); First Citizens Bank & Trust Co. v. Northwestern Ins. Co., 44 N.C. App. 414, 261 S.E.2d 242 (1980); Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, 261 S.E.2d 266 (1980); City of Thomasville v. Lease-Afex, Inc., 44 N.C. App. 506, 261 S.E.2d 253 (1980); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651 (1980); Thomas v. Poole, 45 N.C. App. 260, 262 S.E.2d 854 (1980).

Cited in Craver v. Craver, 41 N.C. App. 606, 255 S.E.2d 253 (1979); Kitchen v. Wachovia Bank & Trust Co., 44 N.C. App. 332, 260 S.E.2d 772 (1979); First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

Rule 57. Declaratory judgments.

Summary judgment is an appropriate procedure in a declaratory judgment action. Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

Section 110-104 Does Not Limit Relief. — The spirit and intent of § 110-104 do not permit, much less compel, a conclusion that the Day-Care Facilities Act is intended to restrict the general statewide jurisdiction of the superior court or to limit the scope of relief normally available in declaratory judgment actions. The mere existence of an alternate adequate remedy under § 110-104 will not be held to bar an appropriate action for declaratory judgment. State, Child Day-Care Licensing Comm'm v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

Rule 58. Entry of judgment.

Where the trial court possessed no independent recollection of what had occurred at a hearing for alimony held more than a year earlier and no judgment had been entered at the conclusion of that hearing in accordance with the provisions of this rule, the trial court did not err in refusing to sign the judgment and order proposed and tendered by the plaintiff. Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570, cert. denied, 298 N.C. 305, 259 S.E.2d 300 (1979).

Quoted in Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

Rule 59. New trials; amendment of judgments.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

A motion to set aside the verdict and for a new trial, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Coletrane v. Lamb, 42 N.C. App. 654, 257 S.E.2d 445 (1979).

In accord with 2nd paragraph in 1979 Cum. Supp. See Coletrane v. Lamb, 42 N.C. App. 654, 257 S.E.2d 445 (1979).

And a motion to limit, etc. —

A ruling by the trial judge on the issue of damages will not be set aside except upon a showing of abuse of discretion. Southern Ry v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979).

The trial judge has discretionary power, etc. —

In accord with 2nd paragraph in 1979 Cum. Supp. See Southern Ry. v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979).

Applied in Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979); McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Cited in Smith v. Beasley, 298 N.C. 798, 259 S.E.2d 907 (1979).

Rule 60. Relief from judgment or order.

I. IN GENERAL.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure and the philosophy of Rule 15 has been applied to this rule. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Authority of Courts to Correct Error, etc. —

In accord with 2nd paragrpah in 1979 Cum. Supp. See Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

The courts have always had inherent authority to correct clerical errors in orders and judgments, but they do not have the power to amend or vacate an order or judgment so as to affect the rights of the parties, without giving the parties notice and an opportunity to be heard; where a court order vacated a prior order and held a party was not entitled to have the default judgment against him set aside, it was not an order correcting a clerical mistake or oversight entered pursuant to section (a). Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

Factors Considered on Hearing of Section (b) Motion. — A trial judge on hearing Rule 60(b) motions should consider such factors as: (1) The general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Excusable Neglect, etc. —

In accord with 2nd paragraph in 1979 Cum. Supp. See Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979).

Perjured testimony is not usually recognized as a "fraud upon the court" within the meaning of sentence of this rule providing that "this rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for a fraud upon the court." McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Applied in McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979); Endsley v. Wolfe Camera Supply Corp., 44 N.C. App. 308, 261 S.E.2d 36 (1979); Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980); Fountain v. Patrick, 44 N.C. App. 584, 261 S.E.2d 514 (1980); Chris v. Hill, 45 N.C. App. 287, 262 S.E.2d 716 (1980).

Cited in State v. Saults, 299 N.C. 319, 261 S.E.2d 839 (1980); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

IV. PLEADING AND PRACTICE.

Forum for Relief from Judgment in Magistrate's Court. — The district court is the proper forum to hear and decide a motion made pursuant to section (b) for relief from judgment or order entered in the magistrate's court. A new trial is not permitted before the magistrate. Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979).

Limitation on Independent Action Alleging Intrinsic Fraud. — Under subsection (b)(3) where relief is sought from final judgment by motion it is irrelevant whether the fraud alleged is "intrinsic" or "extrinsic." The rule states, however, that it does not limit the power of a court to entertain an independent action to set aside a judgment for fraud, but whenever the alleged fraud is intrinsic it can only be the subject of a motion under subsection (b)(3), and then, of course, it is barred after one year following the judgment. Textile Fabricators, Inc. v. C.R.C. Indus., Inc., 43 N.C. App. 530, 259 S.E.2d 570 (1979).

Power of Court under Clause (6) of Section (b). —

In accord with 1st paragraph in 1979 Cum. Supp. See Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Discretion of Judge Not Reviewable, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979); Greenhill v. Crabtree, 45 N.C. App. 49, 262 S.E.2d 315 (1980); In re Estate of Snipes, 45 N.C. App. 79, 262 S.E.2d 292 (1980).

Findings of Trial Court Conclusive. —

Findings of fact by the judge on a motion to set aside a judgment on the grounds of excusable neglect are final unless excepted to or contentions are made that the evidence does not support the findings of fact. Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733,260 S.E.2d 100 (1979).

Consideration of Section (b) Motion by Trial Court While Appeal Pending. — The

general rule is that when one party gives notice of appeal, the jurisdiction of the trial court is ousted and it may take no further action in the case except in aid of the appeal, unless the case is remanded to it by the appellate court. However, the trial court should consider a motion under section (b) of this rule filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending. At the time the motion is made in the lower court the movant should notify the appellate court so that it may delay consideration of the appeal until the trial court has considered the motion. Upon an indication of favoring the motion, appellant would be in position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment is rendered. An indication by the trial court that it would deny the motion would be considered binding on that court and appellant could then request appellate court review of the lower court's action. This procedure allows the trial court to rule in the first instance on the motion and permits the appellate court to review the trial court's decision on such motion at the same time it considers other assignments of error. Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979).

Article 8.

Miscellaneous.

Rule 65. Injunctions.

Remedies Available to Party Wrongfully Restrained. —

In accord with 1979 Cum. Supp. See Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980).

Limitation on Recovery When Proceeding by Motion in Cause. — If a party damaged by an improvidently issued restraining order elects to proceed by motion in the cause of the bond of the opposing party and his sureties, his recovery is limited to the amount of the penalty of the injunction bond. Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980).

Chapter 1B.

Contribution.

Article 1.

Uniform Contribution among Tort-Feasors Act.

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

Applied in Ryder v. Benfield, 43 N.C. App. 278, 258 S.E.2d 849 (1979).

Cited in Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281 (4th Cir. 1979).

Chapter 5A.

Contempt.

Article 2.

Civil Contempt.

Sec.

5A-21. Civil contempt; imprisonment to compel compliance.
5A-23. Proceedings for civil contempt.

Article 1.

Criminal Contempt.

§ 5A-11. Criminal contempt.

Willful Absence of Attorney from Trial. — Generally, the willful absence of an attorney from a scheduled trial constitutes contempt of court, although disputes arise over whether it is direct or indirect contempt. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

Applied in Osmar v. Crosland-Osmar, Inc., 43 N.C. App. 721, 259 S.E.2d 771 (1979).

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

Cited in State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

§ 5A-14. Summary proceedings for contempt.

What Findings of Fact Must Include. — A requirement that the judicial official's findings should indicate that the standard of proof required by subsection (b) was applied to his findings of fact is implicit in this statute. State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

It is implicit in this statute that the judicial official's findings in a summary contempt proceeding should clearly refect that the contemnor was given an opportunity to be heard, along with a summary of whatever response was made and the judicial official's finding that the excuse or explanation proffered was inadequate or disbelieved. State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

§ 5A-15. Plenary proceedings for contempt.

Service under § 1A-1, Rule 4(j)(1)c Proper. — Where the court issued an order pursuant to § 1A-1 Rule 4(j)(1)c notifying a foreign attorney of the contempt charges and allowing him 60 days to respond to the charges, which order was mailed to the attorney at the address he gave the court in a motion to be admitted in a case pro hac vice, this method of service was proper to comply with the requirement of subsection (a) that "[a] copy of the order must be furnished to the person charged" where the court had personal jurisdiction as provided in § 1-75.4. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

ARTICLE 2.

Civil Contempt.

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

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

(1979, 2nd Sess., c. 1080, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "a person who is found in civil contempt may be" for "A judge may order a civil contemnor" at the beginning of subsection (b).

As subsections (a) and (c) were not changed by the amendment, they are not set out.

Even if he does not have the money to make court ordered payments, a person will be guilty of civil contempt if he could take a job which would enable him to make those payments. Frank v. Glanville, 45 N.C. App. 313, 262 S.E.2d 677 (1980).

§ 5A-23. Proceedings for civil contempt.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the judicial district of the court which issued the order. Otherwise, venue is in the county where the order was issued.

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

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

(1979, 2nd Sess., c. 1080, ss. 2-4.)

Editor's Note. —

The 1979, 2nd Sess., amendment added "Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court," at the beginning of subsection (b), and substituted "judicial official" for "judge" in subsection (d) and in two places of subsection (e).

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

Chapter 6.

Liability for Court Costs.

Article 3.

Civil Actions and Proceedings.

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

Allowance of Counsel Fees Discretionary. —

In accord with 2nd paragraph in 1979 Cum. Supp. See Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

Plaintiff Need Not Plead for Award in Complaint. — This section does not require that a plaintiff seeking attorney fees under the statute affirmatively plead for such an award as a separate claim in the complaint. Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

The plaintiff may properly move for an award of attorney's fees after a verdict has been returned in its favor. Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

Separate Findings under Rule 52(a) Not Required. — This section does not require the trial judge to make separate findings and conclusions to support an award of attorney fees in accordance with § 1A-1, Rule 52(a). Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

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

A lease contract is not an evidence of indebtedness within the meaning of this section. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 41 N.C. App. 204, 254 S.E.2d 770 (1979).

Chapter 7A.

Judicial Department.

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

Article 7.

Sec.

Organization.

7A-41. Superior court divisions and districts; judges; assistant district attorneys.
7A-44. Salary and expenses of superior court judge.

Article 12.

Clerk of Superior Court.

7A-101. Compensation.
7A-103. Authority of clerk of superior court.

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

Article 13.

Creation and Organization of the District Court Division.

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

Article 16.

Magistrates.

7A-171.1. Duty hours and salary.

Article 19.

Small Claims Actions in District Court.

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

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

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

7A-271. Jurisdiction of superior court.

Article 24B.

Termination of Parental Rights.

7A-289.23. Jurisdiction.

Sec.

7A-289.32. Grounds for terminating parental rights.

Article 26.

Additional Powers of District Court Judges and Magistrates.

7A-292. Additional powers of magistrates.

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.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

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

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

7A-451. Scope of entitlement.

Article 37.

The Public Defender.

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

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

Article 58.

Juvenile Law Study Commission.

7A-740. Creation; members; terms; qualifications; vacancies.
7A-741. Duties.
7A-742. Chairman; meetings; compensation of members.
7A-743. [Reserved.]
7A-744. Supporting services.

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.

Editor's Note. —

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

A sentence of 10 years to life is a sentence of life imprisonment so as to bring subsection (a) of this section into play. Thus, an appeal from such a sentence should be made directly to the Supreme Court rather than to the Court of Appeals. State v. Ferrell, 44 N.C. App. 374, 260 S.E.2d 808 (1979).

A sentence of from 10 years to life imposed on a defendant convicted of second-degree burglary and second-degree rape is a sentence of imprisonment for life within the meaning of this section so that an appeal must be taken to the Supreme Court of North Carolina rather than the Court of Appeals. State v. Norwood, 44 N.C. App. 174, 260 S.E.2d 433 (1979).

The effect of both § 1-277 and subsection (d) of this section is to provide that no appeal will lie to an appellate court from an interlocutory order or ruling of a trial court unless such order or ruling deprives the appellant of a substantial right which he will lose if the order or ruling is not reviewed before final judgment. Clark v. Clark, 42 N.C. App. 84, 255 S.E.2d 568 (1979).

Order Regarding Interrogatories Interlocutory. — Trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and also denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal was fragmentary and premature. First Union Nat'l Bank v. Olive, 42 N.C. App. 574, 257 S.E.2d 100 (1979).

Applied in State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979); State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979); Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980); State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Cited in State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Barnes, 297 N.C. 442, 255 S.E.2d 386 (1979); State v. Davis, 297 N.C. 566, 256 S.E.2d 184 (1979); State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979); State v. Keller, 297 N.C. 674, 256 S.E.2d 710 (1979); State v. Colvin, 297 N.C. 691, 256 S.E.2d 689 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Perry, 298 N.C. 502, 259 S.E.2d 496 (1979); State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Wetmore, 298 N.C. 743, 259 S.E.2d 870 (1979).

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

An order of the hearing commission of the State Bar denying defendant's motion to dismiss on the ground of lack of jurisdiction is interlocutory; therefore, he cannot appeal therefrom as a matter of right. North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979).

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

Editor's Note. — For a statistical analysis of all of the opinions of the North Carolina Supreme Court for the year 1977, see 15 Wake Forest L. Rev. 39 (1979).

Cited in Moore v. Union Fid. Life Ins. Co., 297 N.C. 375, 255 S.E.2d 160 (1979); Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); State v. Haywood, 297 N.C. 686, 256 S.E.2d 715 (1979); Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); State ex rel. Utilities Comm'n v. Mebane Home Tel. Co., 298 N.C. 162, 257 S.E.2d 623 (1979); State v. Winfrey,

298 N.C. 260, 258 S.E.2d 346 (1979); Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 259 S.E.2d 552 (1979); In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); In re Purported Will of Andrews, 299 N.C. 52, 261 S.E.2d 198 (1980); Pearce v. Southern Bell Tel. & Tel. Co., 299 N.C. 64, 261 S.E.2d 176 (1980); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980); State v. Jones, 299 N.C. 103, 261 S.E.2d 1 (1980); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980); Tanglewood Land Co. v. Byrd, 299 N.C. 260, 261 S.E.2d 655 (1980); State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); National Mtg. Corp. v. American Title Ins. Co., 299 N.C. 369, 261 S.E.2d 844 (1980); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); Thompson v. Soles, 299 N.C. 484, 263 S.E.2d 599 (1980); State ex rel. Utilities Comm'n v. CF Indus., Inc., 299 N.C. 504, 263 S.E.2d 559 (1980).

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

Cited in Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); State v. Joyner, 297 N.C. 349, 255 S.E.2d 390 (1979); State v. Barnes, 297 N.C. 442, 255 S.E.2d 386 (1979); Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979); Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979); Campbell v. First Baptist Church, 298 N.C. 476, 259 S.E.2d 558 (1979); State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979); Harrington v. Collins, 298 N.C. App. 535, 259 S.E.2d 275 (1979); Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979); North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); State v. Jones, 299 N.C. 103, 261 S.E.2d 1 (1980); State v. Bumgarner, 299 N.C. 113, 261 S.E.2d 105 (1980); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); Woodhouse v. Board of Comm'rs, 299 N.C. 211, 261 S.E.2d 882 (1980); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); Ragland v. Moore, 299 N.C. 360, 261 S.E.2d 666 (1980); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980); MacDonald v. University of N.C., 299 N.C. 457, 263 S.E.2d 578 (1980); Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980); Davis v. McRee, 299 N.C. 498, 263 S.E.2d 604 (1980); Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980); State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

Cited in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

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

ARTICLE 7.

Organization.

§ 7A-40. Composition; judicial powers of clerk; statutes applicable.

Stated in Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

§ 7A-41. Superior court divisions and districts; judges; assistant district attorneys. — The counties of the State are organized into four judicial divisions and 33 judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant district attorneys set forth in the following table:

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1	3
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	3
	3	Carteret, Craven, Pamlico, Pitt	2	8
	4	Duplin, Jones, Onslow, Sampson	2	7
	5	New Hanover, Pender	2	7
	6	Bertie, Halifax, Hertford, Northampton	1	4
	7	Edgecombe, Nash, Wilson	2	6
	8	Greene, Lenoir, Wayne	2	6
Second	9	Franklin, Granville, Person, Vance, Warren	1	4
	10	Wake	4	14
	11	Harnett, Johnston, Lee	1	5
	12	Cumberland, Hoke	3	11
	13	Bladen, Brunswick, Columbus	1	4
	14	Durham	3	8
	15A	Alamance	1	3
	15B	Orange, Chatham	1	3
	16	Robeson, Scotland	1	7
Third	17	Caswell, Rockingham, Stokes, Surry	1	4
	18	Guilford	3	13
	19A	Cabarrus, Rowan	2	4
	19B	Montgomery, Randolph	1	3
	20	Anson, Moore, Richmond, Stanly, Union	2	7
	21	Forsyth	2	8
	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	4
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1	3

In a district having more than one regular resident judge, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge. If two judges are of equal seniority, the oldest judge is the senior regular resident judge. In a single-judge district, the single judge is the senior regular resident judge.

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 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.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased by one the number of full-time assistant district attorneys in the seventh, thirteenth and sixteenth judicial districts.

§ 7A-44. Salary and expenses of superior court judge. — A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be paid the same travel allowance as State employees generally by G.S. 138-6(a)(1) and (2), provided that no travel allowance be paid for travel within his county of residence. In addition, a judge of the superior court shall be allowed five thousand five hundred dollars ($5,500) per year, payable monthly, in lieu of necessary subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional education expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36; 1973, c. 1474; 1975, 2nd Sess., c. 983, s. 13; 1977, c. 802, s. 41.1; 1979, 2nd Sess., c. 1137, s. 28.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote the former first sentence as the present first and second sentences of the section.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

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

Applied in Whedbee v. Powell, 41 N.C. App. 250, 254 S.E.2d 645 (1979).

§ 7A-49.3. Calendar for criminal trial sessions.

Filing of Calendar Six Days before Session. — Defendant was not prejudiced by the fact that the district attorney filed the calendar of cases to be tried six days before the beginning of the session of the court rather than a full week before the session began as required by this section, particularly where he was not tried until a full week after the calendar had been filed. State v. Miller, 42 N.C. App. 342, 256 S.E.2d 512 (1979).

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1221, s. 5, provides: "New secretarial positions are created and allocated to the district attorneys in the districts and in the number as follows:

District	Secretaries
3	1
7	1."

§ 7A-61. Duties of solicitor.

Selectivity Required in Preparation of Trial Calendar. — It is the district attorney's statutory duty to prepare the trial docket and prosecute criminal actions in the name of the State. In order to properly perform this duty, he must exercise selectivity in preparing the trial calendar. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Applied in State v. Mitchell, 298 N.C. 549, 259 S.E.2d 254 (1979).

ARTICLE 12.

Clerk of Superior Court.

§ 7A-101. Compensation. — The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the 1970 federal decennial census, according to the following schedule:

Population	*Salary*
Less than 10,000	$15,024
10,000 to 19,999	19,056
20,000 to 49,999	22,536
50,000 to 99,999	25,992
100,000 to 199,999	29,460
200,000 and above	35,808

When a county changes from one population group to another as a result of any future decennial census, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first full biennium subsequent to the taking of the census (July 1, 1981; July 1, 1991; etc.), except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the salaries in the table at the end of the first paragraph to their present levels from $13,656, $17,328, $20,484, $23,628, $26,784 and $32,556, respectively.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

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

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1221, s. 3, provides: "New deputy clerk of court positions are created and allocated to the clerks of superior court in the numbers and to the counties as follows:

Alamance	2
Bladen	1
Burke	1
Columbus	1
Duplin	1
Forsyth	2
Nash	1
Orange	1
Pitt	2
Robeson	1
Sampson	1
Tyrrell	1
Union	2
Vance	1
Wake	2."

Session Laws 1979, 2nd Sess., c. 1221, s. 4, provides: "New assistant clerk of court positions are created and allocated to the clerks of superior court in the numbers and to the counties as follows:

Chatham	1
Durham	1
Nash	1."

§ 7A-103. Authority of clerk of superior court. — The clerk of superior court is authorized to:

(7) Preserve order in this court, punish criminal contempts, and holds persons in civil contempt; subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina.

(1979, 2nd Sess., c. 1080, s. 5.)

Editor's Note. —

The 1979, 2nd Sess., amendment rewrote subdivision (7), which formerly read "Preserve order in his court and to punish contempts."

As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (7) are set out.

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

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties. — Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
1	3	Camden	1	2	
		Chowan	2	3	
		Currituck	1	2	
		Dare	2	3	
		Gates	2	3	
		Pasquotank	3	4	
		Perquimans	2	3	
2	2	Martin	5	7	
		Beaufort	4	5	
		Tyrrell	1	2	
		Hyde	2	3	
		Washington	3	4	
3	6	Craven	7	9	
		Pitt	10	12	Farmville, Ayden
		Pamlico	2	3	
		Carteret	5	8	
4	5	Sampson	6	8	
		Duplin	9	10	
		Jones	2	3	
		Onslow	8	11	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Courts
5	4	New Hanover	6	10	
		Pender	4	6	
6	3	Northampton	5	6	
		Halifax	9	13	Roanoke Rapids, Scotland Neck
		Bertie	4	5	
		Hertford	5	6	
7	4	Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	8	Mount Olive
		Greene	2	4	
		Lenoir	4	7	La Grange
9	4	Person	3	4	
		Granville	3	6	
		Vance	3	4	
		Warren	3	4	
		Franklin	3	5	
10	6	Wake	12	16	Apex Wendell Fuquay-Varina Wake Forest
11	4	Harnett	7	10	Dunn
		Johnston	10	12	Benson and Selma
		Lee	4	6	
12	5	Cumberland	10	15	
		Hoke	4	5	
13	4	Bladen	4	6	
		Brunswick	4	7	
		Columbus	6	8	Tabor City
14	4	Durham	8	10	
15A	3	Alamance	7	9	Burlington
15B	2	Orange	4	8	Chapel Hill
		Chatham	3	6	Siler City
16	4	Robeson	8	14	Fairmont Maxton Pembroke Red Springs Rowland St. Pauls
		Scotland	2	4	
17	4	Caswell	2	4	
		Rockingham	4	9	Riedsville Eden Madison
		Stokes	2	4	
		Surry	5	8	Mt. Airy
18	8	Guilford	20	25	High Point
19A	4	Cabarrus	5	9	Kannapolis
		Rowan	5	10	

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Courts
19B	2	Montgomery	2	3	
		Randolph	5	8	Liberty
20	4	Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	Hamlet
		Moore	5	7	Southern Pines
21	5	Forsyth	3	15	Kernersville
22	4	Alexander	2	3	
		Davidson	7	10	Thomasville
		Davie	2	3	
		Iredell	4	8	Mooresville
23	3	Alleghany	1	2	
		Ashe	3	4	
		Wilkes	4	6	
		Yadkin	2	3	
24	2	Avery	3	4	
		Madison	4	5	
		Mitchell	3	4	
		Watauga	4	6	
		Yancey	2	3	
25	5	Burke	4	7	
		Caldwell	4	7	
		Catawba	6	9	Hickory
26	9	Mecklenburg	15	26	
27A	4	Gaston	11	20	
27B	3	Cleveland	5	8	
		Lincoln	4	6	
28	4	Buncombe	6	13	
29	4	Henderson	4	6	
		McDowell	3	4	
		Polk	3	4	
		Rutherford	6	8	
		Transylvania	2	3	
30	3	Cherokee	3	4	
		Clay	1	2	
		Graham	2	3	
		Haywood	5	7	Canton
		Jackson	3	4	
		Macon	3	4	
		Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the maximum number of magistrates in Mecklenburg County from 25 to 26 and the maximum number of magistrates in Stokes County from three to four.

Session Laws 1979, 2nd Sess., s. 2(b), provides: "The additional magistrate position for Mecklenburg County established in subsection (a) of this section shall be filled by a graduate from a four-year accredited college."

ARTICLE 16.

Magistrates.

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

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

Table of Salaries of Full-Time Magistrates

Number of prior years of service	*Annual salary*
Less than 1	$ 9,456
1 or more but less than 3	10,284
3 or more but less than 5	11,232
5 or more but less than 7	12,252
7 or more but less than 9	13,380
9 or more	14,640

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

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

(1979, 2nd Sess., c. 1137, s. 11.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, increased all salaries in subdivision (1).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subdivisions were not changed by the amendment, only the introductory paragraph and subdivision (1) are set out.

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-228. No new trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal. — No new trial is allowed before the magistrate. The sole remedy for a party aggrieved is by appeal for trial de novo before a district judge. Appeal is perfected by serving written notice thereof on all other parties and by filing written notice with the clerk of superior court within 10 days after rendition of judgment. Notice of appeal may also be given orally in open court upon announcement of or rendition of

the judgment, and shall thereupon be noted in writing by the magistrate upon the judgment. Whenever such appeal is docketed and is regularly set for trial, and the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed. (1965, c. 310, s. 1; 1969, c. 1190, s. 22; 1979, 2nd Sess., c. 1328, s. 3.)

Editor's Note.—
The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added the last sentence.

Rule 60(b) Motion Properly Heard in District Court. — The district court is the proper forum to hear and decide a motion made pursuant to § 1A-1, Rule 60(b) for relief from judgment or order entered in the magistrate's court. A new trial is not permitted before the magistrate. Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979).

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-244. Domestic relations.

Applied in Russ v. Russ, 43 N.C. App. 74, 257 S.E.2d 676 (1979).

Quoted in Francis v. Durham County Dep't. of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

§ 7A-246. Special proceedings; exception; guardianship and trust administration.

Applied in In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

(b) Appeals by the State or the defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance, and when that conviction resulted from a plea arrangement between the defendant and the State pursuant to which misdemeanor charges were dismissed, reduced, or modified, to try those charges in the form and to the extent that they subsisted in the district court immediately prior to entry of the defendant and the State of the plea arrangement.

(1979, 2nd Sess., c. 1328, s. 2.)

Editor's Note.—
The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added to subsection (b) the language beginning "and when that conviction."

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Applied in State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Cited in State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979).

§ 7A-272. Jurisdiction of district court.

The district court has exclusive, etc.— It is fundamental that the district courts of this state have exclusive original jurisdiction of misdemeanors, and the jurisdiction of the superior court is derivative and arises only upon an appeal from a conviction of the misdemeanor in the district court. State v. McKoy, 44 N.C. App. 516, 261 S.E.2d 226 (1980).

Article 24B.

Termination of Parental Rights.

§ 7A-289.22. Legislative intent; construction of Article.

Editor's Note.—
For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

§ 7A-289.23. Jurisdiction. — The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. A guardian ad litem, who shall be an attorney and who shall be appointed in accordance with Rule 17 G.S. 1A-1, of the Rules of Civil Procedure, shall be appointed to represent a parent whose rights, it is alleged, should be terminated pursuant to G.S. 7A-289.32(7), unless such parent has retained counsel, and shall be appointed to represent a minor parent under the age of 14 years. The fees of the guardian ad litem shall be borne by the Administrative Office of the Courts when the court finds that the respondent is indigent. In other cases the fees of the court appointed guardian ad litem shall be a proper charge against the respondent, if the respondent does not secure private legal counsel. Provided that, before exercising jurisdiction under this Article the court shall find that it would have jurisdiction to make a child custody determination under the provisions of G.S. 50A-3. (1977, c. 879, s. 8; 1979, c. 110, s. 7; 1979, 2nd Sess., c. 1206, s. 1.)

Editor's Note.—
The 1979, 2nd Sess., amendment, ratified June 24, 1980, and effective 60 days after ratification, rewrote the third sentence and added the fourth and fifth sentences.

Session Laws 1979, 2nd Sess., c. 1206, s. 6, provides that the act shall not apply to any action brought prior to its effective date.

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

(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:

a. Establish paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so

filed and shall incorporate into the case record the Department's certified reply; or

b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or

c. Legitimated the child by marriage to the mother of the child; or

d. Provided substantial financial support or consistent care with respect to the child and mother.

(7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child. (1977, c. 879, s. 8; 1979, c. 669, s. 2; 1979, 2nd Sess., c. 1088, s. 2; c. 1206, s. 2.)

Editor's Note.—

The first 1979, 2nd Sess., amendment, ratified June 16, 1980 and effective 90 days after ratification, added in subdivision (6)a the language beginning "which has been filed" and ending "certified reply."

The second 1979, 2nd Sess., amendment, ratified June 24, 1980, and effective 60 days after ratification, added subdivision (7).

Session Laws 1979, 2nd Sess., c. 1206, s. 6, provides that the act shall not apply to any action brought prior to its effective date.

As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (6) and (7) are set out.

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

Article 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

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

Trial de novo in the superior court, etc.—

In accord with 1979 Cum. Supp. See State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

The superior court division, as the trial court upon appeal and trial de novo, is generally justified in disregarding completely the plea, trial, verdict and judgment below, even in those situations in which the inferior court has not granted the defendant his constitutional rights. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Article 26.

Additional Powers of District Court Judges and Magistrates.

§ 7A-292. Additional powers of magistrates. — In addition to the jurisdiction and powers assigned in this Chapter to the magistrate in civil and criminal actions, each magistrate has the following additional powers:

(2) To punish for direct criminal contempt subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina. (1979, 2nd Sess., c. 1080, s. 6.)

Editor's Note.—

The 1979, 2nd Sess., amendment rewrote subdivision (2), which formerly read "To punish for contempt."

As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (2) are set out.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-302. Counties and municipalities responsible for physical facilities.

Cited in Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793 (1979).

ARTICLE 28.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-305. Costs in civil actions. — (a) In every civil action in the superior or district court the following costs shall be assessed:

(1) For the use of courtroom and related judicial facilities, the sum of three dollars ($3.00) in cases heard before a magistrate, and the sum of six dollars ($6.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of twenty-eight dollars ($28.00) in the superior court, and the sum of eighteen dollars ($18.00) in the district court, except that in the district court if the amount sued for does not exceed eight hundred dollars ($800.00), excluding interest, the sum shall be five dollars ($5.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(1979, 2nd Sess., c. 1234, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "eight hundred dollars ($800.00)" for "five hundred dollars ($500.00)" in subdivision (2) of subsection (a).

Session Laws 1979, 2nd Sess., c. 1234, s. 2, provides that the act shall not affect pending litigation.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 7A-311. Uniform civil process fees.

Subdivision (a) (1) of this section requires civil process fees to be assessed, collected and remitted when the law enforcement officer serves or attempts to serve civil process.

See opinion of Attorney General to Mr. Larry J. McGlothlin, Cumberland County Sheriff's Attorney, Oct. 3, 1979.

§ 7A-312. Uniform fees for jurors; meals.

Applied in State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

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

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
Treasurer, Department of the State	1
Superintendent of Public Instruction	1
Office of the Attorney General	11
State Bureau of Investigation	1
Agriculture, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Board of Natural Resources and Community Development	1
Revenue, Department of	1
Board of Human Resources	1
Commission for the Blind	1
Board of Transportation	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
Crime Control and Public Safety, Department of	2
State Library	3
Legistative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
Clerks of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.
Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1
Fayetteville State University	1

North Carolina Central University	17
Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell College	25
Federal, Out-of-State and Foreign	
Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1
Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.
Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained by him personally to enable him to keep up-to-date his personal set of reports. (1977, c. 379, s. 2; c. 771, s. 4; 1979, c. 899, s. 1; 1979, 2nd Sess., c. 1278.)

Editor's Note.—
The 1979, 2nd Sess., amendment, effective July 1, 1980, added the provisions for judges of the superior court and clerks of the superior court.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination.

Determination of Right to More Than One Lawyer. — An indigent defendant's right to court-appointed counsel does not include the right to require the court to appoint more than one lawyer unless there is a clear showing that the first appointed counsel is not adequately representing the interests of the accused. In making that determination the legitimate interest that the state has in securing the best utilization of its legal resources must be considered along with the interests of the defendant. State v. Barfield, 298 N.C. 306, S.E.2d 510 (1979).

When Right to Investigator Arises. — An indigent defendant's constitutional and statutory right to a state appointed investigator arises only upon a showing by defendant that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979).

The appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979).

§ 7A-451. Scope of entitlement. — (a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;

(2) A hearing on a petition for a writ of habeaus corpus under Chapter 17 of the General Statutes;

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

(4) A hearing for revocation of probation;

(5) A hearing in which extradition to another state is sought;

(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals) of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statues;

(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;

(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;

(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;

(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and

(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;

(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;

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

(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7A-289.23.

(1979, 2nd Sess., c. 1206, s. 3.)

Editor's Note.—

The 1979, 2nd Sess., amendment, ratified June 24, 1980, and effective 60 days after ratification, added subdivision (14) to subsection (a).

Session Laws 1979, 2nd Sess., c. 1206, s. 6, provides that the act shall not apply to any action brought prior to its effective date.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Chapter 108, Article 4, referred to in subsection (a) of this section, was rewritten by Session Laws 1975, c. 797, and has been recodified as Chapter 108, Article 4A. Chapter 122, Article 7, referred to in subsection (a) of this section, was repealed by Session Laws 1973, c. 726 and Session Laws 1977, c. 738. See now Chapter 122, Article 5A.

The initial appearance before a district court judge is not a critical stage because it is not an adversarial judicial proceeding where rights and defenses are preserved or lost or a plea taken. Therefore, the reference in subsection (b) (4) of this section to a preliminary hearing does not mean that a defendant has a Sixth Amendment right to counsel at the initial appearance before the district court judge. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 7A-454. Supporting services.

Applied in State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

§ 7A-455. Partial indigency; liens; acquittals.

Applied in State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980).

Article 37.

The Public Defender.

§ 7A-465. Public defender; defender districts; qualifications; compensation. — The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts. Effective 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.

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.)

Editor's Note.—
The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, added the fourth paragraph.

§ 7A-466. Selection of defender; term; removal. — The public defender in the third, twelfth, eighteenth, twenty-sixth and twenty-seventh-A judicial districts shall be appointed by the Governor from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The public defender in the twenty-eighth judicial district shall be appointed by the senior resident superior court judge of that judicial district from a list of not less than two names and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The terms of office of the public defenders authorized in G.S. 7A-465 are for four years, beginning on the dates specified in that section for each district, and each fourth year thereafter.

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

A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a superior court district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16; 1977, c. 1130, s. 7; 1979, 2nd Sess., c. 1284, s. 2.)

Editor's Note.— The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, inserted "third" near the beginning of the first sentence of the first paragraph.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

ARTICLE 40A.

North Carolina Courts Commission.

§ 7A-507. Ex officio members.

Cited in State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

§ 7A-508. Duties.

Editor's Note.— Session Laws 1979, 2nd Sess., c. 1221, s. 6, provides: "It is the understanding of the General Assembly that pursuant to Chapter 1077 of the 1979 Session Laws the North Carolina Courts Commission is authorized to make continuing studies of the structure, organization, jurisdiction, procedures and personnel, including the office of the public defender, of the Judicial Department and of the General Court of Justice and to make recommendations to the General Assembly to facilitate the administration of justice."

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 43.

Screening of Delinquency and Undisciplined Petitions.

§ 7A-536. Review of determination that petition should not be filed.

Cited in State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

ARTICLE 48.

Law-Enforcement Procedures in Delinquency Proceedings.

§ 7A-595. Interrogation procedures.

Waiver of Right to Have Attorney Present. — A juvenile, less than 14 years of age, may waive his right to have an attorney present during interrogation. See opinion of Attorney General to Sgt. James Preston Simmons, Elkin Police Department, Dec. 19, 1979.

§ 7A-596. Authority to issue nontestimonial identification where juvenile alleged to be delinquent.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-597. Time of application for nontestimonial identification order.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-598. Grounds for order.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-599. Issuance of order.

Purpose of References to Statutes. — Reference to the designated statutes in Article 14 of Chapter 15A for adult defendants is essential to comply with the new code provisions for juveniles. For example, trial judges should pay particular attention to § 15A-278 which specifies the necessary contents for the order. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-600. Nontestimonial identification order at request of juvenile.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-601. Destruction of records resulting from nontestimonial identification procedures.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-602. Penalty for willful violation.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

Article 51.

Hearing Procedures.

§ 7A-632. Continuances.

Applied in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-635. Quantum of proof in adjudicatory hearing.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-639. Predisposition investigation and report.

Continuance at Request of Juvenile. — This section and § 7A-640 make clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent

to present evidence when he requests such a continuance. This is particularly so in light of the provision of § 7A-632 that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-640. Dispositional hearing.

Consideration of Unadjudicated Acts Unrelated to Petition. — Trial courts giving consideration at a dispositional hearing to unadjudicated acts allegedly committed by a juvenile, unrelated to that for which he stands petitioned, must first determine that such information is reliable and accurate and that it was competently obtained. This does not mean that a full "trial" must be held to make the required determination about the unrelated acts. The trial court should have wide discretion in making the required determination from the sources available to it, but it must make the determination. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

Continuance at Request of Juvenile. — Section 7A-639 and this section make clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent to present evidence when he requests such a continuance. This is particularly so in light of the provision of § 7A-632 that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

ARTICLE 52.

Dispositions.

§ 7A-646. Purpose.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-651. Dispositional order.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

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 15 voting members, 11 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. 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.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1283, s. 3, makes the act effective July 1, 1980.

§ 7A-741. Duties. — It shall be the duty of the Commission to make continuing studies of the law, both statutory and judicial, as it pertains to juveniles, of agency services available to juveniles and their families, and of any other matters the Commission identifies as being of importance to State consideration of juveniles. The Commission shall report to the Governor and the General Assembly on or before the first day of each full session. The report shall be in writing and shall set forth the Commission's findings, conclusions, and recommendations including any proposed legislation. (1979, 2nd Sess., c. 1283, s. 1.)

§ 7A-742. Chairman; meetings; compensation of members. — The Governor shall appoint a chairman. The term of the chairman is two years and he may be reappointed. The Commission shall meet at such times and places as the chairman shall designate. The facilities of the State Legislative Building shall be available to the Commission, subject to approval of the Legislative Services Commission. Legislative members of the Commission shall be reimbursed for subsistence and travel expenses at the rates set out in G.S. 120-3.1. Members of the Commission who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rate set out in G.S. 138-6. (1979, 2nd Sess., c. 1283, s. 1.)

§ 7A-743: Reserved for future codification purposes.

§ 7A-744. Supporting services. — The Commission may solicit, employ, or contract for technical assistance and clerical assistance, and may purchase or contract for the materials and services it needs. Subject to the approval of the Legislative Services Commission, the staff resources of the Legislative Services Commission shall be available to this Commission without cost except for travel, subsistence, supplies, and materials. (1979, 2nd Sess., c. 1283, s. 1.)

Chapter 8.

Evidence.

Article 7.

Competency of Witnesses.

Sec.

8-50.2. Results of speed-measuring instruments; admissibility.

Article 7A.

Restrictions on Evidence in Rape Cases.

Sec.

8-58.6. Restrictions on evidence in rape or sex offenses cases.

Article 1.

Statutes.

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

Cross Reference. — As to medical malpractice actions, see §§ 90-21.11 through 90-21.14 in the 1979 Cum. Supp., which sections were enacted as Article 13 of this Chapter.

Article 2.

Grants, Deeds and Wills.

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

Cited in Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

Article 7.

Competency of Witnesses.

§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

Applied in State v. White, 42 N.C. App. 320, 256 S.E.2d 505 (1979); Bunting v. Beacham, 45 N.C. App. 304, 262 S.E.2d 672 (1980).

Cited in State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 8-50.2. Results of speed-measuring instruments; admissibility. — (a) The results of the use of radio microwave or other speed-measuring instruments shall be admissible as evidence of the speed of an object in any criminal or civil proceeding for the purpose of corroborating the opinion of a person as to the speed of an object based upon the visual observation of the object by such person.

(b) Notwithstanding the provisions of subsection (a) of this section, the results of a radio microwave or other electronic speed-measuring instrument are not admissible in any proceeding unless it is found that:

(1) The operator of the instrument held, at the time the results of the speed-measuring instrument were obtained, a certificate from the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter referred to as the Commission) authorizing

him to operate the speed-measuring instrument from which the results were obtained.

(2) The operator of the instrument operated the speed-measuring instrument in accordance with the procedures established by the Commission for the operation of such instrument.

(3) The instrument employed was approved for use by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6.

(4) The speed-measuring instrument had been calibrated and tested for accuracy in accordance with the standards established by the Commission for that particular instrument.

(c) All radio microwave and other electronic speed-measuring instruments shall be tested for accuracy by a technician possessing at least a second-class radiotelephone license from the Federal Communications Commission within a period of six months prior to the alleged violation. A written certificate by such technician showing that the test was made within the required period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.

(d) In every proceeding where the results of a radio microwave or other speed-measuring instrument is sought to be admitted, judicial notice shall be taken of the rules approving the use of the models and types of radio microwave and other speed-measuring instruments and the procedures for operation and calibration or measuring accuracy of such instruments, when such rules are filed with the Attorney General in accordance with General Statutes Chapter 150A. (1979, 2nd Sess., c. 1184, s. 3.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1184, s. 4, makes the act effective July 1, 1982.

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

I. GENERAL CONSIDERATION.

Testimony as to Independent Facts. — The prohibitions of this section do not prevent a witness from testifying as to the acts and conduct of the deceased where the witness is merely an observer and is testifying to facts based upon independent knowledge. In re Will of Simmons, 43 N.C. App. 123, 258 S.E.2d 466 (1979).

Applied in Hanover Co. v. Twisdale, 42 N.C. App. 472, 256 S.E.2d 840 (1979).

§ 8-51.1. Dying declarations.

Editor's Note. —

For survey of 1978 law on evidence, see 57 N.C.L. Rev. 1061 (1979).

§ 8-53. Communications between physician and patient.

Purpose of Section. —

In accord with 2nd paragraph in original. See In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

What Information Included. —

In accord with original. See In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

Relationship of Physician and Patient Must Exist. —

This privilege extends only to those cases in which the physician and patient relationship existed at the time of the communication and where the information given was necessary for diagnosis or treatment. State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979).

Privilege Is That of Patient. — The privilege created by this statute is for the benefit of the patient alone. In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

The privilege is not absolute, etc. — The privilege created by this statute may be waived by the patient, and in any event is a qualified, rather than an absolute, privilege in that the judge has discretion, either at the trial or prior thereto, to "compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

The statutory privilege is a qualified one, and the judge may compel disclosure by the physician if he finds, in his discretion, that it is necessary for the proper administration of justice. State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979).

This section and § 8-53.3 are to be read in pari materia. When so read, they extend the physician-patient privilege to the psychologist-client situation and withdraw the privilege in all situations where "necessary to a proper administration of justice." The reasons for the exceptions to the privileges granted by the two statutes are the same and it would be discordant to fail to extend to § 8-53.3 the amendment of this section which made it clear that the legislature intended that disclosure could be compelled prior to trial. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Intent as to Phrase "May Compel Such Disclosure." — The legislature intended to employ the phrase "may compel such disclosure" in this section in such manner as to authorize the court to require disclosure in all situations governed by this section without exception, when disclosure "is necessary to a proper administration of justice." In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Implementation of Proviso. — The legislature plainly intended that the implementation of the provisos in this section and § 8-53.3 be a function of the judiciary. By virtue of the failure of the legislature to provide precise statutory directions for fulfilling this responsibility, it becomes incumbent upon the courts to proceed in a manner consistent with law. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Disclosure May Be Compelled Prior to Trial or Filing of Charges. — Construing this section and § 8-53.3 so as to give effect to the obvious intention of the legislature as manifested in the entire act and other acts in pari materia, the language of both of these sections is sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

This section is not applicable in an involuntary commitment proceeding. In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

For a lengthy discussion of statutory provisions which make it manifest that the physician's role in involuntary commitment proceedings was not intended to be inhibited by this section, see In re Farrow, 241 N.C. App. 680, 255 S.E.2d 777 (1979).

Tape Relating to Facts in Death Certificates. — In an action by plaintiff to recover damages for wrongful discharge from his position as superintendent of a State hospital for the mentally disordered, a tape of a meeting of the credentials committee of that hospital would not come within the privilege provided by this section where the information on the tape did not relate to treatment of patients but related basically the facts included in the death certificates of patients which were a matter of public records. Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

Cited in Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

§ 8-53.3. Communications between psychologist and client.

This section as written favors a policy of nondisclosure. Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

But judges should not hesitate where it appears to them that disclosure is necessary in order that the truth be known and justice done. Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

Implementation of Proviso. — The legislature plainly intended that the implementation of the provisos in § 8-53 and this section be a function of the judiciary. By virtue of the failure of the legislature to provide precise statutory directions for fulfilling this responsibility, it becomes incumbent upon the courts to proceed in a manner consistent with law. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Section 8-53 and this section are to be read in pari materia. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d

818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Thus, Disclosure May Be Compelled Prior to Trial or Filing of Charges. — Construing § 8-53 and this section so as to give effect to the obvious intention of the legislature as manifested in the entire act and other acts in pari materia, the language of both of these sections is sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

While the proviso contained in this section does not contain the precise language of the proviso to § 8-53 specifically providing that the required disclosure may be prior to trial, such was the legislative intent. It would be wholly inconsistent to allow disclosure in the case of a physician-patient relationship while, in a statute extending the rule to the psychologist-client relationship, precluding the required disclosure until the time of trial. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

§ 8-54. Defendant in criminal action competent but not compellable to testify.

Extent of Cross-Examination Permitted. —

For purposes of impeachment, a defendant as witness may be cross-examined by the district attorney concerning prior inconsistent statements, prior convictions, and any specific acts of misconduct which tend to impeach his character. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

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

Testimony by plaintiff-wife concerning unnatural sex acts between the plaintiff and the defendant-husband was not rendered inadmissible by this section which establishes a spousal privilege applicable to the testimony of husband or wife in any action or proceeding in consequence of adultery. An application of this section is not proper when the testimony regarding sexual conduct is offered to establish constructive abandonment in a temporary alimony proceeding. Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979).

Admission of a police officer's testimony that he heard defendant say to his wife, "I am in real trouble this time" did not violate the marital privilege since the communication was not confidential as it was made within the hearing of a third party, and at any rate the privilege refers only to testimony by a spouse about the confidential communication. State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

Applied in Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979).

§ 8-57. Husband and wife as witnesses in criminal action.

Applicability to Common-law Marriages. — Common-law marriages are invalid in North Carolina. Hence, the husband-wife testimonial privilege granted in this section may not be asserted by a criminal defendant to disqualify a witness alleged to be his spouse by virtue of a common-law marriage contracted in North Carolina. This State, however, will recognize as valid a common-law marriage if the acts alleged to have created it took place in a state in which such a marriage is valid. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979).

ARTICLE 7A.

Restrictions on Evidence in Rape Cases.

§ 8-58.6. Restrictions on evidence in rape or sex offenses cases.

(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or
(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

Editor's Note. — Subsection (b) of this section is set out to correct a typographical error in subdivision (1) in the 1979 Cumulative Supplement.

As the other subsections were not affected they are not set out.

Applied in State v. Milano, 297 N.C. 485, 256 S.E.2d 154 (1979).

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.
9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.
Sec.
9-6.1. Excuses on account of age.

Article 2.

Petit Jurors.

9-10. Summons to jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-2. Preparation of jury list; sources of names.

The legislative intent of this section is to provide a system for objective selection of veniremen. State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980).

The procedure set forth in this Article is objective and systematic. State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure. — (a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety, or as provided in G.S. 9-6.1.

(1979, 2nd Sess., c. 1207, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added "or as provided in G.S. 9-6.1" at the end of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 9-6.1. Excuses on account of age. — Any person summoned as a juror who is 65 years or older may establish his exemption without appearing in person by filing a signed statement of the ground of his exemption with the chief judge of the district court of the judicial district at any time five days before the date upon which he is summoned to appear. In the case of supplemental jurors summoned under G.S. 9-11, such notice may be given when summoned. (1979, 2nd Sess., c. 1206, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1207, s. 4, makes the act effective Oct. 1, 1980.

ARTICLE 2.

Petit Jurors.

§ 9-10. Summons to jurors. — (a) The register of deeds shall, within three days after the receipt of numbers drawn, deliver the list of prospective jurors to the sheriff of the county, who shall summon the persons named therein. The summons shall be served personally, or by leaving a copy thereof at the place of residence of the juror, or by telephone or first-class mail, at least 15 days before the session of court for which the juror is summoned. Service by telephone, or by first-class mail if mailed to the correct current address of the juror on or before the fifteenth day before the day the court convenes, shall be valid and binding on the person served, and he shall be bound to appear in the same manner as if personally served. The summons shall contain information as to the time, place, and authority before whom applications for excuses from jury service may be heard.

(b) All summons served personally or by mail under this section or under G.S. 9-11 shall inform the prospective juror that persons 65 years of age or older are entitled to exemption from jury service for good cause, shall contain a statement for claiming such exemption and stating the cause and a place for the prospective juror's signature, and shall state the mailing address of the clerk of superior court and the date by which such request for exemption must be received. (1779, c. 157, ss. 4, 6, P. R.; R. C., c. 31, s. 29; 1868-9, c. 9, s. 12; Code, s. 1733; Rev., s. 1976; C. S., s. 2320; 1967, c. 218, s. 1; 1979, 2nd Sess., c. 1207, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, designated the former provisions of this section as subsection (a) and added subsection (b). Session Laws 1979, 2nd Sess., c. 1207, s. 4, as amended by Session Laws 1979, 2nd Sess., c. 1326, provides that the amendment to this section shall not become effective in Wake, Mecklenburg, and Buncombe Counties until July 1, 1981.

§ 9-14. Jury sworn; judge decides competency.

Cited in State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

Chapter 10.

Notaries.

§ 10-5. Powers of notaries public.

Editor's Note. —
For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

Chapter 11.

Oaths.

Article 2.

Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.

Cited in State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

Chapter 14.

Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

Felonies and Misdemeanors.

Sec.

14-1.1. Punishment for felonies.

14-2.2. Sentencing of person convicted of repeated felony using deadly weapon.

Article 2A.

Habitual Felons.

14-7.1 to 14-7.6. [Repealed.]

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 6.

Homicide.

14-17. Murder in the first and second degree defined; punishment.

Sec.

14-19. [Repealed.]

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Trespasses to Land and Fixtures.

14-129.1. [Repealed.]

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries and Gaming.

14-309.1. Defense to possession; antique slot machines.

Article 60.

Computer-Related Crimes.

14-457. Extortion.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1.1. Punishment for felonies. — (a) For felonies that occur on or after the effective date of Article 81A of Chapter 15A of the General Statutes, the following punishments shall be applicable:

(1) A Class A felony shall be punishable by death or life imprisonment as provided by Article 100 of Chapter 15A of the General Statutes;

(2) A Class B felony shall be punishable by life imprisonment;

(3) A Class C felony shall be punishable by imprisonment up to 50 years, or a fine or both;

(4) A Class D felony shall be punishable by imprisonment up to 40 years, or a fine or both;

(5) A Class E felony shall be punishable by imprisonment up to 30 years, or a fine or both;

(6) A Class F felony shall be punishable by imprisonment up to 20 years, or a fine or both;

(7) A Class G felony shall be punishable by imprisonment up to 15 years, or a fine or both;

(8) A Class H felony shall be punishable by imprisonment up to 10 years, or a fine or both;

(9) A Class I felony shall be punishable by imprisonment up to five years, or a fine or both;

(10) A Class J felony shall be punishable by imprisonment up to three years, or a fine or both.

(b) A felony not assigned by statute to any felony class shall be punishable as a Class J felony. (1979, c. 760, s. 1; 1979, 2nd Sess., c. 1316, s. 1.)

Cross-Reference. — As to presumptive punishment for felonies, effect of prior felony convictions,and aggravating or mitigating factors, see § 15A-1340.4.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of this section to March 1, 1981.

Session Laws 1979, 2nd Sess., c. 1316, s. 1, effective March 1, 1981, and applicable to offenses committed on or after that date, amended this section to read as set out above. The amendment deleted provisions in subdivisions (2) through (10) of subsection (a) setting maximum fines.

§ 14-2. Punishment of felonies.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, ch. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Cited in State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979).

§ 14-2.1. Punishment of felonies; second or subsequent offenses.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-2.2. Sentencing of person convicted of repeated felony using deadly weapon. — Notwithstanding any other provision of law, any person who has been previously convicted in the courts of this State within seven years of a felony in which a deadly weapon was used, provided that the previous felony did not occur within 10 days of the second or subsequent felony, in which a deadly weapon was used, shall serve a term for the second or subsequent felony of not less than seven years in prison, excluding gain time granted under G.S. 148-13. Any person sentenced under this section shall receive a sentence of at least 14 years in the State's prison and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not sentence a person sentenced under this section as a committed youthful offender and may not suspend the sentence and place the person sentenced on probation. Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

For the purpose of this section, the record or records of the prior felony conviction shall be admissible in evidence after conviction and before sentencing, but only for the purpose of proving that the person has been convicted of a previous felony. A judgment of a conviction or plea of guilty or no contest to such felony offense certified to a superior court in this State from the custodian of records of any other court of this State under the same name as that by which the defendant is charged shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified.

For the purposes of this section, a felony committed before a person attains the age of 18 years does not constitute a previous felony conviction.

Pleas of guilty or no contest to or convictions of felony offenses prior to September 1, 1977, are not felony offenses within the meaning of this section. Any felony offense to which a pardon has been extended does not for the purpose of this section constitute a felony. The burden of proving a pardon rests with the defendant and the State is not required to disprove a pardon. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, s. 34.)

Editor's Note. — The above section was enacted by Session Laws 1979, c. 760, s. 2, as § 15A-1340.5. The 1979 act was originally made effective July 1, 1980, but was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316, s. 47. The section was transferred and renumbered § 14-2.2 by Session Laws 1979, 2nd Sess., c. 1316, s. 34, effective March 1, 1981, and applicable to offenses committed on or after that date. The 1979, 2nd Sess., act also amended the section by inserting "in which a deadly weapon was used" following "subsequent felony" in the first sentence of the first paragraph and adding the second, third and fourth paragraphs.

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

As to this section as amended by Session Laws 1979, 2nd Sess., c. 1316, see the note catchlined "Amendment Effective March 1, 1981," below.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 2, effective March 1, 1981, and applicable to offenses committed on or after that date, will amend subsection (b) of this section to read as follows:

"(b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony."

§ 14-4. Violation of local ordinances misdemeanor.

Cited in Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980).

Article 2.

Principals and Accessories.

§ 14-6. Punishment of accessories before the fact.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

As to this section as amended by Session Laws 1979, 2nd Sess., c. 1316, see the note catchlined "Amendment Effective March 1, 1981," below.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 3, effective March 1, 1981, and applicable to offenses committed on and after that date, will amend this section to read as follows:

"**§ 14-6. Punishment of accessories before the fact.** — Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape or a sex offense shall be punished as a Class C felon. Every accessory before the fact in any other felony shall be punished as a Class H felon."

§ 14-7. Accessories after the fact; trial and punishment.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 2A.

Habitual Felons.

§§ 14-7.1 to 14-7.6: Repealed by Session Laws 1979, c. 760, s. 4, effective March 1, 1981.

Editor's Note. — Session Laws 1979, ch. 1316, 2nd Sess., s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of the repeal to March 1, 1981.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

ARTICLE 3.

Rebellion.

§ 14-8. Rebellion against the State.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-9. Conspiring to rebel against the State.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 4.

Subversive Activities.

§ 14-12. Punishment for violations.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-12.1. Certain subversive activities made unlawful.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 4A.

Prohibited Secret Societies and Activities.

§ 14-12.15. Punishment for violation of Article.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 5.

Counterfeiting and Issuing Monetary Substitutes.

§ 14-13. Counterfeiting coin and uttering coin that is counterfeit.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catcline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-14. Possessing tools for counterfeiting.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment. — A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison. (1893, cc. 85, 281; Rev., s. 3631; C. S., s. 4200; 1949, c. 299, s. 1; 1973, c. 1201, s. 1; 1977, c. 406, s. 1; 1979, c. 682, s. 6; 1979, 2nd Sess., c. 1251, s. 1.)

I. IN GENERAL.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1251, s. 1, effective July 1, 1980, and applicable to offenses committed on or after that date, inserted in the second sentence "including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative or preparation of opium when the ingestion of such substance causes the death of the user."

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Session Laws 1979, 2nd Sess., c. 1251, s. 3, reads as follows: "Nothing in sections 1 or 2 hereof shall be construed to render lawful any acts committed prior to the effective dates of those sections respectively and unlawful at the time said acts occurred, and nothing contained herein shall be construed to affect any prosecution instituted under section 1 hereof and pending on the effective date of section 2 hereof."

Session Laws 1979, 2nd Sess., c. 1251, s. 9, contains a severability clause.

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1251, s. 2, effective March 1, 1981, amends this section by substituting, at the end of the second sentence, "as a Class D felon" for "by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

Session Laws 1979, 2nd Sess., c. 1251, s. 3, reads as follows: "Nothing in sections 1 or 2 hereof shall be construed to render lawful any acts committed prior to the effective dates of those sections respectively and unlawful at the time said acts occurred, and nothing contained herein shall be construed to affect any prosecution instituted under section 1 hereof and pending on the effective date of section 2 hereof."

Session Laws 1979, 2nd Sess., c. 1251, s. 9, contains a severability clause.

Applied in State v. Hunt, 43 N.C. App. 428, 259 S.E.2d 322 (1979); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

Cited in State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Bonds, 43 N.C. App. 467, 259 S.E.2d 377 (1979); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

II. MURDER IN GENERAL.

Malice — Implied from Use of Deadly Weapon. —

In a prosecution for murder in the first degree, malice on the part of defendant could be established by inference from the use of a deadly weapon and by surrounding circumstances which include two earlier assaults and the accusations concerning deceased's romatic relationship with defendant's wife. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

Instruction Placing Burden of Proving Self-defense on Defendant Unconstitutional. — In a prosecution for second-degree murder, an instruction placing the burden of proving self-defense upon the defendant was constitutionally infirm, since North Carolina considers unlawfulness, or the absence of self-defense, to be an element of murder. Wynn v. Mahoney, 600 F.2d 448 (4th Cir.), cert. denied, — U.S. —, 100 S. Ct. 423, 62 L. Ed. 2d 320 (1979).

III. MURDER IN THE FIRST DEGREE.

Same — Premeditation. —

In accord with original. See State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

Same — Deliberation. —

In accord with original. See State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

Lying in Wait. —

When this section speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. An assailant who watches and waits in ambush for his victim is most certainly lying in wait. State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

Assailant Need Not Be Concealed. — It is not necessary that an assailant be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

When Murder Considered Committed for Purposes of Ex Post Facto Punishment Prohibition. — For purposes of the prohibition against ex post facto legislation, a murder was committed when the murderous acts were performed and not when death resulted. Therefore, where defendant administered poison to her husband on three occasions, all before June 1, 1977, at a time when the maximum punishment for first-degree murder was life imprisonment, imposition of the death sentence under § 15A-2002 would violate the prohibition against imposition of an ex post

facto punishment. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Evidence Sufficient to Take First-Degree Murder by Poison Care to Jury. See State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

V. PLEADING AND PRACTICE.

Charge — Willful Premeditation and Deliberation. —

In all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree. This requirement is present because premeditation and deliberation are operations of the mind which must always be proved, if at all, by circumstantial evidence. If the jury chooses not to infer the presence of premeditation and deliberation, it should be given the alternative of finding the defendant guilty of second-degree murder. State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

When Jury May Be Instructed as to Lesser Degree, etc. —

In a prosecution for first-degree murder, where there is some evidence from which the jury could infer that the defendant killed the victim without premeditation and deliberation, it was error for the trial court not to instruct on second-degree murder since the jury should be instructed on a lesser included offense when there is evidence from which the jury could find that such lesser included offense was committed. Error in failing to submit the question of defendant's guilt of a lesser degree of the same crime is not cured by a verdict of guilty of the offense charged because it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly submitted to the jury. State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

§ 14-18. Punishment for manslaughter.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-19: Repealed by Session Laws 1979, c. 760, s. 5, effective March 1, 1981.

Editor's Note. — Session Laws 1979, c. 1316, 2nd Sess., s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of the repeal to March 1, 1981.

§ 14-20. Killing an adversary in duel; aiders and abettors declared accessories.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 7.

Rape and Kindred Offenses.

§§ 14-21 to 14-23: Repealed by Session Laws 1979, c. 682, s. 7, effective January 1, 1980.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of the 1979 act, cited in the Editor's note in the 1979 Cumulative Supplement, to March 1, 1981.

§§ 14-26, 14-27: Repealed by Session Laws 1979, c. 682, s. 7, effective January 1, 1980.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of the 1979 act, cited in the Editor's note in the 1979 Cumulative Supplement to March 1, 1981.

ARTICLE 7A.

Rape and Other Sex Offenses.

§ 14-27.2. First-degree rape.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 4, effective March 1, 1981 and applicable to offenses committed on or after that date, amends subsection (b) of this section to read as follows:

"(b) Any person who commits the offense defined in this section is guilty of a Class B felony."

The elements of rape in the first degree, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980).

A deadly weapon is used to procure, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See State v. Joyner, 297 N.C. 349, 255 S.E.2d 390 (1979).

§ 14-27.3. Second-degree rape.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 5, effective March 1, 1981 and applicable to offenses committed on or after that date, amends subsection (b) of this section to read as follows:

"(b) Any person who commits the offense defined in this section is guilty of a Class D felony."

§ 14-27.4. First-degree sexual offense.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 6, effective March 1, 1981 and applicable to offenses committed on or after that date, amends subsection (b) of this section to read as follows:

"(b) Any person who commits the offense defined in this section is guilty of a Class B felony."

§ 14-27.5. Second-degree sexual offense.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 7, effective March 1, 1981 and applicable to offenses committed on or after that date, amends subsection (b) of this section to read as follows:

"(b) Any person who commits the offense defined in this section is guilty of a Class D felony."

§ 14-27.6. Penalty for attempt.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 8, effective March 1, 1981 and applicable to offenses committed on or after that date, will amend this section to read as follows:

"**§ 14-27.6. Penalty for attempt.** — An attempt to commit first-degree rape as defined by G.S. 14-27.2, or an attempt to commit a first degree sexual offense as defined by G.S. 14-27.4 is a Class F felony. An attempt to commit

second-degree rape as defined by G.S. 14-27.3, or an attempt to commit a second-degree sexual offense as defined by G.S. 14-27.5 is a Class H felony."

§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 9, effective March 1, 1981 and applicable to offenses committed on or after that date, will amend this section to read as follows:

"**§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.** — If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class G felony. Consent is not a defense to a charge under this section."

ARTICLE 8.

Assaults.

§ 14-28. Malicious Castration.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-29. Castration or other maiming without malice aforethought.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-30. Malicious maiming.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-30.1. Malicious throwing of corrosive acid or alkali.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-31. Maliciously assaulting in a secret manner.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Intent to Kill May Be Inferred, etc. —

The nature of the assault, the manner in which it was made, and the surrounding circumstances are all matters from which an intent to kill may be inferred. State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979).

An intent to kill, being a state of mind of the defendant not easily susceptible of proof, ordinarily must be proved by circumstantial evidence from which a jury may reasonably infer intent. State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979).

Proof of assault with a deadly weapon, etc. —

The mere proof of an assault with a deadly weapon inflicting serious injury does not by itself establish an intent to kill. State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979).

Cited in State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979); State v. Stephenson, 43 N.C. App. 323, 258 S.E.2d 806 (1979).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

Emphasis Either on Intent of Accused or Apprehension of Victim. — In this State a criminal assault may be accomplished either by an overt act on the part of the accused evidencing an intentional offer or attempt by force and violence to do injury to the person of another or by the "show of violence" on the part of the accused sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. Thus, either or both of two rules may be applied in prosecuting a person accused of an assault. The first places emphasis on the intent or state of mind of the person accused. Under the second, which is sometimes referred to as the "show of violence" rule, emphasis is shifted to a consideration of the apprehension of the person assailed and the reasonableness of that apprehension. State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979).

Resisting Officer and Assaulting Officer, etc. —

The offense of unlawfully resisting, delaying or obstructing a public officer in the discharge of a duty of his office, under § 14-223, is not a lesser degree of the offense of assaulting a law-enforcement officer while he is discharging or attempting to discharge a duty of his office, under this section. State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Conviction of Both Resisting Arrest and Assault on Officer, etc. —

It is possible that the facts in a given case might constitute a violation of both this section and § 14-223. In such a case the defendant could not be punished twice for the same conduct. State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Sentence Suspended on Condition of Payment of Fine Improper. — Where defendant was found guilty of simple assault and the judgment imposed a jail sentence of 30 days which was suspended on condition that defendant pay a fine of $50.00 and costs of court, the judgment was not within the limits of this section. The penalty for violation of this section is phrased in the disjunctive. The imposition of a fine in addition to a jail sentence, exceeds the limitations of the statute, and the judgment is improper. State v. Allen, 42 N.C. App. 727, 257 S.E.2d 649 (1979).

Applied in State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979).

Cited in State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979); State v. McKoy, 44 N.C. App. 516, 261 S.E.2d 226 (1980).

§ 14-34. Assaulting by pointing gun.

Intentional Pointing, etc. —

The rule is well established that a violation of this section requires the intentional pointing of a gun without legal justification or excuse. State v. Thornton, 43 N.C. App. 564, 259 S.E.2d 381 (1979).

§ 14-34.1. Discharging firearm into occupied property.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

When Section Violated. —

In accord with 1979 Cum. Supp. See State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

§ 14-34.2. Assault with a firearm or other deadly weapon upon law-enforcement officer or fireman.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Cited in State v. Dunlap, 298 N.C. 725, 259 S.E.2d 893 (1979).

Article 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Constitutionality. —

This section prima facie violates no provision of the State or federal Constitutions. State v. Silhan, 297 N.C. 660, 256 S.E.2d (1979).

The victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the State's burden of proof in regard to consent. If the victim is shown to be under 16, the State has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the State must prove that the action was taken without his or her own consent. State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980).

Substantiality in Terms of Distance, etc. —

A charge to the jury that in order to constitute kidnapping under subsection (a) any unlawful confinement, restraint, or removal from one place to another must involve a substantial period or distance would be improper. State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

Kidnapping as Separate from Later Crime of Rape. —

The restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. State v. Silhan, 297 N.C. 660, 256 S.E.2d (1979).

Quoted in State v. Hoskins, 42 N.C. App. 108, 256 S.E.2d 290 (1979).

Cited in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

§ 14-41. Abduction of children.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-42. Conspiring to abduct children.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated

under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-43. Abduction of married women.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 11.

Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-45.1. When abortion not unlawful.

Stated in Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979).

§ 14-46. Concealing birth of child.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-49. Malicious use of explosive or incendiary; attempt; punishment.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

The trial court's statement to the jury that the motel room in question was a sleeping apartment was an impermissible expression of opinion, or an assumption that a material fact had been proved within the meaning of § 15A-1232. However, since there can be no serious contention that a motel room, regularly and usually occupied by travelers for the purpose of sleeping, is not in fact a "sleeping apartment" within the meaning of this section and its predecessors, nor did defendants contest the "sleeping apartment" issue at trial, other than by their general pleas of not guilty, there was no reasonable possibility that this error contributed to defendant's conviction or that a different result would have obtained had the language complained of been omitted, therefore, the error was harmless. State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

Applied in State v. Hamilton, 298 N.C. 238, 258 S.E.2d 350 (1979); State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979).

§ 14-52. Punishment for burglary.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Cited in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

§ 14-53. Breaking out of dwelling house burglary.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-54. Breaking or entering buildings generally.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of

the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

When Entry Is Lawful. —

In accord with 2nd paragraph in 1979 Cum. Supp. See State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979).

An entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under subsection (a). Therefore, where defendant entered a store at a time when it was open to the public, his entry was thus with the consent, implied if not express, of the owner and it cannot serve as the basis for a conviction for felonious entry. State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

Concealment Voided Consent to Entry. — Although a person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry, where defendant entered the building during normal business hours, but thereafter without the consent of the owner, he went into an area not open to the public and there secreted himself, and remained concealed until well beyond the closing of business hours for the store for the purpose of participating in a theft, these acts voided any consent to the entry. Going into an area not open to the public and remaining hidden there past closing hours made the entry through the front door open for business unlawful. State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979).

The office of the clerk of a superior court in a county courthouse is a "structure designed to house or secure within it any activity or property" within the meaning of subsection (c) of this section and therefore is by statutory definition a "building" under subsection (b) of this section. Even though the office may be open to the public, it is still protected by the statute during the time that it is not open for public business. State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

Effect of Arrest of Judgment in Conviction under § 14-72(b). — The trial court's arrest of judgment on defendant's conviction for felonious larceny under § 14-72(b) had no effect on his conviction for felonious breaking or entering since it is not necessary for conviction of breaking and entering under subsection (a) of this section that a felony or larceny actually be committed in the building broken into; it is merely the intent at the time of the breaking or entering to commit the felony or larceny within the building that is required. State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980).

For the state to survive a motion to dismiss under § 15A-1227(a)(1), it must present evidence that defendant entered a building within the meaning of subsection (b) of this section and that he did so wrongfully, that is, that he entered without any consent or permission of the owner or occupant. State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

§ 14-55. Preparation to commit burglary or other housebreakings.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Use to Which Instrument Is Put Is Not Controlling. — The fact that certain implements were possessed and used by the defendant in breaking open a widow in a building is not determinative of the question of whether or not they were implements of housebreaking possessed in violation of this section. The use to which a tool or instrument is put is not necessarily controlling in determining whether it is within the intent of the phrase "or other implement of housebreaking" as contained in this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Instruction as to Tire Tool. — In a prosecution for felonious possession of implements of storebreaking pursuant to this section, it was not error for the trial court to permit the jury to conclude that a tire tool was an implement of storebreaking, where there is abundant evidence to show that the tire tool was used in the breaking, no explanation appears of record which would justify the presence of the tire tool inside the store after the breaking, no suggestion appears of record that any automobile tire was in need of or receiving repair on the premises in question at the time defendant and his companion were apprehended, and the jury was properly instructed on the principles of actual and constructive possession. State v. Bagley, 43 N.C. App. 171, 258 S.E.2d 427 (1979).

Neither a three-foot long ladder nor an acetylene torch with tanks mounted on a wheeled stand possessed by defendant was

reasonably adapted for use in housebreaking, and they do not qualify as implements of housebreaking within the meaning of this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

§ 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

Editor's Note. —
The amendment to this section noted under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement was repealed by Session Laws 1979, 2nd Sess., c. 1316, s. 10.

As to this section as amended by Session Laws 1979, 2nd Sess., c. 1316, see the note catchlined "Amendment Effective March 1, 1981," below.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 10, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by substituting "Class I felony" for "felony punishable by imprisonment for not more than five years" at the end of the first sentence.

§ 14-56.1. Breaking into or forcibly opening coin or currency-operated machines.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Cited in State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

§ 14-56.3. Breaking into paper currency machines.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Cited in State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

§ 14-57. Burglary with explosives.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Article 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Cited in State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

§ 14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of

the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-59. Burning of certain public buildings.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-60. Burning of schoolhouse or buildings of educational institutions.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-61. Burning of certain bridges and buildings.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-62. Burning of churches and certain other buildings.

I. IN GENERAL.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 2979 Cumulative Supplement.

§ 14-62.1. Burning of building or structure in process of construction.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-63. Burning of boats and barges.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-64. Burning of ginhouses and tobacco houses.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-65. Fraudulently setting fire to dwelling houses.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-66. Burning of personal property.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-67. Attempting to burn dwelling houses and certain other buildings.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Felony created by this section, etc. —
In accord with 1979 Cum. Supp. See State v. Green, 298 N.C. 793, 259 S.E.2d 904 (1979).

§ 14-67.1. Burning or attempting to burn other buildings.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

Cited in State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

§ 14-71. Receiving stolen goods.

Elements of the Offense. —
In accord with 3rd paragraph in 1979 Cum. Supp. See State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979).

This section makes guilty knowledge, etc. —
Guilty knowledge is one of the essential elements of the crime of receiving stolen goods. State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979).

Venue. — Under this section, venue is proper in any county in which a defendant was in possession of the stolen goods. State v. Haywood, 297 N.C. 686, 256 S.E.2d 715 (1979).

Instructions. —
In a prosecution for feloniously receiving stolen goods, where the trial court instructed the jury that they should return a verdict of guilty if they found from the evidence beyond a reasonable doubt that the defendant, with a

dishonest purpose, received hams which he knew "or had reasonable grounds to believe" someone had stolen, it was not error for the court to fail to go further and charge the jury that they should judge the reasonableness of defendant's belief from the circumstances as they appeared to him at the time he received the stolen goods. State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979).

Applied in State v. Haywood, 297 N.C. 686, 256 S.E.2d (1979).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding $400.00 in value.

Editor's Note. —

The effective date of the amendment to this section stated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316, s. 47.

As to this section as amended by Session Laws 1979, 2nd Sess., c. 1316, see the note catchlined "Amendment Effective March 1, 1981," below.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 11, effective March 1, 1981, and applicable to offenses committed on or after that date, amends subsection (a) of this section to read as follows:

"(a) Larceny of goods of the value of more than four hundred dollars ($400.00) is a Class H felony. The receiving or possessing of stolen goods of the value of more than four hundred dollars ($400.00) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than four hundred dollars ($400.00), is a misdemeanor punishable under G.S. 14-3(a). In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen."

Not Lesser Included Offense of Larceny by Employee. — Where defendant was charged with larceny by an employee he could not be convicted of the offense of larceny, since the two are wholly separate offenses, and each requires different evidentiary showings. In short, larceny is not a lesser included offense of larceny by an employee. State v. Daniels, 43 N.C. 556, 259 S.E.2d 396 (1979).

Applied in State v. Haywood, 297 N.C. 686, 256 S.E.2d (1979); State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979).

Cited in State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980).

§ 14-72.2. Unauthorized use of a motor-propelled conveyance.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-74. Larceny by servants and other employees.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Larceny Not Lesser Included Offense. — Where defendant was charged with larceny by an employee he could not be convicted of the offense of larceny, since the two are wholly separate offenses, and each requires different evidentiary showings. In short, larceny is not a lesser included offense of larceny by an employee. State v. Daniels, 43 N.C. 556, 259 S.E.2d 396 (1979).

Applied in State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979).

§ 14-75.1. Larceny of secret technical processes.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated

under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-79. Larceny of ginseng.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

Editor's Note. —

The effective date of the amendment stated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement was postponed to March 1, 1981 by Session Laws 1979, 2nd Sess., c. 1316, s. 47.

As to this section as amended by Session Laws 1979, 2nd Sess., c. 1316, see the note catchlined "Amendment Effective March 1, 1981," below.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 12, effective March 1, 1981 and applicable to offenses committed on or after that date, amends subsection (a) of this section to read as follows:

"(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony."

This section creates no new offense. —

In accord with 1st paragraph in original. See State v. Rivens, 299 N.C. 385, 261 S.E.2d 867 (1980).

Common-Law Robbery Defined. —

In accord with 5th paragraph in original. See State v. Rivens, 299 N.C. 385, 261 S.E.2d 867 (1980).

The offense is complete; etc. —

In accord with 3rd paragraph in 1979 Cum. Supp. See State v. Hunt, 297 N.C. 447, 255 S.E.2d 182 (1979).

Applied in State v. Joyner, 297 N.C. 349, 255 S.E.2d 390 (1979).

Cited in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

§ 14-87.1. Punishment for common law robbery and attempted common law robbery.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of this section to March 1, 1981.

§ 14-88. Train robbery.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-89. Attempted train robbery.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of

the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-89.1. Safecracking.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Elements of Offense. —
In accord with 2nd paragraph in 1979 Cum. Supp. See State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979).

Fiduciary Defined. — The trial court in a prosecution for embezzlement in violation of this section properly defined a fiduciary as "a person having a duty created by his undertaking to act primarily for another's benefit." State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979).

§ 14-91. Embezzlement of State property by public officers and employees.

Editor's Note.—
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-92. Embezzlement of funds by public officers and trustees.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Fraudulent Intent Can Be Inferred. — The fraudulent intent required in the charge of embezzlement can be inferred from the facts proven. It is not necessary that there be direct evidence of such intent. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Exclusive Possession Need Not Be Proved. — It is not necessary for the State to prove that defendant had exclusive possession of the funds to sustain a charge of embezzlement under this section. More than one person can have possession of the same property at the same time. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Use of Words "Fiduciary Person" in Instruction. — Trial court in an embezzlement case did not commit prejudicial error in charging the jury that defendant was a fiduciary person though this section, neither contains nor refers to the words "fiduciary person," since the trial court was not restricted to using the exact words of the statute in giving instructions and the use of "fiduciary person" to define the statutory phrasing of this section has been specifically approved by the North Carolina Supreme Court. The use of the words was not an expression of trial judge's opinion contrary to the mandate of § 15A-1222. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Cited in State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

§ 14-94. Embezzlement by officers of railroad companies.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-95. Conspiring with officers of railroad companies to embezzle.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-98. Embezzlement by surviving partner.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-99. Embezzlement of taxes by officers.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Article 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

Editor's Note.—

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Scope of Proscribed Activity. — The legislature, by the unambiguous language of the 1975 amendment of this section, clearly intended to broaden the scope of the proscribed activity so as to make a false representation "of a past or subsisting fact or of a future fulfillment or event" punishable under the statute, and to include in the definition of the crime an attempt to obtain something of value with an intent to defraud. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Elements of the Crime.—

The crime of obtaining property by false pretenses pursuant to this section should be defined as a false representation: (1) of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

"Intent to Deceive" Is Requisite Intent. — In the context of the provisions of this section, when a person obtains something of value by means of misrepresentations with intent to deceive the victim, the requisite intent to cheat or defraud exists. Therefore, an instruction to the jury that in order to find defendant guilty it must find that defendant "intended to deceive"

meets the statutory requirements of this section while it requires that there be an "intent to cheat or defraud." State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

The phrase "without compensation" is not an essential element of the offense of false pretenses, and, therefore, it is not necessary to allege in a bill of indictment charging false pretenses that the accused obtained property from the victim "without compensation." State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Cited in State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

§ 14-101. Obtaining signatures by false pretenses.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-107. Worthless checks.

Cited in State v. Dickens, 41 N.C. App. 388, 255 S.E.2d 212 (1979).

Article 19B.

Financial Transaction Card Crime Act.

§ 14-113.9. Financial transaction card theft.

Editor's Note.—
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-113.17. Punishment and penalties.

Editor's Note.—
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Article 20.

Frauds.

§ 14-118.4. Extortion.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

Editor's Note.—
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-121. Selling of certain forged securities.

Editor's Note.—
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979. c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-122. Forgery of deeds, wills and certain other instruments.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-123. Forging names to petitions and uttering forged petitions.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-124. Forging certificate of corporate stock and uttering forged certificates.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-127. Willful and wanton injury to real property.

Applied in State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

§ 14-129.1: Repealed by Session Laws 1979, c. 964, s. 2, effective July 1, 1980.

§ 14-136. Setting fire to grass and brushlands and woodlands.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-141. Burning or otherwise destroying crops in the field.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-145. Unlawful posting of advertisements.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 14-150. Disturbing graves.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Applied in Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979).

§ 14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; civil liability.

Applied in State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979).

ARTICLE 23.

Trespasses to Personal Property.

§ 14-163. Poisoning livestock.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 24.

Vehicles and Draft Animals — Protection of Bailor against Acts of Bailee.

§ 14-168.1. Conversion by bailee, lessee, tenant or attorney-in-fact.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 13, effective March 1, 1981, and applicable to offenses committed on or after that date, will amend this section by inserting "Class H" preceding "felony" at the end of the first sentence in the second paragraph.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-178. Incest between certain near relatives.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Intercourse with Illegitimate Daughter.— In accord with 1979 Cum. Supp. See State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850 (1980).

Sufficiency of Evidence. — Where defendant was charged with incest in violation of this section, and the State's evidence established that defendant had sexual intercourse with his stepchild, and that defendant knew the person was related to him, the three elements of the crime of incest were sufficiently established as a matter of law and this is sufficient evidence of a violation of this section to take to a jury. State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979).

§ 14-183. Bigamy.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-190.8. Dissemination to minors 12 years of age or younger.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 14-202. Secretly peeping into room occupied by female person.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 14-202.1. Taking indecent liberties with children.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 670, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Cited in State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Turgeon, 44 N.C. App. 547, 261 S.E.2d 501 (1980).

ARTICLE 26A.

Adult Establishments.

§ 14-202.10. Definitions.

Constitutionality. —
This Article does not violate equal protection. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

The unequal treatment of commercial establishments involved in this Article is based most essentially on the different effects they are considered to have on their surroundings. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Under this Article the incidental restriction on First Amendment interests is no greater than is essential to furtherance of the state's interest. The means chosen by North Carolina in its effort to eliminate the undesired secondary effects of adult establishments is one of the least burdensome means the state could have chosen. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

On its face this Article is a permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article furthers an important or substantial interest. North Carolina has a substantial interest in maintaining a stable, healthful environment in its cities. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article does not violate the constitutionally protected right of privacy. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article is merely a regulation of the place and manner of expression, without proscription of that expression, of the type not forbidden by the First Amendment. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

While the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, those limits are not exceeded by the relocation burden involved in this Article. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Whether or not this Article is a true zoning law, it is a legitimate exercise of the police power, under which the state may limit the use of private property for the public welfare. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Adult establishments which clearly came within the terms of this Article lacked standing to challenge the Article for vagueness. But even were they granted standing to raise this issue, the statute would withstand a vagueness challenge. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Purpose of Article. — This Article is aimed at prohibiting a "supermarket" marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article is within the concept of the public welfare that defines the limits of the police power. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

The essential regulation implemented by this Article is of location. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

§ 14-202.11. Restrictions as to adult establishments.

Constitutionality. —

This Article does not violate equal protection. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

The unequal treatment of commercial establishments involved in this Article is based most essentially on the different effects they are considered to have on their surroundings. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Under this Article the incidental restriction on First Amendment interests is no greater than is essential to furtherance of the state's interest. The means chosen by North Carolina in its effort to eliminate the undesired secondary effects of adult establishments is one of the least burdensome means the state could have chosen. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

On its face this Article is a permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article furthers an important or substantial interest. North Carolina has a substantial interest in maintaining a stable, healthful environment in its cities. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article does not violate the constitutionally protected right of privacy. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article is merely a regulation of the place and manner of expression, without proscription of that expression, of the type not forbidden by the First Amendment. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

While the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, those limits are not exceeded by the relocation burden involved in this Article. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Whether or not this Article is a true zoning law, it is a legitimate exercise of the police power, under which the state may limit the use of private property for the public welfare. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Adult establishments which clearly came within the terms of this Article lacked standing to challenge the Article for vagueness. But even were they granted standing to raise this issue, the statute would withstand a vagueness challenge. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Purpose of Article. — This Article is aimed at prohibiting a "supermarket" marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th cir. 1979).

This Article is within the concept of the public welfare that defines the limits of the police power. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

The essential regulation implemented by this Article is of location. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

§ 14-202.12. Violations; penalties.

Constitutionality. —

This Article does not violate equal protection. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

The unequal treatment of commercial establishments involved in this Article is based most essentially on the different effects they are considered to have on their surroundings. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Under this Article the incidental restriction on First Amendment interests is no greater than is essential to furtherance of the state's interest. The means chosen by North Carolina in its effort to eliminate the undesired secondary effects of adult establishments is one of the least burdensome means the state could have chosen. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

On its face this Article is a permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article furthers an important or substantial interest. North Carolina has a substantial interest in maintaining a stable, healthful environment in its cities. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article does not violate the constitutionally protected right of privacy. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article is merely a regulation of the place and manner of expression, without proscription of that expression, of the type not forbidden by the First Amendment. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

While the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, those limits are not exceeded by the relocation burden involved in this Article. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Whether or not this Article is a true zoning law, it is a legitimate exercise of the police power, under which the state may limit the use of private property for the public welfare. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Adult establishments which clearly came within the terms of this Article lacked standing to challenge the Article for vagueness. But even were they granted standing to raise this issue, the statute would withstand a vagueness challenge. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

Purpose of Article. — This Article is aimed at prohibiting a "supermarket" marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

This Article is within the concept of the public welfare that defines the limits of the police power. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

The essential regulation implemented by this Article is of location. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. Punishment for perjury.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-211. Perjury before legislative committees.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-212. Perjury in court-martial proceedings.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-214. False statement to procure benefit of insurance policy or certificate.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Article 29.

Bribery.

§ 14-217. Bribery of officials.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-218. Offering bribes.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-219. Bribery of legislators.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-220. Bribery of jurors.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 30.

Obstructing Justice.

§ 14-221. Breaking or entering jail with intent to injure prisoners.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-221.1. Altering, destroying, or stealing evidence of criminal conduct.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-221.2. Altering court documents or entering unauthorized judgments.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 14, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by inserting "Class H" preceding "felony" at the end of the section.

§ 14-223. Resisting officers.

There is a distinction between, etc. —
The offense of unlawfully resisting, delaying or obstructing a public officer in the discharge of a duty of his office, is not a lesser degree of the offense of assaulting a law-enforcement officer while he is discharging or attempting to discharge a duty of his office. This does not eliminate the possibility that the facts in a given case might constitute a violation of both statutes. In such a case the defendant could not be punished twice for the same conduct. State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Applied in State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979); State v. Dudley, 45 N.C. App. 295, 265 S.E.2d 235 (1980).

§ 14-225.2. Harassment of and communication with jurors.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 15, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by substituting "Class I felony" for "felony punishable by fine, imprisonment up to five years, or both" at the end of the first sentence in subsection (a).

ARTICLE 31.

Misconduct in Public Office.

§ 14-230. Willfully failing to discharge duties.

Cited in State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

§ 14-233. Making false report by bank examiners; accepting bribes.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-250. Publicly owned vehicle to be marked.

Application of Section. — This section does not apply to vehicles owned by an area mental health, mental retardation and substance abuse authority. See opinion of Attorney General to Dr. Sarah T. Morrow, Secretary, Department of Human Resources, Oct. 10, 1979.

Article 32.

Misconduct in Private Office.

§ 14-254. Malfeasance of corporation officers and agents.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Indictments Quashed. — Indictments charging the defendant with corporate malfeasance in violation of this section must be quashed where they allege an intent "to defraud or to deceive the said Housing Authority of the City of Lumberton, North Carolina," since this section requires that they allege an accompanying intent to injure, defraud, or deceive an officer of the corporation. State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

Article 33.

Prison Breach and Prisoners.

§ 14-256. Prison breach and escape from county or municipal confinement facilities or officers.

A juvenile detention home or center is not a "prison, jail, or lockup" within the meaning of this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

§ 14-258. Conveying messages and weapons to or trading with convicts and other prisoners.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or intoxicating liquor to inmates of charitable, mental or penal institutions or local confinement facilities.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of

the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-258.2. Possession of dangerous weapon by prisoner.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-258.3. Taking of hostage, etc., by prisoner.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-259. Harboring or aiding escaped prisoners.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-263: Repealed by Session Laws 1979, c. 760, s. 4, effective March 1, 1981.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of the repeal to March 1, 1981.

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ 14-277.1. Communicating threats.

Applied in State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36.

Offenses against the Public Safety.

§ 14-278. Willful injury to property of railroads.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-282. Displaying false lights on seashore.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 15, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by substituting "Class H felony" for "felony, and shall be imprisoned in the State's prison for not less than four months nor more than ten years" at the end of the section.

§ 14-284.2. Dumping of toxic substances.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 17, effective March 1, 1981, and applicable to offenses committed on or after that date, amends subsection (a) of this section to read as follows:

"(a) It shall be unlawful to deposit, place, dump, discharge, spill, release, burn, incinerate, or otherwise dispose of any toxic substances as defined in this section or radioactive material as defined in G.S. 104E-5 into the atmosphere, in the waters, or on land, except where such disposal is conducted pursuant to federal or State law, regulation, or permit. Any person who willfully violates the provisions of this section shall be guilty of a Class H felony. The fine authorized by G.S. 14-1.1(a)(8) for a conviction under this section may include a fine of up to one hundred thousand dollars ($100,000) per day of violation."

Article 36A.

Riots and Civil Disorders.

§ 14-288.1. Definitions.

Applied in State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322 (1980).

§ 14-288.2. Riot; inciting to riot; punishments.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

This section is constitutionally valid. — This section is not unconstitutionally vague. State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322 (1980).

The component elements that constitute the crime of riot, etc. —

In accord with 1979 Cum. Supp. See State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322 (1980).

Involuntariness Does Not Negate Fact of Assemblage. — While an assemblage of prison inmates is involuntary, the involuntariness does not negate the fact of an assemblage within the meaning of subsection (a) of this section. State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322 (1980).

§ 14-288.6. Looting; trespass during emergency.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-288.9. Assault on emergency personnel; punishments.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-292.1. Bingo and raffles.

Raffle Offering Merchandise as Prize. — An exempt organization may legally sponsor a raffle which offers merchandise as a prize; the prize need not be in the form of cash. Only a cash prize is limited in the amount of five hundred dollars ($500). See opinion of Attorney General to Mr. R. Michael Jones, Counsel for the Wilson County School System, Sept. 17, 1979.

§ 14-309.1. Defense to possession; antique slot machines. — (a) In any prosecution for possession of a slot machine or device as defined in G.S. 14-306, it is a defense that the slot machine was not intended to be used in the operation or promotion of unlawful gambling activity or enterprise and that the slot machine is an antique. For purposes of this section a slot machine manufactured 25 years ago or earlier is conclusively presumed to be an antique.

(b) When a defendant raises the defense provided in subsection (a), any slot machine seized from the defendant shall not be destroyed or otherwise altered until a final court determination is rendered. If the court determines that the defense has been proved the slot machine shall be returned immediately to the defendant. (1979, 2nd Sess., c. 1090.)

ARTICLE 39.

Protection of Minors.

§ 14-318.4. Child abuse a felony.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 18, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by substituting "Class I felony" for "felony punishable by imprisonment for a period not to exceed five years" at the end of subsection (a).

§ 14-320.1. Transporting child outside the State with intent to violate custody order.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 40.

Protection of the Family.

§ 14-322.1. Abandonment of child or children for six months.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 41.

Intoxicating Liquors.

§ 14-329. Manufacturing, trafficking in, transporting, or possessing poisonous liquors.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 51.

Protection of Athletic Contests.

§ 14-373. Bribery of players, managers, coaches, referees, umpires or officials.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-374. Acceptance of bribes by players, managers, coaches, referees, umpires or officials.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-377. Intentional losing of athletic contest or limiting margin of victory or defeat.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 52.

Miscellaneous Police Regulations.

§ 14-398. Theft or destruction of property of public libraries, museums, etc.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 14-401. Putting poisonous foodstuffs, etc., in certain public places, prohibited.

Constitutionality. — This section is not unconstitutionally vague since the General Assembly intended to prohibit putting poison outside virtually everywhere where an innocent child or animal could find it. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Burden with Respect to Pest Control Exception. — The insect control and rat extermination exception in this section is neither an element of the crime nor an affirmative defense thereto but is instead a "hybrid" factor in determining criminal liability: the State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a nonfrivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State. In sum, the exception is not a sufficiently independent, distinct substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself to put all the "onus" of proof on the defendant. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Requirements of Indictment or Warrant. — An indictment or warrant for an arrest under this section need not set forth a charge that defendant's conduct is not within the insect control and rat extermination exception to the statute. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Concrete patio held within definition of section. See State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Rat Poisons Used for Other Purposes. — While parathion is a poison used in rat extermination, if it is put out for purposes other than rat extermination it comes within the scope of the statutory prohibition. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

§ 14-401.11. Distribution of certain food at Halloween and all other times prohibited.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 52A.

Sales of Weapons in Certain Counties.

§ 14-404. Applicant must be of good moral character; weapon for defense of home; sheriff's fee.

Local Modification. — Catawba: 1979, 2nd Sess., c. 1322; Wake: 1979, 2nd Sess., c. 1322.

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 59.

Public Intoxication.

§ 14-446. Disposition of defendant acquitted because of alcoholism.

Editor's Note. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

ARTICLE 60.

Computer-Related Crimes.

§ 14-454. Accessing computers.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 19, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by inserting "Class H" preceding "felony" near the beginning of the introductory paragraph in subsection (a).

§ 14-455. Damaging computers and related materials.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 20, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by inserting "Class H" preceding "felony" in subsection (a).

§ 14-457. Extortion. — Any person who verbally or by a written or printed communication, maliciously threatens to commit an act described in G.S.

14-455 with the intent to extort money or any pecuniary advantage, or with the intent to compel any person to do or refrain from doing any act against his will, is guilty of a felony. (1979, c. 831, s. 1.)

Editor's Note. — This section is set out to correct an erroneous section reference in the 1979 Cumulative Supplement.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 21, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by inserting "Class H" preceding "felony" at the end of the section.

Chapter 15.

Criminal Procedure.

Article 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.

Scope and Objects of Search Must Be Included in Warrant. — Unless an administrative inspection warrant advises the owner or possessor of the property proposed to be searched of the scope and objects of the search, beyond which limits the inspector may not go, it does not meet the requirements of subsections (d)(3) of this section. In short, a valid search warrant serves not only to authorize a search of premises but also to afford reasonable notice to the possessor of property of the nature and extent of any search that is to be conducted. Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

When Affidavit May Be Notice of Extent of Search. — If the warrant and the affidavit are to be construed together to provide sufficient proof of authority and notice of the extent of the proposed search, there must be an express reference to the affidavit in the warrant which is sufficient to put a reasonable person on notice of its incorporation. It is not enough that a warrant and its supporting affidavit be served together as a unit for the affidavit to serve to uphold the validity of the warrant. Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

Article 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

Cited in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

§ 15-144.1. Essentials of bill for rape.

Editor's Note. —

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Applied in State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980).

Cited in State v. Perry, 298 N.C. 502, 259 S.E.2d 496 (1979).

Article 17.

Trial in Superior Court.

§ 15-173. Demurrer to the evidence.

On motion to nonsuit, the court is required, etc. —

To withstand defendant's motion to dismiss, the State must have presented evidence of every essential element of the crime. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

The trial court in considering motions under this section is concerned only with the sufficiency of the evidence to carry the case to

the jury and not with its weight. The trial court's function is to test whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

The test on a motion to dismiss is whether sufficient evidence has been presented to support a finding by the jury that defendant committed an offense with which he is charged. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

Section 15A-1227 compared. — Both this section and § 15A-1227 allow motions to dismiss to be made at the close of the State's evidence. However, they are not identical. This section provides that "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Although no such provision is contained in § 15A-1227, its enactment did not create a new type of motion to challenge the sufficiency of the evidence. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

A challenge to the sufficiency of the evidence to sustain a conviction is still properly made by either a motion for dismissal or a motion for judgment as in the case of nonsuit. Both motions were known to the law for many years prior to the enactment of § 15A-1227. The motion for dismissal referred to in § 15A-1227 is the same motion for dismissal referred to in this section. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both this section and § 15A-1227. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Same — Waiver. —

Where defendant's motion to dismiss made at the close of the State's evidence was denied, and following the denial of the motion, he put on evidence in his own behalf, and no motion was made at the conclusion of all the evidence, defendant, therefore, waived his prior motion and cannot bring it forward as appealable error. State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

Under this section, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of §§ 15A-1227(d) and 15A-1446(d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Sufficiency of Evidence. —

In accord with 30th paragraph in original. See State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

In ruling on a motion to dismiss, the court must consider the evidence in the light most favorable to the State, and may consider the defendant's evidence only if it is favorable to the State or if it serves to explain the State's evidence without conflicting with it. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

In considering a motion to dismiss or a motion for judgment as in case of nonsuit, the evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

Appeal of Denial of Motion without Exception in Record. — A defendant may properly present on appeal the questions enumerated in Rule 10(a) of the Rules of Appellate Procedure without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under this section without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

Applied in State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980).

Cited in State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

ARTICLE 20.

Suspension of Sentence and Probation.

§ 15-205. Duties and powers of the probation officers.

Editor's Note. — The historical citation to this section as it appears in the replacement volume should include 1977, c. 711, s. 18.

ARTICLE 23.

Expunction of Records.

§ 15-223. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.

Where Several Misdemeanor Offenses Consolidated for Trial. — Where a person under the age of 18 years, who has not previously or subsequently been convicted of any offense, is charged with several misdemeanor offenses, the charges are consolidated for trial and judgment, and the sentence imposed is within the statutory limit for conviction of a single offense, the court may order expungement of the record pursuant to this section. See opinion of Attorney General to Honorable Russell G. Walker, Jr., District Attorney, Nineteenth-B Prosecutorial District, Aug. 28, 1979.

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

Article 35.

Speedy Trial.

Sec.
15A-701. Time limits and exclusions.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 56.

Incapacity to Proceed.

15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 81A.

Sentencing Persons Convicted of Felonies.

15A-1340.1. Applicability of Article 81A; life sentence.
15A-1340.2. Definitions.
15A-1340.3. Purpose of sentencing.
15A-1340.5. [Transferred.]
15A-1340.6. [Repealed.]
15A-1340.7. Service of term of imprisonment; credit for good behavior; Sec.
prisoner conduct rules; informing prisoner of release date; reentry parole and committed youthful offender parole.

Article 82.

Probation.

15A-1343. Conditions of probation.

Article 83.

Imprisonment.

15A-1354. Concurrent and consecutive terms of imprisonment.

Article 85.

Parole.

15A-1370.1. Applicability of Article 85.

SUBCHAPTER XIV. CORRECTION OF ERROR AND APPEAL.

Article 90.

Appeals from Magistrates and District Court Judges.

15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.

SUBCHAPTER I. IN GENERAL.

ARTICLE 4.

Entry and Withdrawal of Attorney in Criminal Case.

§ 15A-144. Withdrawal of attorney with permission of court.

Applied in State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 11.

Search Warrants.

§ 15A-242. Items subject to seizure under a search warrant.

Photographs and Letters Held Admissible as Evidence of Identity. — Where deputies searched a mobile home pursuant to a validly issued "occupant warrant" which specified heroin as the object of the search, and from the trailer's bathroom, a

substance later determined to be heroin was seized, and after the heroin was discovered, letters and photographs which had been seen earlier were also taken from the adjoining bedroom, the photographs and letters were admissible into evidence pursuant to § 15A-253 since under subdivision (4) of this section they constituted evidence of the identity of a person participating in an offense. State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980).

Applied in State v. Armstrong, 45 N.C. App. 40, 262 S.E.2d 370 (1980).

§ 15A-243. Who may issue a search warrant.

Cited in State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

§ 15A-244. Contents of the application for a search warrant.

"Probable Cause". —

In accord with 4th paragraph in original. See State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Probable cause, as used in the Fourth Amendment, subdivision (2) of this section, and § 15A-245, means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Harris, 43 N.C. App. 184, 258 S.E.2d 415 (1979).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

When Probable Cause Exists. —

In accord with 7th paragraph in original. See State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Whether probable cause exists for the issuance of a search warrant depends upon a practical assessment of the relevant circumstances. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Probable cause, as used in the Fourth Amendment, § 15A-244(2) and this section, means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Harris, 43 N.C. App. 184, 258 S.E.2d 415 (1979).

Basis Where Electronic Tracking Beepers Used. — See State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979).

Resolution of Doubtful Cases. —

Each case must be decided on its own facts and reviewing courts are to pay deference to judicial determinations of probable cause. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

§ 15A-249. Officer to give notice of identity and purpose.

Editor's Note. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Effect of Exigent Circumstances. — In a search and seizure case, where the exigent circumstances are adequate to justify the warrantless search of defendant's house by officers under the plain view doctrine, they would also be sufficient to excuse the officers from the knock and announce requirement. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979).

§ 15A-251. Entry by force.

Editor's Note. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Effect of Exigent Circumstances on Announcement Requirement. — In a search and seizure case, where the exigent

circumstances are adequate to justify the warrantless search of defendant's house by officers under the plain view doctrine, they would also be sufficient to excuse the officers from the knock and announce requirement. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979).

§ 15A-252. Service of a search warrant.

Compliance where actual reading of search warrant rendered impossible because of active obstruction of officers. See State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

Applied in State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980); State v. Armstrong, 45 N.C. App. 40, 262 S.E.2d 370 (1980).

§ 15A-255. Frisk of persons present in premises or vehicle to be searched.

Editor's Note. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.

Editor's Note. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

§ 15A-259. Application of Article to all warrants; exception as to inspection warrants and special riot situations.

The requirements of this Article apply only to searches made under warrants. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979).

Article 14.

Nontestimonial Indentification.

§ 15A-278. Contents of order.

Cited in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 15A-281. Nontestimonial identification order at request of defendant.

Cited in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-303. Criminal summons.

Cited in State v. Charlotte Liberty Mut. Ins. Co., 298 N.C. 270, 258 S.E.2d 343 (1979).

§ 15A-305. Order for arrest.

Editor's Note. — The historical citation to this section as it appears in the replacement volume should include 1977, c. 711, s. 21.

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

I. GENERAL CONSIDERATION.

Applied in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Whitehead, 42 N.C. App. 506, 257 S.E.2d 131 (1979); State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980); State v. Whitt, 299 N.C. 393, 261 S.E.2d 914 (1980); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980).

II. ARREST WITHOUT WARRANT.

A. In General.

Information given by one officer, etc. — Probable cause for an arrest can be imputed from one officer to others acting at his request. The officers receiving the request are entitled to assume that the officer requesting aid had probable cause to believe that a crime had been committed. If the transmitting officer did not have probable cause, the arrest would be illegal. State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

B. Illustrative Cases.

2. Offense Out of Presence of Officer.

Where defendant was in an automobile traveling away from the scene of the crime, the arresting officers were warranted in the belief that the defendant would not be apprehended unless immediately arrested. Thus, in arresting the defendant without a warrant for a misdemeanor offense not committed in their presence, the arresting officers complied with subsection (b) of this section, and the arrest was both constitutionally valid and legal. State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

Local Modification: Village of Pinehurst, 1979, 2nd Sess., c. 1168.

Violation of Section Held Not to Require Exclusion of Evidence. — Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion from the evidence of a pistol seized during the stop. Furthermore, even if the stop were an

arrest in terms of subsection (b) of this section, this is not a substantial violation of Chapter 15A which would require exclusion of the evidence under § 15A-974. State v. Harris, 43 N.C. 346, 258 S.E.2d 802 (1979).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

Editor's Note. —

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Section Not Mandatory Procedure Affecting Validity of Trial. — The failure of law-enforcement personnel in complying with the provisions of this section and § 15A-511 can result in the violation of a person's constitutional rights. However, these statutes do not prescribe mandatory procedures affecting the validity of a trial. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979).

Subdivision (5) Not Applicable to Breathalyzer Tests. — The legislature did not intend for the "reasonable time" contemplated by subdivision (5) of this section to apply to the specialized situation contemplated by § 20-16.2, a civil matter involving the administrative removal of driving privileges as a result of refusing to submit to a breathalyzer test. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

§ 15A-502. Photographs and fingerprints.

Applied in State v. Hamilton, 298 N.C. 238, 258 S.E.2d 350 (1979).

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

Effect of Failure to Take Arrested Person before Magistrate. —

The failure of law enforcement personnel in complying with the provisions of § 15A-501 and this section can result in the violation of a person's constitutional rights. However, these statutes do not prescribe mandatory procedures affecting the validity of a trial. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979).

ARTICLE 26.

Bail.

§ 15A-533. Right to pretrial release in capital and noncapital cases.

First-Degree Murder Is "Capital Offense" Regardless of Date Committed. — Whether or not a particular defendant, depending upon the date his crime was committed, faces the death penalty, the crime of first-degree murder is a "capital offense" within the meaning of subsection (b) of this section, so that the release of such defendant on bail is a matter to be determined within the discretion of the trial judge. This is so notwithstanding that the trial itself may not be a "capital case" within the meaning of the jury selection statute, § 15A-1217. State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979).

§ 15A-536. Release after conviction in the superior court.

Discretion of Trial Court. — Under this section it is within the discretion of the trial court to grant or deny bail while a case is pending on appeal following conviction of defendant in superior court. State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979).

§ 15A-544. Forfeiture.

Constitutionality. — Subsection (h) does not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used in the public schools. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, cert. denied, 298 N.C. 302, 259 S.E.2d 303 (1979).

"Extraordinary Cause" Shown. — The trial court did not err in finding that the surety on a forfeited criminal appearance bond had shown "extraordinary cause" for remission to the surety of a portion of the amount forfeited where, after defendant was arrested for driving under the influence, the surety's personal efforts led to denial of any further bond for the defendant and resulted in defendant's detention on the assault charge for which the bondsman had secured defendant's appearance. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, cert. denied, 298 N.C. 302, 259 S.E.2d 303 (1979).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; rights 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.

Purpose. — This statute was designed not only to insure the protection of a defendant's constitutional rights, but also to ensure the orderly progression of a criminal proceeding. The first appearance is a clear and specific directive of the General Statutes and the appropriate officials would be well advised to abide by the prescribed procedures. Indeed, the State runs the risk, in failing to provide the first appearance, of being forced to trial again for an obviously guilty, but prejudiced, defendant. State v. Pruitt, 42 N.C. App. 240, 256 S.E.2d 249 (1979).

This section does not prescribe mandatory procedures, etc. —

In accord with original. See State v. Pruitt, 42 N.C. App. 240, 256 S.E.2d 249 (1979); 44 N.C. App. 27, 259 S.E.2d 802 (1979).

§ 15A-602. Warning of right against self-incrimination.

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-603. Assuring defendant's right to counsel.

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-604. Determination of sufficiency of charge.

The sufficiency of the charges is not determined in an adversarial setting through the introduction of evidence with examination and cross-examination of witnesses. Instead, this section simply recognizes that much time and trouble can be

saved if the district court judge has the authority at the initial appearance to dispose of cases where it is obvious from the relevant process papers that they are insufficient on their face to adequately bring a charge against the defendant. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-605. Additional proceedings at first appearance before judge.

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-606. Demand on waiver of probable-cause hearing.

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Article 31.

The Grand Jury and Its Proceedings.

§ 15A-623. Grand jury proceedings and operations in general.

Public Policy Underlying Subsection (e). — The public policy of this State against allowing a defendant at trial to cross-examine the witnesses before the grand jury in order to show the nature and character of the evidence upon which the bill of indictment was founded is codified in subsection (e) of this section. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

§ 15A-630. Notice to defendant of true bill of indictment.

Defendant Held Not Entitled to Notice. — Where counsel was appointed for a defendant on November 14, 1978, and a bill of indictment was returned on December 11, 1978, clearly defendant was not entitled to the benefits of the notice requirement of this section, since a reading of the statute reveals that its provisions are applicable to defendants "unless [they are] then represented by counsel of record." State v. Miller, 42 N.C. App. 342, 256 S.E.2d 512 (1979).

Article 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.

Quoted in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

§ 15A-644. Form and content of indictment; information or presentment.

Subdivision (a)(5) is merely directory; an indictment is not invalid because it contained no attestation clause that 12 or more grand jurors concurred in the findings of a true bill. State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

An indictment is not invalid merely because there is no specific expression in

the indictment that it is "a true bill." State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions.

(a1) Notwithstanding the provisions of subsection (a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1981, shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;

(2) Within 120 days from the first regularly scheduled criminal session of superior court held after the defendant has given notice of appeal in a misdemeanor case for a trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 120 days of that declaration; or

(5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(1979, 2nd Sess., c. 1317.)

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "1981" for "1980" near the end of the introductory paragraph in subsection (a1).

As the rest of the section was not changed by the amendment, only subsection (a1) is set out.

The Speedy Trial Act applies only to criminal prosecutions. In re Beddingfield, 42 N.C. App. 712, 257 S.E.2d 643 (1979).

And are inapplicable to juvenile proceedings. In re Beddingfield, 42 N.C. App. 712, 257 S.E.2d 643 (1979).

Cited in State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Johnson, 41 N.C. App. 423, 255 S.E.2d 275 (1979); State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-721. Definitions.

An extradition proceeding is intended to be a summary and mandatory executive proceeding. State v. Carter, 42 N.C. App. 325, 256 S.E.2d 535, cert. denied, 298 N.C. 301, 259 S.E.2d 302 (1979).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on detainers entered into; form and contents.

Defendant was not denied his right to a speedy trial under Art. III(a) of this section because he was not brought to trial within 180 days of his first request for a speedy trial where defendant first requested a speedy trial while he was in custody in New York awaiting trial in that state but before a detainer had been filed against him, and the period from the date a detainer was filed against defendant after his conviction in New York and his trial was less than 180 days. State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 43.

Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

§ 15A-811. Definitions.

Applied in State v. Locklear, 41 N.C. App. 292, 254 S.E.2d 653 (1979).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-902. Discovery procedure.

Applied in State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

Cited in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

§ 15A-903. Disclosure of evidence by the State; information subject to disclosure.

Editor's Note. —

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Legislative Intent. —

In accord with 1979 Cum. Supp. See State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Scope of Subsection (a). —

The correctness of a discovery order, presumably made pursuant to subdivision (a)(1), ordering disclosure of recorded statements made by defendant to witnesses, was questionable due to prior holdings that subdivision (a)(2) permits disclosure only of statements made by defendant to police officers. Statements made by defendant to witnesses are shielded from discovery by § 15A-904(a) even when those statements contain remarks made by defendant to those witnesses. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Where the trial ordered disclosure by the state of "any and all statements, written or oral, made by the defendant to . . . any other person or persons," he exceeded his authority under subdivision (a)(2), which restricts a defendant's discovery of his oral statements to those made by him to persons acting on behalf of the state. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Applicability of Subsection (d) Where Documents Used Only in Cross-examination. — The fact that the State did not offer the documents in question into evidence but merely used them on cross-examination does not mean that it was not error under subsection (d) of this section for the State to fail to disclose where disclosure of the documents in the possession of the State and which were intended to be used by the State in any manner was also essential to the preparation of defendant's defense. State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

List of State Witnesses. —

In accord with 2nd paragraph in original. See State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

Applied in State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980).

Cited in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

§ 15A-904. Disclosure of evidence by the State; certain reports not subject to disclosure.

Witnesses' Statements. —

Subsection (a) of this section is an express restriction on pretrial discovery of witnesses' statements that a trial judge has no authority to exceed in his discovery order. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

But subsection (a) does not bar, etc. —

Subsection (a) of this section shields oral statements by a defendant other than those made by him to persons acting on behalf of the State only from pretrial discovery. It does not bar the discovery of prosecution witnesses' statements at trial. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Applied in State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

Cited in State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

§ 15A-910. Regulation of discovery; failure to comply.

Particular Remedy, etc. —

In accord with 4th paragraph in 1979 Cum. Supp. See State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Applied in State v. Milano, 297 N.C. 485, 256 S.E.2d 154 (1979); State v. Locklear, 41 N.C. App. 292, 254 S.E.2d 653 (1979); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980).

Cited in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

Article 49.

Pleadings and Joinder.

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

Editor's Note. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Quoted in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to change crime; surplusage.

Joinder of Separate Offenses Arising from Same Act. — Neither the express language of § 15A-926(a) nor this section will support the contention that the two statutes, when taken together, reflect a legislative intent that separate offenses arising from the same acts or occurrences be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading. State v. Williams, 41 N.C. App. 287,

254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Applied in State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Cited in State v. Powell, 297 N.C. 419, 255 S.E.2d 154 (1979).

§ 15A-925. Bill of particulars.

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-926. Joinder of offenses and defendants.

I. GENERAL CONSIDERATION.

Editor's Note. —

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For article, "Prior Crimes as Evidence in Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

Consolidation Is within Discretion of Court. —

Separate offenses may be joined for trial when they arise from the same act or transaction, and the well-settled rule that the discretion of the trial court in joining cases for trial will not be disturbed absent a showing that the defendant has been deprived thereby of a fair trial, has not been abrogated by this Chapter and continues to apply. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Under this section there must be some sort of "transactional connection" between cases consolidated for trial. State v. Powell, 297 N.C. 419, 255 S.E.2d 154 (1979).

The nature of the offenses is one of the factors, etc. —

Although this section does not permit joinder of offenses solely on the basis that they are the same class, the nature of the offenses is a factor which may properly be considered in determining whether certain acts constitute parts of a single scheme or plan. State v. Street, 45 N.C. App. 1, 262 S.E.2d 365 (1980).

Determination of Prejudice Resulting from Joinder. — In determining whether a defendant has been prejudiced by joinder pursuant to this section, the question which must generally be addressed is whether the offenses are so separate in time and place and so distinct in circumstances as to render joinder unjust and prejudicial to the defendant. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Form of Criminal Pleading Where Offenses Joined. — Neither the express language of subsection (a) of this section nor § 15A-924 will support the contention that the two statutes, when taken together, reflect a legislative intent that separate offenses arising from the same acts or occurrences be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Applied in State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

Cited in State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

Discretion of Trial Judge. —

In accord with 2nd paragraph in original. See State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

§ 15A-928. Allegation and proof of previous convictions in superior court.

Cross-examination for Impeachment Purposes Following Stipulation. — In a prosecution for driving under the influence, third offense, it was not error for the trial court to allow the State to cross-examine the defendant concerning prior convictions of driving under the influence of intoxicants though he had stipulated for the purpose of trial that he had been so previously convicted since the evidence sought by the cross-examination of

the defendant was for impeachment purposes and not as substantive evidence of an element of the offense charged. State v. Crouch, 42 N.C. App. 729, 257 S.E.2d 646 (1979).

Instruction on Prior Convictions Following Stipulation. — In a prosecution of a defendant for driving under the influence, second offense, and driving while his license was revoked, fourth offense, where the defendant stipulated to previous convictions of those crimes, the trial court did not err in instructing jury with respect to defendant's prior convictions, since the harm was in the fact that evidence of these prior convictions was before the jury and not in the instructions concerning them, and it was not error to cross-examine the defendant on these prior convictions for impeachment purposes. State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

Article 51.

Arraignment.

§ 15A-942. Right to counsel.

Editor's Note. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

§ 15A-943. Arraignment in superior court; required calendaring.

Editor's Note. —
For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Article 52.

Motions Practice.

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

A motion in limine to exclude prejudicial evidence comes within the purview of subsection (a) of this section. State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980).

Trial Court's Discretion in Refusing to Hear Untimely Motion to Dismiss. — Where defendants' motion to dismiss came at the conclusion of the evidence, under either common-law practice or this section, the motion was untimely and was therefore addressed to the discretion of the trial judge. His exercise of that discretion in refusing to hear the motion is not reviewable on appeal. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

The trial court did not abuse its discretion in failing to rule on defendant's 26 pretrial motions until the day before the trial where only three months had elapsed since the filing of the first motion, defendant showed no vindictiveness on the part of the district attorney in not bringing the motions on for hearing earlier, and defendant showed no prejudice on the delay in ruling on the motions. State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

Applied in State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Street, 45 N.C. App. 1, 262 S.E.2d 365 (1980).

Cited in State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

§ 15A-954. Motion to dismiss; grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

The right to a full evidentiary hearing is not inherent in this section. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

Applied in State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Cited in State v. Johnson, 42 N.C. App. 234, 256 S.E.2d 297 (1979); State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

§ 15A-957. Motion for change of venue.

Inherent Authority to Change Venue in Interests of Justice. — The statutory power of the court to change the venue of a trial is limited to transferring the case to an adjoining county in the judicial district or to another county in an adjoining judicial district. Notwithstanding this apparent statutory limitation upon the power of a court to order a change of venue, a court of general jurisdiction, of which the superior court is one, has the inherent authority to order a change of venue in the interests of justice. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

Burden of Showing Prejudice on Defendant. —

In accord with original. See State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979).

Allegation of General Ill Will in Community. — Where defendant presents nothing more than an allegation of general ill will in the community, there is no evidence which would support a reversal for abuse of discretion. State v. Whitaker, 43 N.C. App. 600, 259 S.E.2d 316 (1979).

§ 15A-958. Motion for a special venue from another county.

Discretion of Trial Judge. —

In accord with 4th paragraph in original. See State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

Instruction Where Insanity Defense Not in Fact Presented. — Where defendant filed notice of intent to raise the defense in insanity, as required by this section, and, pursuant to § 15A-1213, the judge informed prospective jurors of the possibility that defendant might rely on the affirmative defense of insanity, it was proper at the close of all the evidence for the trial judge to inform the jurors that the insanity defense indeed had not been presented in order to eliminate any idea the jury might have had that they were still to consider the defense. State v. Hart, 44 N.C. 479, 261 S.E.2d 250 (1980).

Article 53.

Motion to Suppress Evidence.

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

A defendant has the burden of establishing that he is an "aggrieved" party before his motion to suppress will be considered. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

When Defendant "Aggrieved". — A defendant is "aggrieved" and "may move to suppress evidence" under this section only when it appears that his personal rights, not those of some third party, may have been violated. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

Defendant Not "Aggrieved". —

Where defendant was charged with felonious conspiracy to possess stolen property, but defendant was not present at the residence that was searched, and neither alleged nor showed any possessory or proprietary interest in either residence or any of the items seized and listed in the indictment charging him with felonious conspiracy to possess stolen property, defendant was not an aggrieved party for purposes of this section and thus lacked standing to contest a search allegedly violating his Fourth Amendment rights. State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

Evidence Seized in Stop Outside Sheriff's Jurisdiction. — Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion from the evidence of a pistol seized during the stop. Furthermore, even if the stop were an arrest in terms of § 15A-402(b), this is not a substantial violation of Chapter 15A which would require exclusion of the evidence under this section. State v. Harris, 43 N.C. 346, 258 S.E.2d 802 (1979).

Applied in State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979).

Quoted in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

Cited in State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

Effect of Failure to Make Pretrial Motion. — When no exception to making the motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Applied in State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

§ 15A-976. Timing of pretrial suppression motion and hearing.

Applied in State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

What Findings of Fact Must Include. — Subsection (f) of this section requires a judge to make findings of fact and conclusions of law when there is a motion to suppress. Such findings of fact must include findings on the issue of voluntariness. When the evidence is conflicting, the findings of fact must be sufficient to provide a basis for the judge's ruling. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

Findings of fact by the trial court judge are conclusive if they are supported by competent evidence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

Applied in State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

§ 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.

Scope of Subsection (a).—

Subsection (a) of this section permits a defendant to contest the validity of a search warrant by attacking the good faith of the affiant in providing the information, and not by attacking the factual accuracy of the information relied upon to establish probable cause. State v. Kramer, 45 N.C. App. 291, 262 S.E.2d 693 (1980).

Applied in State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

Notice of Intention to Appeal Required. — When a defendant intends to appeal from a suppression motion denial pursuant to subsection (b) of this section, he must give

notice of his intention to the prosecutor and the court before plea negotations are finalized or he will waive the appeal of right provisions of the statute. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979).

Appeal of Motion in Limine to Exclude Evidence. — Section 15A-1445 specifically authorizes the State to appeal from an order of the trial court allowing a motion to suppress under this section. If the motion made by the defendant was a motion in limine to exclude evidence and under the facts does not also qualify as a more limited motion to suppress under this section, the State has no right of direct appeal from the order, and the appeal must be dismissed. In such a situation the State may petition for a writ of certiorari under Rule 21 of the Rules of Appellate Procedure. State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980).

Motion Held to Be Motion in Limine. — Defendant's pretrial motion to exclude the results of a test on green vegetable matters on the ground that the motion was not conducted in a scientific manner was a motion in limine to exclude prejudicial evidence, rather than a motion to suppress under this section, since the motion was not based on constitutional objections nor on any substantial violations of Chapter 15A. Therefore, the State had no right under § 15A-1445 to appeal from the court's interlocutory order granting the motion. State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980).

Applied in State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979).

Cited in State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979); State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979); State v. Whitt, 299 N.C. 393, 261 S.E.2d 914 (1980); State v. Wynn, 45 N.C. App. 267, 262 S.E.2d 689 (1980).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report must be forwarded to defense counsel, or to the defendant if he is not represented by counsel, and to the district attorney. Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313.)

Editor's Note.—

The 1979, 2nd Sess., amendment substituted "must" for "shall" in the second sentence of subsection (b), added "and to the district attorney" at the end of that sentence, and deleted the former third sentence of subsection (b), which read "A copy of the covering statement shall be forwarded to the district attorney."

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

Constitutionality. — This State's statutory scheme for determining a defendant's capacity to proceed is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

Applied in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979); State v. Potts, 42 N.C. App. 357, 256 S.E.2d 497 (1979); State v. Womble, 44 N.C. App. 503, 261 S.E.2d 263 (1980).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

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.

Editor's Note.—
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Applied in State v. Puckett, 43 N.C. App. 153, 258 S.E.2d 393 (1979).

Cited in State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

Sources of Information in Subsection (c) Not Exclusive. — Subsection (c) of this section does not require the trial judge to elicit evidence from each, any or all of the enumerated sources. Those sources are not exclusive because the statute specifically so provides. The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest. State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

"A written statement of the defendant" as a source of information under subsection (c) of this section ordinarily consists of defendant's written answers to the questions contained in a document entitled "Transcript of Plea." State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

Applied in State v. Puckett, 43 N.C. App. 153, 258 S.E.2d 393 (1979); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

Applied in State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979).

§ 15A-1026. Record of proceedings.

Applied in State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

Article 61.

Granting of Immunity to Witnesses.

§ 15A-1051. Immunity; general provisions.

Standing to Challenge Grant of Immunity to Witness. — Defendants had no standing to challenge either the propriety or the effectiveness of a grant of immunity to a

witness testifying against them since the privilege against self-incrimination is a personal one. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1212. Grounds for challenge for cause.

The trial court did not err in failing to strike the entire jury panel even though the prosecutor's question, in inquiring into the fitness of jurors to serve, as to whether the jurors had formed an opinion that the defendant was guilty was clearly improper where the court sustained the defendant's objection to the question, and none of the jurors were permitted to respond to it. State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

§ 15A-1213. Informing prospective jurors of case.

Purpose.—
In accord with 1st paragraph in 1979 Cum. Supp. See State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

Instruction as to Insanity Defense Not in Fact Presented. — Where defendant filed notice of intent to raise the defense of insanity, as required by § 15A-959, and, pursuant to this section, the judge informed prospective jurors of the possibility that defendant might rely on the affirmative defense of insanity, it was proper at the close of all the evidence for the trial judge to inform the jurors that the insanity defense indeed had not been presented in order to eliminate any idea the jury might have had that they were still to consider the defense. State v. Hart, 44 N.C. 479, 261 S.E.2d 250 (1980).

§ 15A-1214. Selection of jurors; procedure.

Discretion of Trial Court.—
The provision of subsection (j) of this section vests in the trial judge discretion to allow individual voir dire and sequestration of jurors during voir dire. It is well settled in North Carolina that the trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

§ 15A-1215. Alternate jurors.

Disqualification and Replacement of Juror for Lack of Attention. — Trial court did not abuse its discretion in disqualifying a juror on grounds of "lack of attention" and substituting an alternate juror at the conclusion of the final arguments of counsel and court was not required to explain what was meant by "lack of attention." State v. Barbour, 43 N.C. App. 38, 258 S.E.2d 72 (1979).

Applied in State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

§ 15A-1217. Number of peremptory challenges.

This section does not authorize trial judges to permit either the State or a defendant to exercise more peremptory challenges than specified by statute. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Cited in State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1222. Expression of opinion prohibited.

Former Law Essentially Unchanged. — This section and § 15A-1232 repealed and replaced former § 1-180 effective July 1, 1978. The new provisions restate the substance of § 1-180 and the law remains essentially unchanged. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

Determination of Prejudice Resulting from Remarks. — Whether an accused was deprived of a fair trial by remarks by the judge during any stage of the trial must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant. State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979).

Statement of Parties' Contentions. — When a court undertakes to restate the contentions of the parties, it must fairly present the contentions of both parties without giving undue stress to those of either side. It is sufficient if the contentions are restated with reasonable accuracy. Any minor discrepancies or misstatements in the charge must be brought to the attention of the judge at trial. State v. White, 298 N.C. 430, 259 S.E.2d 281 (1979).

A trial judge's questions, propounded to a witness to clarify his confusing or contradictory testimony, do not constitute an expression of opinion unless a jury could reasonably infer that the questions intimated the court's opinion as to the witness's credibility, the defendants' guilt, or as to a factual controversy to be resolved by the jury. State v. Yellorday, 297 N.C. 574, 256 S.E.2d 205 (1979).

Omission of Word "Alleged" in Instruction. — Trial court's instruction to the jury that "if you are satisfied that the defendant was insane at the time of the robbery with a firearm he would be not guilty by reason of insanity and that would end the case" did not constitute an expression of opinion on a question of fact because of the one omission of the word "alleged" before "robbery with a firearm." State v. Linville, 43 N.C. App. 204, 258 S.E.2d 397 (1979).

Remark about Sentencing Prior to Jury Verdict. — Since it is obvious that a defendant will not be sentenced unless he is first found guilty, a judge's premature remarks about sentencing, in reponse to an inquiry prior to the time the jury reached a verdict by the foreman to the court as to whether the jury could make an "explanation" of its verdict, assumes that the jury has already reached a guilty verdict, and leaves little doubt that the judge expects the jury to find the defendant guilty. Such an assumption amounts to a unwarranted expression of opinion on defendant's guilt and thereby encourages the rendering of a guilty verdict. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

Applied in State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979); State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979); State v. Smith, 41 N.C. App. 600, 255 S.E.2d 210 (1979); State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980).

Cited in State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980); State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

§ 15A-1223. Disqualification of judge.

Applied in State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

§ 15A-1226. Rebuttal evidence; additional evidence.

Applied in State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979).

§ 15A-1227. Motion for dismissal.

Section 15-173 Compared. — Both § 15-173 and this section allow motions to dismiss to be made at the close of the State's evidence. However, they are not identical. Section 15-173 provides that "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Although no such provision is contained in this section, its enactment did not create a new type of motion to challenge the sufficiency of the evidence. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

A challenge to the sufficiency of the evidence to sustain a conviction is still properly made by either a motion for dismissal or a motion for judgment as in the case of nonsuit. Both motions were known to the law for many years prior to the enactment of this section. The motion for dismissal referred to in this section is the same motion or dismissal referred to in § 15-173. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both § 15-173 and this section. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Effect of Subsection (d) on Waiver of Right to Appeal under § 15-173. — Under § 15-173, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of subsection (d) of this section and § 15A-1446(d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Although defendant, under § 15-173, waived his motion for nonsuit made at the close of the State's evidence by presenting evidence and failing to renew his motion, pursuant to subsection (d) of this section and § 15A-1446(d)(5), defendant could have requested review of the sufficiency of all of the evidence without regard to whether the proper motion or exception had been made during trial. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

Court Limited to Determination, etc. — Upon defendant's motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

"Substantial Evidence" Test.—

To withstanding a motion to dismiss, there must be substantial evidence of all material elements of the offense. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979).

Suspicion Insufficient to Withstand Motion. — Upon defendant's motion for dismissal, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. This is true even though the suspicion so aroused by the evidence is strong. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

Applied in State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

Cited in State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979); State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

§ 15A-1231. Jury instructions.

Applied in State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

I. IN GENERAL.

This Section Is Essentially Same as Former Law. —

Section 15A-1222 and this section repealed and replaced former § 1-180 effective July 1, 1978. The new provisions restate the substance of § 1-180 and the law remains essentially unchanged. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

This section imposes a duty, etc. —

This section requires that the judge maintain absolute impartiality until the verdict has been rendered because the jury, out of great respect for him, is easily influenced by his slightest

suggestion. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

Applied in State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979); State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979); State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979); State v. Hoskins, 42 N.C. App. 108, 256 S.E.2d 290 (1979); State v. Horton, 44 N.C. App. 343, 260 S.E.2d 780 (1979).

Cited in State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Hart, 44 N.C. App. 479, 261 S.E.2d 250 (1980).

II. OPINION OF JUDGE.

A. General Consideration.

Section Not Confined to Charge. —

In accord with 5th paragraph in original. See State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979).

The criterion for determining, etc. —

Whether an accused was deprived of a fair trial by remarks by the judge during any stage of the trial must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant. State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979).

B. What Constitutes an Opinion.

Questioning of Witnesses. —

The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

A charge to the jury should present, etc. —

In accord with 5th paragraph in original. See State v. Walton, 41 N.C. App. 281, 254 S.E.2d 661 (1979).

Broadside Exception Untenable. —

In accord with 5th paragraph in original. See State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

B. Explanation Required.

1. In General.

Rule Stated. —

In accord with 2nd paragraph in original. See State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

Where the court recounted the evidence of the State and defendant, and the jury was then instructed what they would have to find from the evidence in order to find the defendant guilty or not guilty of the various charges, this satisfies the requirements of this section. State v. Benton, 42 N.C. App. 228, 256 S.E.2d 279 (1979).

Where Facts Are Simple. —

In accord with 3rd paragraph in original. See State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

2. Statement of Evidence.

Recapitulation Unnecessary. —

In accord with 3rd paragraph in original. See State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

The trial judge is not required to fully recapitulate all the evidence, but when he does so he must summarize the evidence in the case that is favorable to the defendant even though defendant presented no evidence. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

Failure to Summarize Evidence of Defendant. — When the court recapitulates fully the evidence of the State but fails to summarize, at all, evidence favorable to the defendant, he violates the clear mandate of the statute which requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given to the state and to the defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

Where the trial judge failed to summarize evidence which raised inferences favorable to defendant including evidence of defendant's prior statement to police officers and evidence elicited on cross-examination, this omission constituted error prejudicial to defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

It is not error for the court merely to consume more time in summarizing the State's evidence than it does in restating the evidence for defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

Contentions of Parties. —

While the trial judge is not required to state the contentions of the parties, when he undertakes to do so he must give equal stress to the contentions of both parties. This is true even when the defendant does not testify. He still has contentions regarding the case that arise from his plea of not guilty, from the State's evidence and from his cross-examination of the State's witnesses. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

C. Illustrative Cases.

2. Remarks Held Erroneous.

d. Miscellaneous Remarks.

Comment as to Recommendation of Mercy in Capital Case. — Any expression of opinion by the judge on the issue of the defendant's guilt or innocence results in prejudice to his case which is virtually impossible to cure. Thus, for example, the judge may not, in a capital case, apprise the jury as to whether it can make a recommendation of mercy since such a recommendation assumes a guilty verdict. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

§ 15A-1235. Length of deliberations; deadlocked jury.

Comment on Expense of Retrying Case. —

Where the jury foreman advised the court that in his opinion the jury could not reach a decision, it was error for the trial court to charge the jurors that if they did not agree upon a verdict another jury might be called upon to try the case; that the State and defendants had a tremendous amount of time and money invested; and that retrial involved a duplication of all the time and expense. State v. Lamb, 44 N.C. App. 251, 261 S.E.2d 130 (1979).

§ 15A-1237. Verdict.

This section is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Inquiry or Polling of Jury Not Barred. — The statutory requirement of a written jury verdict does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

Specification of Theory of Guilty Verdict. — Where, in an indictment for murder, the evidence would support two guilty verdicts to the charge of first-degree murder, guilty by reason of the felony-murder rule or guilty by reason of premeditation and deliberation, it was appropriate for the trial court to require the jury to specify in its verdict the theory upon which they found defendant guilty, since if the jury's verdict specified the theory, the court could sentence appropriately. The required use of a specific written verdict in this case is consistent with the intent of this section and it enabled the trial court to avoid the difficulty which that provision seeks to alleviate. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Verdict Should Be Received and Recorded. — If the verdict substantially answers the issue(s) so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury, then the verdict should be received and recorded. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

§ 15A-1238. Polling the jury.

Polling Not Barred by Written Verdict. — The statutory requirement of a written jury verdict does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

§ 15A-1240. Impeachment of the verdict.

Juror's Knowledge of Possibility of Parole. — Testimony by a newspaper reporter that a juror told her that the jury had recommended the death penalty for defendant because the jurors knew that defendant would be eligible for parole in 20 years if he was sentenced to life imprisonment was not rendered admissible to impeach the verdict by subdivision (c)(1) since a juror's knowledge that there is a possibility of parole for a defendant would not "violate the defendant's constitutional right to confront the witnesses against him." State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

In Addition to Photographs in Jury Room. — In a first-degree murder case, the trial court did not err in excluding from the record on appeal a juror's affidavit stating in substance that photographic exhibits of the victim's body were taken into the jury room,

and a newspaper clipping indicating that the possibility of parole was a major consideration in the jury's deliberation on whether to recommend the death penalty, since no purpose would have been served by inclusion of the juror's affidavit and the newspaper clipping other than impeachment of the verdict. Any evidence relative to the jury's consideration of the possibility of parole would be excluded by subsection (a) of this section, and the affidavit concerning the pictures could not have been considered pursuant to subdivision (c)(1) of this section because the pictures had been admitted into evidence and in no event would consideration of them violate the defendant's constitutional right to confront the witnesses against him. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

§ 15A-1242. Defendant's election to represent himself at trial.

Applied in State v. Brincefield, 43 N.C. App. 49, 258 S.E.2d 81 (1979).

§ 15A-1243. Standby counsel for defendant representing himself.

Applied in State v. Brincefield, 43 N.C. App. 49, 258 S.E.2d 81 (1979).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

§ 15A-1334. The sentencing hearing.

Continuance within Discretion of Trial Judge. — Whether to allow a continuance of the sentencing hearing lies within the discretion of the judge upon a showing of what he determines to be good cause. State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979).

Trial court did not violate this section by calling a detective on its own motion to testify at defendant's sentencing hearing. State v. Smith, 41 N.C. App. 600, 255 S.E.2d 210 (1979).

Failure to Hold Hearing Not Prejudicial. — Where, after the jury returned with its verdict, the trial judge asked if counsel were ready for the sentencing hearing, and then proceeded to sentence defendant without conducting the hearing as required by statute, inasmuch as defense counsel had conceded in oral argument that she had no further evidence to submit at the hearing, the defendant was not prejudiced by the trial judge's failure to conduct the hearing. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

Applied in State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

§ 15A-1335. Resentencing after appellate review.

Applied in State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§ 15A-1340.1. Applicability of Article 81A; life sentence. — (a) This Article shall apply to the sentencing of all persons convicted of felonies, other than Class A or Class B felonies, that occur on or after March 1, 1981.

(b) Repealed by Session Laws 1979, 2nd Sess., c. 1316, s. 31, effective March 1, 1981. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, ss. 30, 31.)

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of this Article to March 1, 1981.

Session Laws 1979, 2nd Sess., c. 1316, s. 30, effective March 1, 1981, and applicable to offenses committed on or after that date, amended this section by rewriting subsection (a) and repealing subsection (b) of the section as enacted by Session Laws 1979, c. 760, s. 2.

§ 15A-1340.2. Definitions. — The following definitions apply in this Article.

(4) Prior Conviction. — A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, and judgment has been entered thereon, and the time for appeal has expired, or the conviction has been finally upheld on direct appeal.

(1979, 2nd Sess., c. 1316, s. 32.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective March 1, 1981, and applicable to offenses committed on or after that date, rewrote the definition of "prior conviction" in subdivision (4).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (4) are set out.

§ 15A-1340.3. Purpose of sentencing. — The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, s. 33.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective March 1, 1981, and applicable to offenses committed on or after that date, deleted "who have demonstrated a propensity to commit further crimes" following "restraining offenders" near the middle of the section.

§ 15A-1340.5: Transferred to § 14-2.2 by Session Laws 1979, 2nd Sess., c. 1316, s. 34, effective March 1, 1981.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 48, provides that the act shall apply to offenses committed on or after March 1, 1981.

§ 15A-1340.6: Repealed by Session Laws 1979, 2nd Sess., c. 1316, s. 35, effective March 1, 1981.

Editor's Note. — Session Laws 1979, c. 1316, 2nd Sess., s. 48, provides that the act shall become effective on March 1, 1981, and shall apply to offenses committed on or after that date.

§ 15A-1340.7. Service of term of imprisonment; credit for good behavior; prisoner conduct rules; informing prisoner of release date; reentry parole and committed youthful offender parole. — (a) An active term of imprisonment imposed for a felony shall be served in the custody of the Department of Correction or a jail, subject to the provisions of G.S. 15A-1352. Credit toward service of the term shall be given for time already served as provided by Article 19A of Chapter 15 of the General Statutes, and good behavior in prison or jail as provided by subsection (b) of this section.

(b) A prisoner committed to the Department of Correction or a jail to serve a sentence for a felony shall receive credit for good behavior at the rate of one day deducted from his prison or jail term for each day he spends in custody without a major infraction of prisoner conduct rules. Prisoner conduct rules shall be issued by the Secretary of Correction with regard to all prisoners serving prison or jail terms for felony convictions. The rules shall clearly state types of forbidden conduct and a copy of the rules shall be given and explained to each convicted prisoner upon entry into prison or jail. Infractions of the rules shall be of two types, major and minor infractions. Major infractions shall be punishable by forfeiture of specific amounts of accrued good behavior time, disciplinary segregation, loss of privileges for specific periods, demotion in custody grade, extra work duties, or reprimand. Minor infractions shall be punishable by loss of privileges for specific periods, demotion in custody grade, extra work duties, or reprimand, but not by loss of accrued good behavior time or disciplinary segregation. A prisoner charged with infraction of conduct rules shall receive notice of the charge and be afforded a hearing.

(c) Within 30 days of a convicted felon's entry into prison or jail to serve his sentence, the Department of Correction or jailer shall inform him in writing of the date on which he will be released if he receives the maximum amount of time off for good behavior under subsection (b) of this section, and of the date on which he will be released if he receives no such credit for good behavior.

(d) A prisoner committed to the Department of Correction or a jail to serve a sentence imposed for a felony is eligible for reentry parole as provided by Article 85A of Chapter 15A of the General Statutes, and, if sentenced as a committed youthful offender, to parole as provided by Articles 3B and 4 of Chapter 148 of the General Statutes, and Article 85 of Chapter 15A of the General Statutes. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, ss. 36-38.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective March 1, 1981, and applicable to offenses committed on or after that date, deleted the former last sentence of subsection (a), which read "Additional credit may be given by the Department of Correction or jailer under regulations of the Secretary of Correction as provided by G.S. 148-13, and substituted "explained" for "read" in the third sentence of subsection (b) and deleted the last sentence which read "The provisions of this section shall not apply to persons convicted of Class A or Class B felonies," and added at the end of subsection (d) "and Article 85 of Chapter 15A of the General Statutes."

Article 82.

Probation.

§ 15A-1341. Probation generally.

Cited in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 15A-1342. Incidents of probation.

Cited in State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 15A-1343. Conditions of probation.

(b) Appropriate Conditions. — When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:

(1) Not commit any criminal offense.

(2) Work faithfully at suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.

(3) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(4) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on probation.

(5) Support his dependents and meet other family responsibilities.

(6) Make restitution or reparation as provided in subsection (d).

(7) Pay a fine authorized by Article 84, Fines.

(8) Refrain from possession a firearm or destructive device or other dangerous weapon unless granted written permission by the court or the probation officer.

(9) Report to a probation officer at reasonable times and in a reasonable manner, as directed by the court or the probation officer.

(10) Permit the probation officer to visit him at reasonable times at his home or elsewhere.

(11) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer.

(12) Answer all reasonable inquiries by the probation officer and obtain prior approval from the probation officer for any change in address or employment.

(13) Promptly notify the probation officer of any change in address or employment.

(14) Repealed by Session Laws 1979, c. 662, s. 2, effective October 1, 1979.

(15) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision. The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.

(16) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(16a) Within the first 30 says of his probation, visit, with his probation officer, a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation.

(16b) Compensate the Department of Natural Resources and Community Development or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken,

injured, removed, harmfully altered, damaged, or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Natural Resources and Community Development or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

(17) Satisfy any other conditions reasonably related to his rehabilitation.

(1979, c. 830, s. 12.)

Editor's Note. —

The third 1979 amendment, effective July 1, 1980, added subdivision (16b) to subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Documentation of Loss Not Required Where Restitution Ordered. — Where defendant is ordered to make restitution or reparation for loss or injury resulting from the crime for which he was convicted, there need not have been documentation introduced in evidence as to the loss resulting from the offense for which defendant was convicted. State v. Stephenson, 43 N.C. App. 323, 258 S.E.2d 806 (1979).

§ 15A-1344. Response to violations; alteration and revocation.

When Suspended Sentence May Be Put into Effect. — When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, at any time during the period of probation, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect. But the State may not do so after the expiration of the period of probation except as provided in subsection (f) of this section. State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 15A-1345. Arrest and hearing on probation violation.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 39, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by substituting "seven" for "four" in the second sentence of subsection (c).

Article 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Applied in State v. Bonds, 43 N.C. App. 467, 259 S.E.2d 377 (1979); State v. Thornton, 43 N.C. App. 564, 259 S.E.2d 381 (1979); State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

§ 15A-1354. Concurrent and consecutive terms of imprisonment. — (a) Authority of Court. — When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified, sentences shall run concurrently.

(1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 40.)

Editor's Note. — The effective date of Session Laws 1979, c. 760, cited under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement, was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316, s. 47. Session Laws 1979, 2nd Sess., c. 1316, s. 40, effective March 1, 1981, amended this section by deleting the sentence added to subsection (a) by Session Laws 1979, c. 760.

§ 15A-1355. Calculation of terms of imprisonment.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 85.

Parole.

§ 15A-1370.1. Applicability of Article 85. — This Article is applicable to all sentenced prisoners, including Class A and B felons and committed youthful offenders, who are not subject to Article 85A of this Chapter. (1979, c. 706, s. 4; 1979, 2nd Sess., c. 1316, s. 41.)

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone the effective date of this Article to March 1, 1981. Session Laws 1979, 2nd Sess., c. 1316, s. 41, effective March 1, 1981, and applicable to offenses committed on or after that date, rewrote this section to read as set out above.

§ 15A-1371. Parole eligibility, consideration, and refusal.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 42, effective March 1, 1981, and applicable to offenses committed on or after that date, adds to this section a new subsection (a1), reading as follows:

(a1) A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. This subsection applies to offenses committed on and after March 1, 1981.

Applied in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

ARTICLE 85A.

Parole of Convicted Felons.

§ 15A-1380.1. Eligibility of felons for parole.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone the effective date of this Article to March 1, 1981.

SUBCHAPTER XIV. CORRECTION OF ERROR AND APPEAL.

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

The prerequisites for a new trial on the grounds of newly discovered evidence are: (1) that the witness or witnesses will give the newly discovered evidence; (2) that such newly discovered evidence is probably true; (3) that it is competent, material and relevant; (4) that due diligence was used and proper means were employed to procure the testimony at the trial; (5) that the newly discovered evidence is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; and (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

§ 15A-1413. Trial judges empowered to act.

Applied in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Applied in State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979).

Stated in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

Newly Discovered Evidence. —
In accord with 3rd paragraph in original. See State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979).

Quoted in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

Cited in State v. Saults, 299 N.C. 319, 261 S.E.2d 839 (1980).

§ 15A-1417. Relief available.

Resentencing Where No Error of Law Appears. — A trial court upon a motion for appropriate relief does not have authority to resentence a criminal defendant for discretionary reasons after the expiration of the session of court in which he was originally sentenced where no error of law appears upon the face of the judgment. State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

§ 15A-1420. Motion for appropriate relief; procedure.

Applied in State v. Mitchell, 298 N.C. 549, 259 S.E.2d 2254 (1979); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

ARTICLE 90.

Appeals from Magistrates and District Court Judges.

§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.

(b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law. Upon the docketing in the superior court of an appeal from a judgment imposed pursuant to a plea arrangement between the State and the defendant, the jurisdiction of the superior court over any misdemeanor dismissed, reduced, or modified pursuant to that plea arrangement shall be the same as was had by the district court prior to the plea arrangement.

(1979, 2nd Sess., c. 1328, s. 1.)

Editor's Note —

The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added the second sentence of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1442. Grounds for correction of error by appellate division.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Erroneous Instruction on Lesser Offense. — Where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief. State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980).

§ 15A-1443. Existence and showing of prejudice.

Erroneous Instruction on Lesser Offense. — Where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief. State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980).

Applied in State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Colvin, 297 N.C. 691, 256 S.E.2d 689 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

§ 15A-1444. When defendant may appeal; certiorari.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

When the language of subsection (e) of this section is read conversely, it provides that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court. It follows that a defendant whose motion to withdraw his plea of guilty, made during the term and on the day following pronouncement of judgment, was denied, is entitled to appeal as a matter of right. State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

Quoted in State v. Johnson, 42 N.C. App. 234, 256 S.E.2d 297 (1979).

§ 15A-1445. Appeal by the State.

Motion in Limine Not Qualifying under § 15A-979. — This section specifically authorizes the State to appeal from an order of the trial court allowing a motion to suppress under § 15A-979. If the motion made by the defendant was a motion in limine to exclude evidence and under the facts does not also qualify as a more limited motion to suppress under § 15A-979, the State has no right of direct appeal, from the order, and the appeal must be dismissed. In such a situation the State may petition for a writ of certiorari under Rule 21 of the Rules of Appellate Procedure. State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980).

§ 15A-1446. Requisites for preserving the right to appellate review.

Editor's Note. —

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Waiver under § 15-173 Unaffected by Subdivision (d)(5). — Under § 15-173, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of § 15A-1227(d) and subdivision (d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Although defendant, under § 15-173, waived his motion for nonsuit made at the close of the State's evidence by presenting evidence and failing to renew his motion, pursuant to § 15A-1227(d) and subdivision (d)(5), defendant could have requested review of the sufficiency of all of the evidence without regard to whether the proper motion or exception had been made during trial. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

Applied in State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979); State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979); State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979).

Cited in State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

§ 15A-1447. Relief available upon appeal.

Applied in State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

Constitutionality. — For discussion of the constitutionality of the North Carolina Death Penalty Statutes, see State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

For discussion of factors governing interpretation of the death penalty statute, see State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Imposition of Penalty Not Mandatory. — The present North Carolina death penalty

statutes are not mandatory in nature but instead provide for the exercise of guided discretion in the imposition of sentence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

No Authority to Avoid Statutory Scheme in Proper Case. — In a prosecution for first-degree murder, where there was evidence which tended to show the especially heinous, atrocious, and cruel manner in which the victim was clubbed to death, an aggravating circumstance listed in subsection (e)(9) of this section, the presiding judge, district attorney, and defense counsel had no legal authority whatsoever: (1) to announce that the State would not seek the death penalty, (2) to agree to make no motions concerning the death penalty, (3) to eliminate voir dire examinations of jurors with respect to the death penalty, (4) to eliminate the separate sentencing proceeding to determine whether the punishment should be death or life imprisonment, or (5) by consent to fix the punishment at life imprisonment should the jury convict defendant of murder in the first degree. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Effect of Guilty Plea on Determination of Sentence. — The question of sentence in a capital case is to be determined in the same manner whether a defendant pleads guilty to the capital offense or is found guilty by a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

A defendant may not plead guilty to first-degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Conditional Guilty Plea Not Permitted. — In a capital case, the trial judge did not err in construing this section and § 15A-2001 as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

When Refusal to Sanction Plea Negotiation Proper. — Where, in a capital case, there is evidence tending to show the existence of two aggravating factors, i.e., that the murder occurred in the course of a rape or attempted rape and that the murder was especially heinous, atrocious and cruel, the issue whether the death penalty should be imposed is thus necessarily one for the jury, and it would not be error for the trial court to refuse to sanction a proposed plea negotiation. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Duty of Jury in Assessing Appropriateness of Penalty. — The deliberative process of the jury envisioned by this section is not a mere counting process. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. Nuances of character and circumstance cannot be weighed in a precise mathematical formula. At the same time, it would be improper to instruct the jury that they may disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Aggravating Circumstances in Felony Murder Cases. — When a defendant is convicted of first-degree murder under the felony murder rule, the trial judge may not submit to the jury at the sentencing phase of the trail and aggravating circumstance concerning the underlying felony. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Subdivision (e)(3) Refers to Acts Prior to Present Murder Charge. — The "previously convicted" language used by the legislature in subdivision (e)(3) of this section refers to criminal activity conducted prior to the events out of which the charge of murder arose. To decide otherwise would lead to unnecessary duplication within the statute, for subdivision (e)(5) enumerates those felonies which occur simultaneously with the capital felony which the legislature deems worthy of consideration by the jury. It would be improper, therefore, to instruct the jury that this subdivision encompassed conduct which occurred contemporaneously with or after the capital felony with which the defendant is charged. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Subdivision (e)(3) Instruction Proper. — It would be improper to instruct the jury upon the factor enumerated in subdivision (e)(3) of this section when there is no evidence which tends to show a felony conviction. Also, the felony for which the defendant has been convicted must be one involving threat or use of violence to the person. It cannot, under this provision, be a crime against property. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(3) requires that there be evidence that: (1) defendant had been convicted of a felony, (2) the felony for which he was convicted involved the "use or threat of violence to the person," and (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose. If there is no such evidence, it would be improper for the court to instruct the jury on this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Subdivision (e)(4) Instruction Proper. — Subdivision (e)(4) on its face is unambiguous, but it must be construed properly so that instructions on the aggravating circumstances will only be given the jury in appropriate cases. In a broad sense

every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest. It is not accurate to say, however, that in every case this "purpose" motivates the killing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivisions (e)(5) and (e)(3) Compared. — Subdivision (e)(5) of this section differs from subdivision (e)(3) in that it guides the jury's deliberation upon criminal conduct of the defendant which takes place "while" or during the same transaction as the one in which the capital felony occurs, whereas subdivision (e)(3) deals with prior conduct. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Instruction on the provision of subdivision (e)(5) is appropriate only when the defendant is convicted for first-degree murder upon the theory of premeditation and deliberation. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(9) Not Applicable to Every Homicide. — While every murder is, at least arguably, heinous, atrocious, and cruel, subdivision (e)(9) is not intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(9) Limited to Acts during Capital Felony. — Limiting application of subdivision (e)(9) of this section to acts done to the victim during the commission of the capital felony itself is an appropriate construction of the language of this provision. Under this construction, subdivision (e)(9) will not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Test When Aggravating Circumstance Erroneously Submitted. — Whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction is the test which should be applied when one of the aggravating circumstances listed in subsection (e) is erroneously submitted by the court and answered by the jury against the defendants. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Burden on Issue of Mitigating Circumstances. — The burden of persuading the jury on the issue of the existence of any mitigating circumstance is upon the defendant and the standard of proof is by a preponderance of the evidence. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

When Defendant Entitled to Instruction on Mitigating Circumstance. — Where, all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Motion for Listing of Possible Mitigating Circumstances. — If, in a capital case, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, the trial judge must put such circumstances on the written list. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Where, in a capital case, there are a number of things including good character, which a defendant contends the jury should consider in mitigation, in order to insure that the trial judge mentions these to the jury in his instructions the defendant must file a timely request. Otherwise, failure of the court to mention any particular item as a possible mitigating factor will not be held for error so long as the trial judge instructs that the jury may consider any circumstances which it finds to have mitigating value pursuant to subdivision (f)(9). State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

The legislature intended that all mitigating circumstances, both those expressly mentioned in this statute and others which might be submitted under subdivision (f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing. Where, however, defendant makes no specific request to include possible "other mitigating circumstances" on the written verdict form submitted to the jury and, likewise, makes no timely request to include defendant's good character as a mitigating circumstance, the actions of the trial judge in failing to do these things are not erroneous. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Contention of Good Character Not Encompassed by Subdivision (f)(1). — The mitigating circumstance in a capital case which refers to a defendant's lack of "significant history of prior criminal activity" does not encompass a contention regarding defendant's good character, since good character imports more than simply the absence of criminal convictions. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Model Penal Code Test for Mental Capacity Adopted. — The legislature, by

enactment of subdivision (f)(6), has determined to depart from the traditional M'Naghten test and to adopt the Model Penal Code test for mental capacity as a mitigating circumstance to be considered on the question of punishment in capital cases. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

When Subdivision (f)(6) Circumstance Exists. — This mitigating circumstance may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or disminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished). State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

In a first-degree murder prosecution in which there was evidence from which the jury could have found that, although defendant knew the difference between right and wrong at the time of the killing, he suffered from schizophrenia and that at the time of the killing defendant's schizophrenia had surfaced, defendant would be entitled to a new sentencing hearing where the trial judge, in his instruction, failed to explain the difference between defendant's capacity to know right from wrong, and the impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law within the meaning of subdivision (f)(6) of this section. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Power of Review in Supreme Court. — Read together, subdivisions (d)(1) and (d)(3) empower the Supreme Court of this State to review errors assigned in the trial and sentencing phases. When prejudicial error is found, the court must order a new sentencing hearing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Rules of Evidence Not Altered. — The language of this section does not alter the usual rules of evidence or impair the trial judge's power to rule on the admissibility of evidence. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Evidence Unrelated to Defendant Properly Excluded. — Where the evidence offered by the defendant in a capital case and excluded by the trial judge was in no way connected to defendant, his character, his record or the circumstances of the charged offense, it was, therefore, irrelevant and of no probative value as mitigating evidence in the sentencing procedure of defendant's trial, and the trial judge's ruling excluding the evidence did not unduly limit the jury's consideration of mitigating factors in violation of subdivision (f)(9). State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Eyewitness Account of Execution Properly Excluded. — In a capital case, it was not error for the trial judge to refuse to allow the defendant to present during the sentencing phase of the trial, an eyewitness account of a gas chamber execution, since the evidence was in no way connected to defendant, his character, his record or the circumstances of the charged offense. It was totally irrelevant and, therefore, properly excluded by the trial judge. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Stated in Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

Cited in State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980).

§ 15A-2001. Capital offenses; plea of guilty.

Guilty Plea Not Permitted Formerly. — Before the enactment of this statute defendant would not have been permitted to enter a plea of guilty to a crime for which the punishment might be death. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Conditional Plea of Guilty Not Proper. — In a capital case, the trial judge did not err in construing § 15A-2000 and this section as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Cited in State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

§ 15A-2002. Capital offenses; jury verdict and sentence.

Legislative Intent. — This section clearly indicates the legislature's intention that the jury's sentence recommendation be binding on the trial judge. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Cited in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980); State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

§ 17C-6. Powers of Commission.

Amendment Effective July 1, 1982. — Session Laws 1979, 2nd Sess., c. 1184, s. 1, effective July 1, 1982, will add to subsection (a) new subdivisions reading as follows:

"(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."

Session Laws 1979, 2nd Sess., c. 1184, s. 2, effective July 1, 1982, will add a new subsection (d), reading as follows:

"(d) The standards established by the Commission pursuant to G.S. 17C-6(a)(11) and (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."

Chapter 18A.

Regulation of Intoxicating Liquors.

Article 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

Sec.

18A-15. Powers and authority of State Board.

Article 5.

Elections.

Part 1. A.B.C. Store Elections.

18A-51. County elections as to alcoholic beverage control stores and sale of mixed beverages.

Article 7.

Distilleries.

18A-69. Distilleries for fuel alcohol.

Article 1.

General Provisions.

§ 18A-1. Purpose of Chapter.

Editor's Note. — For article, "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18A-2. Definitions.

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

Article 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

§ 18A-14. State Board of Alcoholic Control.

State Government Reorganization. — The State Board of Alcoholic Control Enforcement Division has been transferred to the Department of Crime Control and Public Safety by § 143A-243, Session Laws, 1977, c. 70, s. 1.

The above sentence should be substituted for the second sentence of the note under this catchline in the replacement volume. — Ed. note.

§ 18A-15. Powers and authority of State Board. — The State Board of Alcoholic Control shall have power and authority as follows:

(3) a. To fix the retail price of each bottle of alcoholic beverages sold in the county and municipal A.B.C. stores at such levels as shall promote the temperate use of these beverages and as may facilitate policing, which price shall be uniform throughout the State;

b. To compute the taxes levied by G.S. 105-113.93 and 105-113.94 on the retail prices of spirituous liquors so fixed;

c. To add to said retail price:

1. An amount equal to three and one-half percent (3½%) of said retail price of spirituous liquors; and
2. One cent (1¢) per bottle on each bottle of spirituous liquors containing fifty milliliters or less sold in said county and municipal A.B.C. stores and five cents (5¢) per bottle on each bottle of spirituous liquors containing more than fifty milliliters sold in said stores; the sum of the retail price plus the foregoing additions thereto being the established price for each such bottle of spirituous liquors. The foregoing additions to retail price shall not be subject to the tax levied by G.S. 105-113.93 and 105-113.94. The clear proceeds of the three and one-half percent (3½%) addition to the retail price of spirituous liquors shall be retained by the respective county or municipal A.B.C. boards in the same manner as other profits derived from the sale of spirituous liquors. The clear proceeds of the one cent (1¢) and five cents (5¢) per bottle addition to retail price shall be remitted to the county commissioners of the county in which such additions to retail price were collected, accompanied by forms or reports to be prescribed and furnished by the State Board of Alcoholic Control, which remittances shall be spent in the discretion of the county commissioners only for projects for construction, maintenance and operation of facilities for education, research, treatment or rehabilitation of alcoholics. In connection with such projects and programs, the county commissioners, or such agencies as are by them designated, shall also have the authority to use said funds to purchase or lease real and personal property, and to renovate, remodel, furnish and equip buildings as and when required for the operation of such projects and programs. The funds may also be used for programs of education and research on problems of alcoholism and the treatment and rehabilitation of alcoholics. The county commissioners are hereby empowered to spend the funds for a project not located in the county but which benefits the citizens of the county. The Department of Human Resources and the State Department of Public Instruction are hereby empowered to enact guidelines for the expenditure of such funds by county commissioners and the county commissioners may expend the funds pursuant to those guidelines. Reports and remittances of the aforesaid additions to retail price shall be made monthly by the local boards on or before the fifteenth day of the next succeeding month.
3. Ten dollars ($10.00) on each four liters and a proportional sum on any lesser amount, of spirituous liquor sold to the holder of a mixed beverages permit for the purpose of resale as mixed beverages. This addition to the retail price shall not be subject to the tax levied by G.S. 105-113.93. The clear proceeds from this addition to the retail price of spirituous liquor shall be retained by the respective county or municipal A.B.C. boards in the same manner as other profits derived from the sale of spirituous liquors, except that ten percent (10%) of the proceeds shall be directed to the Department of Human Resources for rehabilitation of alcoholics and research into the causes of alcoholism. When the spirituous liquor is purchased at a city A.B.C. store by a mixed beverage permit holder for premises located at an airport outside the

city, the A.B.C. board share of the ten dollar ($10.00) addition shall be divided equally among the A.B.C. boards of all the cities in that county that have authorized the sale of mixed beverages.

d. To determine the total prices of all such alcoholic beverages, which total price shall be the sum of the established price plus the taxes levied by G.S. 105-113.93 and 105-113.94, and to notify the stores periodically of such prices.

e. To authorize a county or municipal A.B.C. board to sell certain alcoholic beverages at below the uniform price subject to the rules and regulations of the State A.B.C. Board.

Editor's Note. —
The introductory language and subdivision (3) of this section are set out above in order to correct errors in the first sentence of paragraph (3)c2 in the 1979 Cumulative Supplement.

As the other subdivisions were not affected, they are not set out.

For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18A-16. County boards of alcoholic control.

Local Modification. — Northampton County: 1979, 2nd Sess., c. 1126.

§ 18A-17. Powers and duties of county boards.

Local Modification. — Lenoir County, as to subdivision (14): 1979, 2nd Sess., c. 1117.

Editor's Note. —

For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18A-18. Salaries and expenses; net profits.

Editor's Note. —
For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

Article 3.

Sale, Consumption, Possession and Transportation of Alcoholic Beverages.

§ 18A-29. Commercial transportation of spirituous liquors.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 18A-30. Possession and consumption of alcholic beverages at designated places.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18A-31. Permits for social establishments, restaurants, etc.

Editor's Note. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

ARTICLE 5.

Elections.

Part 1. A.B.C. Store Elections.

§ 18A-51. County elections as to alcoholic beverage control stores and sale of mixed beverages.

(b) In any county or city where A.B.C. stores have been established, an election may be called on the question of whether the on-premises sale of mixed beverages should be allowed in social establishments and restaurants. The election shall be called by the board of elections of the county upon, and only upon, the written request of the governing body of the county or a city where A.B.C. stores have been established or upon petition of twenty percent (20%) of the voters registered in that county or city. The provisions of this section with regard to A.B.C. store elections shall apply to the mixed beverages elections except that the propositions to be voted upon shall be the following:

FOR the sale of mixed beverages in social establishments and restaurants.

AGAINST the sale of mixed beverages in social establishments and restaurants.

If a majority of the voters voting in the election vote for the sale of mixed beverages, the sale of mixed beverages shall be permitted in that county or city as provided in G.S. 18A-30. If a county or city has not yet authorized the establishment of A.B.C. stores, the election on the sale of mixed beverages may be called for the same time as the election on A.B.C. stores. The sale of mixed beverages may not continue at any time after a county or city has voted to no longer operate A.B.C. stores and the previously authorized stores have closed.

A city which has no A.B.C. system may hold a separate city election on mixed beverages as provided in this section if each of the following conditions is met:

(1) The county has voted against the sale of mixed beverages in the most recent referendum on the question;

(2) At least one A.B.C. store is located in the city or within a one mile radius of the city boundary;

(3) In the most recent county referendum on mixed beverages, in two or more cities within the county a majority of the persons voting voted in favor of mixed beverages; and

(4) The election has been requested in writing by the city governing body or by petition of twenty percent (20%) of the registered voters of the city.

(1979, 2nd Sess., c. 1174.)

Editor's Note. —

The 1979, 2nd Sess., amendment added to subsection (b) the second paragraph, containing subdivisions (1) through (4).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

Stated in Wilkes v. North Carolina State Bd. of Alcoholic Control, 44 N.C. App. 495, 261 S.E.2d 205 (1980).

Part 2. Malt Beverage and Unfortified Wine Elections.

§ 18A-52. Malt beverage and unfortified wine elections in counties or municipalities.

Editor's Note. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

ARTICLE 6.

Miscellaneous Provisions.

§ 18A-56. Violation a misdemeanor.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 7.

Distilleries.

§ 18A-69. Distilleries for fuel alcohol. — Any person in possession of a Federal Operating Permit pursuant to Title 27, Code of Federal Regulations, Part 201.131 through 201.138 or Part 201.64 through 201.65 shall obtain a permit under this Article before manufacturing any alcohol. The permit entitles the permit holder to perform only those acts allowed by the Federal Operating Permit, and all conditions of the Federal Operating Permit apply to the State permit. The application fee for this permit is ten dollars ($10.00). (1979, 2nd Sess., c. 1329, § 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1329, s. 3, provides: "This act shall become effective on October 1, 1980, and applies to all persons holding or obtaining federal permits on or after that date."

Chapter 20.

Motor Vehicles.

Article 1.

Division of Motor Vehicles.

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20-4.01. Definitions.

Article 1A.

Reciprocity Agreements as to Registration and Licensing.

20-4.2. Definitions.

Article 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

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20-7. Drivers' licenses; expiration; examination; fees.
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20-24. When court to forward license to Division and report convictions.
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20-26. Records; copies furnished.
20-27. Availability of records.
20-28. Unlawful to drive while license suspended or revoked.
20-29. Surrender of license.
20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.
20-30. Violations of license or learner's permit provisions.
20-34.1. Unlawful to issue licenses for anything of value except prescribed fees.
20-37. Limitations on issuance of licenses.

Article 2A.

Afflicted, Disabled or Handicapped Persons.

20-37.1. Motorized wheelchairs or similar vehicles.

Article 2B.

Special Identification Cards for Nonoperators.

20-37.7. Special identification card.

Article 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

20-39. Administering and enforcing laws; rules and regulations; agents, etc.; seal.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

20-63. Registration of plates to be furnished by the Division; requirements; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.
20-65. [Repealed.]
20-66. Renewal of registration; semipermanent plates issued; renewal stricker annually; fees.

Part 5. Issuance of Special Plates.

20-81.4. Free registration plates to disabled veterans and former prisoners of war.

Part 7. Title and Registration Fees.

Sec.
20-88. Property-hauling vehicles.
20-95. License for less than a year.
20-97. Taxes compensatory; no additional tax.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

20-128.2. Motor vehicle emission standards.

Part 10. Operation of Vehicles and Rules of the Road.

20-139.1. Result of a chemical analysis admissible in evidence; presumption.
20-141.3. Unlawful racing on streets and highways.
20-158. Vehicle control signs and signals.
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.
20-166.1. Reports and investigations required in event of collision.

Part 12. Sentencing; Penalties.

20-179. Penalty for driving or operating vehicle while under the influence of intoxicating liquor, narcotic drugs, or other impairing drugs; limited driving permits for first offenders.
20-182. Penalty for failure to stop in event of accident involving injury or death to a person.

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.
20-183.8. Commissioner of Motor Vehicles to issue regulations subject to approval of Governor; penalties for violation; fictitious or unlawful inspection certificate; 30-day grace period for expired inspection certificates.

Article 4.

State Highway Patrol.

20-185. Personnel; appointment; salaries.

Article 7.

Miscellaneous Provisions Relating to Motor Vehicles.

20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances; evidence of identity of driver.
20-218. Standard qualifications for school bus drivers; speed limit.
20-219.2. Removal of unauthorized vehicles from private lots.

Article 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

20-279.13. Suspension for nonpayment of judgment; exceptions.
20-279.32. Exceptions.

Article 13.

The Vehicle Financial Responsibility Act of 1957.

20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period.
20-311. Revocation of registration when financial responsibility not in effect.

Article 14.

Driver Training School Licensing Law.

20-320. Definitions.

Article 1.

Division of Motor Vehicles.

§ 20-4.01. Definitions. — Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

(2) Canceled. — As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud is void and terminated.

(3) Repealed by Session Laws 1979, c. 667, s. 1, effective January 1, 1981. (1979, c. 667, s. 1.)

Editor's Note. —

Session Laws 1979, c. 667, s. 1, effective Jan. 1, 1981, substituted "drivers' licenses" for "operators' and chauffeurs' licenses" in subdivision (2) and deleted subdivision (3).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As the other subdivisions were not changed by the amendment, they are not set out.

Cited in Harper v. Peters, 42 N.C. App. 62, 255 S.E.2d 791 (1979); Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

Article 1A.

Reciprocity Agreements as to Registration and Licensing.

§ 20-4.2. Definitions. — As used in this Article:

(1) "Commercial vehicle" means any vehicle which is operated in furtherance of any commercial enterprise.

(1979, c. 470, s. 2.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, deleted "interstate" after "operated" in subdivision (1).

As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (1) are set out.

Article 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

§ 20-4.18. Definitions. — Unless the context otherwise requires, the following words and phrases, for the purpose of this Article, shall have the following meanings:

(3) Repealed by Session Laws 1979, c. 667, s. 2, effective January 1, 1981. (1979, c. 667, s. 2.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, deleted subdivision (3), which defined "License" as "Any operator's or chauffeur's license or any other license, permit, or privilege to operate a motor vehicle."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As the other subdivisions were not changed by the amendment, they are not set out.

Article 2.

Uniform Driver's License Act.

§ 20-7. Drivers' licenses; expiration; examination; fees. — (a) Except as otherwise provided in this Article, no person shall operate a motor vehicle on a highway unless such person has first been licensed by the Division under the provisions of this Article for the type or class of vehicle being driven. Drivers' licenses shall be classified as follows:

(1) Class "A" which entitles a licensee to drive any vehicle or combination of vehicles, except motorcycles, including all vehicles under Classes "B" or "C."

(2) Class "B" which entitles a licensee to drive a single vehicle weighing over 30,000 pounds gross vehicle weight, any such vehicle towing a vehicle weighing 10,000 pounds gross vehicle weight or less, a single vehicle designed to carry more than 12 passengers and all vehicles under Class "C." A Class "B" license does not entitle the licensee to drive a motorcycle.

(3) Class "C" which entitles a licensee to drive a single vehicle weighing 30,000 pounds gross vehicle weight or less, any such vehicle towing a vehicle weighing 10,000 pounds gross vehicle weight or less, and a church bus, farm bus, or activity bus operated for a nonprofit organization when the activity bus is operated for a nonprofit purpose. A Class "C" license does not entitle the licensee to drive a motorcycle. A Class "C" license does not entitle the licensee to drive a vehicle designed to carry more than 12 passengers unless this subsection or G.S. 20-218(a) specifically entitles him to do so.

Any unusual vehicle shall be assigned by the Commissioner to the most appropriate class with suitable special restrictions if they appear to be necessary.

Any person who takes up residence in this State on a permanent basis is exempt from the provisions of this subsection for 30 days from the date that residence is established, if he is properly licensed in the jurisdiction of which he is a former resident.

(a1) No driver's license issued on or after October 1, 1979, shall authorize the licensee to operate a motorcycle unless the license has been appropriately endorsed by the Division to indicate that the licensee has passed special road and written (or oral) tests demonstrating competence to operate a motorcycle. Any person licensed prior to January 1, 1978, who has operated a motorcycle for at least two years prior to that date, will be exempt from the provisions of this subsection upon filing with the Division of Motor Vehicles an affidavit attesting to said two years' experience. Nothing contained in this subsection shall be construed to require a mo-ped operator to have a driver's license.

(b) Every application for a driver's license shall be made upon the approved form furnished by the Division.

(c) No person shall hereafter be issued a driver's license until it is determined that such person is physically and mentally capable of safely operating motor vehicles (of the type or class for which the person applied to be licensed) over the highways of the State. In determining whether or not a person is physically and mentally capable of safely operating motor vehicles over the highways of the State, the Division shall require such person to demonstrate his capability by passing an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require. The Commissioner may adopt regulations that allow employees of governmental agencies or private businesses to receive a driver's license without taking a road test if the conditions specified in the regulations are complied with. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(d) The Division shall cause each person who has heretofore been issued a driver's license to be examined or reexamined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. Those persons found, as a result of such examination or reexamination, to be capable of safely operating motor vehicles over the highways of the State shall be reissued drivers' licenses; and those persons found to be incapable of safely operating

motor vehicles over the highways of the State shall not be reissued drivers' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require and shall include such test as is necessary to assure that applicants recognize the "international symbol of access" for the handicapped (sign R7-8, Manual on Uniform Traffic Control Devices) and devices relative to handicapped drivers as set forth in Article 2A of this Chapter. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(e) The Division is hereby authorized to grant unlimited licenses or licenses containing such limitations as it may deem advisable. Such limitation or limitations shall be noted on the face of the license, and it shall be unlawful for the holder of a license so limited to operate a motor vehicle without complying with the limitations, and the operation of a motor vehicle without complying with the limitations by a person holding a license with such limitations shall be the equivalent of operating a motor vehicle without a driver's license. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Division may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Division. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Division from refusing to issue a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public: Provided, that nothing herein shall prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) The drivers' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section. Any operator may at any time within 60 days prior to the expiration of his license apply for a new license and if the applicant meets the requirements of this Article, the Division shall issue a new license to him. A new license issued within 60 days prior to the expiration of an applicant's old license or within 12 months thereafter shall automatically expire four years from the date of the expiration of the applicant's old license.

Any person serving in the armed forces of the United States on active duty and holding a valid driver's license properly issued under this section and stationed outside the State of North Carolina may renew his license by making application to the Division by mail. Any other person, except a nonresident as defined in this Article, who holds a valid driver's license issued under this section and who is temporarily residing outside North Carolina, may also renew by making application to the Division by mail. For purposes of this section "temporarily" shall mean not less than 30 days continuous absence from North Carolina. In either case, the Division may waive the examination and color photograph ordinarily required for the renewal of a driver's license, and may impose in lieu thereof such conditions as it may deem appropriate to each particular application; provided that such license shall expire 30 days after licensee returns to North Carolina, and such license shall be designated as temporary.

Provided further, that no person who applies for the renewal of his driver's license shall be required to take a written examination or road test as a part of any such examination unless such person has been convicted of a traffic violation or had prayer for judgment continued with respect to any traffic violation within a four-year period immediately preceding the date of such person's renewal application or unless such person suffers from a mental or physical condition which impairs his ability to operate a motor vehicle.

(g) Repealed by Session Laws 1979, c. 667, s. 6, effective January 1, 1981.

(h) Repealed by Session Laws 1979, c. 113, s. 1.

(i) The fee for issuance or reissuance of a Class "C" license is four dollars ($4.00). The fee for issuance or reissuance of a Class "B" or Class "A" license is ten dollars ($10.00). A person receiving at the same time a driver's license and an endorsement pursuant to G.S. 20-7(a1) shall be charged only the fee required for the class of driver's license he is receiving.

(i1) Any person whose driver's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this Chapter shall pay a restoration fee of fifteen dollars ($15.00) to the Division prior to the issuance of such person of a new driver's license or the restoration of such driver's license or privelege; such restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law. This restoration fee shall not be required for any licensee whose license was suspended, canceled, or revoked for medical or health reasons following a medical evaluation pursuant to this Chapter.

(j) The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund.

(k) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this section.

(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 two dollars ($2.00). 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 three dollars and twenty-five cents ($3.25).

(l-1) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver training program as provided for in G.S. 20-88.1 even though the applicant has not yet reached the legal age to be eligible for a driver's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a specified type or class of motor vehicle subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(m) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver-training program approved by the State Superintendent of Public Instruction even though the applicant has not yet reached the legal age to be eligible for a driver's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a specified type or class of motor vehicle subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(n) Every driver's license issued by the Division shall bear thereon the distinguishing number assigned to the licensee and color photograph of the licensee of a size approved by the Commissioner and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon; provided the requirement that a color photograph of the licensee appear on the license may be waived by the Commissioner upon satisfactory proof that the taking of such photograph violates the religious convictions of the licensee. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to carry a license shall be convicted if he produces in court a driver's license issued to him which was valid at the time of his arrest for the type or class of vehicle he was operating at the time of his arrest.

(o) Any person convicted of violating any provision of this section shall be guilty of a misdemeanor and punished in the discretion of the court: Provided, that no person shall be convicted of operating a motor vehicle without a driver's license if he produces in court at the time of his trial upon such charge an expired driver's license and a renewed driver's license issued to him within 30 days of the expiration date of the expired license and which would have been a defense to the charge had it been issued prior to the time of the alleged offense. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3; 1953, cc. 839, 1284, 1311; 1955, c. 1187, ss. 2-6; 1957, c. 1225; 1963, cc. 754, 1007, 1022; 1965, c. 410, s. 5; 1967, c. 509; 1969, c. 183; c. 783, s. 1; c. 865; 1971, c. 158; 1973, cc. 73, 705; c. 1057, s. 1; 1975, c. 162, s. 1; c. 295; c. 296, ss. 1, 2; c. 684; c. 716, s. 5; c. 841; c. 875, s. 4; c. 879, s. 46; 1977, c. 340, s. 3; c. 865, ss. 1, 3; 1979, c. 37, s. 1; c. 113; c. 178, s. 2; c. 667, ss. 3-11, 41; c. 678, ss. 1-3; c. 801, ss. 5, 6.)

Editor's Note.—

Session Laws 1979, c. 667, effective Jan. 1, 1981, rewrote subsection (a) so as to substitute provisions for Class A, Class B, and Class C drivers' licenses for provisions for operators' and chauffeurs' licenses, inserted the phrase in parenthesis in the first sentence, and added the third sentence, in subsection (c), deleted the former fourth sentence of subsection (d), which related to issuance of licenses to operators who had passed examinations given between July 1, 1945 and July 1, 1947, repealed subsection (g), which related to expiration and renewal of chauffeurs' licenses, rewrote subsection (i) to conform to rewritten subsection (a), inserted "specified type or class of" near the end of the first sentence in subsection (l), in the second sentence of subsection (l-1) and in the second sentence of subsection (m), rewrote the fourth sentence of subsection (l), and, at the end of the last sentence of subsection (n), substituted the language beginning "a driver's license" for "an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 20-8. Persons exempt from license. — The following are exempt from license hereunder:

(1) Any person while operating a motor vehicle the property of and in the service of the armed forces of the United States. This shall not be construed to exempt any operators of the United States Civilian Conservation Corps motor vehicles;

(2) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(3) A nonresident who is at least 16 years of age who has in his immediate possession a valid driver's license issued to him in his home state or country if the nonresident is operating a motor vehicle in this State in accordance with the license restrictions and vehicle classifications that would be applicable to him under the laws and regulations of his home state or country if he were driving in his home state or country.

(4) to (6) Repealed by Session Laws 1979, c. 667, s. 13, effective January 1, 1981.

(7) Any person who is at least 16 years of age and while operating a mo-ped. (1935, c. 52, s. 3; 1963, c. 1175; 1973, c. 1017; 1975, c. 859, s. 2; 1979, c. 574, s. 7; c. 667, s. 13.)

Editor's Note. —

The second 1979 amendment, effective Jan. 1, 1981, deleted "chauffeurs or" preceding "operators" in the second sentence of subdivision (1), rewrote subdivision (3), and deleted subdivisions (4), (5) and (6), relating to the licensing of nonresidents at least 18 years of age.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 20-9. What persons shall not be licensed. — (a) A Class "C" license shall not be issued to any person under 16 years of age and no Class "A" or Class "B" license shall be issued to any person under 18 years of age.

(b) The Division shall not issue a driver's license to any person whose license has been suspended or revoked during the period for which the license was suspended or revoked.

(c) The Division shall not issue a driver's license to any person who is an habitual drunkard or is an habitual user of narcotic drugs or barbiturates, whether or not such use be in accordance with the prescription of a physician.

(d) No driver's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, or feebleminded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feebleminded upon a certificate of the superintendent that such person is competent, nor then unless the Division is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The Division shall not issue a driver's license to any person when in the opinion of the Division such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs.

(f) The Division shall not issue a driver's license to any person whose license or driving privilege is in a state of suspension or revocation in any jurisdiction, if the acts or things upon which the suspension or revocation in such other jurisdiction was based would constitute lawful grounds for suspension or revocation in this State had those acts or things been done or committed in this State.

(g) The Division may issue a driver's license to any applicant covered by subsection (e) of this section under the following conditions:

(1) The Division may issue a license to any person who is afflicted with or suffering from physical or mental disability set out in subsection (e) of this section who is otherwise qualified to obtain a license, provided such person submits to the Division a certificate in the form prescribed in subdivision (2). Unless sooner revoked, suspended or canceled, such

license continues in force as long as the licensee presents to the Division one year from the date of issuance of such license and at yearly intervals thereafter a certificate in the form prescribed in subdivision (2), provided the Commissioner may require the submission of such certificate at six months intervals where in his opinion public safety demands. In no event shall a license issued pursuant to this section be valid beyond the birthday of the licensee in the fourth year following the year of issuance, at which time the license is subject to renewal.

(2) The Division shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine in this State and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle, including, if such is the fact, the examining physician's statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant.

(3) The Commissioner is not bound by the recommendation of the examining physician but shall give fair consideration to such recommendation in exercising his discretion in acting upon the application, the criterion being whether or not, upon all the evidence, it appears that is is safe to permit the applicant to operate a motor vehicle. The burden of proof of such fact is upon the applicant. In deciding whether to issue or deny a license, the Commissioner may be guided by opinion of experts in the field of diagnosing and treating the specific physical or mental disorder suffered by an applicant and such experts may be compensated for their services on an equitable basis. The Commissioner may also take into consideration any other factors which bear on the issue of public safety.

(4) Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the Division within 10 days after receipt of such denial. The reviewing board shall consist of the Commissioner or his authorized representative and four persons designated by the chairman of the Commission for Health Services. The persons designated by the chairman of the Commission for Health Services shall be either members of the Commission for Health Services or physicians duly licensed to practice medicine in this State. The members so designated by the chairman of the Commission for Health Services shall receive the same per diem and expenses as provided by law for members of the Commission for Health Services, which per diem and expenses shall be charged to the same appropriation as per diems and expenses for members of the Commission for Health Services. The Commissioner or his authorized representative, plus any two of the members designated by the chairman of the Commission for Health Services, constitute a quorum. The procedure for hearings authorized by this section shall be as follows:

a. Applicants shall be afforded an opportunity for hearing, after reasonable notice of not less than 10 days, before the review board established by subdivision (4). The notice shall be in writing and shall be delivered to the applicant in person or sent by certified mail, with return receipt requested. The notice shall state the time, place, and subject of the hearing.

b. The review board may compel the attendance of witnesses and the production of such books, records and papers as it desires at a hearing authorized by the section. Upon request of an applicant, a subpoena to compel the attendance of any witness or a subpoena duces tecum to compel the production of any books, records, or papers shall be issued by the board. Subpoenas shall be directed to the sheriff of the county where the witness resides or is found and shall be served and returned in the same manner as a subpoena in a criminal case. Fees of the sheriff and witnesses shall be the same as that allowed in the district court in cases before that court and shall be paid in the same manner as other expenses of the Division of Motor Vehicles are paid. In any case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matters regarding which he may be lawfully interrogated, the district court or superior court where such disobedience, neglect or refusal occurs, or any judge thereof, on application by the board, shall compel obedience or punish as for contempt.

c. A hearing may be continued upon motion of the applicant for good cause shown with approval of the board or upon order of the board.

d. The board shall pass upon the admissibility of evidence at a hearing but the applicant affected may at the time object to the board's ruling, and, if evidence offered by an applicant is rejected the party may proffer the evidence, and such proffer shall be made a part of the record. The board shall not be bound by common law or statutory rules of evidence which prevail in courts of law or equity and may admit and give probative value to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They may exclude incompetent, immaterial, irrelevant and unduly repetitious evidence. Uncontested facts may be stipulated by agreement between an applicant and the board and evidence relating thereto may be excluded. All evidence, including records and documents in the possession of the Division of Motor Vehicles or the board, of which the board desires to avail itself shall be made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The board shall prepare an official record, which shall include testimony and exhibits. A record of the testimony and other evidence submitted shall be taken, but it shall not be necessary to transcribe shorthand notes or electronic recordings unless requested for purposes of court review.

e. Every decision and order adverse to an applicant shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the board's conclusions on each contested issue of fact. Counsel for applicant, or applicant, if he has no counsel, shall be notified of the board's decision in person or by registered mail with return receipt requested. A copy of the board's decision with accompanying findings and conclusions shall be

delivered or mailed upon request to applicant's attorney of record or to applicant, if he has no attorney.

f. Actions of the reviewing board are subject to judicial review as provided under Chapter 150A of the General Statutes.

g. Repealed by Session Laws 1977, c. 840.

h. All records and evidence collected and compiled by the Division and the reviewing board shall not be considered public records within the meaning of Chapter [section] 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. All information furnished by or on behalf of an applicant under this section shall be without prejudice and shall be for the use of the Division, the reviewing board or the court in administering this section and shall not be used in any manner as evidence, or for any other purposes in any trial, civil or criminal.

(h) The Division shall not issue a driver's license to an applicant who is the holder of any license to drive issued by another state, district or territory of the United States and currently in force, unless the applicant surrenders such license or licenses; provided, this section shall not apply to nonresident military personnel or members of their houshold. (1935, c. 52, s. 4; 1951, c. 542, s. 3; 1953, c. 773; 1955, c. 118, s. 7; 1967, cc. 961, 966; 1971, c. 152; c. 528, s. 11; 1973, cc. 135, 441; c. 476, s. 128; c. 1331, s. 3; 1975, c. 716, s. 5; 1979, c. 667, ss. 14, 41.)

Editor's Note.—

The 1979 amendment, effective Jan. 1, 1981, rewrote subsection (a) so as to substitute provisions as to Class A, Class B and Class C licenses for provisions as to operators' and chauffeurs' licenses, deleted "either as operator or chauffeur" following "person whose license" in subsection (b) and substituted references to "driver's license" for references to "operator's or chauffeur's license" throughout the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Where the record on appeal contained no evidence that petitioner suffered from an "uncontrolled seizure disorder," although it did show that petitioner had suffered seizures from time to time, the whole record did not support the finding required by this section that petitioner be suffering from a mental or physical disability that prevents him from exercising reasonable and ordinary control in the operation of a motor vehicle on the highways. Chesnutt v. Peters, 44 N.C. App. 484, 261 S.E.2d 223 (1980).

§ 20-11. Application of minors. — (a) The Division shall not grant the application of any minor between the ages of 16 and 18 years for a driver's license or a learner's permit unless such application is signed both by the applicant and by the parent, guardian, husband, wife or employer of the applicant, or, if the applicant has no parent, guardian, husband, wife or employer residing in this State, by some other responsible adult person. It shall be unlawful for any person to sign the application of a minor under the provisions of this section when such application misstates the age of the minor and any person knowingly violating this provision shall be guilty of a misdemeanor.

The Division shall not grant the application of any minor between the ages of 16 and 18 years for a driver's license unless such minor presents evidence of having satisfactorily completed the driver training and safety education courses offered at the public high schools as provided in G.S. 20-88.1 or upon

having satisfactorily completed a course of driving instruction offered at a licensed commercial driver training school or an approved nonpublic secondary school, provided instruction offered in such schools shall be approved by the State Commissioner of Motor Vehicles and the State Superintendent of Public Instruction and all expenses for such instruction shall be paid by the persons enrolling in such courses and/or by the schools offering them.

(b) The Divsion 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 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 six months or until the applicant attains the age of 16, whichever period is greater. 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.

(c) The Division may, upon satisfactory proof that a minor between the ages of 16 and 18 years has become a resident of North Carolina and holds a valid motor vehicle driver's license from his prior state of residence but has not completed a course in driver education which meets the requirements of this State, grant to such minor a temporary driver's permit under such terms and conditions as shall be deemed necessary by the Division to allow the minor to operate a motor vehicle of a specified type or class in this State in order to obtain the driver education courses necessary for driver's license in North Carolina. Every application for a temporary driver's permit shall be made upon the approved form furnished by the Division. A temporary driver's permit issued pursuant to this section shall be subject to all provisions of law relating to driver's license. (1935, c. 52, s. 6; 1953, c. 355; 1955, c. 1187, s. 8; 1963, c. 968, ss. 2, 2A; 1965, c. 410, s. 3; c. 1171; 1967, c. 694; 1969, c. 37; 1973, c. 191, ss. 1, 2; c. 664, ss. 1, 2; 1975, c. 79; c. 716, s. 5; 1979, c. 101; c. 667, ss. 15, 16, 41.)

Editor's Note.—

The second 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's" near the beginning of the first sentence of the first paragraph of subsection (a) and near the beginning of the second paragraph of subsection (a), inserted "of the specified type or class" and "(of the type or class being operated by the permittee)" in the second sentence of subsection (b), substituted "driver's" for "operator's" throughout section (c) and inserted "of a specified type or class" near the end of the first sentence of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-12. Instruction. — Any licensed driver may instruct a person who is 16 or more years of age in the operation of any motor vehicle that the person instructing is licensed to drive. Any person so instructing another must actually occupy the seat beside the permittee. (1935, c. 52, s. 7; 1953, c. 356; 1979, c. 667, s. 17.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, rewrote this section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-14. Duplicate licenses. — In the event that a driver's license is lost or destroyed, or if it is necessary to change the name or address thereon, the person to whom the license is issued may, upon payment of a fee of one dollar ($1.00) and upon furnishing proof satisfactory to the Division that the license has been lost or destroyed, or that the person's name or address has been changed, obtain a duplicate or substitute license. (1935, c. 52, s. 9; 1943, c. 649, s. 2; 1969, c. 783, s. 2; 1975, c. 716, s. 5; 1979, c. 667, s. 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the beginning of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-15. Authority of Division to cancel license. — (a) The Division shall have authority to cancel any driver's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said licensee failed to give the required to correct information in his application, or committed fraud in making such application.

(1979, c. 667, s. 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-16. Authority of Division to suspend license. — (a) The Division shall have authority to suspend the license of any operator with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(1) to (4) Repealed by Session Laws 1979, c. 36, effective October 1, 1979;

(5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;

(6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;
(8) Has been convicted of illegal transportation of intoxicating liquors;
(9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;
(10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;
(10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or
(11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator not operate a motor vehicle for a period of time.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver's license shall be suspended by the Division of Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisons of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission for [of] the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No driver's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
Speeding in a school zone in excess of the posted school zone speed limit	3
All other moving violations	2

The [above] provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina.

No points shall be assessed for conviction of the following offenses:
Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Public drunk within a vehicle
Possession of liquor
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever a licensee accumulates as many as four points hereunder, the Division shall mail a letter of warning to the licensee at his last known address, but failure to receive such warning letter shall not prevent a suspension under this subsection. Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any 10-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation.

(d) Upon suspending the license of any person as hereinbefore in this section authorized, the Division shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing, unless a

preliminary hearing was held before his license was suspended, as early as practical within not to exceed 20 days after receipt of such request in the county wherein the licensee resides unless the Division and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this section printed thereon. Upon such hearing and duly authorized agents of the Division may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the Division shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. Provided further upon such hearing, preliminary or otherwise, involving subsections (a)(1) through (a)(10a) of this section, the Division may for good cause appearing in its discretion substitute a period of probation not to exceed one year for the suspension or for any unexpired period of suspension. Probation shall mean any written agreement between the suspended driver and a duly authorized representative of the Division and such period of probation shall not exceed one year, and any violation of the probation agreement during the probation period shall result in a suspension for the unexpired remainder of the suspension period. The authorized agents of the Division shall have the same powers in connection with a preliminary hearing prior to suspension as this subsection provided in connection with hearings held after suspension. (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. 16; c. 17, ss. 1, 2; 1975, c. 716, s. 5; 1977, c. 902, s. 1; 1979, c. 36; c. 667, ss. 18, 41.)

I. IN GENERAL.

Editor's Note. —

The second 1979 amendment, effective Jan. 1, 1981, deleted "or chauffeur" following "operator" in the introductory paragraph of subsection (a) and near the end of subdivision (11) of subsection (a), deleted "or chauffeur's" following "driver's" in subsection (b), deleted "or chauffeur" following "operator" near the beginning of the introductory paragraph in subsection (c), substituted "driver's" for "operator's or chauffeur's" near the end of the introductory paragraph in subsection (c) and near the beginning of the next-to-last paragraph of subsection (c), and substituted "driver's" for "operator's" in the Schedule of Point Values in subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Applied in Whedbee v. Powell, 41 N.C. App. 250, 254 S.E.2d 645 (1979).

§ 20-16.1. Mandatory suspension of driver's license upon conviction of excessive speeding; limited driving permits for first offenders. — (a) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 30 days the license of any driver without preliminary hearing on receiving a record of such driver's conviction of exceeding by more than 15 miles per hour the speed limit, either within or outside the corporate limits of a municipality, if such person was also driving at a speed in excess of 55 miles per hour at the time of the offense.

(b)(1) Upon a first conviction only of violating subsection (a), the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered. The judge may impose upon such

limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Division of Motor Vehicles along with any driver's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles of the class or type that would be allowed by the person's license if it were not currently revoked upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to driver's license, not by their nature, rendered inapplicable.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in form and content as follows:

STATE OF NORTH CAROLINA
COUNTY OF . . . . . .

IN THE GENERAL COURT OF JUSTICE
RESTRICTED DRIVING PRIVILEGES

This cause coming on to be heard and being heard before the Honorable . . . . . ., Judge presiding, and it appearing to the court that the defendant, ..., has been convicted of the offense of excessive speeding in violation of G.S. 20-16.1(a), and it further appearing to the court that the defendant should be issued a restrictive driving license and is entitled to the issuance of a restrictive driving privilege under and by the authority of G.S. 20-16.1(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: . . . . . .
Race: . . . . . Sex: . . . . . .
Height: . . . . . Weight: . . . . . .
Color of Hair: . . . . . Color of Eyes: . . . . . .
Birth Date: . . . . . .
Driver's License Number: . . . . . .
Signature of Licensee: . . . . Conditions of Restriction: . . . . .
Type of Vehicle . . . . . .
Geographic Restrictons: . . . . . .
Hours of Restriction: . . . . . .
Other Restrictions: . . . . . .
This limited license shall be effective from . . . . . to . . . . . subject to further orders as the court in its discretion may deem necessary and proper.

This the . . . . . day of . . . . . ., 19. . . .

. . . . . .
(Judge Presiding)

(3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the resident judge of the superior court of the district in which he resides for limited driving privileges

hereinbefore defined. Upon such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.

(4) Any violation of the restrictive driving privileges as set forth in the judgment of the trial judge allowing such privileges shall constitute the offense of driving while license has been suspended as set forth in G.S. 20-28. Whenever a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(c) Upon conviction of a similar second or subsequent offense which offense occurs within one year of the first or prior offense, the license of such operator shall be suspended for 60 days, provided such first or prior offense occurs subsequent to July 1, 1953.

(d) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 60 days the license of any driver without preliminary hearing on receiving a record of such driver's conviction of having violated the laws against speeding described in subsection (a) and of having violated the laws against reckless driving on the same occasion as the speeding offense occurred.

(e) The provisions of this section shall not prevent the suspension or revocation of a license for a longer period of time where the same may be authorized by other provisions of law.

(f) Operators whose licenses have been suspended under the provisions of this section shall not be required to maintain proof of financial responsibility upon reissuance of the license solely because of suspension pursuant to this section. (1953, c. 1223; 1955, c. 1187, s. 15; 1959, c. 1264, s. 4; 1965, c. 133; 1975, c. 716, s. 5; c. 763; 1979, c. 667, ss. 19, 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver" for "operator or chauffeur" and "driver's" for "operator's or chauffeur's" throughout the section, inserted "of the class or type that would be allowed by the person's license if it were not currently revoked" in the last sentence of subdivision (1) of subsection (b) and deleted "or chauffeur" following "operator" in subsection (c) and "or chauffeurs" following "Operators" at the beginning of subsection (f).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test.

(e) If the revocation is sustained after such a hearing, the person whose driving privilege has been revoked, under the provisions of this section, shall have the right to file a petition in the superior court for a hearing de novo to review the action of the Division in the same manner and under the same conditions as is provided in G.S. 20-25 except that such hearing shall be conducted in the judicial district where the arrest was made.

(1979, 2nd Sess., c. 1160.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective October 1, 1980, added at the end of subsection (e) "except that such hearing shall be conducted in the judicial district where the arrest was made."

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

The operator of a motor vehicle has no constitutional right to confer with counsel prior to a decision to submit to the breathalyzer test. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Effect of 1973 Amendment to Subdivision (a)(4). — The 1973 amendment of this section which inserted "for this purpose" in the place of "for these purposes" did so at the same time that it enumerated three other rights accruing to a driver faced with the prospect of a breathalyzer test. The limiting words were inserted to apply to the single generic right enumerated in subdivision (a)(4) of this section, the right to have advice and support during the testing process, as opposed to the other rights enumerated in the preceding subdivisions (a)(1) through (a)(3) of this section. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Time Limit on Right to Call Attorney and Select Witness. — The 30-minute time limit referred to by subdivision (a)(4) of this section applies both to the purpose of calling an attorney and to the purpose of selecting a witness to view the testing procedure. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Section 15A-501(5) Not Applicable to Breathalyzer Tests. — Section 15A-501(5) which gives a criminal defendant a right to consult with counsel within a reasonable time after arrest, does not apply to breathalyzer tests. It would be incongruous to hold that subdivision (a)(4) of this section requires an accused to select a witness to view for him the testing procedure within 30 minutes but allows a greater period for the purpose of calling an attorney since, in virtually every situation, it would be easier for an accused to contact an attorney by telephone within 30 minutes than to contact anyone else and have them travel to the breathalyzer room to observe the test within that same time period. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

The legislature did not intend for the "reasonable time" contemplated by § 15A-501(5), a part of the Criminal Procedure Act, to apply to the specialized situation contemplated by this section, a civil matter involving the administrative removal of driving privileges as a result of refusing to submit to a breathalyzer test. When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Test Not Required to Be Administered within 30 Minutes. — This section does not require that the breathalyzer test be administered within 30 minutes of the time a person's rights are read to him. Pappas v. North Carolina Dep't of Motor Vehicles, 42 N.C. App. 497, 256 S.E.2d 829 (1979).

Applied in Durland v. Peters, 42 N.C. App. 25, 255 S.E.2d 650 (1979); Harper v. Peters, 42 N.C. App. 62, 255 S.E.2d 791 (1979); State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

§ 20-16.3. Preliminary breath test.

Cited in State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980).

§ 20-17. Mandatory revocation of license by Division. — The Division shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction for any of the following offenses when such conviction has become final:

(8) Conviction of using a false or fictitious name or giving a false or fictitious address in any application for a driver's license, or learner's permit, or any renewal or duplicate thereof, or knowingly making a false statement or knowingly concealing a material fact or otherwise committing a fraud in any such application or procuring or knowingly permitting or allowing another to commit any of the foregoing acts.

(1979, c. 667, ss. 20, 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver" for "operator or chauffeur" and "driver's" for "operator's or chauffeur's" in the introductory paragraph and "a driver's" for "an operator's or chauffeur's" near the beginning of subdivision (8).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and

regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As the other subdivisions were not changed by the amendment, they are not set out.

Applied in Whedbee v. Powell, 41 N.C. App. 250, 254 S.E.2d 645 (1979).

§ 20-18. Conviction of offenses described in § 20-181 not ground for suspension or revocation. — Conviction of offenses described in G.S. 20-181 shall not be cause for the suspension or revocation of driver's license under the terms of this Article. (1939, c. 351, s. 2; 1955, c. 913, s. 1; 1979, c. 667, s. 41.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-19. Period of suspension or revocation.

Editor's Note. —

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 20-20. Surrender of licenses. — Whenever any driver's license issued by the Division is revoked or suspended under the terms of this Chapter, the licensee shall surrender to the Division all driver's licenses and duplicates thereof issued to him by the Division which are in his possession. (1935, c. 52, s. 14; 1943, c. 649, s. 4; 1967, c. 280; 1969, c. 182; 1975, c. 716, s. 5; 1979, c. 667, ss. 21, 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "vehicle operator's or chauffeur's" in two places.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-21. No operation under foreign license during suspension or revocation in this State. — Any resident or nonresident whose driver's license or right or privilege to operate a motor vehicle in this State has been suspended or revoked as provided in this Article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this Article. (1935, c. 52, s. 15; 1979, c. 667, s. 41.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-22. Suspending privileges of nonresidents and reporting convictions. — (a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the Division in like manner and for like cause as a driver's license issued hereunder may be suspended or revoked.

(1979, c. 667, s. 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the end of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-23. Suspending resident's license upon conviction in another state. — The Division is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction as defined in G.S. 20-24(c) of such person in another state of the offenses hereinafter enumerated which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator. The provisions of this section shall apply only for the offenses as set forth in G.S. 20-26(a). (1935, c. 52, s. 17; 1971, c. 486, s. 2; 1975, c. 716, s. 5; 1979, c. 667, s. 22.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, deleted "or chauffeur" at the end of the first sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-23.1. Suspending or revoking operating privilege of person not holding license. — In any case where the Division would be authorized to suspend or revoke the license of a person but such person does not hold a license, the Division is authorized to suspend or revoke the operating privilege of such a person in like manner as it could suspend or revoke his license if such person held a driver's license, and the provisions of this Chapter governing suspensions, revocations, issuance of a license, and driving after license suspended or revoked, shall apply in the discretion of the Division in the same manner as if the license has been suspended or revoked. (1955, c. 1187, s. 19; 1969, c. 186, s. 2; 1975, c. 716, s. 5; 1979, c. 667, s. 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the middle of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-24. When court to forward license to Division and report convictions. — (a) Whenever any person is convicted of any offense for which this Article makes mandatory the revocation of the driver's license of such person by the Division, the court in which such conviction is had shall require the surrender to it of all drivers' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Division within 30 days.

The clerks of court, assistant clerks of court and deputy clerks of court in which any person is convicted, and as a result thereof the revocation or suspension of the driver's license of such person is required under the provisions of this Chapter, are hereby designated as agents of the Division of Motor Vehicles for the purpose of receiving all drivers' licenses required to be surrendered under this section, and are hereby authorized to and shall give to such licensee a dated receipt for any such license surrendered, such receipt to be upon such form as may be approved by the Commissioner of Motor Vehicles. The original of such receipt shall be mailed forthwith to the Driver License Section of the Division of Motor Vehicles together with the driver's license. Any driver's license which has been surrendered and for which a receipt has been issued as herein required shall be revoked or suspended as the case may be as of the date shown upon the receipt issued to such person.

(b) Every court having jurisdiction over offenses committed under this Article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the Division a record of the conviction of any person in said court for a violation of any [of] said laws, and may recommend the suspension of the driver's license of the person so convicted. Every court shall also forward to the Division a record of every conviction in which sentence is suspended on condition that the defendant not operate a motor vehicle for a period of time, and such report shall state the period of time for which such condition is imposed; provided that the punishment for the violation of this subsection shall be the same as provided in G.S. 20-7(o).

(c) For the purpose of this Article the term "conviction" shall mean a final conviction. Also, for the purposes of this Article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. Also, a defendant shall be treated for the purposes of this Article as having been convicted of any offense under this Chapter as to which he:

(1) Has been served with process under Article 17, Criminal Process, Chapter 15A of the General Statutes;
(2) Has failed to appear upon due call of the case; and
(3) Has failed within 90 days thereafter to submit himself to the jurisdiction of the court to answer the charge.

In addition to the foregoing provisions and for the purpose of this Article, a third or subsequent prayer for judgment continued within any five-year period shall be considered as a final conviction and to this end all orders entering prayer for judgments continued entered by the courts shall be reported to the Division of Motor Vehicles.

(d) After November 1, 1935, no driver's license shall be suspended or revoked except in accordance with the provisions of this Article. (1935, c. 52, s. 18; 1949, c. 373, ss. 3, 4; 1955, c. 1187, s. 14; 1959, c. 47; 1965, c. 38; 1973, c. 19; 1975, cc. 46, 445; c. 716, s. 5; c. 871, s. 1; 1979, c. 667, s. 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" and "drivers' " for "operators' and chauffeurs' " throughout the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-25. Right of appeal to court.

Cited in Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

§ 20-26. Records; copies furnished. — (a) The Division shall keep a record of test, proceedings and orders pertaining to all driver's licenses granted, refused, suspended or revoked. The Division shall keep records of convictions as defined in G.S. 20-24(c) occurring outside North Carolina only for the offenses of exceeding a stated speed limit of 55 miles per hour or more by more than 15 miles per hour, driving while license suspended or revoked, careless and reckless driving, engaging in prearranged speed competition, engaging willfully in speed competition, hit-and-run driving resulting in damage to property, unlawfully passing a stopped school bus, illegal transportation of intoxicating liquors, and the offenses included in G.S. 20-17.

(b) The Division shall furnish certified copies of license records required to be kept by subsection (a) of this section to State, county, municipal and court officials of this State for official use only, without charge. Provided a certified copy of such record may be transmitted via the police information network and that such copy shall be competent for the purpose of establishing the status of a person's operator's license and driving privilege without further authentication. The Attorney General and the Commissioner of Motor Vehicles are authorized to promulgate such rules and regulations as may be necessary to implement the provision of this subsection.

(c) The Division shall furnish copies of license records required to be kept by subsection (a) of this section to other persons, firms and corporations for uses other than official upon prepayment of the fee therefor, according to the following schedule:

(1) Limited extract copy of license record, for period up to three years $1.00
(2) Complete extract copy of license record 1.00
(3) Certified true copy of complete license record 3.00

All fees received by the Division under the provisions of this subsection shall be paid into and become a part of the "Highway Fund." (1935, c. 52, s. 20; 1961, c. 307; 1969, c. 783, s. 3; 1971, c. 486, s. 1; 1975, c. 716, s. 5; 1979, c. 667, s. 23; c. 903, ss. 9, 10.)

Editor's Note. —

Session Laws 1979, c. 667, s. 23, effective Jan. 1, 1981, substituted "driver's" for "operator's and chauffeur's" near the beginning of subsection (a) and substituted "Highway Fund" for "Operator's and Chauffeur's License Fund" at the end of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-27. Availability of records. — (a) All records of the Division pertaining to application and to drivers' licenses, except the confidential medical report referred to in G.S. 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours.

(b) All records of the division pertaining to chemical tests as provided in G.S. 20-16.2 shall be available to the courts as provided in G.S. 20-26(b). (1935, c. 52, s. 21; 1975, c. 716, s. 5; 1979, c. 667, s. 24; c. 903, s. 11.)

Editor's Note. —

Session Laws 1979, c. 667, effective Jan. 1, 1981, substituted "drivers' licenses" for "operator's and chauffeur's license" near the beginning of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-28. Unlawful to drive while license suspended or revoked. — (a) Any person whose driver's license has been suspended or revoked other than permanently, as provided in this Chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense.

Provided, however, any person whose license has been suspended or revoked under this section for 12 months may apply for a license after 90 days; any person whose license has been suspended or revoked under this section for two years may apply for a license after 12 months; any person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, liquor laws or drug laws of North Carolina or any other state. The new license may be issued upon such terms and conditions as the Division may see fit to impose for the balance of the suspension or revocation period. When the suspension or revocation period is permanent the terms and conditions imposed by the Division may not exceed three years.

Upon conviction, a violator of this section shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of the court not to exceed two years, or both; provided, however, the restoree of a suspended or revoked driver's license who operates a motor vehicle upon the streets or highways of the State without maintaining financial responsibility as provided by law shall be punished as for operating without a driver's license. (1979, c. 377, ss. 1, 2; c. 667, s. 41.)

Editor's Note. —

The second 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operators or chauffeurs" near the beginning of the first sentence of the first paragraph of subsection (a) and in the proviso to the third paragraph of subsection (a) and substituted "a driver's" for "an operator's" at the end of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-29. Surrender of license. — Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the Division, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this Article. Pickup notices for drivers' licenses or revocation or suspension of license notices and orders or demands issued by the Division for the surrender of such licenses may be served and executed by patrolmen or other peace officers, and such patrolmen and peace officers, while serving and executing such notices, orders and demands, shall have all the power and authority possessed by peace officers when serving and executing warrants charging violations of the criminal laws of the State. (1935, c. 52, s. 23; 1949, c. 583, s. 7; 1975, c. 716, s. 5; 1979, c. 667, s. 25.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "drivers' " for "operators' or chauffeurs' " near the beginning of the second sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses. — The Commissioner of Motor Vehicles, having good and sufficient cause to believe that a licensed operator is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the Commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions or upon failure of such reexamination may cancel the license of such person until he passes a reexamination. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the cancellation of the license of the person failing to be reexamined, and the license so canceled shall remain canceled until such person satisfactorily complies with the reexamination requirements of the Commissioner. The Commissioner may, in his discretion and upon the written application of any person qualified to receive a driver's license, issue to such person a driver's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any driver's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted driver's license upon meeting the requirements therefor. (1943, c. 787, s. 2; 1949, c. 1121; 1971, c. 546; 1979, c. 667, ss. 26, 41.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, deleted "or chauffeur" following "operator" near the beginning of the first sentence and substituted "a driver's" for "an operator's or chauffeur's" in two places in the fourth sentence and "driver's" for "chauffeur's or operator's" near the end of the fifth sentence and for "operator's or chauffeur's" in the last sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-30. Violations of license or learner's permit provisions. — It shall be unlawful for any person to commit any of the following acts:

(1) To display or cause to be displayed or to have in possession a driver's license or learner's permit, knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

(2) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, a driver's license or learner's permit.

(3) To display or to represent as one's own a license or learner's permit not issued to the person so displaying same.

(4) To fail or refuse to surrender to the Division upon demand any driver's license or learner's permit that has been suspended, canceled or revoked as provided by law.

(5) To use a false or fictitious name or give a false or fictitious address in any application for a driver's license or learner's permit, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application, or for any person to procure, or knowingly permit or allow another to commit any of the foregoing act. Any license or learner's permit procured as aforesaid shall be void from the issuance thereof, and any moneys paid therefor shall be forfeited to the State.

(6) To photostat or otherwise reproduce a driver's license or learner's permit or to possess a driver's license or learner's permit which has been photostated or otherwise reproduced, unless such photostat or other reproduction was authorized by the Commissioner.

(7) To sell or offer for sale any reproduction or facsimile or simulation of a driver's license or learner's permit. The provisions of this subsection shall not apply to agents or employees of the Division while acting in the course and scope of their employment. Any person, firm or corporation violating the provisions of this subsection shall be guilty of a felony, and shall be punished by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000), imprisonment for not more than three years or both such fine and imprisonment. (1935, c. 52, s. 24; 1951, c. 542, s. 4; 1967, c. 1098, s. 1; 1973, c. 18, s. 2; 1975, c. 716, s. 5; 1979, c. 415; c. 667, ss. 27, 41.)

Editor's Note. —

The second 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "any operator's or chauffeur's" in subdivisions (1) and (2) and for "an operator's or chauffeur's" near the beginning of the first sentence in subdivision (5), in two places in subdivision (6), and in the first sentence of subdivision (7). The second 1979 amendment also rewrote subdivision (4).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Amendment Effective March 1, 1981. —

Session Laws 1979, 2nd Sess., c. 1316, s. 22, effective March 1, 1981, and applicable to offenses committed on or after that date, amends subdivision (7) of this section to read as follows:

"(7) To sell or offer for sale any reproduction or facsimile or simulation of a driver's license or learner's permit. The provisions of this subsection shall not apply to agents or employees of the Division while acting in the course and scope of their employment. Any person, firm or corporation violating the provisions of this subsection shall be guilty of a Class J felony."

§ 20-34.1. Unlawful to issue licenses for anything of value except prescribed fees. — It shall be unlawful for any employee of the Division of Motor Vehicles to charge or accept any money or other thing of value except the fees prescribed by law for the issuance of a driver's license, and the fact that the license is not issued after said employee charges or accepts money or other thing of value shall not constitute a defense to a criminal action under this section. In a prosecution under this section it shall not be a defense to show that the person giving the money or other thing of value or the person receiving the

license or intended to receive the same is entitled to a license under the Uniform Driver's License Act. Any person violating this section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five years or by a fine of not more than five thousand dollars ($5,000) or by both such fine and imprisonment. (1951, c. 211; 1975, c. 716, s. 5; 1979, c. 667, s. 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the middle of the first sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-37. Limitations on issuance of licenses. — There shall be no driver's license issued within this State other than that provided for in this Article, nor shall there be any other examination required: Provided, however, that cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town. (1935, c. 52, s. 34; 1943, c. 639, s. 2; 1979, c. 667, s. 41.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

Article 2A.

Afflicted, Disabled or Handicapped Persons.

§ 20-37.1. Motorized wheelchairs or similar vehicles. — Any afflicted or disabled person who is qualified to operate a motorized wheelchair or other similar vehicle not exceeding 1,000 pounds gross weight, may apply to the Division of Motor Vehicles for a special driver's license and permanent registration plates. When it is made to appear to the satisfaction of the Division of Motor Vehicles that the applicant is qualified to operate such vehicle, and is dependent upon such vehicle as a means of conveyance or as a means of earning a livelihood, said Division shall, upon the payment of a license fee of one dollar ($1.00) for each such motor vehicle, issue to such applicant for his exclusive personal use a special vehicle driver's license, which shall be renewed annually upon the payment of a fee of fifty cents (50¢), and permanent registration plates for such vehicle. The initial one dollar ($1.00) fee required by this section shall be in full payment of the permanent registration plates issued for such vehicle and such plates need not thereafter be renewed and such plates shall be valid only on the vehicle for which issued and then only while such vehicle is owned by the person to whom the plates were originally issued.

Any person other than the licensee who shall operate any motor vehicle equipped with any such special license plate as is authorized by this section shall be guilty of a misdemeanor and upon conviction subject to punishment in the discretion of the court. (1949, c. 143; 1975, c. 716, s. 5; 1979, c. 667, s. 29.)

Editor's Note. —
The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's" near the end of the first sentence and near the end of the second sentence in the first paragraph.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

Article 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card.

(d) A special identification card shall not expire but may be reissued. The fee for the issuance or reissuance of a special identification card shall be one dollar ($1.00) and shall be placed in the "Highway Fund" for use as provided in G.S. 20-7(j).

(1979, c. 667, s. 30.)

Editor's Note. —
The second 1979 amendment, effective Jan. 1, 1981, substituted " 'Highway Fund' " for " 'Operators' and Chauffeurs' License Fund' " in subsection (d).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

Article 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-39. Administering and enforcing laws; rules and regulations; agents, etc.; seal.

(e) The Commissioner is authorized to cooperate with and provide assistance to the Environmental Management Commission, or appropriate local government officials, and to develop, adopt, and ensure enforcement of necessary rules and regulations, regarding programs of motor vehicle emissions inspection/maintenance required for areas in which ambient air pollutant concentrations exceed National Ambient Air Quality Standards. (1937, c. 407, s. 4; 1975, c. 716, s. 5; 1979, 2nd Sess., c. 1180, s. 1.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, added subsection (e).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-63. Registration plates to be furnished by the Division; requirements; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of the State of North Carolina, which may be abbreviated, the year number for which it is issued or the date of expiration, and, if the plate is issued for a commercial vehicle, as defined in G.S. 20-4.2(1), the word "commercial," designating "commercial vehicle." Provided such plates bearing the word "commercial" shall not be issued for trailers or vehicles licensed for less than 5,000 pounds.

(1979, c. 470, s. 1.)

Editor's Note. —

Session Laws 1979, c. 470, effective Jan. 1, 1981, substituted "license" for "registration" near the beginning of the first sentence of subsection (b), deleted "and" following "abbreviated," in that sentence and substituted "and, if the plate is issued for a commercial vehicle, as defined in G.S. 20-4.2(1), the word 'commercial,' designating 'commercial vehicle' " for "thereof" at the end of that sentence, and added the second sentence in subsection (b).

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 20-65: Repealed by Session Laws 1979, 2nd Session, c. 1280, s. 1, effective July 1, 1980.

Editor's Note. —

Session Laws 1979, c. 160, effective July 1, 1980, rewrote this section.

§ 20-66. Renewal of registration; semipermanent plates issued; renewal sticker annually; fees.

(b1) For renewal periods beginning January 1, 1978, and thereafter, renewal registrations of private hauler trucks licensed for 4,000 pounds gross weight, motorcycles, U-drive-it passenger vehicles and trailers may be made by issuance of stickers, tabs, or other devices in lieu of new registration plates, or in combination with new registration plates, at the discretion of the Commissioner. Such stickers, tabs or other devices shall show the period of validity of registration. This provision shall not apply to trucks licensed as common carriers, for-hire trucks, rental trucks or contract carrier trucks.

(d) The Division may also provide for the issuance of license plates for motor vehicles with the dates of expiration thereof to vary from month to month so as to approximately equalize the number that expire during the registration year.

(e) A vehicle license fee shall be computed by dividing the annual license fee by 12 and multiplying the quotient by the number of months remaining prior to the end of the month of expiration of the registration. Amounts so computed shall be rounded to the nearest multiple of twenty-five cents (25¢).

(f) No vehicle owner shall be required to pay the tax required by G.S. 20-88.1 at a rate greater than the annual rate prescribed in G.S. 20-88.1, because of Division of Motor Vehicles' procedures for implementing this subsection. Compliance with this restriction may be accomplished by computing the tax for a portion of a year by dividing the annual amount by 12 and multiplying the quotient by the number of months remaining prior to the end of the month of

expiration of the registration. Amounts so computed shall be rounded to the nearest multiple of twenty-five cents (25¢).

(g) Registration of all vehicles required to be registered under the staggered system shall expire at midnight on the last day of the month designated on the validation sticker, tab or other device issued by the Division of Motor Vehicles to validate that registration: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the 15-day period, inclusive of the fifteenth day immediately following the last day of the month designated on the validation sticker, tab or other device issued by the Division of Motor Vehicles to validate that registration if the registration plate validation sticker, tab or other device is registered to the vehicle prior to the first day of expiration month.

(h) Registration of all vehicles not required to be registered under the staggered system shall expire at midnight on the thirty-first day of December of each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the period between the thirty-first day of December and the fifteenth day of February, inclusive, if the license plate is registered to the vehicle on which it is being used prior to the thirty-first day of December. Provided further that the fee required under G.S. 20-88.1 shall be paid and collected in its entirety at any time such vehicles are registered and is not to be prorated. (1937, c. 407, s. 30; 1955, c. 554, s. 3; 1973, c. 1389, s. 1; 1975, c. 716, s. 5; 1977, c. 337; 1979, 2nd Sess., c. 1280, ss. 2, 3.)

Editor's Note. —

The 1979, 2nd Sess., amendment deleted "farm trucks," preceding "common carriers" in the third sentence of subsection (b1), inserted "registration" near the end of subsection (d) and added subsections (e), (f), (g) and (h). The amendment to subsection (b1) and new subsections (f), (g) and (h) were made effective January 1, 1981. The amendment to subsection (d) was made effective July 25, 1980. New subsection (e) was made effective July 1, 1980.

As subsections (a), (b) and (c) were not changed by the amendment, they are not set out.

Part 5. Issuance of Special Plates.

§ 20-81.4. Free registration plates to disabled veterans and former prisoners of war.

(a1) From and after January 1, 1979, the North Carolina Division of Motor Vehicles, upon request by an ex-prisoner of war residing in this State, shall provide and issue free of charge to such ex-prisoner of war registration and special prisoner of war registration plates for either one automobile or one pickup truck, where a pickup truck is the ex-prisoner of war's only mode of transportation and is not used for hire; an ex-prisoner of war being, for the purpose of this subsection, an American service person captured and held prisoner by forces hostile to the United States while serving in the armed forces of the United States in World War I, World War II, Korean service or Vietnam service.

(c1) The registration plate 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.

(1979, 2nd Sess., c. 1191.)

Editor's Note. —

The 1979, 2nd Sess., amendment changed the date at the beginning of subsection (a1) from 1976 to 1979, substituted, near the beginning of subsection (a1), "upon request by an ex-prisoner of war residing in this State, shall provide and issue free of charge to such ex-prisoner of war registration and special prisoner of war" for "on a first-come first-serve basis to each ex-prisoner of war in this State registration and special P.O.W." and substituted "free of charge" for "at no additional fee" near the beginning of subsection (c1).

As the rest of the section was not changed by the amendment, only subsection (a1) and (c1) are set out.

Part. 7. Title and Registration Fees.

§ 20-88. Property-hauling vehicles.

(b) There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of self-propelled property-carrying vehicles, fees according to the following classification and schedule and upon the following conditions:

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight

	Farmer
Not over 4,500 pounds	$0.20
4,501 to 8,500 pounds inclusive	.25
8,501 to 12,500 pounds inclusive	.32
12,501 to 16,500 pounds inclusive	.44
Over 16,500 pounds	.50

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight

	Private Hauler Contract Carriers, Flat Rate Common Carriers and Exempt for-Hire Carriers
Not over 4,500 pounds	$0.40
4,501 to 8,500 pounds inclusive	.50
8,501 to 12,500 pounds inclusive	.63
12,501 to 16,500 pounds inclusive	.88
Over 16,500 pounds	1.00

	Common Carrier of Property (Deposit)
Not over 4,500	$0.75
4,501 to 8,750 pounds inclusive	.75
8,501 to 12,500 pounds inclusive	.75
12,501 to 16,500 pounds inclusive	.75
Over 16,500 pounds	.75

(1) The minimum fee for a vehicle licensed under this subsection shall be twelve dollars and fifty cents ($12.50) at the farmer rate and sixteen dollars ($16.00) at the private hauler, contract carrier and common carrier rates.

(2) The term "farmer" as used in this subsection means any person engaged in the raising and growing of farm products on a farm in North Carolina not less than 10 acres in area, and who does not engage in the business of buying products for resale.

(3) License plates issued at the farmer rate shall be placed upon trucks and truck-tractors that are operated exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies and not operated in hauling for hire.

(4) "Farm products" means any food crop, cattle, hogs, poultry, dairy products, flower bulbs, or other nursery products and other agricultural products designed to be used for food purposes, including in the term "farm products" also cotton, tobacco, logs, bark, pulpwood, tannic acid wood and other forest products grown, produced, or processed by the farmer.

(5) The Division shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" plates, when vehicle bearing such plates shall be sold or transferred.

(5a) Notwithstanding any other provision of this Chapter, license plates issued pursuant to this subsection at the farmer rate may be purchased for any three-month period at one fourth of the annual fee.

(6) There shall be paid to the Division annually as of the first of January, the following fees for "wreckers" as defined under G.S. 20-38(39): a wrecker fully equipped weighing 7,000 pounds or less, sixty-two dollars and fifty cents ($62.50); wreckers weighing in excess of 7,000 pounds shall pay one hundred twenty-five dollars ($125.00). Fees to be prorated quarterly. Provided, further, that nothing herein shall prohibit a licensed dealer from using a dealer's license plate to tow a vehicle for a customer.

(1979, c. 631.)

Editor's Note. —

The second 1979 amendment, effective April 1, 1980, added subdivision (5a) of subsection (b).

Section 20-38, referred to in subdivision (6) of subsection (b), was repealed by Session Laws 1973, c. 1330. For present definition of "wreckers," see § 20-4.01, subdivision (50).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 20-95. License for less than a year. — (a) Except as provided in subsection (b) of this section, licenses issued on or after April 1 and before July 1 of each year shall be three fourths of the annual fee; licenses issued on or after July 1 and before October 1 shall be one half of the annual fee; and licenses issued on or after October 1 shall be one fourth of the annual fee.

(b) This section shall not apply to licenses issued pursuant to G.S. 20-65, 20-79.1, 20-79.2, 20-79.3, 20-81.2, 20-84, 20-84.1, 20-87(9) through (10) and 20-88(c). (1937, c. 407, s. 59; 1947, c. 914, s. 3; 1979, c. 476.)

Editor's Note. — The 1979 amendment, effective July 1, 1980, rewrote the former provisions of this section as subsection (a) and added subsection (b). In subsection (a), the amendment combined the former three sentences into one, added "Except as provided in subsection (b) of this section," at the beginning of the subsection, and deleted provisions excepting two-wheel trailers under 1500 pounds weight pulled by passenger cars.

Section 20-65, referred to in subsection (b) of this section, was repealed by Session Laws 1979, 2nd Sess., c. 1280.

§ 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 Charlotte, the City of Greenville, the City of Hendersonville, the Town of Cape Carteret, the Town of Chadbourn, the Town of Magnolia, the Town of Mount Olive, the Town of Stoneville, the Town of Wallace and all incorporated cities and towns in the counties of Buncombe, Cumberland, 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, City of Roanoke Rapids, the Town of Weldon, the Town of Garner, the Town of Jackson, the Town of Wendell, the Town of Elizabethtown 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 Charlotte, the City of Greenville, the City of Hendersonville, the Town of Cape Carteret, the Town of Chadbourn, the Town of Mount Olive, the Town of Rose Hill, the Town of Stoneville and all incorporated cities and towns in the counties of Buncombe, Cumberland, 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.

(1979, 2nd Sess., c. 1152; c. 1153, s. 1; c. 1155, s. 1; c. 1189; c. 1308, s. 1.)

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1152, inserted the provisions as to the Town of Wendell and the City of Henderson in subsection (a).

Session Laws 1979, 2nd Sess., c. 1153, s. 1, inserted the provisions as to the Town of Chadbourn in subsection (a).

Session Laws 1979, 2nd Sess., c. 1155, s. 1, inserted the provisions as to the City of Greenville in subsection (a).

Session Laws 1979, 2nd Sess., c. 1189, effective January 1, 1981, inserted the provisions as to the Town of Jackson and the Town of Zebulon in subsection (a).

Session Laws 1979, 2nd Sess., c. 1308, s. 1, inserted the provisions as to the Towns of Magnolia, Rose Hill and Wallace in subsection (a).

Session Laws 1977, c. 433, s. 2, as amended by Session Laws 1977, c. 880, s. 2, and Session Laws 1979, c. 173, s. 2, c. 216, s. 2, c. 248, s. 2, c. 400, s. 2, c. 530, s. 2, and 1979, 2nd Sess., c. 1153, s. 2, c. 1155, s. 2, provides: "This act applies only to the City of Charlotte, the City of Greenville, the City of Hendersonville, the Town of Cape Carteret, the Town of Chadbourn, the Town of Magnolia, the Town of Mount Olive, the Town of Rose Hill, the Town of Stoneville, the Town of Wallace and to the incorporated cities and towns in the counties of Buncombe, Cumberland, Davidson, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey."

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106. Receiving or transferring stolen vehicles.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated

under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 20-109. Altering or changing engine or other numbers.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 20-114. Duty of officers; manner of enforcement.

Cited in Shay v. Nixon, 45 N.C. App. 108, 262 S.E.2d 294 (1980).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

Subsection (g) applies to a basically unloaded truck that is depositing material on the road. See opinion of Attorney General to Mr. Randy Jones, Department of Natural Resources & Community Development, Oct. 3, 1979.

§ 20-128.2. Motor vehicle emission standards. — (a) The rules and regulations promulgated pursuant to G.S. 143-215.107(a)(6) for the purposes of this section shall be limited to carbon monoxide, shall be statewide in scope but enforced on a county unit basis when ambient air pollutant concentrations exceed the National Ambient Air Quality Standards established pursuant to the Clean Air Act of 1970 as amended by the Clean Air Act amendments of 1977 and when the Environmental Management Commission certifies to the Commissioner of Motor Vehicles that the ambient air quality within a specified county requires a motor vehicle inspection/maintenance program; provided the Environmental Management Commission may prescribe different standards for different areas as may be necessary and appropriate to facilitate accomplishment of the stated purposes of this section. Such standards shall be no more restrictive or stringent than federal standards, as required by G.S. 143-215.107(f).

(b) Rules and regulations promulgated pursuant to this section shall be implemented through the use of the safety inspection stations licensed pursuant to Article 3A of Chapter 20 of the General Statutes. (1979, 2nd Sess., c. 1180, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1180, s. 8, makes the act effective July 1, 1980.

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

§ 20-130.2. Use of amber lights on certain vehicles.

Cited in Leisure Prods., Inc. v. Clifton, 44 N.C. App. 233, 260 S.E.2d 803 (1979).

§ 20-131. Requirements as to headlamps and auxiliary driving lamps.

Persons Lying or Sleeping on Highway. — As the law does not require a motorist to anticipate that a person may be lying or sleeping on the travelled portion of the highway, this statute does not require that persons lying or sleeping on the highway be rendered clearly discernible as human beings by motor vehicle headlights. Sink v. Sumrell, 41 N.C. App. 242, 254 S.E.2d 665 (1979).

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor.

V. INSTRUCTIONS.

It is not mandated that the offense defined in subsection (b) be instructed on everytime there is an offense charged pursuant to subsection (a). State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

In a prosecution for driving under the influence of intoxicating liquor, second offense, and driving with a revoked license, fourth offense, where evidence was introduced which indicated that a breathalyzer test revealed 0.11 percent alcohol by blood weight in defendant, it was not error to fail to instruct the jury on the offense of operating a vehicle on a public highway when blood alcohol content is 0.10 percent by weight in violation of subsection (b), since, although the instruction could have been given, the ommission of the instruction was to defendant's benefit, since under subsection (a), the State must prove beyond a reasonable doubt defendant was under the influence of intoxicating liquor, while for a conviction under subsection (b) the State need only prove that the amount of alcohol in defendant's blood was 0.10 percent or more by weight. Thus, by not instructing on the latter motor vehicle violation, the trial judge benefited defendant and handicapped the State. State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in Durland v. Peters, 42 N.C. App. 25, 255 S.E.2d 650 (1979).

§ 20-139. Persons under the influence of drugs.

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

§ 20-139.1. Result of a chemical analysis admissible in evidence; presumption.

(c) When a person shall submit to a blood test at the request of a law-enforcement officer under the provisions of G.S. 20-16.2 only a physician or a registered nurse (or other qualifed person) may withdraw blood for the purpose of determining the alcoholic content therein. If the person withdrawing the blood indicates his desire for written confirmation of the law-enforcement officer's request for the withdrawal of blood, the officer shall furnish it prior to the withdrawal of blood. When blood is withdrawn pursuant to an officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing him, or contracting for the service of withdrawing blood, shall be held criminally or civilly liable by reason of withdrawing blood from another; provided that there shall be no immunity from liability for negligent acts or omissions in withdrawing blood from another pursuant to this section.

(1979, 2nd Sess., c. 1089.)

I. GENERAL CONSIDERATION.

Editor's Note. —

The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted the present second and third sentences of subsection (c) for the former second sentence, which read: "No such person shall be held to answer in any criminal or civil action for assault or battery by reason of withdrawing blood from another under this section; provided, however, that no person shall be relieved of liability for negligent acts of or omissions in withdrawing blood from another under the provisions of this section."

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

II. ADMINISTRATION OF TEST.

How Mandate of Subsection (b) Can Be Met. —

A statement by the State trooper who administered a breathalyzer test to the defendant that he holds a particular certificate number from the department of human resources stating that he is qualified as a breathalyzer operator provides the basis for a reasonable inference that he possessed a valid permit at the time he administered the test to defendant, although it is not established when the permit was issued. State v. Doggett, 41 N.C. App. 304, 254 S.E.2d 793 (1979).

§ 20-140. Reckless driving.

I. GENERAL CONSIDERATION.

Applied in State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

§ 20-141. Speed restrictions.

I. GENERAL CONSIDERATION.

Cited in Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979); Sink v. Sumrell, 41 N.C. App. 242, 254 S.E.2d 665 (1979).

§ 20-141.3. Unlawful racing on streets and highways.

(d) The Commissioner of Motor Vehicles shall revoke the driver's license or privilege to drive of every person convicted of violating the provisions of subsection (a) or subsection (c) of this section, said revocation to be for three years; provided any person whose license has been revoked under this section may apply for a new license after 18 months from revocation. Upon filing of such application the Division may issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past 18 months and that his conduct and attitude are such as to entitle him to favorable consideration and upon such terms and conditions which the Division may see fit to impose for the balance of the three-year revocation period, which period shall be computed from the date of the original revocation.

(e) The Commissioner may suspend the driver's license or privilege to drive of every person convicted of violating the provisions of subsection (b) of this section. Such suspension shall be for a period of time within the discretion of the Commissioner, but not to exceed one year.

(1979, c. 667, s. 31.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the first sentences of subsections (d) and (e).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

Passenger Must Actively Participate, etc. —

Where defendant driver's participation in a prearranged speed competition in violation of this section constituted willful or wanton conduct and was a proximate cause of plaintiff's injuries, and plaintiff had no notice of an agreement to race when he entered the car, plaintiff's failure to remonstrate or to leave the car at a rural crossroads minutes past midnight on a cold Christmas Eve does not constitute willful or wanton conduct as a matter of law which would bar his action against the driver of the second car involved in the race for injuries caused by defendant's willful or wanton conduct. Harrington v. Collins, 298 N.C. 535, 259 S.E.2d 275 (1979).

§ 20-146. Drive on right side of highway; exceptions.

Defendant May Show Cause of Violation Not Negligence. — A violation of this section (requiring a vehicle operator to drive on the right side of the highway, with certain exceptions) is negligence per se. However, a defendant may escape liability by showing that he was on the wrong side of the road from a cause other than his own negligence. Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979).

§ 20-147. Keep to the right in crossing intersections or railroads.

Cited in Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

§ 20-150. Limitations on privilege of overtaking and passing.

Solid center lines are considered to be "markers." See opinion of Attorney General to Ms. Claire McNaught, Public Safety Attorney, July 2, 1979,

Cited in Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

§ 20-152. Following too closely.

Cited in Shay v. Nixon, 45 N.C. App. 108, 262 S.E.2d 294 (1980).

§ 20-154. Signals on starting, stopping or turning.

I. GENERAL CONSIDERATION.

Cited in Jones v. Morris, 42 N.C. App. 10, 255 S.E.2d 619 (1979).

§ 20-158. Vehicle control signs and signals.

(b) Control of Vehicles at Intersections. —

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) Vehicles facing a red light from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light, after coming to a complete stop at the intersection, may enter the intersection to make

a right turn but such vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection. When the stoplight is emitting a steady yellow light, vehicles facing the yellow light are warned that a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) requires a vehicle to stop at an intersection, the driver shall stop at an appropriately marked stop line, or if none, before entering a marked crosswalk, or if none, before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street.

(1979, c. 298, s. 1.)

Editor's Note. — Subsection (b) of this section is set out to supply a line omitted through a printer's error in subdivision (2) in the 1979 Cumulative Supplement. As the rest of the section was not affected, only subsection (b) is set out.

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

Applied in Northwestern Distribs., Inc. v. N.C. Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203 (1979).

§ 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.

(b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, driver's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision; provided that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c), shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle and, provided that if the

damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing said information by U.S. certified mail, return receipt requested, to the North Carolina Division of Motor Vehicles within five days following said collision. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and fined or imprisoned for a period of not more than two years, or both, in the discretion of the court.

(c) The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, driver's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182.

(1979, c. 667, s. 32.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the first sentence of subsection (b) and near the beginning of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As subsections (a) and (d) were not changed by the amendment, they are not set out.

§ 20-166.1. Reports and investigations required in event of collision.

(c) Notwithstanding any other provisions of this section, the driver of any motor vehicle which collides with another motor vehicle left parked or unattended on any street or highway of this State shall within 48 hours report the collision to the owner of such parked or unattended motor vehicle. Such report shall include the time, date and place of the collision, the driver's name, address, driver's license number and the registration number of the vehicle being operated by the driver at the time of the collision, and such report may be oral or in writing. Such written report must be transmitted to the current address of the owner of the parked or unattended vehicle by United States certified mail, return receipt requested, and a copy of such report shall be transmitted to the North Carolina Division of Motor Vehicles.

No report, oral or written, made pursuant to this Article shall be competent in any civil action except to establish identity of the person operating the moving vehicle at the time of the collision referred to therein.

Any person who violates this subsection is guilty of a misdemeanor and shall be punishable by fine or imprisonment, or both, in the discretion of the court.

(1979, c. 667, s. 33.)

Editor's Note. —

The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" in the second sentence of the first paragraph of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 20-168. Drivers of State, county, and city vehicles subject to the provisions of this Article.

Applied in Northwestern Distribs., Inc. v. N.C. Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203 (1979).

Part 11. Pedestrians' Rights and Duties.

§ 20-174. Crossing at other than crosswalks; walking along highway.

Test on Defendants' Motion for Summary Judgment. — In an action to recover damages by plaintiff pedestrian where she was struck by defendants' car while crossing the highway at a point where there was neither a crosswalk nor an intersection, in passing upon defendants' motion for summary judgment, the evidence must be tested by the rule of the reaonably prudent man, in the light of the duties imposed upon both plaintiff and defendant by subsections (a) and (e) of this section. Ragland v. Moore, 299 N.C. 360, 261 S.E.2d 666 (1980).

Part 12. Sentencing; Penalties.

§ 20-177. Penalty for felony.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 20-179. Penalty for driving or operating vehicle while under the influence of intoxicating liquor, narcotic drugs, or other impairing drugs; limited driving permits for first offenders.

(b) (1) Upon a first conviction only of any offense included in G.S. 20-138 or 20-139, and subject to the provisions of this subsection (b) the trial judge may issue a limited driving privilege when feasible and if the person convicted requests that he do so. The limited privilege, if issued, shall contain a condition that the person convicted enroll in and successfully complete, within 75 days of the date of the issuance of said limited privilege, the program of instruction at an Alcohol and Drug Education Traffic School approved by the Department of Human Resources pursuant to G.S. 20-179.2. The limited privilege shall contain a provision allowing the person convicted to drive to and from classes required for successful completion of such program of instruction. In addition, the judge may include in the limited privilege conditions allowing the person convicted to drive a motor vehicle for proper purposes directly connected with the health, education and welfare of the person convicted and his family. The judge, in establishing the limited driving privilege, may impose restrictions as to the days, hours, types of vehicles, routes and geographic boundaries and specific purposes for which the limited driving privilege is issued. The trial judge may issue a limited driving privilege that does not contain a condition that the defendant successfully complete the program of instruction at an Alcohol and Drug Education Traffic School if:

a. There is no Alcohol or Drug Education Traffic School within a reasonable distance of the defendant's residence; or

b. The defendant because of his history of alcohol or drug abuse, is not likely to benefit from the program of instruction; or

c. There are specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

The trial judge shall enter such specific findings in the record provided that in the case of subsection b above such findings shall include the exact reasons why the defendant is not likely to benefit from the program of instruction and that in the case of subsection c above such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of any provision of G.S. 20-138(a), 20-138(b), 20-139(a), or 20-139(b) shall be considered previous convictions. Convictions prior to January 1, 1980, shall be considered for purposes of this subsection.

The limited driving privilege and the restrictions imposed thereon shall be specifically recorded in a written judgment of the court, shall be signed by the trial judge and shall be affixed with the seal of the court. The written judgment shall be as near as practicable in the format established by G.S. 20-179(b)(2). A notice of the conviction and a copy of the judgment must be transmitted to the Division of Motor Vehicles, along with any driver's license in the possession of the person convicted.

The limited driving privilege is valid for such length of time, not to exceed six months, as shall be set forth in the judgment of the trial judge. A limited privilege that does not contain a condition that the defendant successfully complete the program of instruction at an Alcohol or Drug Education Traffic School is valid for such length of time, not to exceed 12 months, as shall be set forth in the judgment of the trial court. Such permit shall constitute a valid license to operate a motor vehicle upon the streets and highways of this or any other state in accordance with the restrictions noted thereon. The holder of a limited driving privilege is subject to all provisions of this Chapter concerning driver's licenses which are not by their nature inapplicable.

A limited driving privilege issued pursuant to this subsection does not authorize a person to drive while the license of such person is also revoked pursuant to G.S. 20-16.2 for failure to take a chemical test of the blood or breath to determine blood alcoholic content.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in the form and contents as follows:

STATE OF NORTH CAROLINA	IN THE GENERAL COURT
COUNTY OF	OF JUSTICE
	RESTRICTED DRIVING
	PRIVILEGES

This cause coming on to be heard and being heard before the Honorable ....., Judge presiding, and it appearing to the Court that the defendant, ..., has been convicted of the offense of (describe offense under G.S. 20-138 or 20-139 or as appropriate), and it further appearing to the Court that the defendant should be issued a limited driving privilege and is entitled to the issuance of a limited driving privilege under and by the authority of G.S. 20-179(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: . . . . . .

Address: . . . . . .

Race: . . . . . Sex: . . . . .

Height: . . . . . Weight: . . . . .

Color of Hair: . . . . . Color of Eyes: . . . . .

Birth Date: . . . . . .

Driver's License Number: . . . . . .

CONDITIONS OF RESTRICTION

1. The defendant must successfully complete the approved program of instruction at an Alcohol and Drug Education Traffic School within 75 days from the date when this limited privilege was issued.

2. Geographical restrictions: . . . . . .

. . . . . .

3. Hours of restriction: . . . . . .

. . . . . .

4. Type(s) of vehicles that may be operated: . . . . . .

. . . . . .

5. Other restrictions: . . . . . .

. . . . . .

. . . . . .

. . . . . .

This limited license shall be effective from . . . . . to . . . . . subject to further orders as the court
(month) (day), (year)

in its discretion may deem necessary and proper.

Issued on this . . . . . day of . . . . . , 19 . . . .

. . . . . .

(Judge Presiding)

Accepted on this . . . . . day of . . . . . , 19 . . . .

. . . . . .

(Signature of Licensee)

(3) If a person is convicted in another state or county or in a federal court of an offense that is equivalent to one of the provisions of G.S. 20-138(a), 20-138(b), 20-139(a) or 20-139(b), and if the person's North Carolina driver's license is revoked as a result of that conviction, the person so convicted may apply to the presiding or resident judge of the superior court or a district court judge of the district in which he resides for a limited driving privilege. Upon such application the judge may issue a limited driving privilege in the same manner as if he were the trial judge.

(4) A district court judge may modify a limited driving privilege if:

a. The holder of the limited privilege petitions the court for a modification of the privilege; and

b. The privilege was issued by a district court judge; and

c. The privilege was issued in the county in which the district judge is conducting court.

A superior court judge may modify a limited driving privilege if:

a. The holder of the limited privilege petitions the court for a modification of the privilege; and

b. The privilege was issued by a superior court judge; and

c. The privilege was issued in the county in which the superior court judge is conducting court.

(5) Any violation of the conditions or restrictions as set forth in the judgment of the trial court allowing such privileges, other than the failure to successfully complete the prescribed program of instruction at an Alcohol and Drug Education Traffic School, shall constitute the offense of driving while license revoked as set forth in G.S. 20-28(a). When a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

Failure to successfully complete an approval program of instruction at an Alcohol and Drug Education Traffic School shall constitute grounds to revoke the limited privilege for the remainder of the time for which such limited privilege was issued. Failure to successfully complete an approved program of instruction at an Alcohol and Drug Education and Traffic School shall not constitute the offense of driving while license revoked. For purposes of this subsection, the phrase "failure to successfully complete the prescribed program of instruction at an Alcohol and Drug Education Traffic School" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 75 days of the issuance of the limited privilege, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to successfully complete the program of instruction to the court which issued the limited driving privilege. The court shall revoke the limited privilege. The person possessing the limited privilege may obtain a hearing prior to revocation.

(6) Notwithstanding any other provisions of this section, no person who has willfully refused to submit to a chemical test upon request of the officer as provided by G.S. 20-16.2 may be granted a limited driving privilege or license while the driving privilege of such person is revoked pursuant to the provisions of G.S. 20-16.2(c) for the willful refusal of such person to submit to such chemical test.

(7) This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125; 1977, 2nd Sess., c. 1222, s. 1; 1979, c. 453, ss. 1, 2; c. 667, ss. 34, 41; c. 903, ss. 1, 2.)

Editor's Note. —

Because subsection (b) of this section was rewritten in its entirety by Acts 1979, c. 903, ratified June 8, 1979, and effective Jan. 1, 1980, the amendment to subsection (b) in Acts 1979, c. 667, s. 34, ratified May 29, 1979, and effective Jan. 1, 1981, cannot be given effect. However, pursuant to Acts 1979, c. 667, s. 41, "driver's" has been substituted for "operator's or chauffeur's" in two places in subsection (b) as set out above.

As subsection (a) was not affected by Acts 1979, c. 667, it is not set out.

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person. — Every person convicted of willfully violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished by imprisonment for not less than one nor more than five years, or in the State prison for not less than one nor more than five years, or by fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment. The Commissioner shall revoke the

driver's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (1937, c. 407, s. 142; 1955, c. 913, s. 8; 1979, c. 667, s. 35.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" in the second sentence.

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Sessions Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

Editor's Note. —
For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

ARTICLE 3A.

Motor Vehicle Law of 1947.

Part. 2. Equipment Inspection of Motor Vehicles.

§ 20-183.3. Inspection requirements. — (a) Before an approval certificate may be issued for a motor vehicle, the vehicle must be inspected by a safety equipment inspection station, and if required by Chapter 20 of the General Statutes of North Carolina, must be found to possess in safe operating condition the following articles and equipment:

(1) Brakes,
(2) Lights,
(3) Horn,
(4) Steering mechanism,
(5) Windshield wiper,
(6) Directional signals,
(7) Tires,
(8) Rearview mirror or mirrors.

No inspection certificate shall be issued by a safety equipment inspection station for a motor vehicle manufactured after model year 1967 unless the vehicle is equipped with such emission control devices to reduce air pollution as were installed at the time of manufacture which are readily visible, provided the foregoing requirements shall not apply where such devices have been removed for the purpose of converting the motor vehicle to operate on natural or liquified petroleum gas or other modifications have been made in order to reduce air pollution, further provided that such modifications shall have first been approved by the Department of Water and Air Resources [Department of Natural Resources and Community Development].

In addition to the items listed above, safety inspection equipment stations shall inspect the exhaust systems of all vehicles inspected and report the condition of each exhaust system to the owners or to the persons offering the vehicles for inspection.

The inspection requirements herein provided for shall not exceed the standards provided in the current General Statutes for such equipment.

(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 include 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. (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.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

§ 20-183.7. Charges for inspections and certificates; safety equipment inspection station records. — (a) Every safety equipment inspection station shall charge a fee of three dollars and sixty-five cents ($3.65) for inspecting a motor vehicle to determine compliance with the safety inspection requirements of this Article and shall give the vehicle operator a dated receipt, indicating the articles and equipment approved and disapproved. At any time within 90 days thereafter, when the receipt is presented to the inspection station which issued it with a request for reinspection, that inspection station shall reinspect the vehicle at no charge. When said vehicle is approved, the inspection station shall obtain a fee of thirty-five cents (35¢) for a valid inspection certificate, and affix the certificate to that vehicle.

(a1) For inspection of vehicles required to be inspected under the inspection/maintenance provisions of G.S. 20-183.3(b), every safety equipment inspection station shall charge a fee of not less than three dollars and sixty-five cents ($3.65), nor more than ten dollars ($10.00), for inspecting a motor vehicle to determine compliance with the safety inspection requirements and the exhaust emission standards pursuant to the inspection/maintenance requirements of this Article and shall give the vehicle operator a dated receipt indicating the articles and equipment approved or disapproved and whether the vehicle met the emission control standards. If the vehicle is disapproved, at any time within 30 days thereafter when the receipt is presented to the inspection station which issued it with a request for reinspection, that inspection station shall reinspect the vehicle at no charge. When said vehicle is approved, the inspection station shall obtain a fee of not less than thirty-five cents (35¢) nor more than two dollars ($2.00) for a valid inspection certificate covering both the safety inspection requirements and the emission control inspection/maintenance requirements and affix the certificate to that vehicle. The amount of the fees under this subsection shall be set by the Commissioner of Motor Vehicles.

(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 thirty-five cent (35¢) fee collected pursuant to (a) shall be transferred to the Highway Fund.

(2) The fee of not less than thirty-five cents (35¢) nor more than two dollars ($2.00) collected pursuant to (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.

(1979, 2nd Sess., c. 1180, ss. 5, 6.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, inserted "safety" preceding "inspection" near the middle of the first sentence in subsection (a), added subsection (a1) and rewrote subsection (c).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

As subsections (b) and (d) were not changed by the amendment, they are not set out.

§ 20-183.8. Commissioner of Motor Vehicles to issue regulations subject to approval of Governor; penalties for violation; fictitious or unlawful inspection certificate; 30-day grace period for expired inspection certificates.

(d) No person shall display or cause to be displayed or permit to be displayed upon any motor vehicle any inspection certificate, knowing the same to be fictitious or to be issued for another motor vehicle or to be issued without inspection and approval having been made. The Division is hereby authorized to take immediate possession of any inspection certificate which is fictitious or which has been otherwise unlawfully or erroneously issued or which has been unlawfully used. Any person violating the provisions of this subsection shall be guilty of a misdemeanor punishable by fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed 30 days.
(1979, 2nd Sess., c. 1180, s. 4.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted "safety" preceding "inspection certificate" in the first and second sentences of subsection (d).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

Article 4.

State Highway Patrol.

§ 20-185. Personnel; appointment; salaries.

(b)-(f) Repealed by Session Laws 1979, 2nd Session, c. 1272, s. 2.
(1979, 2nd Sess., c. 1272, s. 2.)

Cross Reference. — As to payment of salaries of certain State law-enforcement officers incapacitated as the result of injury by accident or occupational disease arising out of and in the course of performance of their duties, see § 143-166.13 et seq.

Editor's Note. —
The 1979, 2nd Sess., amendment deleted subsections (b) through (f), which related to payment of salaries of officers or members of the State Highway Patrol incapacitated by injury, accident or occupational disease arising out of and in the course of the performance of their duties.

Session Laws 1979, 2nd Sess., c. 1272, s. 5, provides: "This act is effective upon ratification and shall apply to persons injured or contracting an occupational disease on or after January 1, 1981."

ARTICLE 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances; evidence of identity of driver. — (a) The driver of any vehicle upon approaching from any direction on the same street or highway any school bus (including privately owned buses transporting children and school buses transporting elderly persons under G.S. 115-183.1), while such bus is displaying its mechanical stop signal, or is stopped for the purpose of receiving or discharging passengers, shall bring his vehicle to a full stop before passing or attempting to pass such bus, and shall remain stopped until the mechanical stop signal has been withdrawn or until the bus has moved on. The driver of a vehicle upon any interstate or other controlled-access highway need not stop upon meeting or passing a school bus which is in the roadway across the dividing space or physical barrier separating the roadways.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear a plainly visible sign containing the words "school bus" in letters not less than eight inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed two hundred dollars ($200.00) or imprisoned not to exceed 90 days.

(b) Proof that a motor vehicle has passed a stopped school bus in violation of this section is prima facie evidence that that motor vehicle was operated at the time of the violation by the registered owner of the vehicle. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1; 1973, c. 1330, s. 35; 1977, 2nd Sess., c. 1280, s. 4; 1979, 2nd Sess., c. 1323.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective October 1, 1980, designated the former provisions of this section as subsection (a) and added subsection (b).

§ 20-218. Standard qualifications for school bus drivers; speed limit. — (a) No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from any representative duly designated by the Commissioner of Motor Vehicles, and the chief mechanic in charge of school buses in said county showing that he has been examined by a representative duly designated by the Commissioner of Motor Vehicles, and said chief mechanic in charge of school buses in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the State. Nothwithstanding the provisions of G.S. 20-7(a)(3), the driver of a school bus must be at least 16 years of age and hold a driver's license of Class "A", "B", or "C" and a school bus driver's certificate, and the driver of a school activity bus must hold a driver's license of Class "C" and a school bus driver's certificate or a driver's license of Class "A" or Class "B".

(1979, c. 31, ss. 1, 2; c. 667, s. 36.)

Editor's Note. —

The second 1979 amendment, effective Jan. 1, 1981, added the second sentence of subsection (a).

As subsections (b) and (c) were not changed by the amendment, they are not set out.

§ 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 and Charlotte. (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.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, made this section applicable to Dare County.

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.13. Suspension for nonpayment of judgment; exceptions.

(b) The Commissioner shall not, however, revoke or suspend the license of an owner or driver if the insurance carried by him was in a company which was authorized to transact business in this State and which subsequent to an accident involving the owner or operator and prior to settlement of the claim therefor went into liquidation, so that the owner or driver is thereby unable to satisfy the judgment arising out of the accident.
(1979, c. 667, s. 37.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, substituted "owner or driver" for "owner, operator or chauffeur" in two places in subsection (b).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As subsections (a) and (c) were not changed by the amendment, they are not set out.

Cited in Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

§ 20-279.21. "Motor vehicle liability policy" defined.

I. GENERAL CONSIDERATION.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Applied in Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979); Tucker v. Peerless Ins. Co., 41 N.C. App. 302, 254 S.E.2d 656 (1979); Jones v. Nationwide Mut. Ins. Co., 42 N.C. App. 43, 255 S.E.2d 617 (1979); Caison v. Nationwide Ins. Co., 45 N.C. App. 30, 262 S.E.2d 296 (1980).

§ 20-279.32. Exceptions. — This Article, except its provisions as to the filing of proof of financial responsibility by a common carrier and its drivers, does not apply to any vehicle operated under a permit or certificate of convenience or necessity issued by the North Carolina Utilities Commission, or by the Interstate Commerce Commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it. This Article does not apply to any motor vehicle owned by the State of North Carolina, nor does it apply to the operator of a vehicle owned by the State of North Carolina who becomes involved in an accident while operating the state-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's

employment as an employee or officer of the State. This Article does not apply to the operator of a vehicle owned by a political subdivision of the State of North Carolina who becomes involved in an accident while operating such vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the subdivision providing that the Commissioner finds that the political subdivision has waived any immunity it has with respect to such accidents and has in force an insurance policy or other method of satisfying claims which may arise out of the accident. This Article does not apply to any motor vehicle owned by the federal government, nor does it apply to the operator of a motor vehicle owned by the federal government who becomes involved in an accident while operating the government-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the federal government. (1953, c. 1300, s. 32; 1955, c. 1152, s. 19; 1979, c. 667, s. 38.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, deleted "and chauffeurs" following "drivers" near the beginning of the first sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Article 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-288. Application for license; information required and considered; expiration of license; supplemental license; bond.

Section 20-294(4) Does Not Enlarge Coverage of Subsection (e). — Section 20-294(4) only sets out grounds for which the State may suspend or revoke a license. It does not enlarge the coverage of subsection (e) of this section to any parties other than a purchaser. Triplett v. James, 45 N.C. App. 96, 262 S.E.2d 374 (1980).

Subsection (e) of this section grants only to purchasers the right to recover on the bond, and the fact that, under § 20-294(4), a dealer may lose his license for defrauding any person in the conduct of his business does not mean that the bond specifically required by subsection (e) and specifically limited by that section as a source of indemnity to purchasers only is available as a remedy to any defrauded party. Triplett v. James, 45 N.C. App. 96, 262 S.E.2d 374 (1980).

§ 20-294. Grounds for denying, suspending or revoking licenses.

Subdivision (4) Does Not Enlarge Coverage of § 20-288(e). — Subdivision (4) of this section only sets out grounds for which the State may suspend or revoke a license. It does not enlarge the coverage of § 20-288(e) to any parties other than a purchaser. Triplett v. James, 45 N.C. App. 96, 262 S.E.2d 374 (1980).

Section 20-288(e) grants only to purchasers the right to recover on the bond, and the fact that, under subdivision (4) of this section, a dealer may lose his license for defrauding any person in the conduct of his business does not mean that the bond specifically required by § 20-288(e) and specifically limited by that section as a source of indemnity to purchasers only is available as a remedy to any defrauded party. Triplett v. James, 45 N.C. App. 96, 262 S.E.2d 374 (1980).

§ 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.

Editor's Note. —

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

ARTICLE 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period. — (a) No self-propelled motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.

(b) Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in Article 9A, Chapter 20 of the General Statutes of North Carolina, as amended.

(c) When it is certified that financial responsibility is a liability insurance policy, the Commissioner of Motor Vehicles may require that the owner produce records to prove the fact of such insurance, and failure to produce such records shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned. It shall be the duty of insurance companies, upon request of the Division, to verify the accuracy of any owner's certification.

(d) When liability insurance with regard to any motor vehicle is terminated by cancellation or failure to renew, or the owner's financial responsibility for the operation of any motor vehicle is otherwise terminated, the owner shall forthwith surrender the registration certificate and plates of the vehicle to the Division of Motor Vehicles unless financial responsibility is maintained in some other manner in compliance with this Article.

(e) Upon termination by cancellation or otherwise of an insurance policy provided in subsection (d), the insurer shall notify the North Carolina Division of Motor Vehicles of such termination as directed by the Commissioner of the Division of Motor Vehicles in accordance with subsection (f) of this section. The Division of Motor Vehicles, upon receiving notice of cancellation or termination of an owner's financial responsibility as required by this Article, shall notify such owner of such cancellation or termination, and such owner shall, to retain the registration plate for the vehicle registered or required to be registered, within 15 days from date of notice given by the Division either:

(1) Certify to the Division that he has financial responsibility effective on or prior to the date of such termination, or

(2) Certify to the Division that he has financial responsibility effective on the date of certification and pay a fifteen dollar ($15.00) administrative fee for the cost of action taken.

Failure of the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and, unless the owner's registration plate has been surrendered to the Division of Motor Vehicles by surrender to an agent or representative of the Division of Motor Vehicles designated by the Division of Motor Vehicles, or depositing the same in the United States mail, addressed to the Division of Motor Vehicles, Raleigh, North Carolina, the Division shall revoke the owner's registration plate for 60 days.

In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be registered in the name of the registered owner, spouse, or any child of the spouse, or any child of such owner within less than 60 days after the date of receipt of the registration plate by

the Division of Motor Vehicles, except that a spouse living separate and apart from the registered owner may register such vehicle immediately in such spouse's name. Provided, the revocation of the registration plate shall be rescinded by the Division of Motor Vehicles upon receipt of certification of current financial responsibility as required by this Article and payment of sixty dollars ($60.00) restoration fee. Any person, firm or corporation failing to give notice of termination shall be subject to a civil penalty of two hundred dollars ($200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Division of Motor Vehicles.

(f) The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the Commissioner under the provisions of this Article. (1957, c. 1393, s. 1; 1959, c. 1277, s. 1; 1963, c. 964, s. 1; 1965, c. 272; c. 1136, ss. 1, 2; 1967, c. 822, ss. 1, 2; c. 857, ss. 1, 2; 1971, c. 477, ss. 1, 2; c. 924; 1975, c. 302; c. 348, ss. 1-3; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective January 1, 1981, deleted, at the end of the first sentence in subsection (a), "and certifies that he has such financial responsibility," deleted "and the Division of Motor Vehicles shall revoke the owner's registration plate for sixty days" at the end of the first sentence of subsection (c), deleted the former second, third and fourth sentences of subsection (c) relating to reregistration of a vehicle registration of which has been revoked for failure to have financial responsibility, and the former sixth sentence of subsection (c), relating to failure by an insurance policy to deny coverage within twenty days. The amendment rewrote subsections (e) and (f).

§ 20-311. Revocation of registration when financial responsibility not in effect. — The Division of Motor Vehicles, upon receipt of evidence that financial responsibility for the operation of any motor vehicle registered or required to be registered in this State is not or was not in effect at the time of operation or certification that insurance was in effect, shall revoke the owner's registration plate issued for the vehicle at the time of operation or certification that insurance was in effect or the current registration plate for the vehicle if the year registration has changed for 60 days. In no case shall any vehicle the registration of which has been revoked for failure to have financial responsibility be reregistered in the name of such owner, spouse or any child of the spouse or any child of such owner within less than 60 days after the registration plates have been surrendered to the Division except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the reregistration of the vehicle the owner shall pay a restoration fee of fifteen dollars ($15.00) and the appropriate fee for a new registration plate. Provided the revocation of the registration plate shall be rescinded by the Division of Motor Vehicles upon receipt of certification of current financial responsibility as required by this Article and payment of a sixty dollar ($60.00) restoration fee. (1957, c. 1393, s. 3; 1959, c. 1277, s. 2; 1963, c. 964, s. 4; 1965, c. 205; c. 1136, s. 3; 1967, c. 822, s. 3; c. 857, s. 4; 1971, c. 477, s. 3; 1975, c. 348, s. 4; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 2.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective January 1, 1981, added the last sentence.

Article 14.

Driver Training School Licensing Law.

§ 20-320. Definitions. — As used in this Article:

(1) "Commercial driver training school" or "school" means a business enterprise conducted by an individual, association, partnership or corporation which educates or trains persons to operate or drive motor vehicles or which furnishes educational materials to prepare an applicant for an examination given by the State for a driver's license or learner's permit, and charges a consideration or tuition for such service or materials.

(1979, c. 667, s. 39.)

Editor's Note. — The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the end of subdivision (1).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (1) are set out.

Article 15.

Vehicle Mileage Act.

§ 20-346. Lawful service, repair, or replacement of odometer.

Applied in Roberts v. Buffaloe, 43 N.C. App. 368, 258 S.E.2d 861 (1979).

§ 20-347. Disclosure requirements.

Applied in Roberts v. Buffaloe, 43 N.C. App. 368, 258 S.E.2d 861 (1979).

§ 20-348. Private civil action.

Where plaintiff seeks treble damages and punitive damages in an action against defendant car dealer in which he alleges that defendant sold him a car and alleged that the odometer reading was accurate when he knew that the true mileage was far in excess of that shown on the odometer, plaintiff's prayer for punitive damages cannot be sustained, even if the jury answers the liability issue in favor of plaintiff. Plaintiff's recovery, if any, will be the greater of three times his actual damages of $1500, costs and reasonable attorneys fees as determined by the court. Roberts v. Buffaloe, 43 N.C. App. 368, 258 S.E.2d 861 (1979).

Chapter 21.

Bills of Lading.

Article 5.

Criminal Offenses.

§ 21-42. Issuing false bills or violating chapter made felony.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 23, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section to read as follows:

"**§ 21-42. Issuing false bills or violating chapter made felony.** — Any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment in this State, or with intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing, or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates or fails to comply with, or aids in any violation of, or failure to comply with any provision of this chapter, shall be guilty of a Class I felony."

Chapter 22.

Contracts Requiring Writing.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.

I. IN GENERAL.

Section 75-4 is consistent with the other "statute of frauds" provisions in the law, including this section and § 25-2-201(a). Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Applied in Mack Fin. Corp. v. Harnett Transf., Inc., 42 N.C. App. 116, 256 S.E.2d 491 (1979).

III. PROMISE TO ANSWER FOR DEBT OF ANOTHER.

B. Illustrative Cases.

A letter written by defendant as president of a corporation would be insufficient to constitute a definite promise to answer for the debt of another within the meaning of this section where the letter does not establish what amount the defendant would pay plaintiff, the date payment would be made, or the event that would determine when payment would be due. Marvel Lamp Co. v. Capel, 45 N.C. App. 105, 262 S.E.2d 368 (1980).

§ 22-2. Contract for sale of land; leases.

I. IN GENERAL.

Editor's Note. —

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

Applied in Pierce v. Gaddy, 42 N.C. App. 622, 257 S.E.2d 459 (1979); Stallings v. Purvis, 42 N.C. App. 690, 257 S.E.2d 664 (1979); Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979).

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

Statement of Price Not Always Required. —

In a contract for the sale of land, where the vendor is the party to be charged it is not necessary that the price be stated in writing. Northwestern Bank v. Church, 43 N.C. App. 538, 259 S.E.2d 313 (1979).

Chapter 24.

Interest.

Article 1.
General Provisions.

Sec.
24-1. Legal rate is eight percent.
24-1.3. [Repealed.]
24-11. Certain revolving credit charges.

Article 2.
Loans Secured by Secondary or Junior Mortgage.

24-12. Applicability of Article.

Sec.
24-13. Principal amount defined.
24-14. Limitations on charges and interest.
24-15. [Repealed.]

Article 1.

General Provisions.

§ 24-1. Legal rate is eight percent. — The legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, and no more. (1876-7, c. 91; Code, s. 3835; 1895, c. 69; Rev., s. 1950; C.S., s. 2305; 1979, 2nd Sess., c. 1157, s. 1.)

Editor's Note.—
The 1979, 2nd Sess., amendment, effective July 1, 1980, raised the legal rate of interest from six percent per annum to eight percent per annum. Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

§ 24-1.1. Contract rates.

Cited in Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979).

§ 24-1.1A. Contract rates on home loans secured by first mortgages or first deeds of trust.

Cross Reference. — As to priority of security instruments securing certain home loans, see § 45-80.

§ 24-1.2. Installment rates.

Editor's Note.—
For article calling for a comprehensive federal consumer credit code, see 58 N.C.L. Rev. 1 (1979).

Cited in Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979).

§ 24-1.3: Repealed by Session Laws 1979, 2nd Session, c. 1302, s. 3, effective June 25, 1975.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1302, s. 4, makes the repeal effective retroactively to June 25, 1975.

§ 24-2. Penalty for usury; corporate bonds may be sold below par.

I. GENERAL CONSIDERATION.

Cited in Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

B. Specific Instances.

Where a usurious note called for level monthly payments and the note provided that each payment was to be applied to principal and interest, defendant was entitled to recover twice the amount of interest paid. Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979).

§ 24-11. Certain revolving credit charges.

(b) On revolving credit loans (including check loans, check credit or other revolving credit plans whereby a bank, banking institution or other lending agency makes direct loans to a borrower), if agreed to in writing by the borrower, such lender may collect interest and service charges by application of a monthly periodic rate computed on the average daily balance outstanding during the billing period, such rate not to exceed one and one-half percent (1½%).

(1979, 2nd Sess., ch. 1330, s. 3.)

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "one and one-half percent (1½%)" for "one and one-quarter percent (1¼%) on such balance up to and including five thousand dollars ($5,000), and such rate not to exceed one percent (1%) on such balance in excess of five thousand dollars ($5,000)."

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

For article calling for a comprehensive federal consumer credit code, see 58 N.C.L. Rev. 1 (1979).

How Amount Due May Be Handled after Relationships Ended. — This section means that the extension of credit at the outset of a relationship as outlined in the statute may not be secured by real or personal property, etc., and does not mean that once the relationship is terminated, the amount due and owing to the creditor may not be handled in a fashion agreeable to both the creditor and the debtor. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

A transaction whereby seller would forebear collection of the amount due from buyer on an open-end credit plan and reduce its interest rate on the balance outstanding and the buyer would execute a promissory note to the seller and give the seller a deed of trust on a farm to secure the note was not an extension of credit within the meaning of this section, but rather constituted a novation of the old agreement. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

ARTICLE 2.

Loans Secured by Secondary or Junior Mortgages.

§ 24-12. Applicability of Article. — This Article shall apply only to loans of money:

(1) Secured in whole or in part by a security instrument on real property, other than a first security instrument on real property; and

(2) The principal amount of the loan does not exceed twenty-five thousand dollars ($25,000);

(3) The loan is repayable in no less than six nor more than 181 successive monthly payments, which payments shall be substantially equal in amount. (1971, c. 1229, s. 2; 1979, 2nd Sess., c. 1157, ss. 2, 3.)

Editor's Note.—

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "seven thousand five hundred dollars ($7,500)" in subdivision (2), and substituted "181" for "72" in subdivision

(3). Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

§ 24-13. Principal amount defined. — The aggregate of the amount or value actually received at the time of the loan, plus the charges allowed by G.S. 24-14(b) and (c); plus the sum of all existing indebtedness of the borrower paid on his behalf by the lender, shall be deemed the principal amount of the loan. (1971, c. 1229, s. 2; 1979, 2nd Sess., c. 1157, s. 4.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "charges allowed by G.S. 24-14(b) and (c)" for "hereinafter stated rate of charge." Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

§ 24-14. Limitations on charges and interest. — (a) No person, copartnership, association, trust, corporation or other legal entity making loans under this Article may charge, take or receive, directly or indirectly, simple interest in excess of one and one-third percent ($1^1/_3\%$) per month or an annual rate equivalent to the Federal Discount Rate plus five percent (5%), whichever is the greater, computed on the actual or average daily unpaid balance of the principal amount of the loan for the time actually outstanding. However, interest may not be compounded.

(b) In addition to the interest permitted in subsection (a), the lender may include in the loan his actual expenses which are paid to third parties in connection with the loan. Such expenses shall be limited to those for: title examination, title insurance, appraisals, surveys, and recording fees or releasing fees to trustees or public officials, and only such insurance charges as permitted in subsection (c).

(1979, 2nd Sess., c. 1157, ss. 5, 6.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted the language beginning "simple interest in excess" at the end of the first sentence of subsection (a) and the second sentence of subsection (a) for former subdivisions (1) and (2) of subsection (a), which detailed limitations on charges and interest. The amendment also rewrote subsection (b). Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

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

§ 24-15: Repealed by Session Laws 1979, 2nd Session, c. 1157, s. 7, effective July 1, 1980.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1157, s. 8, provides: "this act shall not apply to judgments entered prior to July 1, 1980."

Chapter 25.

Uniform Commercial Code.

Article 1.

General Provisions.

PART 1.

Short Title, Construction, Application and Subject Matter of the Act.

§ 25-1-103. Supplementary general principles of law applicable.

Applied in Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978).

§ 25-1-105. Territorial application of the act; parties' power to choose applicable law.

Official Reasons for 1972 Change

The reference to Section 9-102 has been deleted and a change made in Section 9-102 deleting any reference therein to conflict of law problems, because there is no reason why the general principles of the present section should not be applicable to the choice of law problems within its scope. Section 9-103 continues to govern choice of law questions as to perfection of security interests and the effect of perfection and non-perfection thereof. The usual rule is that perfection is governed by the law of the jurisdiction in which the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. Section 9-103 contains special rules for the cases of intangibles which have no situs, certain types of movable goods, goods which the parties intended at the inception of the transaction to be kept in another jurisdiction, goods subject to certificate of title laws, and certain other cases. Section 9-103 also contains local law rules as to reperfection of security interests when collateral is moved from one jurisdiction to another.

1972 Official Comment

Prior Uniform Statutory Provision:

None.

Purposes:

1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the five sections listed in subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place

of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident or geography may violate the commercial understanding of the parties.

4. The Act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

6. Section 9-103 should be consulted as to the rules for perfection of security interests and the effects of perfection and non-perfection.

PART 2.

General Definitions and Principles of Interpretation.

§ 25-1-201. General definitions.

Applied in North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Quoted in Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978); Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

Stated in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Official Reasons for 1972 Change

(9) The new language fits in with changes as to minerals in Section 9-103 which are explained in the references to minerals in the Reasons for Change and Comments to that section.

(37) The omission of the term "contract rights" conforms to the elimination of that term from Article 9. See Reasons for Change under Section 9-106.

1972 Official Comment

* * * * * *

9. "Buyer in ordinary course of business". From Section 1, Uniform Trust Receipts Act. The definition has been expanded to make clear the type of person protected. Its major significance lies in Section 2-403 and in the Article on Secured Transactions (Article 9).

The reference to minerals and the like makes clear that a buyer in ordinary course buying minerals under the circumstances described takes free of a prior mortgage created by the sellers. See Comment to Section 9-103.

A pawnbroker cannot be a buyer in ordinary course of business because the person from whom he buys goods (or acquires ownership after foreclosing an initial pledge) is typically an ordinary user and not a person engaged in selling goods of that kind.

* * * * * *

37. "Security Interest". See Section 1, Uniform Trust Receipts Act. The present definition is elaborated, in view especially of the complete coverage of the subject in Article 9. Notice that in view of the Article the term includes the interest of certain outright buyers of certain kinds of property. The last two sentences give guidance on the question whether reservation of title under a particular lease of personal property is or is not a security interest.

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§ 25-1-203. Obligation of good faith.

Quoted in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-1-204. Time; reasonable time; "seasonably."

Quoted in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-1-207. Performance or acceptance under reservation of rights.

This section does not apply to a check tendered in full payment of a disputed claim. Thus, a disputed claim for compensation for employment was extinguished when the debtor-employer tendered to the creditor-employee a check marked "account in full" and the creditor deposited the check after striking these words from the check and notified the debtor he was reserving his right to contend for the balance of the claim. Brown v. Coastal Truckways, Inc., 44 N.C. 454, 261 S.E.2d 266 (1980).

Applied in Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

Article 2.

Sales.

PART 1.

Short Title, General Construction and Subject Matter.

§ 25-2-102. Scope; certain security and other transactions excluded from this article.

Editor's Note. —

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

A transaction involving a sale of a tractor in consideration of payments of money and delivery of haulage services by the plaintiff is a sale of goods within the purview of this section. Owens v. Harnett Transf., Inc., 42 N.C. App. 532, 257 S.E.2d 136 (1979).

§ 25-2-103. Definitions and index of definitions.

Applied in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Quoted in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-2-104. Definitions: "Merchant"; "between merchants"; "financing agency."

Editor's Note. —

For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

§ 25-2-106. Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation."

Cited in United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

§ 25-2-107. Goods to be served from realty; recording.

Official Reasons for 1972 Change

Several timber-growing states have changed the 1962 Code to make timber to be cut under a contract of severance goods, regardless of the question who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of "goods" in Section 9-105. To protect persons dealing with timberlands, filing on timber to be cut is required in Part 4 of Article 9 to be made in real estate records in a manner comparable to fixture filing.

1972 Official Comment

Prior Uniform Statutory Provision:
See Section 76, Uniform Sales Act on prior policy; Section 7, Uniform Conditional Sales Act.

Purposes:

1. Subsection (1). Notice that this subsection applies only if the minerals or structures "are to be severed by the seller". If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them. Therefore, the Statute of Frauds section of this Article does not apply to such contracts though they must conform to the Statute of Frauds affecting the transfer of interests in land.

2. Subsection (2). "Things attached" to the realty which can be severed without material harm are goods within this Article regardless of who is to effect the severance. The word "fixtures" has been avoided because of the diverse definitions of this term, the test of "severance without material harm" being substituted.

The provision in subsection (3) for recording such contracts is within the purview of this Article since it is a means of preserving the buyer's rights under the contract of sale.

3. The security phases of things attached to or to become attached to realty are dealt with in the Article on Secured Transactions (Article 9) and it is to be noted that the definition of goods in that Article differs from the definition of goods in this Article.

However, both Articles treat as goods growing crops and also timber to be cut under a contract of severance.

PART 2.

Form, Formation and Readjustment of Contract.

§ 25-2-201. Formal requirements; statute of frauds.

Editor's Note. —

For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

Section 75-4 is consistent with the other "statute of frauds" provisions in the law, including § 22-1 and subsection (a) of this section. Manpower of Guilford County, Inc. v.

Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Contract for Services in Repair of Truck. — By its express terms, this section applies only to a contract for the sale of goods. Where the contract was one for services rendered in the repair of a truck, the fact that various parts are also required to properly repair and service the trucks is merely incidental to the repair contract, and does not bar its enforcement, either in its entirety or to the extent of the cost of the parts included. Mack Fin. Corp. v. Harnett Transf., Inc., 42 N.C. App. 116, 256 S.E.2d 491 (1979).

Letter from Agent of Plaintiff's Assignor. — In an action to recover the purchase price of goods sold to defendant, a letter from the agent of plaintiff's assignor to defendant which identified the company as an agent and which stated that at the time of the sale it was agreed by the assignor that the goods were sold on a "guaranteed sales basis" is enough to comply with the statute of frauds and to make evidence of the guaranteed sales agreement admissible under the parol evidence rule. Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. 189, 258 S.E.2d 376 (1979).

Cited in Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

§ 25-2-202. Final written expression; parol or extrinsic evidence.

Applied in Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. 189, 258 S.E.2d 376 (1979).

§ 25-2-203. Seals inoperative.

Editor's Note. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

§ 25-2-205. Firm offers.

Editor's Note. — For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

§ 25-2-207. Additional terms in acceptance or confirmation.

Editor's Note. — For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

§ 25-2-208. Course of performance or practical construction.

Applied in Owens v. Harnett Transf., Inc., 42 N.C. App. 532, 257 S.E.2d 136 (1979).

§ 25-2-209. Modification, rescission and waiver.

Editor's Note. — For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

Applied in Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

PART 3.

General Obligation and Construction of Contract.

§ 25-2-306. Output, requirements and exclusive dealings.

Cited in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-2-312. Warranty of title and against infringement; buyer's obligation against infringement.

Burden on Plaintiffs Seeking Recovery on Warranty. — In an action to recover the price paid by plaintiffs to defendants for a tractor where plaintiffs alleged that the tractor was sold to satisfy a lien which existed at the time of the sale, summary judgment was improperly granted for the plaintiffs where they neither alleged nor offered evidentiary material to show that they had no knowledge of the existence of the lien, since the burden was on the plaintiffs, as movants, to produce evidence on every element necessary for them to prove in order to be entitled to judgment, and in order to recover on the warranty provided by this section, plaintiffs must prove the presence of a lien or encumbrance of which they had no knowledge. Smith v. Taylor, 44 N.C. App. 363, 261 S.E.2d 19 (1979).

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

Editor's Note. —

For note on farmers as merchants under the Uniform Commercial Code, see 1 Campbell L. Rev. 141 (1979).

What Plaintiff Must Show.—

Under this section, a plaintiff must prove: first, that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651 (1980).

Burden of Proof.—

In accord with 2nd paragraph in 1979 Cum. Supp. See Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651 (1980).

§ 25-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.

Applied in Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. App. 189, 258 S.E.2d 376 (1979).

PART 6.

Breach, Repudiation and Excuse.

§ 25-2-606. What constitutes acceptance of goods.

In an action to recover for breach of contract in the sale of the typesetting equipment, where the record clearly shows that plaintiff retained the machines in question, had possession of them at the time of trial, and had ample time to reject them, particularly since the condition of the goods was fully known to plaintiff, the acts of plaintiff were inconsistent with the seller's (defendant's) ownership and constituted acceptance under subsection (1)(c) of this section. Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

§ 25-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

Applied in Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

§ 25-2-608. Revocation of acceptance in whole or in part.

Applied in Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

PART 7.

REMEDIES.

§ 25-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

Cited in Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

§ 25-2-712. "Cover"; buyer's procurement of substitute goods.

Applied in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-2-713. Buyer's damages for nondelivery or repudiation.

Applied in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

§ 25-2-715. Buyer's incidental and consequential damages.

Incidental damages are those that are causally related to the breach. B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

Applied in Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980).

§ 25-2-725. Statute of limitations in contracts for sale.

Editor's Note. —
For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

ARTICLE 3.

Commercial Paper.

PART 1.

SHORT TITLE, FORM AND INTERPRETATION.

§ 25-3-102. Definitions and index of definitions.

Cited in Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

§ 25-3-103. Limitations on scope of Article.

Cited in Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

§ 25-3-113. Seal.

Editor's Note. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

§ 25-3-120. Instruments "payable through" bank.

A defendant bank was not a "payor bank" with respect to instruments which were "payable through" the defendant bank and were the subject of an action wherein the issuer of a banker's blanket bond sought to recover on the theory that the negligence of the defendant bank in misrouting, mislaying, or causing confusion in the collection process was the proximate cause of the loss sustained by the bank to which the bond was issued where the defendant bank was not named as a drawee and was not ordered or even authorized to pay drafts out of the drawee's account or any other funds of the drawee in its hands. Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

PART 3.

RIGHTS OF A HOLDER.

§ 25-3-302. Holder in due course.

Applied in Lowe's of Sanford, Inc. v. Mid-South Bank & Trust Co., 44 N.C. App. 365, 260 S.E.2d 801 (1979); Alamance Bldrs., Inc. v. Central Carolina Bank & Trust Co., 45 N.C. App. 46, 262 S.E.2d 338 (1980).

Stated in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Cited in Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

§ 25-3-303. Taking for value.

Applied in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979); Alamance Bldrs., Inc. v. Central Carolina Bank & Trust Co., 45 N.C. App. 46, 262 S.E.2d 338 (1980).

§ 25-3-305. Rights of a holder in due course.

Stated in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

Cited in Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

§ 25-3-306. Rights of one not holder in due course.

Applied in Branch Banking & Trust Co. v. Creasy, 44 N.C. App. 289, 260 S.E.2d 782 (1979).

PART 4.

Liability of Parties.

§ 25-3-403. Signature by authorized representative.

Applied in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

Cited in Keels v. Turner, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 25-3-405. Impostors; signature in name of payee.

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-3-413. Contract of maker, drawer and acceptor.

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-3-418. Finality of payment or acceptance.

Where a bank issued its own cashier's check in payment of a check to a third party drawn on an account of a depositor, and the depositor subsequently took action which rendered its check worthless, the bank's issuance of the cashier's check, which by definition is also an acceptance, constitutes an engagement by the bank to honor the check as presented extinguishing the right of the bank or anyone else to countermand the check. Lowe's of Sanford, Inc. v. Mid-South Bank & Trust Co., 44 N.C. App. 365, 260 S.E.2d 801 (1979).

Quoted in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-3-419. Conversion of instrument; innocent representative.

Applied in Alamance Bldrs., Inc. v. Central Carolina Bank & Trust Co., 45 N.C. App. 46, 262 S.E.2d 338 (1980).

PART 6.

DISCHARGE.

§ 25-3-606. Impairment of recourse or of collateral.

Applied in Better Adv., Inc. v. Peace, 43 N.C. App. 534, 259 S.E.2d 359 (1979).

PART 8.

MISCELLANEOUS.

§ 25-3-803. Notice to third party.

Cited in IFCO of S.C., Inc. v. Southern Nat'l Bank, 42 N.C. App. 499, 256 S.E.2d 825 (1979).

ARTICLE 4.

Bank Deposits and Collections.

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

§ 25-4-102. Applicability.

Applied in Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

§ 25-4-104. Definitions and index of definitions.

Instruments Held Drafts. — Instruments which consisted of three parts, with the top part being a bank "draft," the second part being a record copy of the draft, and the third part being an envelope into which titles of vehicles purchased with drafts were to be inserted and mailed, were not "checks" under this section, but were "drafts." Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

§ 25-4-105. "Depositary bank"; "intermediary bank"; "collecting bank"; "payor bank"; "presenting bank"; "remitting bank."

Applied in Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978).

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-4-106. Separate office of a bank.

Editor's Note. —
For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

PART 2.

Collection of Items: Depositary and Collecting Banks.

§ 25-4-202. Responsibility for collection; when action seasonable.

A defendant bank, upon dishonor of a draft, did not have a duty to send the titles of automobiles to the bank to which plaintiffs had issued a banker's blanket bond where the titles were "accompanying documents" and where the bank to which the plaintiffs issued the bond never established a "security interest" in those titles prior to the time the defendant bank sent them back to the drawee after they were dishonored. Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

§ 25-4-207. Warranties of customer and collecting bank on transfer or presentment of items; time for claims.

For purposes of deciding whether to impose liability on a collecting bank at summary judgment, "good title" under this section means only that a collecting bank is warranting that it is presenting a check whose indorsements appear to be genuine. If in fact such indorsement is not genuine, then the collecting bank is not admitting strict liability for its breach of warranty, but can in turn sue the previous collecting bank. North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

Unproven and contested allegations of forged indorsement are insufficient as a matter of law to breach a warranty of good title under this section. North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-4-208. Security interest of collecting bank in items, accompanying documents and proceeds.

A defendant bank, upon dishonor of a draft, did not have a duty to send the titles of automobiles to the bank to which plaintiffs had issued a banker's blanket bond where the titles were "accompanying documents" and where the bank to which the plaintiffs issued the bond never established a "security interest" in those titles prior to the time the defendant bank sent them back to the drawee after they were dishonored. Fidelity & Deposit Co. v. Bank of Bladenboro, 472 F. Supp. 885 (E.D.N.C. 1978), aff'd, 596 F.2d 632 (4th Cir. 1979).

PART 4.

Relationship between Payor Bank and Its Customer.

§ 25-4-401. When bank may charge customer's account.

Cited in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

§ 25-4-403. Customer's right to stop payment; burden of proof of loss.

Editor's Note. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

§ 25-4-407. Payor bank's right to subrogation on improper payment.

Editor's Note. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

ARTICLE 5.

Letters of Credit.

§ 25-5-114. Issuer's duty and privilege to honor; rights to reimbursement.

Editor's Note. — For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

§ 25-5-116. Transfer and assignment.

Official Reasons for 1972 Change

The change conforms to the deletion of the defined term "contract right" from Article 9.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. The situation involved is typified by that of an exporter who has made a contract for sale with a foreign buyer and is beneficiary of a letter of credit initiated by the buyer, especially where the subject matter involves goods still to be manufactured. The exporter is frequently in need of the wherewithal not only to finance payment to his supplier but to assure the latter against cancellation of the order during the process of manufacture. For this purpose assignment of the exporter's rights under the letter of credit is frequently desirable.

Since, however, there is general confusion of thought as to the meaning of "assignment or transfer of a credit," the law remains uncertain. If "assignment of the credit" includes delegation of performance of the conditions under the credit then the initiating customer, who in many cases has put his faith in performance or supervision of performance by a beneficiary of established reputation, may be deprived of real and intended security. See Comment to Section 2-210 on the comparable situation as to the sales contract. On the other hand, all "negotiation credits" involve a transfer of the rights of the beneficiary by way of negotiations of the draft and such transfer involves no important loss of the initiating party's intended safety. Meanwhile, the exceedingly useful institution of "back to back" credits, in which an American bank issues a credit with the exporter as the initiating customer and the exporter's supplier as the beneficiary, is dangerous for the banker unless he can secure in advance an effective assignment from the exporter of the latter's rights under the initial credit issued on behalf of his foreign buyer. Against this background, the section is drawn.

2. Subsection (1) requires the beneficiary's signature on drafts drawn under the credit unless it is expressly designated as assignable or transferable. If it is so designated, the normal rules of assignment apply and both the right to draw and the performance of the beneficiary can be transferred, subject to the beneficiary's continuing liability, if any, for the nature of the performance.

3. Subsection (2) makes clear that to safeguard among other things the letter of credit "back to back" practice, the assignability of proceeds in advance of performance cannot be prohibited in advance of performance. In this respect the letter of credit is treated like any other contract calling for money to be earned. See Section 9-318 generally and Section 2-210 as to sales contracts. But the special nature of the letter of credit as evidence of the right to proceeds is recognized by the additional requirement of delivery of the letter to the assignee as a condition precedent to the perfection of the assignment. Similarly, the fact that letters of credit normally require presentation of drafts or demands for payment which are drawn under it and that as a result notice of assignment of proceeds can exist simultaneously with a draft payable by order or indorsement to either the beneficiary or another third person leads to the necessity for permitting an issuer to protect itself against exhibition of the letter or advice of credit.

4. Subsection (3) makes clear that the section has no application to the normal case of negotiation of a draft or the transfer of a

demand for payment unless effective assignment under the section has taken place.

ARTICLE 7.

Warehouse Receipts, Bills of Lading and Other Documents of Title.

PART 1.

GENERAL.

§ 25-7-102. Definitions and index of definitions.

Cited in Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

PART 2.

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

§ 25-7-209. Lien of warehouseman.

The proper issuance of a warehouse receipt requires not only mailing, but mailing to the proper address. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

And Question of Proper Address Is for Trier of Fact. — Where the question of whether defendant mailed the receipt to the proper address is disputed by the parties, it must be determined by the trier of fact and since it is a material fact, summary judgment for either party would not be proper. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

§ 25-7-210. Enforcement of warehouseman's lien.

The purpose of the requirement of subdivision (2)(f) that the advertisement must include a description of the goods is to insure that those who might be interested in buying the items will be present at the sale. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

And this purpose is not adequately served by the use of the general term "household goods," where the goods to be sold include such varied items as a stereo, color TV, lawn mower, aquarium, and washing machine. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

Defendant's noncompliance with subsection (f) would not invalidate the sale, but it would entitle plaintiff to whatever damages he can prove resulted from the noncompliance. Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979).

ARTICLE 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

PART 1.

SHORT TITLE, APPLICABILITY AND DEFINITIONS.

§ 25-9-101. Short title.

1972 Official Comment

This Article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. It supersedes prior legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignments of accounts receivable (see Note to Section 9-102).

Consumer installment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. Many states now regulate such loans and sales under small loan acts, retail installment selling acts and the like. The National Conference of Commissioners on Uniform State Laws has proposed a Uniform Consumer Credit Code dealing with this subject. While this Article applies generally to security interests in consumer goods, it is not designed to supersede such regulatory legislation (see Notes to Sections 9-102 and 9-203). Nor is this Article designed as a substitute for small loan acts or retail installment selling acts in any state which does not presently have such legislation.

Pre-Code law recognized a wide variety of security devices, which came into use at various times to make possible different types of secured financing. Differences between one device and another persisted, in formal requisites, in the secured party's rights against the debtor and third parties, in the debtor's rights against the secured party, and in filing requirements, although many of those differences no longer served any useful function. Thus an unfiled chattel mortgage was by the law of many states "void" against creditors generally; a conditional sale, often available as a substitute for the chattel mortgage, was in some states valid against all creditors without filing, and in states where filing is required was, if unfiled, void only against lien creditors. The recognition of so many separate security devices had the result that half a dozen filing systems covering chattel security devices might be maintained within a state, some on a county basis, others on a state-wide basis, each of which had to be separately checked to determine a debtor's status.

Nevertheless, despite the great number of security devices there remained gaps in the structure. In many states, for example, a security interest could not be taken in inventory or a stock in trade although there was a real need for such financing. It was often baffling to try to maintain a technically valid security interest when financing a manufacturing process, where the collateral starts out as raw materials, becomes work in process and ends as finished goods. Furthermore, it was by no means clear, even to specialists, how under pre-Code law a security interest might be taken in many kinds of intangible property — such as television or motion picture rights — which have come to be an important source of commercial collateral.

While the chattel mortgage was adaptable for use in almost any situation where goods are collateral, there were limitations, sometimes highly technical, on the use of other devices, such as the conditional sale and particularly the trust receipt. The cases are many in which a security transaction described by the parties as a conditional sale or a trust receipt was later determined by a court to be something else, usually a chattel mortgage. The consequence of such a determination was typically to void the security interest against creditors because the security agreement was not filed *as a chattel mortgage* (even though it may have been filed as a conditional sale or a trust receipt). The already mentioned difficulty of financing on the security of inventory was got around to some extent by the device known as "field warehousing" as well as by the use of the trust receipt. After 1940 a number of states generally authorized inventory financing by enacting statutes, similar although not uniform, known as "factor's lien" acts. Also after 1940 the increasingly important business of lending against accounts receivable inspired new statutes in that field in more than thirty states.

The growing complexity of financing

transactions forced legislatures to keep piling new statutory provisions on top of our inadequate and already sufficiently complicated nineteenth-century structure of security law. The results of this continuing development were increasing costs to both parties and increasing uncertainty as to their rights and the rights of third parties dealing with them.

The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

Under this Article the traditional distinctions among security devices, based largely on form, are not retained; the Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of descriptive terms which had grown up at common law and under a hundred-year accretion of statutes. This does not mean that the old forms may not be used, and Section 9-102(2) makes it clear that they may be.

This Article does not determine whether "title" to collateral is in the secured party or in the debtor and adopts neither a "title theory" nor a "lien theory" of security interests. Rights, obligations and remedies under the Article do not depend on the location of title (Section 9-202). The location of title may become important for other purposes — as, for example, in determining the incidence of taxation — and in such a case the parties are left free to contract as they will. In this connection the use of a form which has traditionally been regarded as determinative of title (e. g., the conditional sale) could reasonably be regarded as evidencing the parties' intention with respect to title to the collateral.

Under the Article distinctions based on form (except as between pledge and non-possessory interests) are no longer controlling. For some purposes there are distinctions based on the type of property which constitutes the collateral — industrial and commercial equipment, business inventory, farm products, consumer goods, accounts receivable, documents of title and other intangibles — and, where appropriate, the Article states special rules applicable to financing transactions involving a particular type of property. Despite the statutory simplification a greater degree of flexibility in the financing transaction is allowed than is possible under existing law.

The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines.

This has made possible a radical simplification in the formal requisites for creation of a security interest.

A more rational filing system replaces the present system of different files for each security device which is subject to filing requirements. Thus not only is the information contained in the files made more accessible but the cost of procuring credit information, and, incidentally, of maintaining the files, is greatly reduced.

The Article's flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortably under its provisions, thus avoiding the necessity, so apparent in recent years, of year by year passing new statutes and tinkering with the old ones to allow legitimate business transactions to go forward.

The rules set out in this Article are principally concerned with the limits of the secured party's protection against purchasers from and creditors of the debtor. Except for procedure on default, freedom of contract prevails between the immediate parties to the security transaction.

§ 25-9-102. Policy and subject matter of Article.

Editor's Note. —

For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

Cited in Equilease Corp. v. Belk Hotel Corp. 42 N.C. App. 436, 256 S.E.2d 836 (1979).

Official Reasons for 1972 Change

The omissions in the first paragraph of subsection (1) make applicable the general choice of law principles of Section 1-105 (except for special rules stated in Section 9-103), instead of an incomplete statement in this section.

The omission in clause (1) (b) conforms to the elimination of the term "contract rights" from the Article. See Reasons for Change under Section 9-106.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

The main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article, except for certain types of transactions excluded by Section 9-104. In addition certain sales of accounts and chattel paper are brought within this Article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended. As to security interests in fixtures created under the law applicable to real estate, see Section 9-313(1).

1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this Article is: is the transaction intended to have effect as security? For example, Section 9-104 excludes certain transactions where the security interest (such as an artisan's lien) arises under statute or common law by reason of status and not by consent of the parties. Transactions in the form of consignments or leases are subject to this Article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. (As to consignments the provisions of Sections 2-326, 9-114 and 9-408 should be consulted.) When it is found that a security interest as defined in Section 1-201(37) was intended, this Article applies regardless of the form of the transaction or the name by which the parties may have christened it. The list of traditional security devices in subsection (2) is illustrative only; other old devices, as well as any new ones which the ingenuity of lawyers may invent, are included, so long as the requisite intent is found. The controlling definition is that contained in subsection (1).

The Article does not in terms abolish existing security devices. The conditional sale or bailment-lease, for example, is not prohibited; but even though it is used, the rules of this Article govern.

2. If an obligation is to repay money lent and is not part of chattel paper, it is either an instrument or a general intangible. A sale of an instrument or general intangible is not within this Article, but a transfer intended to have effect as security for an obligation of the transferor is covered by subsection 1(a). In either case the nature of the transaction is not affected by the fact that collateral is transferred with the instrument or general intangible. Such a transfer is treated as a transfer by operation of law, whether or not it is articulated in the agreement.

An assignment of accounts or chattel paper as security for an obligation is covered by subsection (1)(a). Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsection (1)(b) whether intended for security or not, unless excluded by Section 9-104. The buyer then is treated as a secured party, and his interest as a security interest. See Sections 9-105(1)(m), 1-201(37). Certain sales which have nothing to do with commercial financing transactions are excluded by Section 9-104(f); compare Spurlin v. Sloan, 368 S.W.2d 314 (Ky. 1963). See also Section 9-302(1)(e), exempting from filing casual or isolated assignments, and Section 9-302(2), preserving the perfected status of a security interest against the original debtor when a secured party assigns his interest.

3. In general, problems of choice of law in this Article as to the validity of security agreements are governed by Section 1-105. Problems of choice of law as to perfection of security interests and the effect of perfection or non-perfection thereof, including rules requiring reperfection, are governed by Section 9-103.

4. An illustration of subsection (3) is as follows:

The owner of Blackacre borrows $10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or nonrecording of an assignment of the mortgagee's interest. See Section 9-104(j). But under Section 3-304(5) recording of the assignment does not of itself prevent X from holding the note in due course.

5. While most sections of this Article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral. An index of sections where such special rules are stated follows:

§ 25-9-103. Perfection of security interests in multiple-state transactions.

Official Reasons for 1972 Change

The section has been completely rewritten to clarify the relationship of its several provisions to each other and to other sections defining the applicable law. Now that the Code has been adopted in all states but Louisiana and also adopted in the District of Columbia and the Virgin Islands, the emphasis in the revision has been to make clear where perfection of a security interest must take place, rather than on problems of actual conflicts of rules of law.

1. The section now concerns itself exclusively with perfection of security interests and the effect of perfection or non-perfection thereof. The 1962 Code has several references to the "validity" of a security agreement, and these have been deleted. Likewise, a deletion has been made from Section 9-102 of the language which went beyond that section's basic function of defining the scope of Article 9 and purported to state a choice of law rule. These two changes make it clear that Article 9 does not govern problems of choice of law between the original parties, and that this question is governed by the general choice of law provision in Section 1-105.

2. While most of the substantive materials of the section are in the 1962 Text, the statement thereof and their relationship to each other were not clear. In the revision they are clarified according to the following structure:

The basic rule of this section is that the controlling law, as to perfection of the security interests and the effect of perfection or non-perfection, is the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected (paragraph (1) (b)). There are certain exceptions: (i) In the case of a purchase money security interest in goods, where the parties intended to remove the collateral to another jurisdiction within 30 days after the debtor received possession of the goods, the law of the latter jurisdiction will govern the initial perfection until the expiration of the 30-day period, and thereafter if the goods are removed to the other jurisdiction before the end of the period (paragraph (1) (c)). (ii) Where the collateral is covered by a certificate of title, perfection will be governed by the law of the issuing jurisdiction (subsection (2)). (iii) If the collateral is certain mobile goods or certain intangibles, perfection will be governed by the law of the jurisdiction wherein is located the debtor (subsection (3)).

Where the collateral has been removed from the jurisdiction whose law first governed, the jurisdiction into which it is removed (i. e., "this state") adds a local requirement of re-perfection to the requirements of the state from which the collateral was removed — i. e., refiling is required within 4 months after removal, or within any lesser period during which perfection would have continued in the other jurisdiction (paragraphs (1) (d) and (2) (c)).

3. The two former rules for determining place of perfection as to intangibles (namely, for accounts, the office where the records were kept concerning the accounts; and for general intangibles, the chief place of business of the debtor) have been consolidated into the rule that the filing is at the debtor's location. That location will ordinarily be the office designated in the 1962 Text as "chief place of business," now redesignated as "chief executive office." A new provision (paragraph (3) (e)) has been added to cover the case where that office moves from one jurisdiction to another.

A principal objection to the original rule that the place for filing as to accounts was the place where the debtor kept his records with respect to them was that persons seeking to search records might not know where this place might be, in the case of a far-flung debtor or of multicorporate enterprises with central accounting. Where the debtor assigned his accounts without recourse, as in factoring, he might keep few records with respect to them. Moreover, it was thought undesirable to have one rule for accounts and another rule for general intangibles, because in many financing situations both types of receivables may be involved. See discussion in Reasons for Change to Section 9-106. Therefore, it was decided to adopt for both types of intangibles the rule heretofore applicable to general intangibles.

1972 Official Comment

Prior Uniform Statutory Provisions:
Paragraph 1(d): Section 14, Uniform Conditional Sales Act.

Purposes:

1. The general rules on choice of law between the original parties in Section 1-105 apply to this Article. However, when conflicting claims to collateral arise, the question depends on *perfection* of security interests, and thus on the effect of perfection or non-perfection. These problems are dealt with in this section. The general rule (paragraph (1) (b)) is that these questions are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. This event will frequently be the filing. If the last event is not filing and perfection is through filing, the filing required is in the jurisdiction where the collateral is when the last event occurs; prior filing in another jurisdiction is not effective and is not saved by the four-month rule discussed below, which applies only when the security interest was *perfected* in the jurisdiction from which the collateral was removed. If the security interest was perfected in one jurisdiction and then removed to another jurisdiction, maintenance of perfection in the latter jurisdiction or failure to do so is the "last event" to which the basic rule refers.

There are, however, exceptions to this basic rule:

2. If the parties to a transaction creating a purchase money security interest in goods understand when the security interest attaches that the collateral will be kept in another jurisdiction, the law of that jurisdiction governs perfection and the effect of perfection or non-perfection until 30 days after the debtor receives possession of the goods (paragraph (1) (c)). A filing in that jurisdiction perfects the security interest even before the goods are removed. The 30-day period is not a period of grace during which filing is unnecessary or has retroactive effect, but merely states the period during which the other jurisdiction is the place of filing. The effect of late filing is governed by other provisions, such as Sections 9-301 and 9-312.

3. If the goods reach that jurisdiction within the 30 days, the effectiveness of the filing in that jurisdiction continues without interruption. If the collateral is not kept in that jurisdiction before the end of the 30-day period, paragraph (1) (c) ceases to be applicable and thereafter the law of the jurisdiction where the collateral is controls perfection. A failure of the collateral to reach the intended destination jurisdiction before the expiration of the 30-day period because of a conflicting claim or otherwise may cause disappointment of expectations that the law of the destination jurisdiction will govern continuously, and caution may dictate filing both in that jurisdiction and in the jurisdiction where the security interest attaches.

This section uses the concepts that goods are "kept" in a state or "brought" into a state, and related terms. These concepts imply a stopping place of a permanent nature in the state, not merely transit or storage intended to be transitory.

4.(a) Where the collateral is an automobile or other goods covered by a certificate of title issued by any state and the security interest is perfected by notation on the certificate of title, perfection is controlled by the certificate of title rather than by the law of the state wherein the security interest attached (subsection (2)).

(b) It has long been hoped that "exclusive certificate of title laws" would provide a sure means of controlling property interests in goods like automobiles, which because of their nature cannot readily be controlled by local or statewide filing alone. In theory the certificate of title should control the property interests in the vehicle wherever the vehicle may be. However, two circumstances operate to prevent the perfect operation of the certificate of title device:

First, some states have never adopted certificate of title laws. This results in a problem in the issuance of a certificate of title when the vehicle moves from a non-certificate to a certificate state, because the certificate-issuing officer is in no position to conduct a complete search to ascertain the condition of the title in a state of origin which requires no filing or in which filing could be in any one or more of several localities. Also, it seems that when a vehicle moves from a certificate to a non-certificate state, the officers issuing a new registration for the vehicle are not always meticulous to notify secured parties shown on the certificate to give them a chance to perfect their security interests in the non-certificate state when a new registration is issued. Moreover, some vehicles like mobile homes are not always registered and title certificates are not always issued even in a state which may have certificate laws applicable thereto, because the certificate laws may apply only if the mobile homes use the highways. Registration plates of a mobile home having a certificate could be removed and there would be nothing visible to show that a certificate had ever issued for it.

Second, various fraudulent devices based on allegations of loss of the certificate of title

enable a dishonest person to obtain both an original and a duplicate of title; to have a security interest shown on only one thereof; and then to effect a transfer into a new state on the basis of the clean certificate, no matter how diligent the officers in the second state may be.

Given these practical problems, the choice of applicable rules of law after interstate removals of vehicles subject to certificate of title laws is most difficult. This Article provides the rules set forth below.

(c) The security interest perfected by notation on a certificate of title will be recognized without limit as to time; but, of course, perfection by this method ceases if the certificate of title is surrendered (paragraph (2) (b)). Since the secured party ordinarily holds the certificate, surrender thereof could not occur without his action in the matter in some respect. If the vehicle is reregistered in another jurisdiction while the secured party still holds the certificate, a danger of deception to third parties arises. The section provides that the certificate ceases to control after 4 months following removal if reregistration has occurred, but during the 4 months the secured party has the same protection for cases of interstate removal as is set forth in paragraph (1) (d) of the section and Comment 7, subject to additional limitation if the reregistration also involves a new "clean" certificate of title in the removal jurisdiction and a non-professional buyer buys while that new certificate is outstanding. See paragraph (2) (d) and Comment 4(e).

(d) If a vehicle not described in the preceding paragraph (i. e., not covered by a certificate of title) is removed to a certificate state and a certificate is issued therefor, the holder of a security interest has the same 4-month protection, subject to the provision discussed in the next paragraph of Comment.

(e) Where "this state" issues a certificate of title on collateral that has come from another state subject to a security interest perfected in any manner, problems will arise if this state, from whatever cause, fails to show on its certificate the security interest perfected in the other jurisdiction. This state will have every reason, nevertheless, to make its certificate of title reliable to the type of person who most needs to rely on it. Paragraph (2) (d) of the section therefore provides that the security interest perfected in the other jurisdiction is subordinate to the rights of a limited class of persons buying the goods while there is a clean certificate of title issued by this state, without knowledge of the security interest perfected in the other jurisdiction. The limited class are buyers who are non-professionals, i. e., not dealers and not secured parties, because these are ordinarily professionals. The protective rule mentioned does not apply if this state adopts a device used under some certificate of title laws, namely, stating on the certificate of title that the vehicle may be subject to security interests not shown on the certificate, where the collateral came from a non-certificate state.

In any event the security interest perfected out of state becomes unperfected unless reperfected in this state under the usual 4-month rule (paragraph (2) (d) of the section). States which place a cautionary statement on a certificate of title coming from a non-certificate state make provision to reissue the certificate without the caution after 4 months.

One difficulty is that no state's certificate of title law makes any provision by which a foreign security interest may be reperfected in that state, without the cooperation of the owner or other person holding the certificate in temporarily surrendering the certificate. But that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party. The only solution for the out-of-state secured party under present certificate of title laws seems to be to reperfect by possession, i. e., by repossessing the goods.

5. The general rules of the section based on location of the collateral could not be applied to certain types of intangible collateral which have no location in any realistic sense, or to certain movable chattels which have no permanent location.

(a) For accounts and general intangibles there is no indispensable or symbolic document which represents the underlying claim, whose endorsement or delivery is the one effectual means of transfer. There is a considerable body of case law dealing with the situs of choses in action such as these. This case law is in the highest degree confused, contradictory and uncertain: it affords no base on which to build a statutory rule.

An account arises typically out of a sale; the contract of sale may be executed in State A, the goods shipped from a warehouse in State B to buyer (account debtor) in State C. The account may then be assigned to an assignee in State D. The seller-assignor may keep his principal records in State E. Under the non-notification system of accounts financing, the seller-assignor, despite the assignment, bills and collects from the account debtor; under notification financing the account debtor makes payment to the assignee, but the bills may be prepared and sent out by either assignor or assignee. The contacts of the transaction are with many jurisdictions: to which one is it appropriate to look for the governing law? Even more complicated situations may be anticipated when the collateral consists of novel or

uncommon types of personal property, which fall within the definition of general intangibles.

If we bear in mind that our principal question is where certain financing statements shall be filed, two things become clear. *First:* since the purpose of filing is to allow subsequent creditors of the *debtor-assignor* to determine the true status of his affairs, the place chosen must be one which such creditors would normally associate with the assignor; thus the place of business of the assignee and the places of business or residences of the various account debtors must be rejected in ordinary situations. *Second:* the place chosen must be one which can be determined with the least possible risk of error. The place chosen by subsection (3) is the debtor's location, which is ordinarily the location of its chief executive office. This concept is discussed below.

(b) Another class of collateral for which a special rule is stated in subsection (3) is mobile goods of types which are normally moved for use from one jurisdiction to another. Such goods are generally classified as equipment; sometimes they may be classified as inventory, for example, goods leased by a professional lessor. Subsection (3) provides that a security interest in such equipment or inventory is subject to this Article when the debtor's location, i. e., ordinarily its chief executive office, is in this state.

While automobiles are obviously mobile goods, they will in most cases be covered by subsection (2) of this section and therefore excluded from subsection (3) by paragraph (a) thereof. If an automobile is not covered by a certificate of title and is classified as equipment or as inventory under lease, it will be subject to subsection (3). Automobiles and other mobile goods which are classified as consumer goods are not subject to subsection (3).

The rule of subsection (3) applies to goods of a type "normally used" in more than one jurisdiction; there is no requirement that particular goods be in fact used out of state. Thus, if an enterprise whose chief executive office is in State X keeps in State Y goods of the type covered by subsection (3), the rule of subsection (3) requires filing in State X even though the goods never leave State Y.

(c) "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief executive office" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief executive office" of a multi-state enterprise, but it would be rare that there could be more than two possibilities. A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place. The subsection states a rule which will be simple to apply in most cases, and which makes it possible to dispense with much burdensome and useless filing.

(d) If the location of the debtor is moved after a security interest has been perfected in another jurisdiction, the secured party has four months within which to refile, unless the perfection in the original jurisdiction would have expired earlier (paragraph (3) (e)).

(e) Under subsection (3) each state other than that of the debtor's location in effect disclaims jurisdiction over certain accounts and general intangibles which, by common law rules, might be held to be within its jurisdiction; in the same way there is a disclaimer of jurisdiction over mobile chattels, even though they may be physically located within the state much of the time. If the jurisdiction whose law controls under this rule is a United States jurisdiction or has enacted legislation permitting perfection of the security interest by filing or recording in that jurisdiction, the law of that jurisdiction will be recognized in the disclaiming jurisdiction as perfecting the security interest. The jurisdiction of the debtor's location may not, however, have such legislation. For example, mobile equipment is used in New York; the debtor's chief place of business is in a Canadian jurisdiction which will not permit or recognize filing as to property not physically located therein. Paragraph (3) (c) solves this difficulty by permitting perfection through filing in the jurisdiction in the United States in which the debtor has its major executive office in the United States. Where the debtor is not located in the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the secured party may alternatively perfect by notification to account debtors.

(f) A sentence in paragraph (3) (d) provides a special rule for security interests in airplanes owned by a foreign air carrier. Without that sentence subsection (3) might refer such a case to the law of a foreign nation whose law is difficult or impossible to ascertain. The sentence clears up such doubts by treating as the location of the carrier the office designated for service of process in the United States under the Federal Aviation Act of 1958. To the extent that it is applicable, the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in Section 9-302(3), but some nations are not parties to that Convention.

6. Subsection (4) deals with chattel paper, a semi-intangible security interest which may be perfected either by possession or by filing (Sections 9-304(1), 9-305). As to possessory

security, subsection (4) provides that chattel paper shall be subject to the same rule as goods in subsection (1). As to non-possessory security, subsection (4) provides that it shall be subject to the same rule as the intangibles under subsection (3), except that notification to the account debtor is ruled out as an optional means of perfection under paragraph (3)(c). The reason for this is that a different alternative, possession, is available for chattel paper.

7. In addition to the foregoing rules defining which jurisdiction governs perfection of a security interest in the first instance, "this state" (i. e., a destination state after removal) adds its own rules requiring reperfection following removal of collateral other than that described in subsections (2), (3), and (5). "This state" will for four months recognize perfection under the law of the jurisdiction from which the collateral came, unless the remaining period of effectiveness of the perfection in that jurisdiction was less than four months (paragraph (1)(d)). After the four month period or the remaining period of effectiveness, whichever is shorter, the secured party must comply with perfection requirements in this state. This rule differs from the former rule of Section 14 of the Uniform Conditional Sales Act. Under that section a conditional seller was required to file within 10 days after he "received notice" that the goods had been removed into this state. Apparently, under the Uniform Conditional Sales Act, if the seller never "received notice" his interest continued or became perfected in this state without filing. Paragraph (1)(d) proceeds on the theory that not only the secured party whose collateral has been removed but also creditors of and purchasers from the debtor "in this state" should be considered.

The four-month period is long enough for a secured party to discover in most cases that the collateral has been removed and refile in this state; thereafter, if he has not done so, his interest, although originally perfected in the jurisdiction from which the collateral was removed, is subject to defeat here by purchasers of the collateral. Compare the situation arising under Section 9-403(2) when a filing lapses.

It should be noted that a "purchaser" includes a secured party. Section 1-201(32) and (33). The rights of a purchaser with a security interest against an unperfected security interest are governed by Section 9-312.

In case of delay beyond the four-month period, there is no "relation back"; and this is also true where the security interest is perfected for the first time in this state.

If the removal occurs within a short period, like two weeks, before the lapse of the filing in the original state, the secured party has only that period, not the full four months, to reperfect in "this state". But ordinarily he would have filed a continuation statement in the original jurisdiction; and he may do so to avoid lapse and allow himself the full four months if he is searching for the collateral and needs more time.

Paragraph (1)(d) does not apply to the case of goods removed from one filing district to another within this state (see subsection (3) of Section 9-401), but only to property brought into this state from another jurisdiction.

8. Subsection (5) deals with problems relating to the financing of minerals (including oil and gas) as these products come from the ground. In some cases rights in oil and gas in the ground have been split into a large variety of interests. As the oil or gas issues from the ground, it may be encumbered by the group of persons having interests therein. Or the product may be sold at minehead or wellhead and the resulting accounts assigned. The question arises as to the place of filing. The usual rule of this section in subsection (3) would make the place to search for encumbrances on the accounts the locations of the respective assignors; but the assignors might be a number of individuals located throughout the country. To avoid the difficult problems of search thus created, subsection (5) provides that the place for filing with respect to security interests in the minerals as they issue from the ground at minehead or wellhead or in the accounts arising out of the sale of the minerals at minehead or wellhead shall be in the state where the minehead or wellhead is located. Section 9-401 similarly provides that the place to file within the state is in the real property records in the county where the minehead or wellhead is located. These rules conform to pre-Code practice and to practice which seems to have continued in the early Code period before express provision was made for these situations.

The term "at wellhead" is intended to encompass arrangements based on sale of the product as soon as it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" or the far side of a gathering tank or at some other point. The term "at minehead" is a comparable concept.

§ 25-9-104. Transactions excluded from article.

Official Reasons for 1972 Change

Former paragraph (e), excluding railway equipment trusts from the coverage of Article 9, has been deleted. The whole thrust of Article 9 is to eliminate differences based on the form of

a transaction, and the equipment trust serves the same function as other purchase money forms of financing. In fact, a form known as the "New York equipment trust" comes closer to a conditional sale contract than it does to a Pennsylvania equipment trust, and thus the former exclusion left substantial uncertainty. Railway financing on rolling stock will continue to be exempt from the filing provisions of Article 9 by virtue of Section 9-302(3) and (4). Thus, the principal purpose of the former exclusion will be retained. There is, however, no reason why the other provisions of Article 9 as to the rights of parties, manner of foreclosure, etc., should not be available to the parties to railway financing, since these problems are not adequately covered in any other statutes.

A new paragraph (e) has been added to make clear that this Article does not apply to security interests created by governmental debtors.

Other changes reflect the elimination of the term "contract rights" and the fact that, while transfers of claims under insurance policies and deposit accounts are in general excluded from the Article by this section, proceeds claims thereto are subject to Section 9-306.

1972 Official Comment

Prior Uniform Statutory Provisions:
None.

Purposes:

To exclude certain security transactions from this Article.

1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article. The Ship Mortgage Act, 1920, is an example of such a federal act. The present provisions of the Federal Aviation Act of 1958 (49 U.S.C. 1403 et seq.) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this Article (Section 9-302(3)); but to the extent that the Federal Aviation Act does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article.

Although the Federal Copyright Act contains provisions permitting the mortgage of a copyright and for the recording of an assignment of a copyright (17 U.S.C. §§ 28, 30) such a statute would not seem to contain sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this Article. Compare Republic Pictures Corp. v. Security-First National Bank of Los Angeles, 197 F.2d 767 (9th Cir. 1952). Compare also with respect to patents, 35 U.S.C. § 47. The filing provisions under these Acts, like the filing provisions of the Federal Aviation Act, are recognized as the equivalent to filing under this Article. Section 9-302(3) and (4).

Even such a statute as the Ship Mortgage Act is far from a comprehensive regulation of all aspects of ship mortgage financing. That Act contains provisions on formal requisites, on recordation and on foreclosure but not much more. If problems arise under a ship mortgage which are not covered by the Act, the federal admiralty court must decide whether to improvise an answer under "federal law" or to follow the law of some state with which the mortgage transaction has appropriate contacts. The exclusionary language in paragraph (a) is that this Article does not apply to such security interest "to the extent" that the federal statute governs the rights of the parties. Thus if the federal statute contained no relevant provision, this Article could be looked to for an answer.

2. Except for fixtures (Section 9-313), the Article applies only to security interests in personal property. The exclusion of landlord's liens by paragraph (b) and of leases and other interests in or liens on real estate by paragraph (j) merely reiterates the limitations on coverage already made explicit in Section 9-102(3). See Comment 4 to that section.

3. In all jurisdictions liens are given suppliers of many types of services and materials either by statute or by common law. It was thought to be both inappropriate and unnecessary for this Article to attempt a general codification of that lien structure which is in considerable part determined by local conditions and which is far removed from ordinary commercial financing. Moreover, federal law may displace state law in situations such as admiralty liens. Paragraph (c) therefore excludes statutory liens from the Article. Section 9-310 states a rule for determining priorities between such liens and the consensual security interests covered by this Article.

4. In many states assignments of wage claims and the like are regulated by statute. Such assignments present important social problems whose solution should be a matter of local regulation. Paragraph (d) therefore excludes them from this Article.

5. Certain governmental borrowings include collateral in the form of assignments of water, electricity or sewer charges, rents on dormitories or industrial buildings, tools, etc. Since these assignments are usually governed by special provisions of law, these governmental transfers are excluded from this Article.

6. In general sales as well as security transfers of accounts and chattel paper are within the Article (see Section 9-102). Paragraph (f) excludes from the Article certain transfers of such intangibles which, by their nature, have nothing to do with commercial financing transactions.

Similarly, this paragraph excludes from the Article such transactions as that involved in Lyon v. Ty-Wood Corporation, 212 Pa.Super. 69, 239 A.2d 819 (1968) and Spurlin v. Sloan, 368 S.W.2d 314 (Ky.1963).

7. Rights under life insurance and other policies, and deposit accounts, are often put up as collateral. Such transactions are often quite special, do not fit easily under a general commercial statute and are adequately covered by existing law. Paragraphs (g) and (l) make appropriate exclusions, but provision is made for coverage of deposit accounts and certain insurance money as proceeds.

8. The remaining exclusions go to other types of claims which do not customarily serve as commercial collateral: judgments under paragraph (h), set-offs under paragraph (i) and tort claims under paragraph (k).

§ 25-9-105. Definitions and index of definitions.

Applied in Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

Official Reasons for 1972 Change

A definition of "transmitting utility" has been added to identify a class of debtor with special filing problems on far-flung properties, for which special filing rules are stated in Part 4.

A definition of "deposit account" has been added to facilitate references to such accounts in the section on proceeds (Section 9-306).

A definition of "pursuant to commitment" has been added as the basis for use of this concept in Sections 9-301, 9-307, and 9-312.

Definitions of "encumbrance" and "mortgage" have been added as the basis for the use thereof in Section 9-313.

The definition of "document" has been amended to include therein the kind of receipt issued by a person who is not technically a warehouseman, as described in Section 7-201(2).

The exclusion of "other things in action" from the definition of "goods" has been deleted as unnecessary. "General intangibles", which under Section 9-106 includes "things in action", are themselves excluded from the definition of goods.

Other minor changes reflect the elimination of the classification "contract right" in Section 9-106.

1972 Official Comment

Prior Uniform Statutory Provisions:
Various.

Purposes:

1. General. It is necessary to have a set of terms to describe the parties to a secured transaction, the agreement itself, and the property involved therein; but the selection of the set of terms applicable to any one of the existing forms (e.g., mortgagor and mortgagee) might carry to some extent the implication that the existing law referable to that form was to be used for the construction and interpretation of this Article. Since it is desired to avoid any such implication, a set of terms has been chosen which have no common law or statutory roots tying them to a particular form.

In place of such terms as "chattel mortgage," "conditional sale," "assignment of accounts receivable," "trust receipt," etc., this Article substitutes the general term "security agreement" defined in paragraph (1) (l). In place of "mortgagor," "mortgagee," "conditional vendee," "conditional vendor," etc., this Article substitutes "debtor", defined in paragraph (1) (d), and "secured party", defined in paragraph

(1) (m). The property subject to the security agreement is "collateral", defined in paragraph (1) (c). The interest in the collateral which is conveyed by the debtor to the secured party is a "security interest", defined in Section 1-201(37).

2. Parties. The parties to the security agreement are the "debtor" and the "secured party."

"Debtor": In all but a few cases the person who owes the debt and the person whose property secures the debt will be the same. Occasionally, one person furnishes security for another's debt, and sometimes property is transferred subject to a secured debt of the transferor which the transferee does not assume; in such cases, under the second sentence of the definition, the term "debtor" may, depending upon the context, include either or both such persons. Section 9-112 sets out special rules which are applicable where collateral is owned by a person who does not owe a debt.

"Secured party": The term includes any person in whose favor there is a security interest (defined in Section 1-201). The term is used equally to refer to a person who as a seller retains a lien on or title to goods sold, to a person whose interest arises initially from a loan transaction, and to an assignee of either. Note that a seller is a "secured party" in relation to his customer; the seller becomes a "debtor" if he assigns the chattel paper as collateral. This is also true of a lender who assigns the debt as collateral. With the exceptions stated in Section 9-104(f) the Article applies to any sale of accounts or chattel paper: the term "secured party" includes an assignee of such intangibles whether by sale or for security, to distinguish him from the payee of the account, for example, who becomes a "debtor" by pledging the account as security for a loan.

On the applicability of the terms "debtor" and "secured party" to consignments and leases see Section 9-408 and Comment thereto.

"Account debtor": Where the collateral is an account, chattel paper or general intangible the original obligor is called the "account debtor", defined in paragraph (1) (a).

3. Property subject to the security agreement. "Collateral", defined in paragraph (1) (c), is a general term for the tangible and intangible property subject to a security interest. For some purposes the Code makes distinctions between different types of collateral and therefore further classification of collateral is necessary. Collateral which consists of tangible property is "goods,", defined in paragraph (1) (h); and "goods" are again subdivided in Section 9-109. For purposes of this Article all intangible collateral fits one of five categories, two of which, "accounts", and "general intangibles" are defined in the following Section 9-106; the other three, "documents", "instruments" and "chattel paper" are defined in paragraphs (1) (f), (1) (i) and (1) (b) of this section.

"Goods": The definition in paragraph (1) (h) is similar to that contained in Section 2-105 except that the Sales Article definition refers to "time of identification to the contract for sale", while this definition refers to "the time the security interest attaches."

For the treatment of fixtures, Section 9-313 should be consulted. It will be noted that the treatment of fixtures under Section 9-313 does not at all points conform to their treatment under Section 2-107 (goods to be severed from realty). Section 2-107 relates to sale of such goods; Section 9-313 to security interests in them. The discrepancies between the two sections arise from the differences in the types of interest covered. A comparable discrepancy exists as to minerals. In the case of timber, both sections treat it as goods if it is to be severed under a contract of sale, but not otherwise.

If in any state minerals before severance are deemed to be personal property, they fall outside the Article's definition of "goods" and would therefore fall in the catch-all definition, "general intangibles", in Section 9-106. The special provisions of Section 9-103(5) would not apply and those of Section 9-103(3) would apply. The resulting problems should be considered locally.

For the purpose of this Article, goods are classified as "consumer goods", "equipment", "farm products", and "inventory"; those terms are defined in Section 9-109. When the general term "goods" is used in this Article, it includes, as may be appropriate in the context, the subclasses of goods defined in Section 9-109.

"Instrument": The term as defined in paragraph (1) (i) includes not only negotiable instruments and securities but also any other intangibles evidenced by writings which are in ordinary course of business transferred by delivery. As in the case of chattel paper "delivery" is only the minimum stated and may be accompanied by other steps.

If a writing is itself a security agreement or lease with respect to specific goods it is not an instrument although it otherwise meets the term of the definition. See Comment below on "chattel paper".

The fact that an instrument is secured by collateral, whether the collateral be other instruments, documents, goods, accounts or general intangibles, does not change the character of the principal obligation as an instrument or convert the combination of instrument and collateral into a separate Code classification of personal property. The single qualification to this principle is that an instrument which is secured by chattel paper is

itself part of the chattel paper, while also retaining its identity as an instrument.

"Document": See the Comments under Sections 1-201(15) and 7-201.

"Chattel paper": To secure his own financing a secured party may wish to borrow against or sell the security agreement itself along with his interest in the collateral which he has received from his debtor. Since the refinancing of paper secured by specific goods presents some problems of its own, the term "chattel paper" is used to describe this kind of collateral. The Comments under Section 9-308 further describe this concept.

Charters of vessels are excluded from the definition of chattel paper because they fit under the definition of accounts. See Comment to Section 9-106. The term "charter" as used herein and in Section 9-106 includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for use of vessels.

4. The following transactions illustrate the use of the term "chattel paper" and some of the other terms defined in this section.

A dealer sells a tractor to a farmer on conditional sales contract or purchase money security interest. The conditional sales contract is a "security agreement", the farmer is the "debtor", the dealer is the "secured party" and the tractor is the type of "collateral" defined in Section 9-109 as "equipment". But now the dealer transfers the contract to his bank, either by outright sale or to secure a loan. Since the conditional sales contract is a security agreement relating to specific equipment, the conditional sales contract is now the type of collateral called "chattel paper". In this transaction between the dealer and his bank, the bank is the "secured party", the dealer is the "debtor", and the farmer is the "account debtor".

Under the definition of "security interest" in Section 1-201(37) a lease does not create a security interest unless intended as security. Whether or not the lease itself is a security agreement, it is chattel paper when transferred if it relates to specific goods. Thus, if the dealer enters into a straight lease of the tractor to the farmer (not intended as security), and then arranges to borrow money on the security of the lease, the lease is chattel paper.

Security agreements of the type formerly known as chattel mortgages and conditional sales contracts are frequently executed in connection with a negotiable note or a series of such notes. Under the definitions in paragraphs (1) (b) and (1) (i) the rules applicable to chattel paper, rather than those relating to instruments, are applicable to the group of writings (contract plus note) taken together.

5. Miscellaneous definitions.

"Deposit account" is a type of collateral excluded from this Article under Section 9-104 (*l*), except when it constitutes proceeds of other collateral under Section 9-306.

The terms "encumbrance" and "mortgage" are defined for use in the section on fixtures, Section 9-113.

The term "transmitting utility" is defined to designate a special class of debtors for whom separate filing rules are provided in Part 4, thus obviating all local filing and particularly the several local filings that would be necessary under the usual rules of Section 9-401 for the fixture collateral of a far-flung public utility debtor. See Comments under Sections 9-401 and 9-403.

The term "pursuant to commitment" is defined for use in the rules relating to priority of future advances in Sections 9-301(4), 9-307(3), and 9-312(7).

6. Comments to the definitions indexed in subsections (2) and (3) follow the sections in which the definitions are contained.

§ 25-9-106. Definitions: "Account"; "general intangibles".

Official Reasons for 1972 Change

The term "contract right" has been eliminated as unnecessary. As indicated by a sentence now being eliminated from Section 9-306(1), "contract right" was thought of as an "account" before the right to payment became unconditional by performance by the creditor. But the distinction between "account" and "contract right" was not used in the Article except in subsection (2) to Section 9-318 on the right of original parties to modify an assigned contract, and that subsection has been redrafted to preserve the distinction without needing the term "contract right". The term has been troublesome in creating a "proceeds" problem where a contract right becomes an "account" by performance; in the Code's former denial that there could be any right in an account until it came into existence (former Section 9-204(2) (d)), notwithstanding a security interest in the preexisting contract right; and in the danger of inadequate description in financing statements by claiming "accounts" or "general intangibles" when before performance they should have been

described as "contract rights"; and in other respects.

"Money" is expressly excluded from the catch-all definition, "general intangible", to preclude any possible reading that a security interest in money may be perfected by filing.

The other changes are conforming changes.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

The terms defined in this section round out the classification of intangibles: see the definitions of "document", "chattel paper" and "instrument" in Section 9-105. Those three terms cover the various categories of commercial paper which are either negotiable or to a greater or less extent dealt with as if negotiable. The term "account" covers most choses in action which may be the subject of commercial financing transactions but which are not evidenced by an indispensable writing. The term "general intangibles" brings under this Article miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security. Examples are goodwill, literary rights and rights to performance. Other examples are copyrights, trademarks and patents, except to the extent that they may be excluded by Section 9-104(a). This Article solves the problems of filing of security interests in these types of intangibles (Section 9-103(3) and 9-401). Note that this catch-all definition does not apply to money or to types of intangibles which are specifically excluded from the coverage of the Article (Section 9-104) and note also that under Section 9-302 filing under a federal statute may satisfy the filing requirements of this Article.

A right to the payment of money is frequently buttressed by ancillary covenants to insure the preservation of collateral, such as covenants in a purchase agreement, note or mortgage requiring insurance on the collateral or forbidding removal of the collateral; or covenants to preserve creditworthiness of the promisor, such as covenants restricting dividends, etc. While these miscellaneous ancillary rights might conceivably be thought to fall within the definition of "general intangibles", it is not the intention of the Code to treat them separately and require the perfection of assignment thereof by filing in the manner required for perfection of an assignment of general intangibles. Whatever perfection is required for the perfection of an assignment of the right to the payment of money will also carry these ancillary rights.

Similarly, when the right to the payment of money is not yet earned by performance, there are frequently ancillary rights designed to assure that an assignee may complete the performance and crystallize the right to payment of money. Such rights are frequently present in a "maintenance" lease where the lessor has continuing duties to perform, or in a ship charter. These ancillary rights, if considered in the abstract, might be thought to be "general intangibles", since they do not themselves involve the payment of money; but it is not the intent of the Code to split up the rights to the payment of money and its ancillary supports, and thereby multiply the problem of perfection of assignments. Therefore, all rights of the lessor in a lease are to be perfected as "chattel paper", and all rights of the owner in a ship charter are to be perfected as "accounts".

"Account" is defined as a right to payment for goods sold or leased or services rendered; the ordinary commercial account receivable. In some special cases a right to receive money not yet earned by performance crystallizes not into an account but into a general intangible, for it is a right to payment of money that is not "for goods sold or leased or for services rendered." Examples of such rights are the right to receive payment of a loan not evidenced by an instrument or chattel paper; a right to receive partial refund of purchase prices paid by reason of retroactive volume discounts; rights to receive payment under licenses of patents and copyrights, exhibition contracts, etc.

This Article rejects any lingering common law notion that only rights already earned can be assigned. In the triangular arrangement following assignment, there is reason to allow the original parties — assignor and account debtor — more flexibility in modifying the underlying contract before performance than after performance (see Section 9-318). It will, however, be found that in most situations the same rules apply to accounts both before and after performance.

§ 25-9-107. Definitions: "Purchase money security interest".

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. Under existing rules of law and under this Article purchase money obligiations often have priority over other obligations. Thus a purchase money obligation has priority over an interest acquired under an after-acquired property clause (Section 9-312(3) and (4)); where filing is required a grace period of ten days is allowed against creditors and transferees in bulk (Section 9-301(2)); and in some instances filing may not be necessary (Section 9-302(1)(d)).

Under this section a seller has a purchase money security interest if he retains a security interest in the goods; a financing agency has a purchase money security interest when it advances money to the seller, taking back an assignment of chattel paper, and also when it makes advances to the buyer (e. g., on chattel mortgage) to enable him to buy, and he uses the money for that purpose.

2. When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation": the quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a pre-existing claim or antecedent debt.

§ 25-9-108. When after-acquired collateral not security for antecedent debt.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. Many financing transactions contemplate that the collateral will include both the debtor's existing assets and also assets thereafter acquired by him in the operation of his business. This Article generally validates such after-acquired property interests (see Section 9-204 and Comment) although they may be subordinated to later purchase money interests under Section 9-312(3) and (4).

Interests in after-acquired property have never been considered as involving transfers of property for antecedent debt merely because of the after-acquired feature, nor should they be so considered. The section makes explicit what has been true under the case law: an after-acquired property interest is not, by virtue of that fact alone, security for a pre-existing claim. This rule is of importance principally in insolvency proceedings under the federal Bankruptcy Act or state statutes which make certain transfers for antecedent debt voidable as preferences. The determination of when a transfer is for antecedent debt is largely left by the Bankruptcy Act to state law.

Two tests must be met under this section for an interest in after-acquired property to be one not taken for an antecedent debt. First: the secured party must, at the inception of the transaction, have given new value in some form. Second: the after-acquired property must come in either in the ordinary course of the debtor's business or as an acquisition which is made under a contract of purchase entered into within a reasonable time after the giving of new value and pursuant to the security agreement. The reason for the first test needs no comment. The second is in line with limitations which judicial construction has placed on the operation of after-acquired property clauses. Their coverage has been in many cases restricted to subsequent ordinary course acquisitions: this Article does not go so far (see Section 9-204 and Comment), but it does deny present value status to out of ordinary course acquisitions not made pursuant to the original loan agreement. This solution gives the secured party full protection as to the collateral which he may be reasonably thought to have contracted for; it gives other creditors the possibility, under the law of preferences, of subjecting to their claims windfall or uncontemplated acquisitions shortly before bankruptcy.

2. The term "value" is defined in Section 1-201(44) and discussed in the accompanying Comment. In this section and in other sections of this Article the term "new value" is used but is left without statutory definition. The several illustrations of "new value" given in the text of this section (making an advance, incurring an obligation, releasing a perfected security interest) as well as the "purchase money security interest" definition in Section 9-107 indicate the nature of the concept. In other situations it is left to the courts to distinguish between "new" and "old" value, between present considerations and antecedent debt.

§ 25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory".

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. This section classifies goods as consumer goods, equipment, farm products and inventory. The classification is important in many situations: it is relevant, for example, in determining the rights of persons who buy from a debtor goods subject to a security interest (Section 9-307), in certain questions of priority (Section 9-312), in determining the place of filing (Section 9-401) and in working out rights after default (Part 5). Comment 5 to Section 9-102 contains an index of the special rules applicable to different classes of collateral.

2. The classes of goods are mutually exclusive; the same property cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases — a physician's car or a farmer's jeep which might be either consumer goods or equipment — the principal use to which the property is put should be considered as determinative. Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder.

3. The principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. Implicit in the definition is the criterion that the prospective sale is in the ordinary course of business. Machinery used in manufacturing, for example, is equipment and not inventory even though it is the continuing policy of the enterprise to sell machinery when it becomes obsolete. Goods to be furnished under a contract or service are inventory even though the arrangement under which they are furnished is not technically a sale. When an enterprise is engaged in the business of leasing a stock of products to users (for example, the fleet of cars owned by a car rental agency), that stock is also included within the definition of "inventory". It should be noted that one class of goods which is not held for disposition to a purchaser or user is included in inventory: "Materials used or consumed in a business". Examples of this class of inventory are fuel to be used in operations, scrap metal produced in the course of manufacture, and containers to be used to package the goods. In general it may be said that goods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use; but are inventory, even though not held for sale, if they are used up or consumed in a short period of time in the production of some end product.

4. Goods are "farm products" only if they are in the possession of a debtor engaged in farming operations. Animals in a herd of livestock are covered whether they are acquired by purchase or result from natural increase. Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. The terms "crops", "livestock" and "farming operations" are not defined; however, it is obvious from the text that "farming operations" includes raising livestock as well as crops; similarly, since eggs are products of livestock, livestock includes fowl.

When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be "farm products". If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory.

Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not determined by this Article. At one end of the scale some processes are so closely connected with farming — such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar — that they would not rank as manufacturing. On the other hand an extensive canning operation would be manufacturing. The line is one for the courts to draw. After farm products have been subjected to a manufacturing operation, they become inventory if held for sale.

Note that the buyer in ordinary course who under Section 9-307 takes free of a security interest in goods held for sale does not include one who buys farm products from a person engaged in farming operations.

5. The principal definition of equipment is a negative one: goods used in a business (including farming or a profession) which are not inventory and not farm products. Trucks, rolling stock, tools, machinery are typical. It will be noted furthermore that any goods which are not covered by one of the other definitions in this section are to be treated as equipment.

§ 25-9-110. Sufficiency of description.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

The requirement of description of collateral (see Section 9-203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it — that it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a financing statement. See Section 9-402.

§ 25-9-111. Applicability of bulk transfer laws.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

The bulk transfer laws, which have been almost everywhere enacted, were designed to prevent a once prevalent type of fraud which seems to have flourished particularly in the retail field: the owner of a debt-burdened enterprise would sell it to an unwary purchaser and then remove himself, with the purchase price and his other assets, beyond the reach of process. The creditors would find themselves with no recourse unless they could establish that the purchaser assumed existing debts. The bulk transfer laws, which require advance notice of sale to all known creditors, seem to have been successful in preventing such frauds.

There has been disagreement whether the bulk transfer laws should be applied to security as well as to sale transactions. In most states security transactions have not been covered; in a few states the opposite result has been reached either by judicial construction or by express statutory provision. Whatever the reasons may be, it seems to be true that the bulk transfer type of fraud has not often made its appearance in the security field: it may be that lenders of money are more inclined to investigate a potential borrower than are purchasers of retail stores to determine the true state of their vendor's affairs. Since compliance with the bulk transfer laws is onerous and expensive, legitimate financing transactions should not be required to comply when there is no reason to believe that other creditors will be prejudiced.

This section merely reiterates the provisions of Article 6 on Bulk Transfers which provides in Section 6-103(1) that transfers "made to give security for the performance of an obligation" are not subject to that Article.

§ 25-9-113. Security interests arising under article on sales.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e. g., Sections 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under Sections 2-703, 2-705 and 2-706 which are similar to the rights of a secured party. Similarly, under such sections as Sections 2-506, 2-707 and 2-711, a financing agency, an agent, a buyer or another person may have a security interest or other right in goods similar to that of a seller. The use of the term "security interest" in the Sales Article is meant to bring the interests so designated within this Article. This section makes it clear, however, that such security

interests are exempted from certain provisions of this Article. Compare Section 4-208(3), making similar special provisions for security interests arising in the bank collection process.

2. The security interests to which this section applies commonly arise by operation of law in the course of a sales transaction. Since the circumstances under which they arise are defined in the Sales Article, there is no need for the "security agreement" defined in Section 9-105(1) (*l*) and required by Section 9-203(1) and paragraph (a) dispenses with such requirements. The requirement of filing may be inapplicable under Sections 9-302(1) (a) and (b), 9-304 and 9-305, where the goods are in the possession of the secured party or of a bailee other than the debtor. To avoid difficulty in the residual cases, as for example where a bailee does not receive notification of the secured party's interest until after the security interest arises, paragraph (b) dispenses with any filing requirement. Finally, paragraph (c) makes inapplicable the default provisions of Part 5 of this Article, since the Sales Article contains detailed provisions governing stoppage of delivery and resale after breach. See Sections 2-705, 2-706, 2-707(2) and 2-711(3).

3. These limitations on the applicability of this Article to security interests arising under the Sales Article are appropriate only so long as the debtor does not have or lawfully obtain possession of the goods. Compare Section 56(b) of the Uniform Sales Act. A secured party who wishes to retain a security interest after the debtor lawfully obtains possession must comply fully with all the provisions of this Article and ordinarily must file a financing statement to perfect his interest. This is the effect of the "except" clause in the preamble to this section. Note that in the case of a buyer who has a security interest in rejected goods under Section 2-711(3), the buyer is the "secured party" and the seller is the "debtor".

4. This section applies only to a "security interest". The definition of "security interest" in Section 1-201(37) expressly excludes the special property interest of a buyer of goods on identification under Section 2-401(1). The seller's interest after identification and before delivery may be more than a security interest by virtue of explicit agreement under Section 2-401(1) or 2-501(1), by virtue of the provisions of Section 2-401(2), (3) or (4), or by virtue of substitution pursuant to Section 2-501(2). In such cases, Article 9 is inapplicable by the terms of Section 9-102(1) (a).

5. Where there is a "security interest", this section applies only if the security interest arises "solely" under the Sales Article. Thus Section 1-201(37) permits a buyer to acquire by agreement a security interest in goods not in his possession or control; such a security interest does not impair his rights under the Sales Article, but any rights based on the security agreement are fully subject to this Article without regard to the limitations of this section. Similarly, a seller who reserves a security interest by agreement does not lose his rights under the Sales Article, but rights other than those conferred by the Sales Article depend on full compliance with this Article.

§ 25-9-114. Consignment.

Official Reasons for 1972 Adoption

An uncertainty has existed under the 1962 Code whether the filing rule in Section 2-326(3) applicable to true consignments requires only filing under Part 4 of Article 9 or also requires notice to prior inventory secured parties of the debtor under Section 9-312(3). The new Section 9-114 accepts the latter view and provides in substance that, in order to protect his ownership of the consigned goods, the consignor must give the same notice to an inventory secured party of the debtor that he would have to give if his transaction with the consignee was in the form of a security transaction instead of in the form of a consignment. This new section follows closely the language of Section 9-312(3).

1972 Official Comment

Prior Uniform Statutory Provisions:
None.

Purposes:

1. This section requires that where goods are furnished to a merchant under the arrangement known as consignment rather than in a security transaction, the consignor must, in order to protect his position as against an inventory secured party of the consignee, give to that party the same notice and at the same time that he would give to that party if that party had filed first with respect to inventory and if the consignor were furnishing

the goods under an inventory security agreement instead of under a consignment.

For the distinction between true consignment and security arrangements, see Section 1-201(37). For the assimilation of consignments under certain circumstances to goods on sale or return and the requirement of filing in the case of consignments, see Section 2-326.

The requirements of notice in this section conform closely to the concepts and the language of Section 9-312(3), which should be consulted together with the relevant Comments.

Except in the limited cases of identifiable cash proceeds received on or before delivery of the goods to a buyer, no attempt has been made to provide rules as to perfection of a claim to proceeds of consignments (compare Section 9-306) or the priority thereof (compare Section 9-312). It is believed that under many true consignments the consignor acquires a claim for an agreed amount against the consignee at the moment of sale, and does not look to the proceeds of sale. In contrast to the assumption of this Article that rights to proceeds of security interests under Section 9-306 represent the presumed intent of the parties (compare Section 9-203(3)), the Article goes on the assumption that if consignors intend to claim the proceeds of sale, they will do so by expressly contracting for them and will perfect their security interests therein.

PART 2.

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO.

§ 25-9-201. General validity of security agreement.

1972 Official Comment

Prior Uniform Statutory Provisions: Section 4, Uniform Conditional Sales Act; Section 3, Uniform Trust Receipts Act.

This section states the general validity of a security agreement. In general the security agreement is effective between the parties; it is likewise effective against third parties. Exceptions to this general rule arise where there is a specific provision in any Article of this Act, for example, where Article 1 invalidates a disclaimer of the obligations of good faith, etc. (Section 1-102(3)), or this Article subordinates the security interest because it has not been perfected (Section 9-301) or for other reasons (see Section 9-312 on priorities) or defeats the security interest where certain types of claimants are involved (for example Section 9-307 on buyers of goods). As pointed out in the Note to Section 9-102, there is no intention that the enactment of this Article should repeal retail installment selling acts or small loan acts. Nor of course are the usury laws of any state repealed. These are mentioned in the text of Section 9-201 as examples of applicable laws, outside this Code entirely, which might invalidate the terms of a security agreement.

§ 25-9-202. Title to collateral immaterial.

1972 Official Comment

Prior Uniform Statutory Provision:

None.

Purposes:

The rights and duties of the parties to a security transaction and of third parties are stated in this Article without reference to the location of "title" to the collateral. Thus the incidents of a security interest which secures the purchase price of goods are the same under this Article whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed it or a lien to the secured party. This Article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other rule of law depends upon who has title. Thus if a revenue law imposes a tax on the "legal" owner of goods or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this Article does not attempt to define whether the secured party is a "legal" owner or whether the

transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determine the location of "title" for such purposes.

Petitions for reclamation brought by a secured party in his debtor's insolvency proceedings have often been granted or denied on a title theory: where the secured party has title, reclamation will be granted; where he has "merely a lien", reclamation may be denied. For the treatment of such petitions under this Article, see Point 1 of Comment to Section 9-507.

§ 25-9-203. Attachment and enforceability of security interests; proceeds; formal requisites.

Official Reasons for 1972 Change

Subsection (1) has been revised to incorporate into the concept of enforceability of a security interest the elements of agreement, value, and rights in the collateral, which formerly were stated in Section 9-204. These are combined with the requirement of written agreement (unless the security interest is evidenced by possession of the collateral by the secured party), and the security interest is said to "attach" when all of the events specified have occurred. This drafting cures the former anomaly that a security interest could attach and be perfected, and yet be unenforceable against anyone for lack of a written security agreement.

The requirement that a security agreement covering oil, gas or minerals to be extracted contain a description of the land concerned has been eliminated since the Article does not recognize a security interest in such collateral until it has been extracted from the land.

The former reference to proceeds in subsection (1) has been eliminated and new subsection (3) added to make clear that claims to proceeds under Section 9-306 do not require a statement in the security agreement, for it is assumed that the parties so intend unless otherwise agreed.

1972 Official Comment

Prior Uniform Statutory Provision:

Section 2, Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing unless the collateral is in the possession of the secured party (including an agent on his behalf — see Comment 2 to Section 9-305). When all of these elements exist, the security agreement becomes enforceable between the parties and is said to "attach". Perfection of a security interest (see Section 9-303) will in many cases depend on the additional step of filing a financing statement (see Section 9-302) or possession of the collateral (Sections 9-304(1) and 9-305). Section 9-301 states who will take priority over a security interest which has attached but which has not been perfected. Subsection (2) states a rule of construction under which the security interest, unless postponed by explicit agreement, attaches automatically when the stated events have occurred.

2. As to the type of description of collateral in a written security agreement which will satisfy the requirements of this section, see Section 9-110 and Comment thereto.

In the case of crops growing or to be grown or timber to be cut the best identification is by describing the land, and subsection (1) (a) requires such a description.

3. One purpose of the formal requisites stated in subsection (1) (a) is evidentiary. The requirement of written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured. Where the collateral is in the possession of the secured party, the evidentiary need for a written record is much less than where the collateral is in the debtor's possession; customarily, of course, as a matter of business practice the written record will be kept, but, in this Article as at common law, the writing is not a formal requisite. Subsection (1) (a), therefore, dispenses with the written agreement — and thus with signature and description — if the collateral is in the secured party's possession.

4. The definition of "security agreement" (Section 9-105) is "an agreement which creates or provides for a security interest". Under that definition the requirement of this section that

the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale although absolute in form may be shown to have been in fact given as security. Under this Article as under prior law a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgment of satisfaction.

5. The formal requisite of a writing stated in this section is not only a condition to the enforceability of a security interest against third parties, it is in the nature of a Statute of Frauds. Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies paragraph (1) (a) is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like. If he has advanced money, he is of course a creditor and, like any creditor, is entitled after judgment to appropriate process to enforce his claim against his debtor's assets; he will not, however, have against his debtor the rights given a secured party by Part 5 of this Article on Default. The theory of equitable mortgage, insofar as it has operated to allow creditors to enforce informal security agreements against debtors, may well have developed as a necessary escape from the elaborate requirements of execution, acknowledgment and the like which the nineteenth century chattel mortgage acts vainly relied on as a deterrent to fraud. Since this Article reduces formal requisites to a minimum, the doctrine is no longer necessary or useful. More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing.

6. Subsection (4) states that the provisions of regulatory statutes covering the field of consumer finance prevail over the provisions of this Article in case of conflict. The second sentence of the subsection is added to make clear that no doctrine of total voidness for illegality is intended: failure to comply with the applicable regulatory statute has whatever effect may be specified in that statute, but no more.

§ 25-9-204. After-acquired property; future advances.

Official Reasons for 1972 Change

Former subsection (1) has been eliminated. The term "attach" has been moved to Section 9-203 and related to the concept of enforceability of the security interest between the parties to the security agreement contained in that section.

Former subsection (2) has been eliminated as unnecessary and in some cases confusing. Its operation appeared to be arbitrary, and it is believed that the questions considered are best left to the courts.

Former subsections (3) and (5), now subsections (1) and (3), have been rewritten for clarity.

Former subsection (4) is redesignated (2), and clause (a) thereof relating to crops eliminated. That clause provided that no security interest in crops attaches under an after-acquired property clause to crops which become such more than one year after the security agreement, unless the agreement involved certain real estate transactions. The obvious purpose of this provision was to protect a necessitous farmer from encumbering his crops for many years in the future. The provision did not work because there was no corresponding limit on the scope of a financing statement covering crops and under the Code's notice-filing rules the priority position of a security arrangement covering successive crops would be as effectively protected by the filing of a first financing statement whether the granting clause as to successive crops was in one security agreement with an after-acquired property clause or in a succession of security agreements. On the other hand the clause did require an annual security agreement for crops even when the encumbrance on crops was agreed to as part of a long-term financing covering farm machinery and other assets. The provision thus appeared to be meaningless in operation except to cause unnecessary paperwork, but it did introduce some element of uncertainty as to its purpose.

1972 Official Comment

Prior Uniform Statutory Provision:
None.
Purposes:

1. Subsection (1) makes clear that a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the

security agreement. That is to say: the security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party — such as the taking of a supplemental agreement covering the new collateral — is required. This does not however mean that the interest is proof against subordination or defeat: Section 9-108 should be consulted on when a security interest in after-acquired collateral is not security for antecedent debt, and Section 9-312(3) and (4) on when such a security interest may be subordinated to a conflicting purchase money security interest in the same collateral.

2. This Article accepts the principle of a "continuing general lien". It rejects the doctrine — of which the judicial attitude toward after-acquired property interests was one expression — that there is reason to invalidate as a matter of law what has been variously called the floating charge, the free-handed mortgage and the lien on a shifting stock. This Article validates a security interest in the debtor's existing and future assets, even though (see Section 9-205) the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. (See further, however, Section 9-306 on Proceeds and Comment thereto.)

The widespread nineteenth century prejudice against the floating charge was based on a feeling, often inarticulate in the opinions, that a commercial borrower should not be allowed to encumber all his assets present and future, and that for the protection not only of the borrower but of his other creditors a cushion of free assets should be preserved. That inarticulate premise has much to recommend it. This Article decisively rejects it not on the ground that it was wrong in policy but on the ground that it was not effective. In pre-Code law there was a multiplication of security devices designed to avoid the policy: field warehousing, trust receipts, factor's lien acts and so on. The cushion of free assets was not preserved. In almost every state it was possible before the Code for the borrower to give a lien on everything he held or would have. There have no doubt been sufficient economic reasons for the change. This Article, in expressly validating the floating charge, merely recognizes an existing state of things. The substantive rules of law set forth in the balance of the Article are designed to achieve the protection of the debtor and the equitable resolution of the conflicting claims of creditors which the old rules no longer give.

Notice that the question of assignment of future accounts is treated like any other case of after-acquired property: no periodic list of accounts is required by this Act. Where less than all accounts are assigned such a list may of course be necessary to permit identification of the particular accounts assigned.

3. Subsection (1) has been already referred to in connection with after-acquired property. It also serves to validate the so-called "cross-security" clause under which collateral acquired at any time may secure advances whenever made.

4. Subsection (2) limits the operation of the after-acquired property clause against consumers. No such interest can be claimed as additional security in consumer goods (defined in Section 9-109), except accessions (see Section 9-314), acquired more than ten days after the giving of value.

5. Under subsection (3) collateral may secure future as well as present advances when the security agreement so provides. At common law and under chattel mortgage statutes there seems to have been a vaguely articulated prejudice against future advance agreements comparable to the prejudice against after-acquired property interests. Although only a very few jurisdictions went to the length of invalidating interests claimed by virtue of future advances, judicial limitations severely restricted the usefulness of such arrangements. A common limitation was that an interest claimed in collateral existing at the time the security transactions was entered into for advances made thereafter was good only to the extent that the original security agreement specified the amount of such later advances and even the times at which they should be made. In line with the policy of this Article toward after-acquired property interests this subsection validates the future advance interest, provided only that the obligation be covered by the security agreement.

The effect after-acquired property and future advance clauses in the security agreement should not be confused with the use of financing statements in notice filing. The references to after-acquired property clauses and future advance clauses in Section 9-204 are limited to security agreements. This section follows Section 9-203, the section requiring a written security agreement, and its purpose is to make clear that confirmatory agreements are not necessary where the basic agreement has the clauses mentioned. This section has no reference to the operation of financing statements. The filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, whether the security agreement involved is one existing at the date of filing with an after-acquired property clause or a future advance clause, or whether the applicable security agreement is executed later. Indeed, Section 9-402(1) expressly contemplates that a financing statement may

be filed when there is no security agreement. There is no need to refer to after-acquired property or future advances in the financing statement.

As in the case of interests in after-acquired collateral, a security interest based on future advances may be subordinated to conflicting interests in the same collateral. See Sections 9-301(4); 9-307(3); 9-312(3), (4), and (7).

§ 25-9-205. Use or disposition of collateral without accounting permissible.

Official Reasons for 1972 Change

The change reflects the deletion of the defined term "contract right" from the Article.

1972 Official Comment

Prior Uniform Statutory Provisions:
None.
Purposes:

1. This Article expressly validates the floating charge or lien on a shifting stock. (See Sections 9-201, 9-204, and Comment to Section 9-204.) This section provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral. It repeals the rule of Benedict v. Ratner, 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991 (1925), and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over the collateral. The principal effect of the Benedict rule has been, not to discourage or eliminate security transactions in inventory and accounts receivable — on the contrary such transactions have vastly increased in volume — but rather to force financing arrangements in this field toward a self-liquidating basis. Furthermore, several lower court cases drew implications from Justice Brandeis' opinion in Benedict v. Ratner which required lenders operating in this field to observe a number of needless and costly formalities: for example it was thought necessary for the debtor to make daily remittances to the lender of all collections received, even though the amount remitted is immediately returned to the debtor in order to keep the loan at an agreed level.

2. The Benedict rule was, in the accounts receivable field, repealed in many of the state accounts receivable statutes enacted after 1943, and, in the inventory field, by some of the factor's lien statutes. (Benedict v. Ratner purported to state the law of New York and not a rule of federal bankruptcy law. Since its acceptance is a matter of state law, it can of course be rejected by state statute.)

3. The requirement of "policing" is the substance of the Benedict rule. While this section repeals Benedict in matters of form, the filing requirements (Section 9-302) give other creditors the opportunity to ascertain from public sources whether property of their debtor or prospective debtor is subject to secured claims, and the provisions about proceeds (Section 9-306(4)) enable creditors to claim collections which were made by the debtor more than 10-days before insolvency proceedings and commingled or deposited in a bank account before institution of the insolvency proceedings. The repeal of the Benedict rule under this section must be read in the light of these provisions.

4. Other decisions reaching results like that in the Benedict case, but relating to other aspects of dominion (of which Lee v. State Bank & Trust Co., 54 F.2d 518 (2d Cir. 1931), is an example) are likewise rejected.

5. Nothing in Section 9-205 prevents such "policing" or dominion as the secured party and the debtor may agree upon; business and not legal reasons will determine the extent to which strict accountability, segregation of collections, daily reports and the like will be employed.

6. The last sentence is added to make clear that the section does not mean that the holder of an unfiled security interest, whose perfection depends on possession of the collateral by the secured party or by a bailee (such as a field warehouseman), can allow the debtor access to and control over the goods without thereby losing his perfected interest. The common law rules on the degree and extent of possession which are necessary to perfect a pledge interest or to constitute a valid field warehouse are not relaxed by this or any other section of this Article.

§ 25-9-206. Agreement not to assert defenses against asignee; modification of sales warranties where security agreement exists.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 2, Uniform Conditional Sales Act.

Purposes:

1. Clauses are frequently inserted in installment purchase contracts under which the conditional vendee agrees not to assert defenses against an assignee of the contract. These clauses have led to litigation and their present status under the case law is in confusion. In some jurisdictions they have been held void as attempts to create negotiable instruments outside the framework of Article 3 or on grounds of public policy; in others they have been allowed to operate to cut off at least defenses based on breach of warranty. Under subsection (1) such clauses in a security agreement are validated outside the consumer field, but only as to defenses which could be cut off if a negotiable instrument were used. This limitation is important since if the clauses were allowed to have full effect as typically drafted, they would operate to cut off real as well as personal defenses. The execution of a negotiable note in connection with a security agreement is given like effect as the execution of an agreement containing a waiver of defense clause. The same rules are made applicable to leases as to security agreements, whether or not the lease is intended as security.

2. This Article takes no position on the controversial question whether a buyer of consumer goods may effectively waive defenses by contractual clause or by execution of a negotiable note. In some states such waivers have been invalidated by statute. In other states the course of judicial decision has rendered them ineffective or unreliable — courts have found that the assignee is not protected against the buyer's defense by a clause in the contract or that the holder of a note, by reason of his too close connection with the underlying transaction, does not have the rights of a holder in due course. This Article neither adopts nor rejects the approach taken in such statutes and decisions, except that the validation of waivers in subsection (1) is expressly made "subject to any statute or decision" which may restrict the waiver's effectiveness in the case of a buyer of consumer goods.

3. Subsection (2) makes clear, as did Section 2 of the Uniform Conditional Sales Act, that purchase money security transactions are sales, and warranty rules for sales are applicable. It also prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sale arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article 2.

§ 25-9-207. Rights and duties when collateral is in secured party's possession.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. Subsection (1) states the duty to preserve collateral imposed on a pledge at common law. See Restatement of Security, §§ 17, 18. In many cases a secured party having collateral in his possession may satify this duty by notifying the debtor of any act which must be taken and allowing the debtor to perform such act himself. If the secured party himself takes action, his reasonable expenses may be added to the secured obligation.

Under Section 1-102(3) the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement, in any manner not manifestly unreasonable, what shall constitute reasonable care in a particular case.

2. Subsection (2) states rules, which follow common law precedents, and which apply, unless there is agreement otherwise, in typical situations during the period while the secured party is in possession of the collateral.

3. The right of a secured party holding instruments or documents to have them indorsed or transferred to him or his order is dealt with in the relevant sections of Articles 3 (Commercial Paper), 7 (Warehouse Receipts, Bills of Lading and Other Documents) and 8 (Investment Securities). (Sections 3-201, 7-506, 8-307.)

4. This section applies when the secured party has possession of the collateral before

default, as a pledgee, and also when he has taken possession of the collateral after default. See Section 9-501(1) and (2). Subsection (4) permits operation of the collateral in the circumstances stated, and subsection (2) (a) authorizes payment of or provision for expenses of such operation. Agreements providing for such operation are common in trust indentures securing corporate bonds and are particularly important when the collateral is a going business. Such an agreement cannot of course disclaim the duty of care established by subsection (1), nor can it waive or modify the rights of the debtor contrary to Section 9-501(3).

§ 25-9-208. Request for statement of account or list of collateral.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. To provide a procedure whereby a debtor may obtain from the secured party a statement of the amount due on the obligation and in some cases a statement of the collateral.

2. The financing statement required to be filed under this Article (see Section 9-402) may disclose only that a secured party may have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement third parties are told neither the amount of the obligation secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under which the secured party will be required to make disclosure. On the other hand, the secured party should not be under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only when his own records identify the collateral and that if he claims all of a particular type of collateral owned by the debtor he is not required to approve an itemized list.

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."

Official Reasons for 1972 Change

Paragraph (1) (b) has been amended to eliminate the element of knowledge in the conditions under which a lien creditor may defeat an unperfected security interest. Knowledge of the security interest will no longer subordinate the lien creditor to the unfiled security interest. The former section denied the lien creditor priority even though he had no knowledge when he got involved by extending credit, if he acquired knowledge while attempting to extricate himself. It was completely inconsistent in spirit with the rules of priority between security interests, where knowledge plays a very minor role.

The change in subsection (2) is made to conform the language to that of the related provision in section 9-312(4).

The second sentence of subsection (3) is deleted because the question of knowledge has been eliminated from paragraph (1) (b).

New subsection (4) deals with the question of the extent to which advances made under a perfected security interest after the rights of a lien creditor have attached to the collateral will come ahead of the position of the lien creditor. This subsection should be read with Section 9-307(3) (which deals with the same problem in the case of an intervening buyer) and Section 9-312(7) (which deals with the same problem in the case of a secured party), and paragraph (5) of Reasons for Change under Section 9-312.

In the case of the lien creditors dealt with by this subsection, the rule chosen is crucial to the priority of the security interest for advances

over a federal tax lien for 45 days after the tax lien has been filed, as contemplated under section 6323(c) (2) and (d) of the Internal Revenue Code of 1954 as amended by the Federal Tax Lien Act of 1966. The actual importance of the priority rule chosen between a secured party and possible lien creditors during the 45 days is believed to be slight; but the rule chosen is essential to give the secured party the protection against Federal tax liens believed to have been intended by the Federal Tax Lien Act of 1966, the operation of which is made to depend on state law. The rule of state law was not certain before this revision. Accordingly, the priority of the security interest for future advances over the judgment lien has to be absolute for the 45 days, without regard to any knowledge of the secured party that the judgment lien exists. After the 45 days the priority of the security interest depends on the secured party's lack of knowledge of the lien at the time he makes the subsequent advance or commits to do so.

1972 Official Comment

Prior Uniform Statutory Provision:
Sections 8(2) and 9(2) (b), Uniform Trust Receipts Act; Section 5, Uniform Conditional Sales Act.

Purposes:

1. This section lists the classes of persons who take priority over an unperfected security interest. As in Section 60 of the Federal Bankruptcy Act, the term "perfected" is used to describe a security interest in personal property which cannot be defeated in insolvency proceedings or in general by creditors. A security interest is "perfected" when the secured party has taken whatever steps are necessary to give him such an interest. These steps are explained in the five following sections (9-302 through 9-306).

2. Section 9-312 states general rules for the determination of priorities among conflicting security interests and in addition refers to other sections which state special rules of priority in a variety of situations. The interests given priority under Section 9-312 and the other sections therein cited take such priority in general even over a perfected security interest. A fortiori they take priority over an unperfected security interest, and paragraph (1) (a) of this section so states.

3. Paragraph (1) (b) provides that an unperfected security interest is subordinate to the rights of lien creditors. The section rejects the rule applied in many jurisdictions in pre-Code law that an unperfected security interest is subordinated to all creditors, but requires the lien obtained by legal proceedings to attach to the collateral before the security interest is perfected. The section subordinates the unperfected security interest but does not subordinate the secured debt to the lien.

4. Paragraphs (1) (c) and (1) (d) deal with purchasers (other than secured parties) of collateral who would take subject to a perfected security interest but who are by these subsections given priority over an unperfected security interest. In the cases of goods and of intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (instruments, documents and chattel paper) the purchaser who takes priority must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection (paragraph (1) (c)). Thus even if the purchaser gave value without knowledge and before perfection, he would take subject to the security interest if perfection occurred before physical delivery of the collateral to him. The paragraph (1) (c) rule is obviously not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. Therefore with respect to such intangibles (accounts and general intangibles), paragraph (1) (d) gives priority to any transferee who has given value without knowledge and before perfection of the security interest.

The term "buyer in ordinary course of business" referred to in paragraph (1) (c) is defined in Section 1-201(9).

Other secured parties are excluded from paragraphs (1) (c) and (1) (d) because their priorities are covered in Section 9-312 (see point 2 of this Comment).

5. Except to the extent provided in subsection (2), this Article does not permit a secured party to file or take possession after another interest has received priority under subsection (1) and thereby protect himself against the intervening interest.

A few chattel mortgage statutes did have grace periods, i. e., a filing within x days after the mortgage was given related back to the day the mortgage was given. The Uniform Conditional Sales Act had a ten-day period which cut off all intervening interests. The Uniform Trust Receipts Act had a thirty-day period but did not cut off the interest of a purchaser who took delivery before the filing.

Subsection (2) gives a grace period for perfection by filing as to purchase money security interests only (that term is defined in Section 9-107). The grace period runs for ten

days after the debtor receives possession of the collateral but operates to cut off only the interests of intervening lien creditors or bulk purchasers.

6. Subsection (3) defines "lien creditor", following in substance the provisions of the Uniform Trust Receipts Act.

7. Subsection (4) deals with the question whether advances under an existing security interest in collateral, made after rights of lien creditors have attached to that collateral, will take precedence over rights of lien creditors. See related problems in Sections 9-307(3) and 9-312(7). In this section, because of the impact of the rule chosen on the question whether the security interest for future advances is "protected" under Sections 6323(c) (2) and (d) of the Internal Revenue Code as amended by the Federal Tax Lien Act of 1966, the priority of the security interest for future advances over a judgment lien is made absolute for 45 days regardless of knowledge of the secured party concerning the judgment lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien obtained by legal proceedings. The importance of the rule chosen for actual conflicts between secured parties making subsequent advances and judgment lien creditors may not be great; but the rule chosen for the first 45 days is important in effectuating the intent of the Federal Tax Lien Act of 1966.

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.

Official Reasons for 1972 Change

Former paragraph (1) (c), which created a nonfiling rule for purchase money security interests in certain farm equipment, has been eliminated. The analogy drawn in the 1962 Code of farm equipment to consumer goods (for which a similar nonfiling rule is provided in paragraph (1) (d)) is believed to be inappropriate. The effect of the rule was to make farmers' equipment unavailable to them as collateral for loans from some lenders.

A new paragraph (1) (c) exempts from filing rules security interests created by assignments of beneficial interests in trusts and estates, because these assignments are not ordinarily thought of as subject to this Article, and a filing rule might operate to defeat many assignments.

The requirement of filing for purchase-money security interests in consumer goods which are fixtures has been made applicable only for priority against real estate interests (Section 9-313).

A new paragraph (1) (g) has been added exempting from filing assignments for the benefit of creditors because they are not financing transactions.

Former subsections (3) and (4) have been rewritten into new subsections (3) and (4). The alternatives of former subsection (3) had proved unacceptable formulations in many states. The states adopted non-uniform amendments to use language more closely geared to their certificate of title laws than the uniform alternatives. It is believed that the simplest thing is to have each state specify its statutes intended to be applicable as it adopts the revised Article 9.

Former Alternative B to subsection (3) has been abandoned as no longer serving any purpose: it had been an attempt to convert obsolete non-mandatory certificate of title laws into laws under which notation on the certificate of title was the necessary method of perfection of a security interest.

Subsection (3) continues to carry the thought that was formerly only in Alternative B — namely, that the certificate of title procedure does not control the perfection of inventory or "floor plan" security interests, but instead normal Code filing rules are applicable. Non-uniform variations to the contrary under some state laws are believed to increase operating burdens and it is hoped that the states will abandon them.

References to federal statutes have been broadened to include treaties.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 5, Uniform Conditional Sales Act; Section 8, Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) states the general rule that to perfect a security interest under this Article a financing statement must be filed. Paragraphs (1) (a) through (1) (g) exempt from the filing requirement the transactions described. Subsection (3) further sets out certain transactions to which the filing provisions of this Article do not apply, but it does not defer to another state statute on the filing of inventory security interests. The cases recognized are those where suitable alternative systems for giving public notice of a security interest are available. Subsection (4) states the consequences of such other form of notice.

Section 9-303 states the time when a security interest is perfected by filing or otherwise. Part 4 of the Article deals with the mechanics of filing: place of filing, form of financing statement and so on.

2. As at common law, there is no requirement of filing when the secured party has possession of the collateral in a pledge transaction (paragraph (1) (a)). Section 9-305 should be consulted on what collateral may be pledged and on the requirements of possession.

3. Under this Article, as under the Uniform Trust Receipts Act, filing is not effective to perfect a security interest in instruments. See Section 9-304(1).

4. Where goods subject to a security interest are left in the debtor's possession, the only permanent exception from the general filing requirement is that stated in paragraph (1) (d): purchase money security interests in consumer goods. For temporary exceptions, see Sections 9-304(5) (a) and 9-306.

In many jurisdictions under prior law security interests in consumer goods under conditional sale or bailment leases were not subject to filing requirements. Paragraph (1) (d) follows the policy of those jurisdictions. The paragraph changes prior law in jurisdictions where all conditional sales and bailment leases were subject to a filing requirement, except that filing is required for purchase money security interests in consumer fixtures to attain priority under Section 9-313 against real estate interests.

Although the security interests described in paragraph (1) (d) are perfected without filing, Section 9-307(2) provides that unless a financing statement is filed certain buyers may take free of the security interest even though perfected. See that section and the Comment thereto.

On filing for security interests in motor vehicles under certificate of title laws see subsection (3) of this section.

5. A financing statement must be filed to perfect a security interest in accounts except for the transactions described in paragraphs (1) (e) and (g). It should be noted that this Article applies to sales of accounts and chattel paper as well as to transfers thereof for security (Section 9-102(1) (b)); the filing requirement of this section applies both to sales and to transfers thereof for security. In this respect this Article follows many of the pre-Code statutes regulating assignments of accounts receivable.

Over forty jurisdictions had enacted accounts receivable statutes. About half of these statutes required filing to protect or perfect assignments; of the remainder, one was a so-called "book-marking" statute and the others validated assignments without filing. This Article adopts the filing requirement, on the theory that there is no valid reason why public notice is less appropriate for assignments of accounts than for any other type of nonpossessory interest. Section 9-305, furthermore, excludes accounts from the types of collateral which may be the subject of a possessory security interest: filing is thus the only means of perfection contemplated by this Article. See Section 9-306 on accounts as proceeds.

The purpose of the subsection (1) (e) exemption is to have from *ex post facto* invalidation casual or isolated assignments: some accounts receivable statutes were so broadly drafted that all assignments, whatever their character or purpose, fell within their filing provisions. Under such statutes many assignments which no one would think of filing might have been subject to invalidation. The paragraph (1) (e) exemption goes to that type of assignment. Any person who regularly takes assignments of any debtor's accounts should file. In this connection Section 9-104(f) which excludes certain transfers of accounts from the Article should be consulted.

Assignments of interests in trusts and estates are not required to be filed because they are often not thought of as collateral comparable to the types dealt with by this Article. Assignments for the benefit of creditors are not required to be filed because they are not financing transactions and the debtor will not ordinarily be engaging in further credit transactions.

6. With respect to the paragraph (1) (f) exemptions, see the sections cited therein and Comments thereto.

7. The following example will explain the operation of subsection (2): Buyer buys goods

from seller who retains a security interest in them which he perfects. Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on his part, continues perfected against *Buyer's* transferees and creditors. If, however, the assignment from Seller to X was itself intended for security (or was a sale of accounts or chattel paper), X must take whatever steps may be required for perfection in order to be protected against *Seller's* transferees and creditors.

8. Subsection (3) exempts from the filing provisions of this Article transactions as to which an adequate system of filing, state or federal, has been set up outside this Article and subsection (4) makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (i. e., filing under this Article is not a permissible alternative).

Examples of the type of federal statute referred to in paragraph (3) (a) are the provisions of 17 U.S.C. §§ 28, 30 (copyrights), 49 U.S.C. § 1403 (aircraft), 49 U.S.C. § 20(c) (railroads). The Assignment of Claims Act of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of paragraph (3) (a). An assignee of a claim against the United States, who must of course comply with the Assignment of Claims Act, must also file under this Article in order to perfect his security interest against creditors and transferees of his assignor.

Some states have enacted central filing statutes with respect to security transactions in kinds of property which are of special importance in the local economy. Subsection (3) adopts such statutes as the appropriate filing system for such property.

In addition to such central filing statutes many states have enacted certificate of title laws covering motor vehicles and the like. Subsection (3) exempts transactions covered by such laws from the filing requirements of this Article.

For a discussion of the operation of state motor vehicle certificate of title laws in interstate contexts, see Comment 4 to Section 9-103.

9. Perfection of a security interest under a state or federal statute of the type referred to in subsection (3) has all the consequences of perfection under the provisions of this Article. Subsection (4).

§ 25-9-303. When security interest is perfected; continuity of perfection.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. The term "attach" is used in this Article to describe the point at which property becomes subject to a security interest. The requisites for attachment are stated in Section 9-203. When it attaches a security interest may be either perfected or unperfected: "Perfected" means that the secured party has taken all the steps required by this Article as specified in the several sections listed in subsection (1). A perfected security interest may still be or become subordinate to other interests (see Section 9-312) but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor. Subsection (1) states the truism that the time of perfection is when the security interest has attached and any necessary steps for perfection (such as taking possession or filing) have been taken. If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

2. The following example will illustrate the operation of subsection (2): A bank which has issued a letter of credit honors drafts drawn under the credit and receives possession of the negotiable bill of lading covering the goods shipped. Under Sections 9-304(2) and 9-305 the bank now has a perfected security interest in the document and the goods. The bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under Section 9-304(5) the bank continues to have a perfected security interest in the document and goods for 21 days. The bank files before the expiration of the 21 day period. Its security interest now continues perfected for as long as the filing is good. The goods are sold by the debtor. The bank continues to have a security interest in the proceeds of the sale to the extent stated in Section 9-306.

If the successive stages of the bank's security interest succeed each other without an intervening gap, the security interest is "continuously perfected" and the date of perfection is when the interest first became perfected (i. e., in the example given, when the bank received possession of the bill of lading against honor of the drafts). If, however, there is a gap between stages — for example, if the bank does not file until after the expiration of the 21 day period specified in Section 9-304(5), the collateral still being in the debtor's possession — then, the chain being broken, the perfection is no longer continuous. The date of perfection would now be the date of filing (after expiration of the 21 day period); the bank's interest might now become subject to attack under Section 60 of the federal Bankruptcy Act and would be subject to any interests arising during the gap period which under Section 9-301 take priority over an unperfected security interest.

The rule of subsection (2) would also apply to the case of collateral brought into this state subject to a security interest which became perfected in another state or jurisdiction. See Section 9-103(1) (d).

§ 25-9-304. Perfection of security interest in instruments, documents, and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession.

Official Reasons for 1972 Change

The change in subsection (1) corrects an inadvertent omission in the 1962 Text, and makes clear that a security interest in money cannot be perfected by filing.

A provision has been added to subsection (5) making it clear that the 21-day period referred to therein deals only with perfection, but that there must be compliance with the notice provisions of Section 9-312(3) in order to achieve periority over earlier inventory financers. Corresponding clarifying changes have been made in Section 9-312(3).

1972 Official Comment

Prior Uniform Statutory Provision:

Sections 3 and 8(1), Uniform Trust Receipts Act.

Purposes:

1. For most types of property, filing and taking possession are alternative methods of perfection. For some types of intangibles (i. e., accounts and general intangibles) filing is the only available method (see Section 9-305 and point 1 of Comment thereto). With respect to instruments subsection (1) provides that, except for the cases of "temporary perfection" covered in subsections (4) and (5), taking possession is the only available method; this provision follows the Uniform Trust Receipts Act. The rule is based on the thought that where the collateral consists of instruments, it is universal practice for the secured party to take possession of them in pledge; any surrender of possession to the debtor is for a short time; therefore it would be unwise to provide the alternative of perfection for a long period by filing which, since it in no way corresponds with commercial practice, would serve no useful purpose.

For similar reasons, filing is not permitted as to money.

Subsection (1) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents, which also come within Section 9-305 on perfection by possession. Chattel paper is sometimes delivered to the assignee, sometimes left in the hands of the assignor for collection; subsection (1) allows the assignee to perfect his interest by filing in the latter case. Negotiable documents may be, and usually are, delivered to the secured party; subsection (1) follows the Uniform Trust Receipts Act in allowing filing as an alternative method of perfection. Perfection of an interest in goods through a non-negotiable document is covered in subsection (3).

2. Subsection (2), following prior law and consistently with the provisions of Article 7, takes the position that, so long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document and the proper way of dealing with such goods is through the document. Perfection therefore is to be made with respect to the document and, when made, automatically carries over to the goods. Any interest perfected directly in the goods while the document is outstanding (for example, a chattel mortgage type of security interest on goods in a

warehouse) is subordinated to an outstanding negotiable document.

3. Subsection (3) takes a different approach to the problem of goods covered by a non-negotiable document or otherwise in the possession of a bailee who has not issued a negotiable document. Here title to the goods is not looked on as being locked up in the document and the secured party may perfect his interest directly in the goods by filing as to them. The subsection states two other methods of perfection: issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a non-negotiable warehouse receipt) and receipt of notification of the secured party's interest by the bailee which, under Section 9-305, is looked on as equivalent to taking possession by the secured party.

4. Subsections (4) and (5) follow the Uniform Trust Receipts Act in giving perfected status to security interests in instruments (other than certificated securities, which are governed by Section 8-321) and documents for a short period although there has been no filing and the collateral is in the debtor's possession. The period of 21 days is chosen to conform to the provisions of Section 60 of the Federal Bankruptcy Act. There are a variety of legitimate reasons — some of them are described in subsections (5) (a) and (5) (b) — why such collateral has to be temporarily released to a debtor and no useful purpose would be served by cluttering the files with records of such exceedingly short term transactions. Under subsection (4) the 21 day perfection runs from the date of attachment; there is no limitation on the purpose for which the debtor is in possession but the secured party must have given new value under a written security agreement. Under subsection (5) the 21 day perfection runs from the date a secured party who already has a perfected security interest turns over the collateral to the debtor (an example is a bank which has acquired a bill of lading by honoring drafts drawn under a letter of credit and subsequently turns over the bill of lading to its customer); there is no new value requirement but the turnover must be for one or more of the purposes stated in subsections (5) (a) and (5) (b). Note that while subsection (4) is restricted to instruments and *negotiable* documents, subsection (5) extends to goods covered by non-negotiable documents as well. Thus the letter of credit bank referred to in the example could make a subsection (5) turn-over without regard to the form of the bill of lading, provided that, in the case of a non-negotiable document, it had previously perfected its interest under one of the methods stated in subsection (3). But note that the discussion of subsection (5) in this Comment deals only with perfection. Priority of a security interest in inventory after surrender of the document depends on compliance with the requirements of Section 9-312(3) on notice to prior inventory financer.

Finally, it should be noted that the 21 days applies only to the documents and to the goods obtained by surrender thereof. If the goods are sold, the security interest will continue in proceeds for only 10 days under Section 9-306, unless a further perfection occurs as to the security interest in proceeds.

§ 25-9-305. When possession by secured party perfects security interest without filing.

Official Reasons for 1972 Change

The change corresponds to the change in Section 9-304 to clarify the special position of money.

Official Comment

Prior Uniform Statutory Provision:

None.

Purposes:

1. As under the common law of pledge, no filing is required by this Article to perfect a security interest where the secured party has possession of the collateral. Compare Section 9-302(1) (a). This section permits a security interest to be perfected by transfer of possession only when the collateral is goods, instruments (other than certificated securities, which are governed by Section 8-321), documents or chattel paper: that is to say, accounts and general intangibles are excluded. See Section 5-116 for the special case of assignments of letters and advices of credit. A security interest in accounts and general intangibles — property not ordinarily represented by any writing whose delivery operates to transfer the claim —

may under this Article be perfected only by filing, and this rule would not be affected by the fact that a security agreement or other writing described the assignment of such collateral as a "pledge". Section 9-302 (1) (e) exempts from filing certain assignments of accounts which are out of the ordinary course of financing: such exempted assignments are perfected when they attach under Section 9-303(1); they do not fall within this section.

2. Possession may be by the secured party himself or by an agent on his behalf: it is of course clear, however, that the debtor or a person controlled by him cannot qualify as such an agent for the secured party. See also the last sentence of Section 9-205. Where the collateral (except for goods covered by a negotiable document) is held by a bailee, the time of perfection of the security interest, under the second sentence of the section, is when the bailee receives notification of the secured party's interest: this rule rejects the common law doctrine that it is necessary for the bailee to attorn to the secured party or acknowledge that he now holds on his behalf.

3. The third sentence of the section rejects the "equitable pledge" theory of relation back, under which the taking possession was deemed to relate back to the date of the original security agreement. The relation back theory has had little vitality since the 1938 revision of the federal Bankruptcy Act, which introduced in Section 60a provisions designed to make such interests voidable as preferences in bankruptcy proceedings. This section now brings state law into conformity with the overriding federal policy: where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected, before that under the rules stated in Section 9-204. The only exception to this rule is the short twenty-one day period of perfection provided in Section 9-304(4) and (5) during which a debtor may have possession of specified collateral in which there is a perfected security interest.

§ 25-9-306. "Proceeds"; secured party's rights on disposition of collateral.

Official Reasons for 1972 Change

The first sentence of subsection (1) is rewritten for clarity.

The former second sentence of subsection (1) is omitted consistently with the abandonment of the term "contract right" in Section 9-106.

The new second sentence of subsection (1) is intended to overrule various cases to the effect that proceeds of insurance on collateral are not proceeds of the collateral. The "except" clause is intended to say that if the insurance contract specifies the person to whom the insurance is payable, the concept of "proceeds" will not interfere with performance of the contract.

Heretofore an apparent inconsistency and ambiguity has existed between the last sentence of Section 9-203(1) (b) of the 1962 Code, which indicated that a claim to proceeds had to be an express term of a security agreement, and Section 9-306(2), which indicated that a right to proceeds was automatic without reference to a term of a security agreement. This ambiguity has been clarified in favor of an automatic right to proceeds, on the theory that this is the intent of the parties, unless otherwise agreed. Further, there has been eliminated the requirement of claiming proceeds in a financing statement, which had resulted in a checking of a box on each financing statement in order to claim proceeds. Instead, the filed claim to the original collateral is treated as constituting automatically a filing as to proceeds. To this principle, a limitation has been stated: Where the filing as to the original collateral is an inappropriate means of perfection as to proceeds of certain types, or is made at a place that is inappropriate as to such proceeds, the filed claim to the original collateral perfects the claim to proceeds for only 10 days. One example of this is negotiable instruments as proceeds, as to which filing is inappropriate under Section 9-304(1). Another example is the case of accounts as proceeds of inventory, as to which under the rules of Section 9-103 the state of filing for the accounts might be different from the state of filing for the inventory.

The revised subsection (4) is a clarification based on the California revision. It makes clear that the claim to cash allowed in insolvency is exclusive of any other claim based on tracing.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 10, Uniform Trust Receipts Act.

Purposes:

1. This section states a secured party's right to the proceeds received by a debtor on disposition of collateral and states when his interest in such proceeds is perfected.

It makes clear that insurance proceeds from casualty loss of collateral are proceeds within the meaning of this section.

As to proceeds of consigned goods, see Section 9-114 and the Comment thereto.

2. (a) Whether a debtor's sale of collateral was authorized or unauthorized, prior law generally gave the secured party a claim to the proceeds. Sometimes it was said that the security interest attached to the "property" received in substitution; sometimes it was said the debtor held the proceeds as "trustee" or "agent" for the secured party. Whatever the formulation of the rule, the secured party, if he could identify the proceeds, could reclaim them or their equivalent from the debtor or his trustee in bankruptcy. This section provides new rules for insolvency proceedings. Paragraphs 4(a) through (c) substitute specific rules of identification for general principles of tracing. Paragraph 4(d) limits the security interest in proceeds not within these rules to an amount of the debtor's cash and deposit accounts not greater than cash proceeds received within ten days of insolvency proceedings less the cash proceeds during this period already paid over and less the amounts for which the security interest is recognized under paragraphs 4(a) through (c).

(b) Subsections (2) and (3) make clear that the four-month period for calculating a voidable preference in bankruptcy begins with the date of the secured party's obtaining the security interest in the original collateral and not with the date of his obtaining control of the proceeds. The interest in the proceeds "continues" as a perfected interest if the original interest was perfected; but the interest ceases to be perfected after the expiration of ten days unless a filed financing statement covered the original collateral and the proceeds are collateral of a type as to which a security interest could be perfected by a filing in the same office or unless the secured party perfects his interest in the proceeds themselves — i. e., by filing a financing statement covering them or by taking possession. See Section 9-312(6) and Comment thereto for priority of rights in proceeds perfected by a filing as to original collateral.

(c) Where cash proceeds are covered into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds. What has been said relates to payments and transfers in ordinary course. The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party.

3. In most cases when a debtor makes an unauthorized disposition of collateral, the security interest, under prior law and under this Article, continues in the original collateral in the hands of the purchaser or other transferee. That is to say, since the transferee takes subject to the security interest, the secured party may repossess the collateral from him or in an appropriate case maintain an action for conversion. Subsection (2) codifies this rule. The secured party may claim both proceeds and collateral, but may of course have only one satisfaction.

In many cases a purchaser or other transferee of collateral will take free of a security interest: in such cases the secured party's only right will be to proceeds. The transferee will take free whenever the disposition was authorized; the authorization may be contained in the security agreement or otherwise given. The right to proceeds, either under the rules of this section or under specific mention thereof in a security agreement or financing statement does not in itself constitute an authorization of sale.

Section 9-301 states when transferees take free of unperfected security interests. Sections 9-307 on goods, 9-308 on chattel paper and instruments and 9-309 on negotiable instruments, negotiable documents and securities state when purchasers of such collateral take free of a security interest even though perfected and even though the disposition was not authorized.

4. Subsection (5) states rules to determine priorities when collateral which has been sold is returned to the debtor: for example goods returned to a department store by a dissatisfied customer. The most typical problems involve sale and return of inventory, but the subsection can also apply to equipment. Under the rule of Benedict v. Ratner, failure to segregate such returned goods sometimes led to invalidation of the entire security arrangement. This Article rejects the Benedict v. Ratner line of cases (see Section 9-205 and Comment). Subsection (5) (a) of this section reinforces the rule of Section 9-205: as between secured party and debtor (and debtor's trustee in bankruptcy) the original security interest continues on the returned goods. Whether or not the security interest in the returned goods is perfected depends upon factors stated in the text.

Paragraphs (5) (b), (c) and (d) deal with a different aspect of the returned goods situation. Assume that a dealer has sold an automobile and transferred the chattel paper or the account arising on the sale to Bank X (which had not previously financed the car as inventory). Thereafter the buyer of the automobile rightfully rescinds the sale, say for breach of warranty, and the car is returned to the dealer. Paragraph (5) (b) gives the bank as transferee of the chattel paper or the account a security interest in the car against the dealer. For protection against dealer's creditors or purchasers from him (other than buyers in the ordinary course of business, see Section 9-307), Bank X as the transferee, under paragraph (5) (d), must perfect its interest by taking possession of the car or by filing as to it. Perfection of his original interest in the chattel paper or the account does not automatically carry over to the returned car, as it does under paragraph (5) (a) where the secured party originally financed the dealer's inventory.

In the situation covered by (5) (b) and (5) (c) a secured party who financed the inventory and a secured party to whom the chattel paper or the account was transferred may both claim the returned goods — the inventory financer under paragraph (5) (a), the transferee under paragraphs (5) (b) and (5) (c). With respect to chattel paper, Section 9-308 regulates the priorities. With respect to an account, paragraph (5) (c) subordinates the security interest of the transferee of the account to that of the inventory financer. However, if the inventory security interest was unperfected, the transferee's interest could become entitled to priority under the rules stated in Section 9-312(5).

In cases of repossession by the dealer and also in cases where the chattel was returned to the dealer by the voluntary act of the account debtor, the dealer's position may be that of a mere custodian; he may be an agent for resale, but without any other obligation to the holder of the chattel paper; he may be obligated to repurchase the chattel, the chattel paper or the account from the secured party or to hold it as collateral for a loan secured by a transfer of the chattel paper or the account. If the dealer thereafter sells the chattel to a buyer in ordinary course of business in any of the foregoing cases, the buyer is fully protected under Section 2-403(2) as well as under Section 9-307(1), whichever is technically applicable.

§ 25-9-307. Protection of buyers of goods.

Official Reasons for 1972 Change

The change in subsection (2) is a conforming change made necessary by the deletion of Section 9-302(1) (c) of the 1962 Code, which provided in substance that a purchase money security interest in farm equipment having an original purchase price not in excess of $2500 need not be filed. The omission of that provision in Subsection 9-302(1) makes any corresponding reference unnecessary in the present section.

Subsection (3) is one of three new provisions clarifying the extent to which future advances under a security interest may outrank an intervening right. See Sections 9-301(4) and 9-312(7) and paragraph (5) of Reasons for Change under Section 9-312.

1972 Official Comment

Prior Uniform Statutory Provision:

Section 9, Uniform Conditional Sales Act; Section 9(2), Uniform Trust Receipts Act.

Purposes:

1. This section states when buyers of goods take free of a security interest even though perfected. A buyer who takes free of a perfected security interest of course takes free of an unperfected one. Section 9-301 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest.

Article 2 (Sales) states general rules on purchase of goods from a seller with defective or voidable title (Section 2-403).

2. The definition of "buyer in ordinary course of business" in Section 1-201(9) restricts the application of subsection (1) to buyers (except pawnbrokers) "from a person in the business of selling goods of that kind": thus the subsection applies, in the terminology of this Article, primarily to inventory. Subsection (1) further excludes from its operation buyers of "farm products", defined in Section 9-109(3), from a person engaged in farming operations. The buyer in ordinary course of business is defined as one who buys "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party." This section provides that such a

buyer takes free of a security interest, even though perfected, and although he knows the security interest exists. Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods but takes subject if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

The limitations which this section imposes on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this section. Section 9-306 states the right of a secured party to the proceeds of a sale, authorized or unauthorized.

3. Subsection (2) deals with buyers of "consumer goods" (defined in Section 9-109). Under Section 9-301(1) (d) no filing is required to perfect a purchase money interest in consumer goods subject to this subsection except motor vehicles required to be registered; filing is required to perfect security interests in such goods other than purchase money interests and, for motor vehicles, even in the case of purchase money interests. (The special case of fixtures has added complications that are apart from the point of this discussion.)

Under subsection (2) a buyer of consumer goods takes free of a security interest even though perfected a) if he buys without knowledge of the security interest, b) for value, c) for his own personal, family, or household purposes and d) before a financing statement is filed.

As to purchase money security interests which are perfected without filing under Section 9-302(1) (d): A secured party may file a financing statement (although filing is not required for perfection). If he does file, all buyers take subject to the security interest. If he does not file, a buyer who meets the qualifications stated in the preceding paragraph takes free of the security interest.

As to security interests which can be perfected only by filing under Section 9-302: This category includes all nonpurchase money interests, and all interests, whether or not purchase money, in motor vehicles, as well as interests which may be and are filed, though filing was not required for perfection under Section 9-302. (Note that under Section 9-302(3) the filing provisions of this Article do not apply when a state has enacted a certificate of title law. Thus where motor vehicles are concerned, in a state having such a certificate of title law, perfection will be under that law.) So long as the security interest remains unperfected, not only the buyers described in subsection (2) but the purchasers described in Section 9-301 will take free of the interest. After a financing statement has been filed or after compliance with the certificate of title law all subsequent buyers, under the rule of subsection (2), are subject to the security interest.

4. Although a buyer is of course subject to the Code's system of notice from filing or possession, subsection (3) makes clear that he will not be subject to future advances under a security interest after the secured party has knowledge that the buyer has purchased the collateral and in any event after 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45 days and without knowledge of the purchase. Of course, a buyer in ordinary course who takes free of the security interest under subsection (1) is not subject to any future advances. Compare Sections 9-301(4) and 9-312(7).

§ 25-9-308. Purchase of chattel paper and instruments.

Official Reasons for 1972 Change

The section has been rewritten for clarity.

Another purpose of the changes is to make the rules of this section applicable to negotiable instruments. Heretofore, the holder of a negotiable instrument was under some circumstances in a less protected position against competing claims than the holder of chattel paper. The holder of a negotiable instrument had protection only if he achieved the holder in due course status referred to in Section 9-309, which status would not be achieved if the holder had knowledge of a conflicting proceeds claim. In contrast, the holder of chattel paper who met the stated conditions was protected under the second sentence of Section 9-308 of the 1962 Code even if he had knowledge of the conflicting proceeds claim. Under the changes, the holder of a negotiable instrument who may not qualify as holder in due course may nevertheless qualify for the protections of this section.

1972 Official Comment

Prior Uniform Statutory Provision:
Sections 9(a) and 10 of Uniform Trust Receipts Act.

Purposes:

1. Chattel paper is defined (Section 9-105) as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods". Such paper has become an important class of collateral in financing arrangements, which may — as in the automobile and some other fields — follow an earlier financing arrangement covering inventory or which may begin with the chattel paper itself.

Arrangements where the chattel paper is delivered to the secured party who then makes collections, as well as arrangements where the debtor, whether or not he is left in possession of the paper, makes the collections, are both widely used, and are known respectively as notification (or "direct collection") and non-notification (or "indirect collection") arrangements. In the automobile field, for example, when a car is sold to a consumer buyer under an installment purchase agreement and the resulting chattel paper is assigned, the assignee usually takes possession, the obligor is notified of the assignment and is directed to make payments to the assignee. In the furniture field, for an example on the other hand, the chattel paper may be left in the dealer's hands or delivered to the assignee; in either case the obligor may not be notified, and payments are made to the dealer-assignor who receives them under a duty to remit to his assignee. The widespread use of both methods of dealing with chattel paper is recognized by the provisions of this Article, which permit perfection of a chattel paper security interest either by filing or by taking possession.

2. Although perfection by filing is permitted as to chattel paper, certain purchasers of chattel paper allowed to remain in the debtor's possession take free of the security interest despite the filing.

Clause (b) of the section deals with the case where the security interest in the chattel paper is claimed merely as proceeds — i. e., on behalf of an inventory financer who has not by some new transaction with the debtor acquired a specific interest in the chattel paper. In that case a purchaser, even though he knows of the inventory financer's proceeds interest, takes priority provided he gives new value and takes possession of the paper in the ordinary course of his business.

The same basic rule applies in favor of a purchaser of other instruments who claims priority against a proceeds interest therein of which he has knowledge. Thus a purchaser of a negotiable instrument might prevail under clause (b) even though his knowledge of the conflicting proceeds claim precluded his having holder in due course status under Section 9-309.

3. Clause (a) deals with the case where the non-possessory security interest in the chattel paper is more than a mere claim to proceeds — i. e., exists in favor of a secured party who has given value against the paper, whether or not he financed the inventory whose sale gave rise to it. In this case the purchaser, to take priority, must not only give new value and take possession in the ordinary course of his business; he must also take without knowledge of the existing security interest. Thus a secured party, who has a specific interest in the chattel paper and not merely a claim to proceeds, and who wishes to leave the paper in the debtor's possession can, because of the knowledge requirement, protect himself against purchasers by stamping or noting on the paper the fact that it has been assigned to him.

4. It should be noted that under Section 9-304(1) a security interest in an instrument, negotiable or nonnegotiable, cannot be perfected by filling (except where the instrument constitutes part of chattel paper). Thus the only types of perfected non-possessory security interest that can arise in an instrument are the temporary 21 day perfection provided for in Section 9-304(4) and (5) or the 10 day perfection in proceeds of Section 9-306. Where such a perfected interest exists in a non-negotiable instrument, purchasers will take free if they qualify under clause (a) of the section.

§ 25-9-309. Protection of purchasers of instruments and documents.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 9(a), Uniform Trust Receipts Act.

Purposes:

1. Under this Article as at common law and under prior statutes the rights of purchasers of negotiable paper, including negotiable documents of title and investment securities, are determined by the rules of holding in due course and the like which are applicable to the

type of paper concerned. (Articles 3, 7, and 8.) This section, as did Section 9(a) of the Uniform Trust Receipts Act, makes explicit the rule which was implicity but universally recognized under the earlier statutes.

2. Under Section 9-304(1) filing is ineffective to perfect a security interest in instruments (including securities) except those instruments which are part of chattel paper, and of course is ineffective to constitute notice to subsequent purchasers. Although filing is permissible as a method of perfection for a security interest in documents, this section follows the policy of the Uniform Trust Receipts Act in providing that the filing does not constitute notice to purchasers.

§ 25-9-310. Priority of certain liens arising by operation of law.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 11, Uniform Trust Receipts Act.

Purposes:

1. To provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.

2. Apart from the Uniform Trust Receipts Act which had a section similar to this one, there was generally no specific statutory rule as to priority between security devices and liens for services or materials. Under chattel mortgage or conditional sales law many decisions made the priority of such liens turn on whether the secured party did or did not have "title". This section changes such rules and makes the lien for services or materials prior in all cases where they are furnished in the ordinary course of the lienor's business and the goods involved are in the lienor's possession. Some of the statutes creating such liens expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest.

§ 25-9-311. Alienability of debtor's rights; judicial process.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. To make clear that in all security transactions under this Article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach.

2. Some jurisdictions have held that when a mortgagee or conditional seller has "title" to the collateral, creditors may not proceed against the mortgagor's or vendee's interest by levy, attachment or other judicial process. This section changes those rules by providing that in all security interests the debtor's interest in the collateral remains subject to claims of creditors who take appropriate action. It is left to the law of each state to determine the form of "appropriate process".

3. Where the security interest is in inventory, difficult problems arise with reference to attachment and levy. Assume that a debt of $100,000 is secured by inventory worth twice that amount. If by attachment or levy certain units of the inventory are seized, the determination of the debtor's equity in the units seized is not a simple matter. The section leaves the solution of this problem to the courts. Procedures such as marshalling may be appropriate.

§ 25-9-312. Priorities among conflicting security interests in the same collateral.

Official Reasons for 1972 Change

(1) The change in subsection (1) is primarily a simplification of statement.

(2) Changes have been made in subsection (3) to answer unresolved questions under the 1962 Code.

(a) One change answers the question how

often a notice must be given under that subsection. The period of five years has been chosen by analogy to the duration of a financing statement.

(b) Another change answers the question of the priority status of the security interest in inventory temporarily perfected for 21 days without filing or perfection in a situation which begins with release of a pledged document under Section 9-304(5). The answer provided is the usual rule that the purchase-money claimant to preserve his priority resulting from the document must give the required notice before the debtor receives possession of the inventory. If the secured party fails to give timely notice, he loses his priority under this subsection.

(c) One of the most widely discussed questions under the 1962 Code was the question of the priority between a person claiming accounts as proceeds of inventory and a person claiming the accounts by direct filing with respect thereto. One issue was whether the special position of an inventory financer as a purchase money financer or as the first financer in the business cycle of the debtor gave him any special position as to accounts resulting from the inventory. In general, as revised, a negative answer has been given, and a prior right to inventory does not confer a prior right to any proceeds except identifiable cash proceeds received on or before the delivery of the inventory (i. e., without the intervention of an account). Other aspects of this issue are discussed under subsection (5) of this section.

(3) A different answer has been given in subsection (4) relating to purchase money security interests in collateral other than inventory. Here, where it is not ordinarily expected that the collateral will be sold and that proceeds will result, it seems appropriate to give the party having a purchase money security interest in the original collateral an equivalent priority in its proceeds. The 1962 Code was unclear on this point.

(4) Existing subsection (5) contains two principal rules. Paragraph (a) is a first-to-file rule where both competing security interests are perfected by filing. Paragraph (b) is a first-to-perfect rule when either of the security interests is or both of them are perfected otherwise than by filing. A traffic rule is provided by existing subsection (6) to the effect that a continuously perfected security interest shall be treated for the purpose of the foregoing rules as if at all times perfected in the manner it was first perfected. The problems raised have been the subject of an enormous legal literature. They are complicated by the unforeseeable effect of the temporary perfection of security interest in proceeds without filing under Section 9-306, and by speculation as to whether a secured party could claim that his security interest was originally perfected without filing under this rule even though the security interest in proceeds was claimed in his filing as to the original collateral. They are further complicated by the question whether different rules would apply when a financing statement was drawn to cover, e. g., inventory and its proceeds (which would include accounts) and when it was drawn to cover inventory and accounts.

To settle these questions it is proposed to replace the present paragraphs (a) and (b) of subsection (5) by a single rule, subsection (5), and to eliminate existing subsection (6). Together with this treatment should be noted the fact that a filing as to proceeds automatically arises from a filed security interest in original collateral under the proposed revision of Section 9-306(3), subject to limitations therein discussed. New proposed subsection (6) makes it clear that subject to these limitations the time of filing or perfection as to original collateral is the time of filing or perfection as to proceeds.

The rule of proposed subsection (5) ranks conflicting perfected security interests by their priority in time, dating back to the respective times when without interruption the security interests were either perfected or were the subjects of appropriate filings.

Perhaps the most debated subject under Article 9 has been the question whether between conflicting security interests a priority as to original collateral confers a priority as to proceeds. As indicated above, in the case of collateral other than inventory, e. g., equipment, it seems clear that the policy favoring the purchase money secured party in Section 9-312(4) should give him the first claim to the proceeds. This is so even though the security interests will have been perfected simultaneously when the proceeds arise and the debtor acquires rights therein.

Proper policy is much less clear when the collateral involved is inventory and proceeds consisting of accounts. (Policy as to other types of receivables as proceeds is expressed in Sections 9-308 and 9-309). Accounts financing is more important in the economy than the financing of the kinds of inventory that produce accounts, and the desirable rule is one which makes accounts financing certain as to its legal position. Therefore, the rule proposed is that where a financing statement as to accounts is filed first (with or without related inventory financing), the security interest in accounts should not be defeated by any subsequent claim to accounts as proceeds of a security interest in inventory filed later. There is therefore no provision in Section 9-312(3) carrying forward to accounts any priority right in inventory, and proposed subsections (5) and (6) adhere firmly

to the principle that a date of filing as to original collateral also defines the date of filing as to proceeds. Correspondingly, a financing statement as to inventory (carrying with it a claim to proceeds) which is filed first will under the same provisions have priority over a laterfiled security interest in accounts.

(5) The priority of future advances against an intervening party has been the subject of much discussion and disagreement. Where both interests are filed security interests, the first-to-file rule of present Section 9-312(5) (a) or the corresponding proposed revision is clearly applicable. Under the 1962 Code, the position of an intervening pledgee in reference to a subsequent advance by an earlier-filed secured party is debatable. The proposed unified priority rule of subsection 9-312(5) would indicate that subsequent advances by the first-filed party have priority, and subsequent advances under a security interest perfected by possession likewise have priority over an intervening filed security interest. These priority rules are expressly stated in proposed subsection (7). That proposal also deals with the rare case of the priority position of a subsequent advance made by a secured party whose security interest is temporarily perfected without either filing or possession, against an intervening secured party. Since there is no notice by the usual methods of filing or possession of the existence of the security interest, the subsequent advances rank only from the actual date of making unless made pursuant to commitment.

Different but related problems exist with reference to the status of subsequent advances when the intervening party is a judgment creditor. He is not directly part of the Code's system of priorities. It seems unfair to make it possible for a debtor and secured party with knowledge of the judgment lien to squeeze out a judgment creditor who has successfully levied on a valuable equity subject to a security interest, by permitting later enlargement of the security interest by an additional advance, unless that advance was committed in advance without such knowledge. Proposed Section 9-301(4) provides that a lien creditor does not take subject to a subsequent advance unless it is given or committed without knowledge, but there is an exception protecting future advances within 45 days after the levy regardless of knowledge. The 45-day period corresponds to a provision on protection of advances made after the filing of tax liens in the Federal Tax Lien Act of 1966.

A similar problem arises where the intervening party is a buyer of the collateral subject to the security interest. While buyers must necessarily take subject to rights of secured parties, the buyer should take subject to subsequent advances only to the extent that they are given "pursuant to commitment" or within the period of 45 days after the purchase but not later than the time that the secured party acquires knowledge of the purchase. It is so proposed in Section 9-307(3). A definition of the quoted phrase appears in Section 9-105.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. In a variety of situations two or more people may claim an interest in the same property. The several sections specified in subsection (1) contain rules for determining priorities between security interests and such other claims in the situations covered in those sections. For cases not covered in those sections this section states general rules of priority between conflicting security interests.

2. Subsection (2) gives priority to a new value security interest in crops based on a current crop production loan over an earlier security interest in the crop which secured obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops become growing crops. This priority is not affected by the fact that the person making the crop loan knew of the earlier security interest.

3. Subsections (3) and (4) give priority to a purchase money security interest (defined in Section 9-107) under certain conditions over non-purchase money interests, which in this context will usually be interests asserted under after-acquired property clauses. See Section 9-204 on the extent to which after-acquired property interests are validated and Section 9-108 on when a security interest in after-acquired property is deemed taken for new value.

Prior law, under one or another theory, usually contrived to protect purchase money interest over after-acquired property interests (to the extent to which the after-acquired property interest was recognized at all). For example, in the field of industrial equipment financing it was possible, by manipulation of title theory, for the purchase money financer of new equipment (under conditional sale or equipment trust) to protect himself against the claims of prior mortgagees or bondholders under an after-acquired clause in the mortgage or trust indenture: the result was arrived at on the theory that since "title" to the equipment was never in the vendee or lessee there was

nothing for the lien of the mortgage to attach to. While this Article broadly validates the after-acquired property interest, it also recognizes as sound the preference which prior law gave to the purchase money interest. That policy is carried out in subsections (3) and (4).

Subsection (4) states a general rule applicable to all types of collateral except inventory: the purchase money interest takes priority if it is perfected when the debtor receives possession of the collateral or within ten days thereafter. As to the ten day grace period, compare Section 9-301(2). The perfection requirement means that the purchase money secured party either has filed a financing statement before that time or has a temporarily perfected interest in goods covered by documents under Section 9-304(4) and (5) (which is continued in a perfected status by filing before the expiration of the 21 day period specified in that section). There is no requirement that the purchase money secured party be without notice or knowledge of the other interest; he takes priority although he knows of it or it has been filed.

Under subsection (3) the same rule of priority, but without the ten day grace period for filing, applies to a purchase money security interest in inventory, with the additional requirement that the purchase money secured party give notification, as stated in subsection (3), to any other secured party who filed earlier for the same item or type of inventory. The reason for the additional requirement of notification is that typically the arrangement between an inventory secured party and his debtor will require the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though he has already given a security interest in the inventory to another secured party. The notification requirement protects the inventory financer in such a situation: if he has received notification, he will presumably not make an advance; if he has not received notification (or if the other interest does not qualify as a purchase money interest), any advance he may make will have priority. Since an arrangement for periodic advances against incoming property is unusual outside the inventory field, no notification requirement is included in subsection (4).

Where the purchase money inventory financing began by possession of a negotiable document of title by the secured party, he must in order to retain priority give the notice required by subsection (3) at or before the usual time, i. e., when the debtor gets possession of the inventory, even though his security interest remains perfected for 21 days under Section 9-304(5).

When under these rules the purchase money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Under subsection (4) which deals with non-inventory collateral and where there was no ordinary expectation that the goods would be sold, the section gives an affirmative answer. In the case of inventory collateral under subsection (3), where it was expected that the goods would be sold and where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the subsection gives an answer limited to the preservation of the purchase money priority only in so far as the proceeds are cash received on or before the delivery of the inventory to a buyer, that is, without the creation of an intervening account to which conflicting rights might attach. The conflicting rights to proceeds consisting of accounts are governed by subsection (5). See Comment 8.

The foregoing rules applicable to purchase money security interests in inventory apply also to the rights in consigned merchandise. See Section 9-114.

4. Subsection (5) states a rule for determining priority between conflicting security interests in cases not covered in the sections referred to in subsection (1) or in subsections (2), (3) and (4) of this section. Note that subsection (5) applies to cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4).

There is a single priority rule based on precedence in the time as of which the competing parties either filed their security interests or perfected their security interests. The form of the claim to priority, i. e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection so long as there is no intervening period without filing or perfection. Filing may occur as to particular collateral before the collateral comes into existence. Under the standards of Section 9-203 perfection cannot occur as to particular collateral until the collateral itself (and not prior collateral) comes into existence and the debtor has rights therein; but under subsection (6) of this section the secured party's priority may date from his time of perfection as to the prior collateral, if perfection or filing has been continuously maintained. Subsection (6) provides that a date of filing or perfection as to original collateral is also a date of filing or perfection as to proceeds. This rule should also be read with Section 9-306, which makes it unneccessary to claim proceeds expressly in a financing statement and provides in effect that a filing as to original collateral is also a filing as to proceeds (with exceptions therein stated). Thus, if a financing

statement is filed covering inventory, then (subject to the exception involving multistate problems) this filing is also a filing as to the resulting accounts and constitutes the date of filing as to the accounts.

The party who may have had a prior security interest in inventory or may have had the only such security interest does not automatically for that reason have priority as to the accounts. His claim to accounts may or may not have priority over competing filed claims to accounts. The priority is based on precedence as to the accounts under the rules stated in the preceding paragraph.

5. The operation of this section is illustrated by the examples set forth under this and the succeeding Points.

Example 1. A files against X (debtor) on February 1. B files against X on March 1. B makes a non-purchase money advance against certain collateral on April 1. A makes an advance against the same collateral on May 1. A has priority even though B's advance was made earlier and was perfected when made. It makes no difference whether or not A knew of B's interest when he made his advance.

The problem stated in the example is peculiar to a notice filing system under which filing may be made before the security interest attaches (see Section 9-402). The Uniform Trust Receipts Act, which first introduced such a filing system, contained no hint of a solution and case law under it was unpredictable. This Article follows several of the accounts receivable statutes in determining priority by order of filing. The justification for the rule lies in the necessity of protecting the filing system — that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filings later than his. Note, however, that his protection is not absolute: if, in the example, B's advance creates a purchase money security interest, he has priority under subsection (4), or, in the case of inventory, under subsection (3) provided he has properly notified A. (See further Example 3 below.)

Example 2. A and B make non-purchase money advances against the same collateral. The collateral is in the debtor's possession and neither interest is perfected when the second advance is made. Whichever secured party first perfects his interest (by taking possession of the collateral or by filing) takes priority and it makes no difference whether or not he knows of the other interest at the time he perfects his own.

This result may be regarded as an adoption, in this type of situation, of the idea, deeply rooted at common law, of a race of diligence among creditors. Subsection (5) (b) adds the thought that so long as neither of the interests is perfected, the one which first attached (i. e., under the advance first made) has priority. The last mentioned rule may be thought to be of merely theoretical interest, since it is hard to imagine a situation where the case would come into litigation without either A or B having perfected his interest. If neither interest had been perfected at the time of the filing of a petition in bankruptcy, of course neither would be good against the trustee in bankruptcy.

Example 3. A has a temporarily perfected (21 day) security interest, unfiled, in a negotiable document in the debtor's possession under Section 9-304(4) or (5). On the fifth day B files and thus perfects a security interest in the same document. On the tenth day A files. A has priority, whether or not he knows of B's interest when he files, because he perfected first and has maintained continuous perfection or filing.

6. The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection, but may also be based on priority in filing before perfection.

Example 4. On February 1 A makes advances to X under a security agreement which covers "all the machinery in X's plant" and contains an after-acquired property clause. A promptly files his financing statement. On March 1 X acquires a new machine, B makes an advance against it and files his financing statement. On April 1 A, under the original security agreement, makes an advance against the machine acquired March 1. If B's advance creates a purchase money security interest, he has priority under subsection (4) (provided he filed before X received possession of the machine or within ten days thereafter). If B's advance, although he gave new value, did not create a purchase money interest, A has priority as to both of his advances by virtue of his priority in filing, although the parties perfected simultaneously on March 1 as to the new machine.

The application of the priority rules to proceeds presents special features discussed in Comment 8.

7. The application of the priority rules to future advances is complicated. In general, since any secured party must operate in reference to the Code's system of notice, he takes subject to future advances under a prior security interest while it is perfected through filing or possession, whether the advances are committed or noncommitted, and to any advances subsequently made "pursuant to commitment" (Section 9-105) during that period. In the rare case when a future advance is made without commitment while the security interest is perfected temporarily without either filing or possession, the future advance has priority from the date it is made. These rules are more liberal toward the priority of future

advances than the corresponding rules applicable to an intervening buyer (Section 9-307(3)) because of the different characteristics of the intervening party. Compare the corresponding rule applicable to an intervening judgment creditor. (Section 9-301(4)).

Example 5. On February 1 A makes an advance against machinery in the debtor's possession and files his financing statement. On March 1 B makes an advance against the same machinery and files his financing statement. On April 1 A makes a further advance, under the original security agreement, against the same machinery (which is covered by the original financing statement and thus perfected when made). A has priority over B both as to the February 1 and as to the April 1 advance and it makes no difference whether or not A knows of B's intervening advance when he makes his second advance.

A wins, as to the April 1 advance, because he first filed even though B's interest attached, and indeed was perfected, before the April 1 advance. The same rule would apply if either A or B had perfected through possession. Section 9-204(3) and the Comment thereto should be consulted for the validation of future advances.

The same result would be reached even though A's April 1 advance was not under the original security agreement, but was under a new security agreement under A's same financing statement or during the continuation of A's possession.

8. The application of the priority rules of subsections (5) and (6) to proceeds is shown by the following examples:

Example 6. A files a financing statement covering a described type of inventory then owned or thereafter acquired. B subsequently takes a purchase money security interest in certain inventory described in A's financing statement and achieves priority over A under subsection (3) as to this inventory. This inventory is then sold, producing proceeds.

If the proceeds of the inventory are instruments or chattel paper, the rights of A and B on the one hand and any adverse claimant to these proceeds on the other are governed by Sections 9-308 and 9-309. If the proceeds are cash, subsection (3) indicates that B's priority as to the inventory carries over to the cash. Proceeds which are accounts constitute different collateral and the priorities as to the original collateral do not control the priority as to the accounts. Under Sections 9-306 and 9-312(6), A's first filing as to the inventory constitutes a first filing as to the accounts, provided that the same filing office would be appropriate for filing as to accounts under the rules of Section 9-306(3). Therefore, A has priority as to the accounts.

Many parties financing inventory are quite content to protect their first security interest in the inventory itself, realizing that when inventory is sold, someone else will be financing the accounts and the priority for inventory will not run forward to the accounts. Indeed, the cash supplied by the accounts financer will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase money basis makes contractual arrangements that the proceeds of accounts financing by another be devoted to paying off the first inventory security interest.

Example 7. In the foregoing case, if B had filed directly as to accounts, the date of that filing as to accounts would be compared with the date of A's first filing as to the inventory, and the first-to-file rule would prevail.

Subsection (6) provides that a filing as to original collateral determines the date of a filing as to the proceeds thereof. This rule implies, of course, that the filing as to the original collateral is effective as to proceeds under the rule of Section 9-306(3).

Example 8. If C had filed as to accounts in Example 6 above before either A or B had filed as to inventory, C's first filing as to accounts would have priority over the filings of A and B, which would also constitute filings as to accounts under the rule just mentioned. A's and B's position as to the inventory gives them no automatic claim to the proceeds of the inventory consisting of accounts against someone who has filed earlier as to accounts. If, on the other hand, either A's or B's filings as to the inventory constituted good filings as to accounts and these filings preceded C's direct filings as to accounts, A or B would outrank C as to the accounts.

If the filings as to inventory were not effective under subsection (6) for filing as to accounts because a filing for accounts would have to be a different filing office under Section 9-103(3), these inventory filings would nevertheless be effective for 10 days as to accounts. If the perfection of the security interest in accounts was continued within the 10 days by appropriate filings, then A and B's interests in the accounts would date from the date of filing as to inventory.

§ 25-9-313. Priority of security interests in fixtures.

Offical Reasons for 1972 Change

As the Code came to be widely enacted, the real estate bar came to realize the impact of the fixture provisions on real estate financing and real estate titles. They apparently had not fully appreciated the impact of these provisions of Article 9 on real estate matters during the enactment of the Code, because of the commonly-held assumption that Article 9 was concerned only with chattel security matters.

The treatment of fixtures in pre-Code law had varied widely from state to state. The treatment in Article 9 was based generally on prior treatment in the Uniform Conditional Sales Act which, however, had been enacted in only a dozen states. In other states the word "fixture" had come to mean that a former chattel had become real estate for all purposes and that any chattel rights therein were lost. For lawyers trained in such states the Code provisions seemed to be extreme. Some sections of the real estate bar began attempting with some success to have Section 9-313 amended to bring it closer to the pre-Code law in their states. In some states, such as California and Iowa, Section 9-313 simply was not enacted.

Even supporters of Article 9 and of its fixture provisions came to recognize that there were some ambiguities in Section 9-313, particularly in its application to construction mortgages, and also in its failure to make it clear that filing of fixture security interests was to be in real estate records where they could be found by a standard real estate search.

Section 9-313 and related provisions of Part 4 have been redrafted to meet the legitimate criticisms and to make a substantial shift in the law in favor of construction mortgages. The specific changes are described in the 1972 Comments to Section 9-313, and the Comments to the several sections of Part 4.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 7, Uniform Conditional Sales Act.

Purposes:

1. Section 9-313 deals with the problem that certain goods which are the subject of chattel financing become so affixed or otherwise so related to real estate that they become part of the real estate, and that chattel interests would be subordinate to real estate interests except as protected by the priorities regulated by the section. These goods are called "fixtures". Some fixtures also retain their chattel nature in that a chattel financing with respect to them may exist and may continue to be recognized, if notice thereof is given to real estate interests in accordance with this section. But this concept does not apply if the goods are integrally incorporated into the real estate.

The term "fixture filing" has been introduced and defined. It emphasizes that when a filing is intended to give the priority advantages herein discussed against real estate interests, the filing must (except as stated below) be for record in the real estate records and indexed therein, so that it will be found in a real estate search.

Since the determination in advance of judicial decision of the question whether goods have become fixtures is a difficult one, no inference may be drawn from a fixture filing that the secured party concedes that the goods are or will become fixtures. The fixture filing may be merely precautionary.

2. "Fixture" is defined to include any goods which become so related to particular real estate that an interest in them arises under real estate law and therefore, goods integrally incorporated into the real estate are clearly fixtures. But under subsection (2) no security interest exists under Article 9 in ordinary building materials incorporated into an improvement on land.

Goods may be technically "ordinary building materials," e. g., window glass, but if they are incorporated into a structure which as a whole has not become an integral part of the real estate, the rules applicable to the ordinary building materials follow the rules applicable to the structure itself. The outstanding examples presenting this kind of problem are the modern "mobile homes" and the modern prefabricated steel buildings usable as warehouses, garages, factories, etc. In the case of the mobile homes, most of them are erected on leased land and the right of the debtor under a mobile home purchase contract to remove the goods as lessee will make clear that his secured party ordinarily has a similar right. See paragraph (5) (b).

In cases where mobile homes or prefabricated steel buildings are erected by a person having an ownership interest in the land, the question into which category the buildings fall is one determined by local law. In general, the governing local law will not be that applicable in determining whether goods have become real property between landlord and tenant, or between mortgagor and mortgagee, or between grantor and grantee, but rather than applicable in a three-party situation, determining whether chattel financing can survive as against parties who acquire rights through the affixation of the goods to the real estate.

The assertion that no security interest exists in ordinary building materials is only for the operation of the priority provisions of this section. It is without prejudice to any rights which the secured party may have against the debtor himself if he incorporated the goods into real estate or against any party guilty of wrongful incorporation thereof in violation of the secured party's rights.

3. Under these concepts the section recognizes three categories of goods: (1) those which retain their chattel character entirely and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their chattel character for purposes of finance; and (3) an intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved. This third and intermediate class is the primary subject of this section. The demarcation between these classifications is not delineated by this section.

4. In considering fixture priority problems, there will always first be a preliminary question whether real estate interests per se have an interest in the goods as part of real estate. If not, it is immaterial, so far as concerns real estate parties as such, whether a chattel security interest is perfected or unperfected. In no event does a real estate party acquire an interest in a "pure" chattel just because a security interest therein is unperfected. If on the other hand real estate law gives real estate parties an interest in the goods, a conflict arises and this section states the priorities.

(a) The principal exception to the general rule of priority stated in Comment 4(b) based on time of filing or recording is a priority given in paragraph (4) (a) to purchase money security interests in fixtures as against *prior* recorded real estate interests, provided that the purchase money security interest is filed as a fixture filing in the real estate records before the goods become fixtures or within 10 days thereafter. This priority corresponds to one given in Section 9-312(4), and the 10 days of grace represents a reduction of the purchase money priority as against prior interests in the real estate under the present Section 9-313, where the purchase money priority exists even though the security interest is *never* filed.

It should be emphasized that this purchase money priority with the 10-day grace period for filing is limited to rights against *prior* real estate interests. There is no such priority with the 10-day grace period as against subsequent real estate interests. The fixture security interest can defeat subsequent real estate interests only if it is filed first and prevails under the usual conveyancing rule recognized in paragragh (4) (b).

(b) The general principle of priority announced in this section is set forth in paragraph (4) (b). It is basically that a fixture filing gives to the fixture security interest priority as against other real estate interests according to the usual priority rule of conveyancing, that is, the first to file or record prevails. An apparent limitation to this principle set forth in paragraph (4) (b), namely that the secured party must have had priority over any interest of a predecessor in title of the conflicting encumbrancer or owner, is not really a limitation, but is an expression of the usual rule that a person must be entitled to transfer what he has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage even though the assignment is a later recorded instrument. Similarly if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

(c) A qualification to the rule based on priority of filing or recording is paragraph (4) (d), where priority based on precedence in filing or recording is preserved, but there is no requirement that as against a judgment lienor of the real estate, the prior filing of the fixture security interest must be in the real estate records. The fixture security interest if perfected first should prevail even though not filed or recorded in real estate records, because generally a judgment creditor is not a reliance creditor who would have searched records. Thus, even a prior filing in the chattel records protects the priority of a fixture security interest against a subsequent judgment lien.

It is hoped that this rule will have the effect of preserving a fixture security interest so filed against invalidation by a trustee in bankruptcy. That would, of course, be the result under Section 60a of the Bankruptcy Act if the time of perfection of the fixture security interest were measured by the judgment creditor test applicable to personal property. It would not be the result if the time of perfection were measured by the purchaser test applicable to real estate. Since the fixture security interest arises against the goods in their capacity as chattels, the bankruptcy courts should apply the judgment creditor test. The effectiveness of the drafting to achieve its purpose cannot be known certainly until the courts adjudicate the question or until it is settled by amendment to Section 60a of the Bankruptcy Act.

The phrase "lien by legal or equitable proceedings" is suggested by Section 70c of the Bankruptcy Act, and is intended to encompass all liens on real estate obtained by any of the creditor action therein described.

(d) A special exception to the usual rule of priority based on precedence in time is the one of paragraph (4) (c) in favor of holders of security interests in factory and office machines, and in certain replacement domestic appliances, as discussed below. This is not as broad an exception as it might seem. To repeat, a fixture conflict is not reached if the goods are held as a matter of local law not to have become part of the real estate, which will frequently be the holding for goods of these types. If the opposite is held, the rule of paragraph (4) (c) operates only if the fixture security interest is perfected before the goods become fixtures. Having been perfected, it would of course have priority over subsequent real estate interests under the rule of paragraph (4) (b). Since it would in almost all cases be a purchase money security interest, it would also have priority over other real estate interests under the purchase-money priority of paragraph (4) (a), discussed in paragraph (a) above. The rule is stated separately because the permitted perfection is by any method permitted by the Article, and not exclusively by fixture filing in the real estate records. This rule is made necessary by the confusions of the law as to whether certain machinery and appliances become fixtures.

As an additional point, in the case of machinery, the separate statement of this rule makes clear that it is not overridden by the construction mortgage priority of subsection (6) discussed in Comment 4(e) below, as would have been true if reliance had been solely on the purchase money priority. Factory and office machines are not always financed as part of a construction mortgage, and the mortgagee should be alert of conflicting chattel financing of these manchines.

As to appliances, the rule stated is limited to readily removable replacements, not original installations, of appliances which are consumer goods in the hands of the debtor (Section 9-109). To facilitate financing of original appliances in new dwellings as part of the real estate financing of the dwellings, no special priority is given to chattel financing of original appliances. This section leaves to other law of the state the question whether original installations are fixtures to which the protection accorded by this section to construction mortgages would be applicable. Likewise, it is recognized that (when not supplied by tenants) appliances in commercial apartment buildings are intended as permanent improvements, and no special rule is stated for appliances in that case. The special priority rule here stated in favor of chattel financing is limited to situations where the installation of appliances may not be intended to be permanent, i. e., replacement appliances used by the debtor or his family (consumer goods). The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial owner-occupied contexts need not concern himself with real estate descriptions or records; indeed, for a purchase-money replacement of consumer goods, perfection without any filing will be possible. (The priority of the construction mortgage has no application to replacement appliances.)

(e) The purchase money priority presents a difficult problem in relation to construction mortgages. The latter will ordinarily have been recorded even before the commencement of delivery of materials to the job, and therefore would be prior in rank to the fixture security interests were it not for the problem of the purchase money priority. Subsection (6) expressly gives priority to the construction mortgage recorded before the filing of the fixture security interest, but this priority of a construction mortgage applies only during the construction period leading to the completion of the improvement. As to additions to the building made long after completion of the improvement, the construction priority will not apply simply because the additions are financed by the real estate mortgagee under an open end clause of his construction mortgage. In such case, the applicable principles will be those of paragraphs (4) (a) and (4) (b). A refinancing of a construction mortgage has the same priority as the mortgage itself.

The phrase "an obligation incurred for the construction of an improvement" covers both optional advances and advances pursuant to commitment, and both types of advances have the same priority under the section.

5. The section makes it impossible for a fixture supplier to retain a security interest against a contractor, to the possible surprise and deception of real estate interests, unless the debtor has an interest of record in the real estate. See paragraphs (4) (a) and (b).

On the other hand, these paragraphs do recognize that fixture filing may be necessary when the debtor is in possession of the real estate (e. g., a lessee) even without an interest of record. This possibility of a filing against a debtor who is not in the real estate chain of title makes it necessary to require the furnishing of the name of a record owner in such cases. See Sections 9-402(3), item 3; 9-402(5); 9-403(7).

6. The status of fixtures installed by tenants (as well as such persons as licensees and holders of easements) is defined by paragraph (5) (b) to the effect that if the debtor (tenant or other interest mentioned) has the right to remove the fixture as against a real estate interest, the secured party has priority over that real estate interest.

7. Real estate lenders and title companies will have little difficulty in locating relevant fixture security interests applicable to particular parcels of real estate because of the provisions as to real estate description in fixture filings, the indexing thereof, and other related provisions in Part 4 of Article 9.

8. Real estate lending is typically long-term, and is usually done by institutional investors who can afford to take a long view of the matter rather than concentrating on the results of any particular case. It is apparent that the rule which permits and encourages purchase money fixture financing, which in contrast is typically short-term, will result in the modernization and improvement of real estate rather than in its deterioration and will on balance benefit long-term real estate lenders. Because of the short-term character of the chattel financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule would chill the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.

9. Subsection (8) is an important departure from Section 7 of the Uniform Conditional Sales Act and from much other conditional sales legislation. Under the Uniform Conditional Sales Act a conditonal vendor could not sever and remove the affixed chattel if a "material injury to the freehold" would result. The courts of various jurisdictions were in sharp disagreement of the meaning of "material injury": some held that only physical injury was meant; others adopted the so-called "institutional theory" and denied removal whenever the "going value" of the structure would be materially diminished by the removal. Under these rules the conditional vendor either could not remove at all, or, if he could, could damage the structure on removal without becoming accountable to the real estate claimant. The situation was complicated by the fact that it became increasingly difficult to predict what types of goods the courts in a given jurisdiction would hold not subject to removal.

Subsection (8) abandons the "material injury to the freehold" rule. Instead a secured party entitled to priority may in all cases sever and remove his collateral, subject, however, to a duty to reimburse any real estate claimant (other than the debtor himself) for any physical injury caused by the removal. The right to reimbursement is implemented by the last sentence of subsection (8) which gives the real estate claimant a statutory right to security or indemnity failing which he may refuse permission to remove. The subsection (8) rule thus accomplishes two things: it puts an end to the uncertainty which has grown up under the "material injury" rule, while at the same time it protects the real estate claimant under the reimbursement provisions.

§ 25-9-314. Accessions.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. To state when a secured party claiming an interest in goods installed in or affixed to other goods is entitled to priority over a party with a security interest in the whole.

2. This section changes prior law in that the secured party claiming an interest in a part (e. g., a new motor in an old car) is entitled to priority and has a right to remove even though under other rules of law the part now belongs to the whole.

3. This section does not apply to goods which, for example, are so commingled in a manufacturing process that their original identity is lost. That type of situation is covered in Section 9-315. Section 9-315 should also be consulted for the effect of a financing statement which claims both component parts and the resulting product.

§ 25-9-315. Priority when goods are commingled or processed.

1972 Official Comment

Prior Uniform Statutory Provision:

None.

Purposes:

1. To state when a secured party whose collateral contributes to a product has priority

over others who have conflicting claims in the same product.

2. This section changes the law in some jurisdictions where a security interest in goods (e. g., raw materials) was lost when the goods lost their identity by being commingled or processed. Under this section the security interest continues in the resulting mass or product in the cases stated in subsection (1).

3. This section applies not only to cases where flour, sugar and eggs are commingled into cake mix or cake, but also to cases where components are assembled into a machine. In the latter case a secured party is put to an election at the time of filing, by the last sentence of subsection (1), whether to claim under this section or to claim a security interest in one component under Section 9-314.

4. Subsection (2) is new and is needed because under subsection (1) it is possible to have more than one secured party claiming an interest in a product. The rule stated treats all such interests as being of equal priority entitled to share ratably in the product.

§ 25-9-316. Priority subject to subordination.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:
The several preceding sections deal elaborately with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate his claim. Only the person entitled to priority may make such an agreement: his rights cannot be adversely affected by an agreement to which he is not a party.

§ 25-9-317. Secured party not obligated on contract of debtor.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 12, Uniform Trust Receipts Act.

Purposes:
There were a few common law decisions, mostly in cases involving trust receipts, which suggested, if they did not hold, that a secured party who gave his debtor liberty of sale might be liable (for example, for breach of warranty) on the debtor's contracts of sale. The theory was grounded on the law of agency; the debtor being regarded as selling agent for the secured party as principal. This section rejects that theory. Section 12 of the Uniform Trust Receipts Act provided that the entruster was not subject to liability, merely because of his status as entruster, on sale of the goods subject to trust receipt. This section adopts the policy of the prior act and states it in general terms.

§ 25-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment.

Applied in Equitable Factors Co. v. Chapman-Harkey Co., 43 N.C. 189, 258 S.E.2d 376 (1979).

Official Reasons for 1972 Change

The principal changes conform to the elimination of the term "contract right" in Section 9-106.

Minor changes in subsections (3) and (4) eliminate technical difficulties in the 1962 Code which arose out of the fact that the term "account debtor" used in these subsections is defined to include debtors under general intangibles and chattel paper, and is therefore broader than the term "account" heretofore used in these subsections. Subsection (4) is broadened to apply to general intangibles for money due as well as to accounts.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 9(3), Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) makes no substantial change in prior law. An assignee has traditionally been subject to defenses or set-offs existing before an account debtor is notified of the assignment. When the account debtor's defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment (paragraph (1)(a)). The account debtor may also have claims against the assignor which arise independently of that contract: an assignee is subject to all such claims which accrue before, and free of all those which accrue after, the account debtor is notified (paragraph (1)(b)). The account debtor may waive his right to assert claims or defenses against an assignee to the extent provided in Section 9-206.

2. Prior law was in confusion as to whether modification of an executory contract by account debtor and assignor without the assignee's consent was possible after notification of an assignment. Subsection (2) makes good faith modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. This rule may do some violence to accepted doctrines of contract law. Nevertheless it is a sound and indeed a necessary rule in view of the realities of large scale procurement. When for example it becomes necessary for a government agency to cut back or modify existing contracts, comparable arrangements must be made promptly in hundreds and even thousands of subcontracts lying in many tiers below the prime contract. Typically the right to payments under these subcontracts will have been assigned. The government, as sovereign, might have the right to amend or terminate existing contracts apart from statute. This subsection gives the prime contractor (the account debtor) the right to make the required arrangements directly with his subcontractors without undertaking the task of procuring assents from the many banks to whom rights under the contracts may have been assigned. Assignees are protected by the provision which gives them automatically corresponding rights under the modified or substituted contract. Notice that subsection (2) applies only so far as the right to payment has not been earned by performance, and therefore its application ends entirely when the work is done or the goods furnished.

3. Subsection (3) clarifies the right of an account debtor to make payment to his seller-assignor in an "indirect collection" situation (see Comment to Section 9-308). So long as the assignee permits the assignor to collect claims or leaves him in possession of chattel paper which does not indicate that payment is to be made at some place other than the assignor's place of business, the account debtor may pay the assignor even though he may know of the assignment. In such a situation an assignee who wants to take over collections must notify the account debtor to make further payments to him.

4. Subsection (4) breaks sharply with the older contract doctrines by denying effectiveness to contractual terms prohibiting assignment of sums due and to become due under contracts of sale, construction contracts and the like. Under the rule as stated, an assignment would be effective even if made to an assignee who took with full knowledge that the account debtor had sought to prohibit or restrict assignment of the claims.

It is only for the past hundred years that our law has recognized the possibility of assigning choses in action. The history of this development, at law and equity, is in broad outline well known. Lingering traces of the absolute common law prohibition have survived almost to our own day.

There can be no doubt that a term prohibiting assignment of proceeds was effective against an assignee with notice through the nineteenth century and well into the twentieth. Section 151 of the Restatement of Contracts (1932) so states the law without qualification, but the changing character of the law is shown in the proposed Section 154 of the Restatement, Second, Contracts.

The original rule of law has been progressively undermined by a process of erosion which began much earlier than the cited section of the Restatement of Contracts would suggest. The cases are legion in which courts have construed the heart out of prohibitory or restrictive terms and held the assignment good. The cases are not lacking where courts have flatly held assignments valid without bothering to construe away the prohibition. See 4 Corbin on Contracts (1951) §§ 872, 873. Such cases as Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 103 N.E.2d 891 (1952), are rejected by this subsection.

This gradual and largely unacknowledged shift in legal doctrine has taken place in response to economic need: as accounts and other rights under contracts have become the

collateral which secures an ever increasing number of financing transactions, it has been necessary to reshape the law so that these intangibles, like negotiable instruments and negotiable documents of title, can be freely assigned.

Subsection (4) thus states a rule of law which is widely recognized in the cases and which corresponds to current business practices. It can be regarded as a revolutionary departure only by those who still cherish the hope that we may yet return to the views entertained some two hundred years ago by the Court of King's Bench.

5. The Federal Assignment of Claims Act of 1940 — to which of course this section is subject — requires that assignments of claims against the United States be filed as provided in that Act. Many large business enterprises, situated like the United States in that claims against them are held by hundreds or thousands of subcontractors or suppliers, often require in their contract or purchase order forms that assignments against them be filed in a prescribed way. Subsection (3) requires reasonable identification of the account assigned and recognizes the right of an account debtor to require reasonable proof of the making of the assignment and to that extent validates such requirements in contracts or purchase order forms. If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request, the account debtor may disregard the assignment and make payment to the assignor. What is "reasonable" is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it unless he has notified the assignee with commercial promptness as to the respects in which identification or proof is considered defective.

6. If the thing to be assigned is the beneficiary's right under a letter of credit, Section 5-116 should be consulted.

PART 4.

FILING.

§ 25-9-401. Place of filing; erroneous filing; removal of collateral.

Editor's Note. —
For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

Official Reasons for 1972 Change

The several alternatives for subsection (1) have been rewritten to provide for filing in the real estate records of security interests intended to give a priority as a "fixture filing" under Section 9-313.

This requirement for filing in real estate records applies only if the priority advantages of Section 9-313 are desired. If the secured party is not concerned about priority against real estate parties, he can file for a fixture as for an ordinary chattel, in the chattel records, omitting the filing in the real estate records, and he will have a security interest perfected against everyone but real estate parties. In the case of a purchase money security interest in consumer goods, he need not file at all. See Section 9-313(1) (d). For the question of the effect of the regular chattel filing in lieu of fixture filing in the event of the debtor's bankruptcy, see Comment 4(c) to Section 9-313.

This requirement for filing in real estate records applies also to timber to be cut and to minerals or the like (including oil and gas) financed at the wellhead or minehead or accounts resulting from the sale thereof.

This filing is not merely in the *office* where a mortgage of real estate would be recorded, but it is intended that it be filed *in the real estate records.* This is made clear by the model form in Section 9-402(3) which recites that the financing statement is to be filed for record in the real estate records, the required recital in Section 9-402(5), and the provision of Section 9-403(7) requiring the indexing thereof in the real estate records. Thus, it is intended that these filings will be readily disclosed on any real estate search and they can be treated like any real estate encumbrance so disclosed.

A new subsection (5) makes clear that a financing statement filed against a "transmitting utility" (Section 9-105) need be filed only in the office of the [Secretary of State] and not locally. Special provision had to be made for filing where these far-flung utilities

were debtors. If the problem were only on non-fixtures, not more than one local filing would have been necessary under any of the alternative versions of subsection (1), but the problem was more difficult in the case of fixtures, where the standard rule would require filing with real estate descriptions in every county where there were fixtures.

There has been some difficulty in the concept that one files against farmers at their residences, in view of the number of incorporated farms. A new subsection (6) is therefore added to define the residence of an organization. Subsection (6) is also needed if the provision of the Third Alternative Subsection (1) for double filing against local business debtors is adopted.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 4, Uniform Trust Receipts Act; Sections 6 and 7, Uniform Conditional Sales Act.

Purposes:

1. Under chattel mortgage acts, the Uniform Conditional Sales Act and other conditional sales legislation the geographical unit for filing or recording was local: the county or township in which the mortgagor or vendee resided or in which the goods sold or mortgaged were kept. The Uniform Trust Receipts Act used the state as the geographical filing unit: under that Act statements of trust receipt financing were filed with an official in the state capital and were not filed locally. The state-wide filing system of the Trust Receipts Act has been followed in many accounts receivable and factor's lien acts.

Both systems have their advocates and both their own advantages and drawbacks. The principal advantage of state-wide filing is ease of access to the credit information which the files exist to provide. Consider for example the national distributor who wishes to have current information about the credit standing of the thousands of persons he sells to on credit. The more completely the files are centralized on a state-wide basis, the easier and cheaper it becomes to procure credit information; the more the files are scattered in local filing units, the more burdensome and costly. On the other hand, it can be said that most credit inquiries about local businesses, farmers and consumers come from local sources; convenience is served by having the files locally available and there is not great advantage in centralized filing.

This section does not attempt to resolve the controversy between the advocates of a completely centralized state-wide filing system and those of a large degree of local autonomy. Instead the section is drafted in a series of alternatives; local considerations of policy will determine the choice to be made.

2. Fortunately there is general agreement that the proper filing place for security interests in fixtures is in the office where a mortgage on the real estate concerned would be filed or recorded, and paragraph (1) (a) in the First Alternative and paragraph (1) (b) in the Second and Third Alternatives so provide. This provision follows the Uniform Conditional Sales Act. Note that there is no requirement for an additional filing with the chattel records.

3. In states where it is felt wise to preserve local filing for transactions of essentially local interest, either the Second or Third Alternative of subsection (1) should be adopted. Paragraph (1) (a) in both alternatives provides county (township, etc.) filing for consumer goods transactions and for agricultural transactions (farm equipment, farm products, farm accounts and crops). Note that the subsection departs from Section 6 of the Uniform Conditional Sales Act and adopts instead the policy of many chattel mortgage acts in selecting the county of the debtor's residence, rather than the county where the goods are located, as the normal filing place. Where, however, the debtor is an out-of-state resident, the filing must of necessity be in the county where the goods are, and the subsection so provides. Though not expressly stated, it is evident that filing for an assignment of accounts arising from the sale of farm products by a farmer who is not a resident must be in the county where the debtor keeps his farm products. In the case of crops growing or to be grown, where the land is in one county and the debtor's residence in another, filing must be made in both counties. Neither this filing for crops in the county where the land is nor the requirements that the security agreement (Section 9-203(1)(a)) and the financing statement (Section 9-402(1) and (3)) contain a description of the real estate point to the conclusion that a financing statement for a security interest in crops must be filed in the real estate records. This Article follows pre-Code law which recognized such a financing as a chattel mortgage. The policy of the subsection is to require filing in the place or places where a creditor would normally look for information concerning interests created by the debtor.

For some incorporated farmers, reference to residence is an anomaly. Therefore subsection (6) provides that the residence of an organization is its place of business, or its chief executive office if it has more than one place of business. Compare Section 9-103(3), which reaches essentially the same concept as a definition of the "location" of a debtor.

4. It is thought that sound policy requires a

state-wide filing system for all transactions except the essentially local ones covered in paragraph (1)(a) of the Second and Third Alternatives and land-related transactions covered in paragraph (1) (b) of the Second and Third Alternatives. Paragraph (1) (c) so provides in both alternatives, as does paragraph (1) (b) in the First Alternative. In a state which has adopted either the Second or Third Alternative, central filing would be required when the collateral was goods except consumer goods, farm equipment or farm products (including crops), or was documents or chattel paper or was accounts or general intangibles, unless related to a farm. Note that the filing provisions of this Article do not apply to instruments (see Section 9-304).

If the Third Alternative subsection (1) is adopted, then local filing, in addition to the central filing, is required in all the cases stated in the preceding paragraph, with respect to any debtor whose places of business within the state are all within a single county (township, etc.) or a debtor who is not engaged in business. The last event test stated in Section 9-103(1) (b) and Comment thereto applies to determine whether local filing is required under the present section, as well as to determine in which state filing is required.

In states where the arguments for a completely centralized set of files (except for fixtures) prevail, the First Alternative subsection (1) should be adopted. That alternative provides for exclusive central filing of all security interests except those in fixtures.

5. When a secured party has in good faith attempted to comply with the filing requirements but has not done so correctly, subsection (2) makes his filing effective in so far as it was proper, and also makes it good for all collateral covered by the financing statement against any person who actually knows the contents of the improperly filed statement. The subsection rejects the occasional decisions that an improperly filed record is ineffective to give notice even to a person who knows of it. But if the Third Alternative subsection (1) is adopted, the requirements of paragraph (1) (c) are not complied with unless there is filing in both offices specified; filing in only one of two required places is not effective except as against one with actual knowledge of the contents of the defective financing statement.

6. Subsection (3) deals with change of residence or place of business or the location or use of the goods *after* a proper filing has been made. The subsection is important only when local filing is required, and covers only changes between local filing units in the state. For changes of location between states see Section 9-103(1) (d).

Subsection (3) is presented in alternative forms. Under the first, no new filing is required in the county to which the collateral has been removed. Under alternative subsection (3) the original filing lapses four months after the change in location; this is basically the same rule that is applied by Section 9-103(1) (d) to the case of collateral brought into the state subject to a security interest which attached elsewhere.

7. The usual filing rules do not apply well for a transmitting utility (defined in Section 9-105). Many pre-Code statutes provided special filing rules for railroads and in some cases for other public utilities to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. The Code recreates and broadens these provisions by subsection (5) of this section, which provides that for transmitting utilities the filing need only be in the office of the Secretary of State. The nature of the debtor will inform persons searching the record as to where to make a search.

§ 25-9-402. Formal requisites of financing statement; amendments; mortgage as financing statement.

Official Reasons for 1972 Change

Certain changes are conforming changes to new requirements of Section 9-401 that certain financing statements covering such collateral as timber and minerals be filed in the real estate records. Persons interested in real estate have complained with some justice that the provisions of the 1962 Code failed in several ways to tie the fixture filings to the real estate search system. Among these was the absence of clear specification that the fixture security interest was to indexed in the real estate records. On this point, a responsive change has been made in Section 9-403. Other objections related to the adequacy of the real estate description and to the fact that the debtor might not be an owner of an interest of record in the real estate. The optional language in subsection (5) is designed to meet the objection as to real estate descriptions but without imposing on a fixture-secured party the duty of obtaining a "legal description" unless the state's recording system requires it. While no doubt a full "legal description" is proper practice in conveyancing, it is believed that something significantly less, like a street address, would be adequate in most states, and would frequently be a guide to a recorded map. Where a state has a tract index system or other special system not dependent

on a grantor-grantee index, special adaptations may be required and no attempt is made in the Code to deal with all such situations.

Another objection of real estate parties has been that the name of the debtor might not be in the real estate chain of title and there have been numerous non-uniform amendments to Sections 9-401, 9-402, or 9-403 designed to require the showing of the name of the record owners of the real estate in the financing statement. Since Section 9-313(4) (a) and (b) permit fixture filing against persons in possession of the real estate who do not have interests of record, Section 9-402 requires the naming of an owner of record of the real estate in such cases, and Section 9-403(7) requires indexing the fixture filing against the name.

Subsection (6) makes it possible for a real estate mortgage to serve as a financing statement, and a related change in Section 9-403(6) makes it unnecessary to file continuation statements for such a financing statement.

Subsection (1) has been changed to require only the signature of the debtor rather than that of the secured party. The requirement of signatures of secured parties has sometime misled secured parties, who are accustomed to pre-Code practice and real estate practice under which only the debtor, not the secured party, need sign such instruments as chattel mortgages and real estate mortgages. Thus, when the security agreement was used as the financing statement, it might have been defective under the 1962 Code for failure to have the signature of the secured party. This change also fit in with the provisions of Section 9-403(6), under which a real estate mortgage (customarily signed only by the debtor) may be effective as a financing statement.

Changes in the form of financing statement in subsection (3) conform to the foregoing and are also intended to have the secured party make clear when a financing statement is intended to be filed in real estate records. This had been a matter of some concern when the parties used the term "fixture" loosely in their description of goods.

Certain of the changes in Section 9-402 are not related to real estate filings. The changes in paragraph (2) (a) conform to Section 9-103(3), which requires refiling when the debtor's location changes. Additions in subsections (2) (d) and (7) relating to the problem of the name of the debtor against which a filing should be made and the effect of transfer are discussed in the related Comments.

1972 Official Comment

Prior Uniform Statutory Provision:
Sections 13(3), 13(4), Uniform Trust Receipts Act.

Purposes:

1. Subsection (1) sets out the simple formal requisites of a financing statement under this Article. These requirements are: (1) signature of the debtor; (2) addresses of both parties; (3) a description of the collateral by type or item.

Where the collateral is crops growing or to be grown or when the financing statement is filed as a fixture filing (Section 9-313) or when the collateral is timber to be cut or minerals or the like (including oil and gas) financed at wellhead or minehead or accounts resulting from the sale thereof, the financing statement must also contain a description of the lands concerned. On description generally, see Section 9-110 and Comment 5 to the present section. An important distinction must be drawn, however, between the function of the description of land in reference to crops and its function in the other cases mentioned. For crops it is merely part of the description of the crops concerned, and the security interest in crops is a Code security interest, like the pre-Code "crop mortgage" which was a *chattel* mortgage. In contrast, in the other cases mentioned the function of the description of land is to have the financing statement filed in the county where the land is situated and in the realty records, as distinguished from the chattel records. Subsection (3) suggests a form which complies with the statutory requirements and makes clear that for the types of collateral mentioned other than crops, the financing statement containing a description of the land concerned is to go in the realty records. Note also subsection (5) on the adequacy of the description of land where the filing is to be in the real estate records. See also Section 9-403(7) on the indexing of these filings in the real estate records.

A copy of the security agreement may be filed in place of a separate financing statement, if it contains the required information and signature.

2. This section adopts the system of "notice filing" which proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the

debtor's request, may be required to make disclosure. Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refiling on each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution. Sometimes more than one copy of a financing statement or of a security agreement used as a financing statement is needed for filing. In such a case the section permits use of a carbon copy or photographic copy of the paper, including signatures.

However, even in the case of filings that do not necessarily involve a series of transactions the financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the description of collateral in the financing statement is broad enough to encompass them. Similarly, the financing statement is valid to cover after-acquired property and future advances under security agreements whether or not mentioned in the financing statement.

3. This section departs from the requirements of many pre-Code chattel mortgage statutes that the instrument filed be acknowledged or witnessed or accompanied by affidavits of good faith. Those requirements did not seem to have been successful as a deterrent to fraud; their principal effect was to penalize good faith mortgages who had inadvertently failed to comply with the statutory niceties. They are here abandoned in the interest of a simplified and workable filing system.

4. Subsection (2) allows the secured party to file a financing statement signed only by himself where the filing is required by any of the events listed, each of which occurs after the commencement of the financing, and therefore under circumstances where the cooperation of the debtor is not certain. Section 9-401(3), alternative provision, contains similar permission on removal between counties in this state. The secured party should not be penalized for failure to make a timely filing by reason of difficulty in procuring the signature of a possibly reluctant or hostile debtor. Financing statements filed under this subsection must explain the circumstances under which they are filed with the signature of the secured party rather than that of the debtor.

In contrast to the signatures on original financing statements, an amendment to a financing statement must be signed by both parties, to preclude either from adversely affecting the interests of the other.

The reference in subsection (4) to an amendment which "adds collateral" refers to additional types of collateral. A security interest on additional units of a type of collateral already described can be created under an after-acquired property clause or a new security agreement. See Comment 5 to Section 9-204. On priorities in such cases see Section 9-312 and Comments thereto.

5. A description of real estate must be sufficient to identify it. See Section 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing, but of course the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real estate must be sufficient so that the fixture financing statement will fit into the real estate search system and the financing statement be found by a real estate searcher. Optional language has been added by which the test of adequacy of the description is whether it would be adequate in a mortgage of the real estate. As suggested in the Note, more detail may be required if there is a tract indexing system or a land registration system.

Where the debtor does not have an interest of record in the real estate, a fixture financing statement must show the name of a record owner, and Section 9-403(7) requires the financing statement to be indexed in the name of that owner. Thus the fixture financing statement will fit into the real estate search system.

6. A real estate mortgage may provide that it constitutes a security agreement with respect to fixtures (or other goods) in conformity with this Article. Combined mortgages on real estate and chattels are common and useful for certain purposes. This section goes further and makes provision that the recording of the real estate mortgage (if it complies with the requirements of a financing statement) shall constitute the filing of a financing statement as to the fixtures (but not, of course, as to the other goods). Section 9-403(6) makes the usual five-year maximum life for financing statements inapplicable to real estate mortgages which operate as financing statements under Section 9-402(6), and they are effective for the duration of the real estate recording.

Of course, if a combined mortgage covers chattels which are not fixtures, a regular chattel filing is necessary, and subsection (6) is inapplicable to such chattels. Likewise, filing as a "fixture filing" provided in Section 9-401 does not apply to true chattels.

7. Subsection (7) undertakes to deal with some of the problems as to who is the debtor. In the case of individuals, it contemplates filing

only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system. However, provision is made in Section 9-403(5) for indexing in a trade name if the secured party so desires.

Subsection (7) also deals with the case of a change of name of a debtor and provides some guidelines when mergers or other changes of corporate structure of the debtor occur with the result that a filed financing statement might become seriously misleading. Not all cases can be imagined and covered by statutes in advance; however, the principle sought to be achieved by the subsection is that after a change would be seriously misleading, the old financing statement is not effective as to new collateral acquired more than four months after the change, unless a new appropriate financing statement is filed before the expiration of the four months. The old financing statement, if legally still valid under the circumstances, would continue to protect collateral acquired before the change and, if still operative under the particular circumstances, would also protect collateral acquired within the four months. Obviously, the subsection does not undertake to state whether the old security agreement continues to operate between the secured party and the party surviving the corporate change of the debtor.

8. Subsection (7) also deals with a different problem, namely whether a new filing is necessary where the collateral has been transferred from one debtor to another. This question has been much debated both in pre-Code law and under the Code. This Article now answers the question in the negative. Thus, any person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it.

9. Subsection (8) is in line with the policy of this Article to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves. As an example of the sort of reasoning which this subsection rejects, see General Motors Acceptance Corporation v. Haley, 329 Mass. 559, 109 N.E.2d 143 (1952).

§ 25-9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer.

A lien by levy pursuant to judgment does not relate back to the filing date of the financing statement when the security interest has become unperfected by the lapse of time under subsection (2). Hassell v. First Pa. Bank, 41 N.C. App. 296, 254 S.E.2d 768 (1979).

1972 Official Comment

Prior Uniform Statutory Provision:
Sections 13(3), 13(4), Uniform Trust Receipts Act; Section 10, Uniform Conditional Sales Act.

Purposes:

1. Prior law was not always clear whether a mortgage filed for record gave constructive notice from the time of presentation to the filing officer or only from the time of indexing Subsection (1) adopts the former position.

2. Prior statutes have usually limited the effectiveness of a filing to a specified period of time after which refiling is necessary. Subsection (2) follows the same policy, establishing five years as the filing period, with an exception for the cases mentioned in subsection (6). Subsection (3) provides for the filing of one or more continuation statements (which need be signed only by the secured party) if it is desired to continue the effectiveness of the original filing.

The theory of this Article is that the public files of financing statements are self-clearing, because the filing officer may automatically discard each financing statement after a period of five years plus the year after lapse required by subsection (3), unless a continuation statement is filed, or the financing statement is still effective under subsection (6). This theory materially lessens the tension that would otherwise exist to have the files cleared by termination statements under Section 9-404. Similarly, a person searching the files need not go back past this five years plus one year; and if the indices are arranged by years, he has a limited and defined search problem. The section asks the filing officer to attach financing statements whose life has been continued by continuation statements to the latter statements, so that anything contained in the files of old years can be discarded.

Subsection (6) provides certain special filing rules, namely, filings against transmitting utilities (Section 9-105), for which financing

statements are filed in the office of the [Secretary of State]; and real estate mortgages which serve as fixture financing statements and which are filed in the real estate records. In both of these cases the financing statement is valid for the life of the obligations secured. No confusion as to the required scope of search should result, because of the special nature of the filings involved.

3. Under subsection (2) the security interest becomes unperfected when filing lapses. Thereafter, the interest of the secured party is subject to defeat by purchasers and lienors even though before lapse the conflicting interest may have been junior. Compare the situation arising under Section 9-103(1) (d) when a perfected security interest under the law of another jurisdiction is not perfected in this state within four months after the property is brought into this state.

Thus if A and B both make nonpurchase money advances against the same collateral, and both perfect security interest by filing, A who files first is entitled to priority under Section 9-312(5). But if no continuation statement is filed, A's filing may lapse first. So long as B's interest remains perfected thereafter, he is entitled to priority over A's unperfected interest. This rule avoids the circular priority which arose under some prior statutes, under which A was subordinate to the debtor's trustee in bankruptcy, A retained priority over B, and B's interest was valid against the trustee in bankruptcy. In re Andrews, 172 F.2d 996 (7th Cir. 1949).

4. Subsection (7) makes clear that the filings in real estate records (Sections 9-401 and 9-402(3) and (5)) shall be indexed in the real estate records, where they will be found by a real estate searcher. Where the debtor is not an owner of record, the financing statement must show the name of an owner of record, and the statement is to be indexed in his name. See Sections 9-313(4) (b) and (c); 9-402(3); 9-402(5).

§ 25-9-404. Termination statement.

Official Reasons for 1972 Change

The additions to subsection (1) require the filing of termination statements in the case of consumer goods even without a demand by the consumer. It is believed that consumers will frequently not understand the importance of making demand in order to clear the files. The scope of the change is not as great as might first appear, because (1) filing is not required for purchase money security interests in consumer goods, except in the case of motor vehicles (Section 9-302(1) (d)); and (2) perfection of security interest in most motor vehicles is governed by certificate of title laws, not by the provisions of Article 9.

The other changes are purely formal and tie in with corresponding changes in filing mechanics in other sections.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 12, Uniform Conditional Sales Act.

Purposes:

1. To provide a procedure for noting discharge of the secured obligation on the records and for noting that a financing arrangement has been terminated.

Since most financing statements expire in five years unless a continuation statement is filed (Section 9-403), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance of clearing the situation as it appears on file, an affirmative duty is put on the secured party in that case. But many purchase money security interests in consumer goods will not be filed, except for motor vehicles (Section 9-302(1) (d)); and in the case of motor vehicles a certificate of title law may control instead of the provisions of Article 9.

2. This section adds to the usual provisions one covering the problem which arises because a secured party under a notice filing system may file notice of an intention to make advances which may never be made. Under this section a debtor may require a secured party to send a termination statement when there is no outstanding obligation and no commitment to make future advances.

§ 25-9-405. Assignment of security interest; duties of filing officer; fees.

Official Reasons for 1972 Change

The changes are all conforming changes connecting with changes in mechanics in other sections of Part 4; with the addition of timber and minerals or the like (including oil and gas) at wellhead or minehead and accounts resulting from the sale thereof to the groups of collateral which must be filed and indexed in the real estate records; and with the provision (Section 9-402(6)) that a mortgage of real estate may act as a financing statement of fixtures.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:
This section provides a permissive device whereby a secured party who has assigned all or part of his interest may have the assignment noted of record. Note that under Section 9-302(2) no filing of such an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. A secured party who has assigned his interest might wish to have the fact noted of record, so that inquiries concerning the transaction would be addressed not to him but to the assignee (see Point 2 of Comment to Section 9-402). After a secured party has assigned his rights of record, the assignee becomes the "secured party of record" and may file a continuation statement under Section 9-403, a termination statement under Section 9-404, or a statement of release under Section 9-406.

Where a mortgage of real estate is effective as a financing statement filed as a fixture filing (Section 9-402(6)), then an assignment of record of the security interest may be made only in the manner in which an assignment of the mortgage may be made under the local state law.

§ 25-9-406. Release of collateral; duties of filing officer; fees.

Official Reasons for 1972 Change

The changes are merely conforming changes to changes in other sections.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:
Like the preceding section, this section provides a permissive device for noting of record any release of collateral. There is no requirement that such a statement be filed when collateral is released (cf. Section 9-404 on Termination Statements). It is merely a method of making the record reflect the true state of affairs so that fewer inquiries will have to be made by persons who consult the files.

If the statement of release is not signed by the secured party of record, the assignment procedure of Section 9-405(2) must be followed.

§ 25-9-407. Information from filing officer.

Official Reasons for 1972 Change

The change in this optional section is merely a conforming change to the changes in other sections.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. Subsection (1) requires the filing officer upon request to return to the secured party a copy of the financing statement on which the material data concerning the filing are noted. Receipt of such a copy will assure the secured party that the mechanics of filing have been complied with. Note, however, that under Section 9-403(1) the secured party does not bear the risk that the filing officer will not properly perform his duties: under that section the secured party has complied with the filing requirements when he presents his financing statement for filing and the filing fee has been tendered or the statement accepted by the filing officer.

2. Subsection (2) requires the filing officer on request to issue to any person who has tendered the proper fee his certificate as to what filings have been made against any particular debtor and to furnish copies of such filed financing statements. In view of the centralized filing system adopted by this Article (see Section 9-401 and Comment thereto), this provision is of obvious convenience to a person who wishes to know what the files contain but who cannot conveniently consult files located in the state capitol.

§ 25-9-408. Recording of financing statement and security agreement in lieu of filing.

Official Reasons for 1972 Adoption

This new section adapts the filing system of the Article to consignments and leases. Filing of consignments is required under certain conditions (Sections 2-326(3), 9-114). Filing of true leases which are not security interests (Section 1-201(37)) is not required; but because the question whether a lease is a true lease may be a close one, filing is permitted for leases.

1972 Official Comment

Prior Uniform Statutory Provisions:
None.

Purposes:

1. Where filing is required under Sections 2-326(3) and 9-114 for a consignment which is not a security interest (Section 1-201(37)), this section authorizes the appropriate adaptations of terminology.

Apart from the rules in Part 4, the rules of this article using the terms "debtor" and "secured party" will not apply to consignments if they are not security interests. Section 9-114 on consignments essentially parallels Section 9-312(3) on inventory priorities, and the latter rule therefore does not apply to consignments. Section 2-326 states the rights of creditors of a consignee who has not filed or otherwise complied with subsection (3), and Section 9-301 on unperfected security interests is therefore not applicable. Section 2-326 and the law of consignments supply rules which are provided by Section 9-311 for security interests and that section is therefore not applicable to consignments. For reasons indicated in the Comment to Section 9-114, Section 9-306 on proceeds is inapplicable to consignments. An equivalent to the protection of a buyer in ordinary course of business against a security interest under Section 9-307(1) is provided against consignments by Section 2-403(2) and (3).

2. If a lease is actually intended as security (Section 1-201(37)), this Article applies in full. But this question of intention is a doubtful one, and the lessor may choose to file for safety even while contending that the lease is a true lease for which no filing is required. This section authorizes filing with appropriate changes of terminology, and without affecting the substantive question of classification of the lease. If the lease is a true lease, none of the provisions of the Article is applicable to the lease as an interest in the chattel. Note, however, that the Article may be applicable to the lease in its aspect as chattel paper. See Section 9-105(b).

PART 5.

DEFAULT.

§ 25-9-501. Default; procedure when security agreement covers both real and personal property.

Applied in Hassell v. First Pa. Bank, 41 N.C. App. 296, 254 S.E.2d 768 (1979).

Official Reasons for 1972 Change

The change is purely technical, to clear up an ambiguity as to whether a debtor could after default agree on the time within which a sale might be held or the time after which a secured party might keep the goods in lieu of a sale.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 6, Uniform Trust Receipts Act; Sections 16 through 26, Uniform Conditional Sales Act.

Purposes:

1. The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction. These are the rights which distinguish the secured from the unsecured lender. This section and the following six sections state those rights as well as the limitations on their free exercise which legislative policy requires for the protection not only of the defaulting debtor but of other creditors. But subsections (1) and (2) make it clear that the statement of rights and remedies in this Part does not exclude other remedies provided by agreement.

2. Following default and the taking possession of the collateral by the secured party, there is no longer any distinction between the security interest which before default was non-possessory and that which was possessory under a pledge. Therefore no general distinction is taken in this Part between the rights of a non-possessory secured party and those of a pledgee; the latter, being in possession of the collateral at default, will of course not have to avail himself of the right to take possession under Section 9-503.

3. Section 9-207 states rights, remedies and duties with respect to collateral in the secured party's possession. That section applies not only to the situation where he is in possession before default, as a pledgee, but also, by subsections (1) and (2) of this section, to the secured party in possession after default. Nevertheless the relations of the parties have been changed by default, and Section 9-207 as it applies after default must be read together with this Part. In particular, agreements permitted under Section 9-207 cannot waive or modify the rights of the debtor contrary to subsection (3) of this section.

4. Section 1-102(3) states rules to determine which provisions of this Act are mandatory and which may be varied by agreement. In general, provisions which relate to matters which come up between immediate parties may be varied by agreement. In the area of rights after default our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties: no mortgage clause has ever been allowed to clog the equity of redemption. The default situation offers great scope for overreaching; the suspicious attitude of the courts has been grounded in common sense.

Subsection (3) of this section contains a codification of this longstanding and deeply rooted attitude: the specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions not specified in subsection (3) are subject to the general rules stated in Section 1-102(3).

5. The collateral for many corporate security issues consists of both real and personal property. In the interest of simplicity and speed subsection (4) permits, although it does not require, the secured party to proceed as to both real and personal property in accordance with his rights and remedies in respect of the real property. Except for the permission so granted, this Act leaves to other state law all questions of procedure with respect to real property. For example, this Act does not determine whether the secured party can proceed against the real estate alone and later proceed in a separate action against the personal property in accordance with his rights and remedies against the real estate. By such separate actions the secured party "proceeds as to both,"

and this Part does not apply in either action. But subsection (4) does give him an option to proceed under this Part as to the personal property.

6. Under subsection (1) a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure, outside this Article, which state law may provide. The first sentence of subsection (5) makes clear that any judgment lien which the secured party may acquire against the collateral is, so to say, a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore stated to relate back to the date of perfection of the security interest. The second sentence of the subsection makes clear that a judicial sale following judgment, execution and levy is one of the methods of foreclosure contemplated by subsection (1); such a sale is governed by other law and not by this Article and the restrictions which this Article imposes on the right of a secured party to buy in the collateral at a sale under Section 9-504 do not apply.

§ 25-9-502. Collection rights of secured party.

Burden on Secured Party Seeking Deficiency Judgment. — A secured party seeking a deficiency judgment under this section has the burden of establishing compliance with the twin duties of reasonable notification and commercially reasonable disposition. Placing the burden of persuasion on the secured party tends to insure that the deficiency sought has not been unnecessarily enhanced by abuses of the broad discretion accorded the secured party with respect to the disposition of collateral. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Quoted in Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

Official Reasons for 1972 Change

The change is only the deletion of the term "contract rights", which is being eliminated as a defined term under the Article.

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. The assignee of accounts, chattel paper, or instruments holds as collateral property which is not only the most liquid asset of the debtor's business but also property which may be collected without any interruption of the business, assuming it to continue after default. The situation is far different from that where the collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore the problems of valuation and identification, present where the collateral is tangible chattels, do not arise so sharply on the assignment of intangibles. Considerations, similar although not identical, apply to assignments of general intangibles, which are also covered by the rule of the section. Consequently, this section recognizes the fact that financing by assignment of intangibles lacks many of the complexities which arise after default in other types of financing, and allows the assignee to liquidate in the regular course of business by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i. e., payment by the account debtor to the assignee, "notification" financing) or indirect (i. e., payment by the account debtor to the assignor, "non-notification" financing). By agreement, of course, the secured party may have the right to give notice and to make collections before default.

2. In one form of accounts receivable financing, which is found in the "factoring" arrangements which are common in the textile industry, the assignee assumes the credit risk — that is, he buys the account under an agreement which does not provide for recourse or charge-back against the assignor in the event the account proves uncollectible. Under such an arrangement, neither the debtor nor his creditors have any legitimate concern with the disposition which the assignee makes of the accounts. Under another form of accounts receivable financing, however, the assignee does not assume the credit risk and retains a right of full or limited recourse or charge-back for uncollectible accounts. In such a case both

debtor and creditors have a right that the assignee not dump the accounts, if the result will be to increase a possible deficiency claim or to reduce a possible surplus.

3. Where an assignee has a right of charge-back or a right of recourse, subsection (2) provides that liquidation must be made with due regard to the interest of the assignor and of his other creditor — "in a commercially reasonable manner" (compare Section 9-504 and see Section 9-507(2)) — and the proceeds allocated to the expenses of realization and to the indebtedness. If the "charge-back" provisions of the assignment arrangement provide only for "charge-back" of bad accounts against a reserve, the debtor's claim to surplus and his liability for a deficiency are limited to the amount of the reserve.

4. Financing arrangements of the type dealt with by this section are between business men. The last sentence of subsection (2) therefore preserves freedom of contract, and the subsection recognizes that there may be a true sale of accounts or chattel paper although recourse exists. The determination whether a particular assignment constitutes a sale or a transfer for security is left to the courts. Note that, under Section 9-102, this Article applies both to sales and to security transfers of such intangibles.

§ 25-9-503. Secured party's right to take possession after default.

Editor's Note. —

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

Quoted in Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

1972 Official Comment

Prior Uniform Statutory Provision:
Section 6, Uniform Trust Receipts Act; Sections 16 and 17, Uniform Conditional Sales Act.

Purposes:

Under this Article the secured party's right to possession of the collateral (if he is not already in possession as pledgee) accrues on default unless otherwise agreed in the security agreement. This Article follows the provisions of the earlier uniform legislation in allowing the secured party in most cases to take possession without the issuance of judicial process. In the case of collateral such as heavy equipment, the physical removal from the debtor's plant and the storage of the equipment pending resale may be exceedingly expensive and in some cases impractical. The section therefore provides that in lieu of removal the lender may render equipment unusable or dispose of collateral on the debtor's premises. The authorization to render equipment unusable or to dispose of collateral without removal would not justify unreasonable action by the secured party, since, under Section 9-504(3), all his actions in connection with disposition must be taken in a "commercially reasonable manner".

§ 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.

Editor's Note. —

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

Public Sale Held Valid Despite Absence of Other Bidders. — A lender conducted a valid public sale of a repossessed automobile pursuant to a purchase money security agreement, notwithstanding the fact that no third persons bid at the sale, where the lender duly sent notice to the debtor in accord with subsection (3) of this section, and the sale was held as scheduled, at which time any person had the right to enter a bid on the automobile. Under § 25-9-605(1)(a), the sale need not be postponed because of the lack of bidders. Therefore, the transaction did not constitute a mere transfer of collateral under subsection (5) of this section and defendant dealer had no obligation to account to debtor for any surplus proceeds received through its subsequent resale of the automobile. Shields v. Bobby Murray

Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

Official Reasons for 1972 Change

Under the 1962 Code the secured party giving notice of sale had to notify (except in the case of consumer goods) not only every other person who had duly filed a financing statement indexed in the name of the debtor in the state and who still had a security interest in the collateral, but also any other person known by the secured party to have an interest in the collateral. This meant that the secured party had to search the records in every case of notice of sale, to ascertain whether there were any other secured parties with financing statements that might be deemed to cover the collateral in question. Moreover, he ran the risk that some informal communication by letter, or even orally, might be deemed to have given him knowledge of the interest of that other party. These burdens of searching the record and of checking the secured party's files were greater than the circumstances called for because as a practical matter there would seldom be a junior secured party who really had an interest needing protection in the case of a foreclosure sale. Therefore, a change is made requiring notice to persons other than the debtor only if such persons had notified the secured party in writing of their claim of an interest in the collateral before he sent his notification to the debtor or before the debtor's renunciation of his rights. Express provision is made to recognize the right of a debtor to renounce or modify his right to notice after, but not before, default. A corresponding change is made in Section 9-505.

1972 Official Comment

Prior Uniform Statutory Provision:

Section 6, Uniform Trust Receipts Act; Sections 19, 20, 21, and 22, Uniform Conditional Sales Act.

Purposes:

1. The Uniform Trust Receipts Act provides that an entruster in possession after default holds the collateral with the rights and duties of a pledgee, and, in particular, that he may sell such collateral at public or private sale with a right to claim deficiency and a duty to account for any surplus. The Uniform Conditional Sales Act insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the Trust Receipts Act. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods (Section 2-706). Subsection (1) does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of—subject of course to the general requirement of subsection (2) that all aspects of the disposition be "commercially reasonable". Section 9-507(2) states some tests as to what is "commercially reasonable".

2. Subsection (1) in general follows prior law in its provisions for the application of proceeds and for the debtor's right to surplus and liability for deficiency. Under paragraph (1) (c) the secured party, after paying expenses of retaking and disposition and his own debt, is required to pay over remaining proceeds to the extent necessary to satisfy the holder of any junior security interest in the same collateral if the holder of the junior interest has made a written demand and furnished on request reasonable proof of his interest: this provision is necessary in view of the fact that under subsection (4) the junior interest is discharged by the disposition. Since the requirement is conditioned on written demand, it should not result in undue burden on the secured party making the disposition. It should be noted also that under Section 9-112 where the secured party knows that the collateral is owned by a person who is not the debtor, the owner of the collateral and not the debtor is entitled to any surplus.

3. In any security transaction the debtor (or the owner of the collateral if other than the debtor: see Section 9-112) is entitled to any surplus which results from realization on the collateral; the debtor will also, unless otherwise agreed, be liable for any deficiency. Subsection (2) so provides. Since this Article covers sales of certain intangibles as well as transfers for security, the subsection also provides that apart from agreement the right to surplus or liability for deficiency does not accrue where the transaction between debtor and secured party was a sale and not a security transaction.

4. Subsection (4) provides that a purchaser for value from a secured party after default takes free of any rights of the debtor and of the holders of junior security interests and liens, even though the secured party has not complied with the requirements of this Part or of any judicial proceedings. This subsection follows a similar provision in the Uniform Trust Receipts Act and in the section of this Act on resale by a seller (Section 2-706). Where the purchaser for value has bought at a public sale he is protected under paragraph (a) if he has no knowledge of any defects in the sale and was not guilty of collusive practices. Where the purchaser for value has bought at a private sale he must, to receive the protection of paragraph (b), qualify in all respects as a purchaser in good faith. Thus while the purchaser at a private sale is required to proceed in the exercise of good faith, the purchaser at public sale is protected so long as he is not acting in bad faith, and is put under no duty to inquire into the circumstances of the sale.

5. Both the Uniform Trust Receipts Act and the Uniform Conditional Sales Act required a waiting period after repossession and before sale (five days in the Trust Receipts Act, ten days in the Conditional Sales Act). Under subsection (3), the secured party in most cases is required to give reasonable notification of disposition to the debtor unless the debtor has after default signed a statement renouncing or modifying his right to notification of sale.

The secured party must also (except for consumer goods) give notice to any other secured parties who have in writing given notice of a claim of an interest in the collateral. This latter notice must be given before the debtor renounces his rights or before the secured party gives his notification to the debtor. Compare Section 9-505(2). Except for the requirement of notification there is no statutory period during which the collateral must be held before disposition. "Reasonable notification" is not defined in this Article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire.

6. Section 19 of the Uniform Conditional Sales Act required that sale be made not more than thirty days after possession taken by the conditional vendor. The Uniform Trust Receipts Act contained no comparable provision. Here again this Article follows the Trust Receipts Act, and no period is set within which the disposition must be made, except in the case of consumer goods which under Section 9-505(1) must in certain instances be sold within ninety days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this Article to encourage disposition by private sale through regular commercial channels. It may, for example, be wise not to dispose of goods when the market has collapsed, or to sell a large inventory in parcels over a period of time instead of in bulk. Note, however, that under subsection (3) every aspect of the sale or other disposition of the collateral must be commercially reasonable; this specifically includes method, manner, time, place and terms. See Section 9-507(2). Under that provision a secured party who without proceeding under Section 9-505(2) held collateral a long time without disposing of it, thus running up large storage charges against the debtor, where no reason existed for not making a prompt sale, might well be found not to have acted in a "commercially reasonable" manner. See also Section 1-203 on the general obligation of good faith.

§ 25-9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation.

Official Reasons for 1972 Change

Under subsection (2) of this section the secured party may in lieu of sale give notice to the debtor and certain other persons that he proposes to retain the collateral in lieu of sale. Under the 1962 Code the other persons were the same as those who were entitled to notice of sale under Section 9-504(3), and such other persons are limited by the change in the same fashion as they were limited in Section 9-504(3) and for the same reasons. See the Reasons for Change under Section 9-504.

1972 Official Comment

Prior Uniform Statutory Provision:

Section 23, Uniform Conditional Sales Act.

Purposes:

1. Experience has shown that the parties are

frequently better off without a resale of the collateral; hence this section sanctions an alternative arrangement. In lieu of resale or other disposition, the secured party may propose under subsection (2) that he keep the collateral as his own, thus discharging the obligation and abandoning any claim for a deficiency. This right may not be exercised in the case of consumer goods where the debtor has paid 60% of the price or obligation and thus has a substantial equity, and may be exercised in other cases only on notification to the debtor, unless the debtor has signed after default a statement renouncing or modifying his rights under this section, and (except in the case of consumer goods) to any other secured party who has given written notice of a claim of an interest in the collateral. In the latter case, notice must be given before the secured party receives the debtor's renunciation or before he sends his notice to the debtor. The secured party may keep the goods in lieu of sale on failure of anyone receiving notification to object within twenty-one days.

2. When an objection is received by the secured party he must then proceed to dispose of the collateral in accordance with Section 9-504, and on failure to do so would incur the liabilities set out in Section 9-507. In the case of consumer goods where 60% of the price or obligation has been paid the disposition must be made within 90 days after possession taken. For failure to make the sale within the 90-day period the secured party is liable in conversion or alternatively may incur the liabilities set out in Section 9-507.

In the absence of objection the secured party is bound by his notice.

3. After default (but not before) a consumer-debtor who has paid 60% of the cash price may sign a written renunciation of his rights to require resale of the collateral.

§ 25-9-506. Debtor's right to redeem collateral.

1972 Official Comment

Prior Uniform Statutory Provision:
Section 18, Uniform Conditional Sales Act.

Purposes:

Except in the case stated in Section 9-505(1) (consumer goods) the secured party is not required to dispose of collateral within any stated period of time. Under this section so long as the secured party has not disposed of collateral in his possession or contracted for its disposition, and so long as his right to retain it has not become fixed under Section 9-505(2), the debtor or another secured party may redeem. The debtor must tender fulfillment of all obligations secured, plus certain expenses: if the agreement contains a clause accelerating the entire balance due on default in one installment, the entire balance would have to be tendered. "Tendering fulfillment" obviously means more than a new promise to perform the existing promise; it requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured. If unmatured obligations remain, the security interest continues to secure them as if there had been no default.

Under Section 9-504 the secured party may make successive sales of parts of the collateral in his possession. The fact that he may have sold or contracted to sell part of the collateral would not affect the debtor's right under this section to redeem what was left. In such a case, of course, in calculating the amount required to be tendered the debtor would receive credit for net proceeds of the collateral sold.

§ 25-9-507. Secured party's liability for failure to comply with this Part.

Editor's Note. —

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

Applied in Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

1972 Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. The principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (Section 1-203) and in a commercially reasonable manner see Section 9-504. In the case where he proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted. The section further provides for damages where the unreasonable disposition has been concluded, and, in the case of consumer goods, states a minimum recovery.

A case may be put in which the liquidation value of an insolvent estate would be enhanced by disposing of all the debtor's property (including that subject to a security interest) in the liquidation proceeding and in which, if a secured party repossesses and sells that part of the property which he holds as collateral, the remainder will have little or no resale value. In such a case the question may arise whether a particular court has the power to control the manner of disposition, although reasonable in other respects, in order to preserve the estate for the benefit of creditors. Such a power is no doubt inherent in a Federal bankruptcy court, and perhaps also in other courts of equity administering insolvent estates. Traditionally it was not exercised where the secured party claimed under a title retention device, such as conditional sale or trust receipt. See In re Lake's Laundry, Inc., 79 F.2d 326 (2d Cir. 1935) and the remarks of Clark, J., concurring, in In re White Plains Ice Service, Inc., 109 F.2d 913 (2d Cir. 1940). It has been held that distinctions in results based on these distinctions in form have been made obsolete by this Article. In re Yale Express System, Inc., 370 F.2d 433 (2d Cir. 1966), 384 F.2d 990 (2d Cir. 1967).

2. In view of the remedies provided the debtor and other creditors in subsection (1) when a secured party does not dispose of collateral in a commercially reasonable manner, it is of great importance to make clear what types of disposition are to be considered commercially reasonable, and in an appropriate case to give the secured party means of getting, by court order or negotiation with a creditors' committee or a representative of creditors, approval of a proposed method of disposition as a commercially reasonable one. Subsection (2) states rules to assist in the determination, and provides for such advance approval in appropriate situations. One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer — a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of subsection (2). However, none of the specific methods of disposition set forth in subsection (2) is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable.

Part 6.

Public Sale Procedures.

§ 25-9-601. Disposition of collateral by public sale.

Editor's Note. —

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

Constitutionality of Presumption of Commercial Reasonableness. — There is no merit to the contention of defendants that the presumption of commercial reasonableness created by this section denies them the opportunity to contest the reasonableness of a public sale of collateral by a secured party and thereby deprives them of their property without

procedural due process in violation of Art. I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. The mandate of procedural due process contained in the Constitution and in the Fourteenth Amendment applies only to actions by the government which deprive individuals of their fundamental rights. The presumption of commercial reasonableness created by this section does not constitute "state action" in the constitutional sense. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

§ 25-9-602. Contents of notice of sale.

Editor's Note. —

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

§ 25-9-603. Posting and mailing notice of sale.

Editor's Note. —

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

"Actual Address". — An "actual address" of a debtor, as used in this section, is an address where a notice of sale could reasonably be expected to be received by the addressee in the ordinary course of the mails. Whether an address utilized by a creditor is an "actual address" of a debtor is a determination which must be made on the basis of circumstances known to, or which should have been known to, the creditor at the time the notice of sale was mailed. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

No Requirement to Insure Notice Actually Received. — Substantial compliance is the prescribed standard in determining whether the procedures outlined in this section have been followed, and the secured party is not required to insure that the notice of sale is actually received by the debtor. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Effect of Substantial Compliance with Notice Procedures. — If the secured party who seeks a deficiency judgment can establish that he gave notice of a public sale of collateral in a manner which substantially complies with the procedures of Part 6 of Article 9, he is not required to further establish that the sale was commercially reasonable. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Judgment N.O.V. Property Granted on Question of Commercial Reasonableness. — In an action to recover a deficiency after a sale of collateral, where the record in the case reveals that plaintiff's evidence is manifestly credible and establishes as a matter of law that plaintiff mailed notice of sale to an "actual address" of the debtors in substantial compliance with this section, judgment n.o.v. for plaintiff on the question of commercial reasonableness was properly granted. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Cited in Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979).

§ 25-9-604. Exception as to perishable property.

Editor's Note. —

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

§ 25-9-605. Postponement of public sale.

Editor's Note. —

For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

Under subdivision (1)(a), the sale need not be postponed because of the lack of bidders. Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980).

§ 25-9-606. Procedure upon dissolution of order restraining or enjoining sale.

Editor's Note. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

§ 25-9-607. Disposition of proceeds of sale.

Editor's Note. — For comment, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina," see 15 Wake Forest L. Rev. 71 (1979).

Article 11.

1975 Amendatory Act — Effective Date and Transition Provisions.

§ 25-11-101. Effective date.

Discussion of Section 11-101. An effective date substantially after enactment is advisable to allow ample time for refilings as required.

§ 25-11-102. Preservation of old transition provisions.

Discussion of Section 11-102. This section may be necessary in states in which the U.C.C. has only recently been effective. It preserves the principle of Section 10-102(2) of the 1962 Code that pre-Code transactions continue to be governed by pre-Code law. A different principle is set forth in this Article 11 for transition problems between the [old Code] and the [new Code], because the changes are not nearly as great. That principle is that the [new Code] governs (with minor exceptions).

§ 25-11-103. Transition to new article 9; general rule.

Discussion of Section 11-103. This makes the [new Code] applicable to existing security interests, e. g., the revised notice provisions of Part 5 will apply to existing security interests. This would be so even if a 30-day notice period concerning retention of the collateral in lieu of sale were running on the effective date of the [new Code].

Suppose that a security interest attached in State A and the secured party filed in State B and assumed that he had 30 days to have the goods reach State B, in a non-purchase money case, under Section 9-103(3) of the [old Code]. Section 9-103(1) (c) of the [new Code] limits the 30-day provision on intended removals to purchase money cases. So long as an ample period of waiting and familiarization is allowed under Section 11-101, this should cause no practical problem.

The "except" clause at the end is necessary because of the possibility that new financing statements would have to be filed in different offices.

§ 25-11-104. Transition provisions on change of requirement of filing.

Discussion of Section 11-104. This covers the case of a purchase money security interest in consumer goods, which would not have had to be filed under the original Code if the goods had not been fixtures. Under the [new Code] the security interest will be perfected without filing, subject to the rights of real estate parties. Section 9-301(1)(d).

This also covers the case of factory or office machinery or replacement consumer goods appliances where the filing of a financing statement under the original Code in the

regular chattel files was invalid because the goods were fixtures, but under the [new Code] that filing would be proper.

Under the [old Code] the status of assignments of revenues and similar collateral for governmental obligations was unclear. Section 9-104(e) of the [new Code] will make clear that Article 9 does not apply to these transfers. Section 11-108 of this draft may apply on the theory that the changes made by the [new Code] are considered to be merely declaratory. If this does not dispose of the matter, and if it might sometime be held that an assignment by a municipality had been ineffective for lack of filing, this provision would then apply from the effective date of the [new Code].

§ 25-11-105. Transition provisions on change of place of filing.

Discussion of Section 11-105. Subsection (1): All existing financing statements with a duration of less than 5 years are extended to the full 5 years. In the case of transmitting utilities for which a special rule of longer validity had been provided, the special rule will be continued.

Subsection (2) makes clear that all existing financing statements and continuations on the effective date remain valid for the remainder of the five years *as to existing collateral,* even though the appropriate place for filing may have changed under the new rules for accounts, general intangibles, etc. The existing filings also apply to new collateral acquired after the effective date, unless the appropriate filing place is different under the new rules. In that case there will have to be a new filing on the effective date to catch new collateral.

Subsection (3): A continuation statement may be filed after the effective date, but if the appropriate places under the new rules are different, the filing should be a financing statement.

Subsection (4) retroactively validates real estate mortgage recording as fixture filing.

§ 25-11-106. Required refilings.

Discussion of Section 11-106. Subsection (1) covers farm equipment perfected without filing. The three-year period ought to cover most existing transactions. It also applies to equipment trusts, and would appear to allow three years for filing. But generally filing under Article 9 for equipment trusts is excluded by Section 9-302(3), and the old pre-amendment filing under the Interstate Commerce Act will continue to serve the purpose.

Subsection (2) covers transmitting utility statutes and the like which were *outside the Code,* and provided for indefinite duration. It allows three years for refiling. But perfection under a certificate of title law or the like continues to be effective.

Some states dealt with transmitting utilities by *internal amendment* of the Code to permit filing which was good indefinitely. Section 11-105(1) operates to validate those filings indefinitely even though they may not have been in the Secretary of State's office.

Similarly, Section 11-105(1) would preserve the effect of Ohio's present Section 9-403(2), which in effect makes financing statements related to combined real estate and chattel mortgages good for the duration of the real estate mortgage, whether or not the chattels are fixtures.

Subsection (3) covers the case (if any) where a prior transmitting utility provision outside the Code had a filing of limited duration.

Subsection (4) covers a case where an ordinary continuation statement cannot be filed because the original filing was a non-Code filing or was a Code filing in a different filing office. It was thought advisable to use the concept of financing statement rather than the concept of continuation statement for these fact situations.

§ 25-11-107. Transition provisions as to priorities.

Discussion of Section 11-107. Most questions of priority can be broken down to questions between two parties, and the rule is that the [new Code] applies unless the rights of both parties were fixed under the [old Code].

If a creditor acquires knowledge of an unfiled security interest before the effective date of the [new Code], but gets his judgment after the effective date, the rule of the [new Code] governs, since he has no rights until after judgment and levy.

§ 25-11-108. Presumption that rule of law continues unchanged.

Discussion of Section 11-108. This asserts that the new Code is declaratory, except where a change is clearly intended. This is an effort to minimize transitional problems.

Chapter 25A.

Retail Installment Sales Act.

Sec.

25A-15. Finance charge rates for consumer credit installment sale contracts.

§ 25A-2. "Consumer credit sale" defined.

Transaction Held Not Consumer Credit Sale. — A transaction whereby the seller would forbear collection of an amount due from the buyer on an open-end credit plan and reduce interest rates, and the buyer would execute a promissory note to the seller and give the seller a deed of trust on a farm to secure the note was not a "consumer credit sale" within the meaning of this section, but rather constituted a novation of the old agreement. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

§ 25A-15. Finance charge rates for consumer credit installment sale contracts.

(b) Except as hereinafter provided, the finance charge rate for a consumer credit installment sales contract may not exceed:

(1) Twenty-two percent (22%) per annum where the amount financed is less than one thousand five hundred dollars ($1,500),

(2) Twenty percent (20%) per annum where the amount financed is one thousand five hundred dollars ($1,500) or greater, but less than two thousand dollars ($2,000),

(3) Eighteen percent (18%) per annum where the amount financed is two thousand dollars ($2,000) or greater, but less than three thousand dollars ($3,000),

(4) Sixteen percent (16%) per annum where the amount financed is three thousand dollars ($3,000) or greater,

(5) Repealed by Session Laws 1979, 2nd Sess., c. 1330, s. 2.

except that a minimum finance charge of five dollars ($5.00) may be imposed. (1979, 2nd Sess., c. 1330, ss. 1, 2.)

Editor's Note. — The 1979, 2nd Sess., amendment deleted "but less than five thousand dollars ($5,000), and" at the end of subdivision (4) of subsection (b), and deleted subdivision (5), which read: "Fourteen percent (14%) per annum where the amount financed is five thousand dollars ($5,000) or greater,".

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

For article calling for a comprehensive federal consumer credit code, see 58 N.C.L. Rev. 1 (1979).

Subsection (d) Not Applicable to Novation. — Where the transaction in question was not a "consumer credit sale" under this Chapter but a novation, the restrictions of subsection (d) of this section would not be applicable. Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

§ 25A-23. Collateral taken by the seller.

Cited in Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

§ 25A-44. Remedies and penalties.

Cited in Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977).

Chapter 28A.

Administration of Decedents' Estates.

Article 17.

Sales, Leases or Mortgages of Real Property.

Sec.
28A-17-12. Sale, lease or mortgage of real property by heirs or devisees.

Article 22.

Distribution.

Sec.
28A-22-9. Distribution to known but unlocated devisees or heirs.

Article 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

Jurisdiction Exclusive. — In this State, the clerk is given exclusive original jurisdiction of the administration, settlement and distribution of estates except in cases where the clerk is disqualified to act. In re Estate of Snipes, 45 N.C. App. 79, 262 S.E.2d 292 (1980).

The right, time and manner, and effect of the filing and recording of a dissent to a will are all matters within the probate jurisdiction of the clerk. In re Estate of Snipes, 45 N.C. App. 79, 262 S.E.2d 292 (1980).

Article 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-2. Persons disqualified to serve as personal representative.

Stated in Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980).

Article 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-3. Powers of a personal representative or fiduciary.

Quoted in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

Article 14.

Notice to Creditors.

§ 28A-14-3. Personal notice to creditors.

Cited in Anderson v. Gooding, 43 N.C. App. 611, 259 S.E.2d 398 (1979).

ARTICLE 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

Stated in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 28A-15-2. Title and possession of property.

Quoted in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

ARTICLE 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

Stated in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 28A-17-12. Sale, lease or mortgage of real property by heirs or devisees. — (a) If the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 occurs within two years after the death of the decedent:

(1) All sales, leases or mortgages of real property by heirs or devisees of any resident or nonresident decedent made after the death of the decedent and before the first publication or posting of the general notice to creditors are void as to creditors and personal representatives; and

(2) All sales, leases or mortgages of real property by heirs or devisees of any resident or nonresident decedent made after such first publication or posting and before approval of the final account shall be void as to creditors and personal representatives unless the personal representative joins in the sale, lease or mortgage.

(1979, 2nd Sess., c. 1246, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted "and the transaction is approved by the clerk of superior court" at the end of subdivision (2) of subsection (a), and deleted the former second sentence of subdivision (2) of subsection (a), which detailed the manner in which the approval by the clerk of superior court was to have been manifested.

Session Laws 1979, 2nd Sess., c. 1246, s. 2, provides: "This act shall become effective on July 1, 1980, and shall apply only to the administration of estates of decedents dying on or after that date."

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

Applied in Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843, cert. denied, 298 N.C. 298, 259 S.E.2d 300 (1979).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

I. IN GENERAL.

Stated in Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980); Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980).

IV. DISTRIBUTION OF RECOVERY.

Action Not Abated upon Death of Primary Beneficiary. — Although the Wrongful Death Act was amended drastically in some respects in 1969, there was absolutely no change in the basic portions allowing the action and providing for the disposition of the recovery. There is nothing in the amended statute which would, in any way, indicate any intent on the part of the legislature that a wrongful death action should abate upon the death of the primary beneficiary pending determination of the action. Willis v. Duke Power Co., 42 N.C. App. 582, 257 S.E.2d 471 (1979).

§ 28A-18-3. To sue or defend in representative capacity.

Cited in Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-3. Limitations on presentation of claims.

Applied in Anderson v. Gooding, 43 N.C. App. 611, 259 S.E.2d 398 (1979).

ARTICLE 22.

Distribution.

§ 28A-22-9. Distribution to known but unlocated devisees or heirs. — (a) If there are known but unlocated devisees or heirs, the personal representative may deliver the share of such devisee or heir to the clerk of superior court immediately prior to filing of the final account. If the devisee or heir is located after the final account has been filed, he may present a claim for the share to the clerk. If the clerk determines that the claimant is entitled to the share, he shall deliver the share to the devisee or claimant. If the clerk denies the claim, the claimant may take an appeal as in a special proceeding.

(b) The clerk shall hold the share without liability for profit or interest. If no claim has been presented within a period of five years after the filing of the final account, the clerk shall deliver the share to the State Treasurer as abandoned property.

(c) The clerk shall not be required to publish any notice to such devisee or heir and shall not be required to report such share to the State Treasurer. If the devisee or heir is located, the clerk shall inform the devisee or heir that he is entitled to file a claim with the State Treasurer for the share under the provisions of G.S. 116B-34(a). (1979, 2nd Sess., c. 1311, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1311, s. 2, makes the act effective January 1, 1981.

Article 26.

Foreign Personal Representatives and Ancillary Administration.

§ 28A-26-3. Ancillary administration.

Stated in Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980).

Chapter 29.

Intestate Succession.

Article 1.

General Provisions.

§ 29-2. Definitions.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Article 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

Statute Does Not Violate Equal Protection. —

The statutory scheme established by this section and the other statutes referred to herein (§§ 49-14 through 49-16, and § 52-6(c)) does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Interest of State, etc. —

This section and the other statutes referred to herein (§§ 49-14 through 49-16, and § 52-6(c)), insofar as they provide that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father and otherwise in accord with those applicable statutes, establish a statutory scheme which bears an evident and substantial relation to the permissible and important interest of the State in providing for the just and orderly disposition of property at death. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Article 7.

Advancements.

§ 29-23. In general.

Applied in Thompson v. Soles, 299 N.C. 484, 263 S.E.2d 599 (1980).

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

§ 30-1. Right of dissent.

Cited in Moore v. Jones, 44 N.C. App. 578, 261 S.E.2d 289 (1980).

§ 30-3. Effect of dissent.

Cited in Moore v. Jones, 44 N.C. App. 578, 261 S.E.2d 289 (1980).

Article 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.

Editor's Note. —
For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

Part 3. Assigned in Superior Court.

§ 30-27. Surviving spouse or child may apply to superior court.

Editor's Note. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

§ 30-31. Duty of commissioners; amount of allowance.

Editor's Note. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

Chapter 31.

Wills.

Article 1.

Execution of Will.

§ 31-3.2. Kinds of wills.

Editor's Note. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

Article 2.

Revocation of Will.

§ 31-5.5. After-born or after-adopted child; illegitimate child; effect on will.

Stated in Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Article 4A.

Self-Proved Wills.

§ 31-11.6. How attested wills may be made self-proved.

Editor's Note. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

Article 7.

Construction of Will.

§ 31-40. What property passes by will.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Chapter 31A.

Acts Barring Property Rights.

Article 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

This chapter preserved the common law, etc. —

In accord with 2nd paragraph in original. See Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

Chapter 32.

Fiduciaries.

Article 3.

Powers of Fiduciaries.

§ 32-26. Incorporation by reference of powers enumerated in § 32-27; restriction on exercise of such powers.

Cited in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 32-27. Powers which may be incorporated by reference in trust instrument.

Sale of Real Property Devised to Testator's Son. — Where a will granted the executor all of the power set forth in this section, neither the will nor this section gave the executor the authority to sell real property devised to the testator's minor son without prior court approval, since the title to the real property vested in the devisee son upon the testator's death, and the executor did not "hold" the property and it was not "at his disposal" within the meaning of this section. See Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

Chapter 36A.

Trusts and Trustees.

Article 1.

Investment and Deposit of Trust Funds.

§ 36A-2. Investment; prudent man rule.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 36A-6. Employee trusts.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Article 2.

Removal of Fiduciary Funds.

§ 36A-13. Removal of fiduciary funds from this State.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

Article 5.

Uniform Trusts Act.

§ 36A-74. Contracts of trustee.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

Article 9.

Alienability of Beneficial Interest; Spendthrift Trust.

§ 36A-115. Alienability of beneficiary's interest; spendthrift trusts.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Chapter 39.

Conveyances.

Article 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Applied in Crawford v. Wilson, 43 N.C. App. 69, 257 S.E.2d 696 (1979).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

Editor's Note. —
For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Legislative Intent. —
In accord with 1979 Cum. Supp. See Johnson v. Burrow, 42 N.C. App. 273, 256 S.E.2d 811 (1979).

§ 39-6. Revocation of deeds of future interests made to persons not in esse.

Editor's Note. —
For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Applied in Wachovia Bank & Trust Co. v. Sevier, 41 N.C. App. 762, 255 S.E.2d 636, cert. denied, 298 N.C. 304, 259 S.E.2d 305 (1979).

§ 39-6.1. Validation of deeds of revocation of conveyances of future interests to persons not in esse.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 39-6.2. Creation of interest or estate in personal property.

Editor's Note. —
For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7.1. Certain instruments affecting married woman's title not executed by husband validated.

Editor's Note. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

In determining the validity of a 1922 deed from a wife to a husband which was required to be in writing and acknowledged before a certifying officer who was required to make a private examination of the wife touching upon her voluntary execution of the contract, where the only omission was the certificate that the deed was not unreasonable or injurious to her and the deed was in all other respects regular, and there was no contention that there was any defect in the premises, the granting clause, the description, the habendum, or the warranties or that there was anything about the deed which was not regular except the lack of the certificate of the certifying officer as to injury or unreasonableness, this was certainly one of the situations to which this section was intended to apply. Otherwise, the curative statute would be stripped of all meaning. The deed was validated by subsection (b) of this section. Johnson v. Burrow, 42 N.C. App. 273, 256 S.E.2d 811 (1979).

§ 39-13.3. Conveyances between husband and wife.

Cited in Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

Cited in Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

II. WHAT CONVEYANCES FRAUDULENT.

A. In General.

Rule Stated. —
In accord with original. See Wurlitzer Distrib. Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688 (1980).

Chapter 40.

Eminent Domain.

Article 1.

Right of Eminent Domain.

§ 40-2. By whom right may be exercised.

Cited in Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225 (1979).

Article 2.

Condemnation Proceedings.

§ 40-14. Service where parties unknown.

Service by publication in condemnation proceeding by United States held inadequate. — See United States v. Chatham, 323 F.2d 95 (4th Cir. 1963).

When service by publication inadequate. — Service by publication is not an adequate substitute for actual notice, when giving actual notice to identified parties is neither impossible; impractical, nor unreasonable. United States v. Chatham, 323 F.2d 95 (4th Cir. 1963).

When condemnation plaintiffs take the easy course, they should not be heard to say that the proceedings had upon published notice addressed to unknown persons foreclosed the rights of interested parties who were readily identifiable and easily served, particularly when the condemnation plaintiff knew, or should have known, that the unidentified persons had a substantial interest in the litigation. United States v. Chatham, 323 F.2d 95 (4th Cir. 1963).

§ 40-19. Exceptions to report; hearing; appeal; when title vests; restitution.

Stay of Entry within Discretion of Trial Court. — Trial court in an eminent domain proceeding did not err in refusing to stay petitioner's entry upon the land pending appeal, where petitioner had deposited with the clerk the full amount of compensation awarded by the commissioners; though the trial court was empowered to stay petitioner's entry upon the land, it was not required to do so; it lies in the sound discretion of the trial court to determine whether a temporary restraining order should be granted. Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225 (1979).

Chapter 41.

Estates.

§ 41-1. Fee tail converted into fee simple.

I. GENERAL CONSIDERATION.

Editor's Note. —
For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Change of Joint Account. — Where plaintiff and his former wife executed a joint account agreement with right of survivorship pursuant to this section, the joint account could be changed only by the signatures of all the parties to the joint account agreement or by one party's withdrawing the complete account and opening a new account. This section does not permit only one of the joint tenants of the account in question to change it from the original agreement executed by both parties to the detriment of the other. Benfield v. First Fed. Sav. & Loan Ass'n, 44 N.C. App. 371, 261 S.E.2d 150 (1979).

Cited in Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

§ 41-4. Limitations on failure of issue.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Editor's Note. —
For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-6.1. Meaning of "next of kin."

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-11. Sale, lease or mortgage in case of remainders.

I. GENERAL CONSIDERATION.

Editor's Note. —
For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-12. Sales or mortgages of contingent remainders validated.

Editor's Note. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Chapter 42.

Landlord and Tenant.

Article 1.

General Provisions.

§ 42-14. Notice to quit in certain tenancies.

Cited in Goler Metropolitan Apts., Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979).

Article 3.

Summary Ejectment.

§ 42-30. Judgment by confession or where plaintiff has proved case.

Applied in Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980).

§ 42-33. Rent and costs tendered by tenant.

Applied in Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979).

§ 42-36. Damages to tenant for dispossession, if proceedings quashed, etc.

Eviction of Tenant in Federally Subsidized Low-Income Housing Project. — A tenant in a federally subsidized low-income housing project has an "entitlement" to continued occupancy and cannot be evicted until certain procedural protections have been afforded him. Where a tenant, upon eviction was not afforded Housing and Urban Development eviction procedures, tenant's tenancy continued as a month-to-month tenancy without interruption. Pursuant to this section, the damages of the tenant which proximately flowed from her wrongful eviction were the loss of her security deposit, her moving expenses, the cost of transfer and storage of her furniture, and the loss of her entitlement to federal rental subsidy payments from the times of her eviction until she obtained a reversal of the eviction order. Goler Metropolitan Apts., Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979).

Chapter 43.

Land Registration.

Article 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Editor's Note. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

Article 3.

Procedure for Registration.

§ 43-10. Notice of petition published.

Sufficiency of Short Form of Description. — Where the notice is required to contain a short form of description of the property, it is sufficient if it clearly calls the attention of adjoining owners or others interested to the particular property intended and need not contain all of the elements of a full description. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Reference to County Public Registry for Description Insufficient. — Where notice published in county newspaper under this section simply says where in the county public registry a description of the land in question may be found, the notice by publication is inadequate to give the notice required by statute. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

§ 43-11. Hearing and decree.

Contested proceedings, etc. — Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by subdivisions (a), (b), and (c) of this section; the same rules for proving title apply in these actions as in ejectment and other actions involving the establishment of land titles. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Article 4.

Registration and Effect.

§ 43-17. New certificate issued, if original lost.

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Article 5.

Adverse Claims and Corrections after Registration.

§ 43-26. Limitations.

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Chapter 44A.

Statutory Liens and Charges.

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Editor's Note. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

§ 44A-10. Effective date of liens.

Editor's Note. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979). For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

Complaint held insufficient to state claim under subcontractor's lien theory. — See Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979).

Chapter 45.

Mortgages and Deeds of Trust.

Article 7.

Instruments to Secure Future Advances and Future Obligations.

Sec.

45-75 to 45-79. [Reserved.]

Article 8.

Instruments to Secure Certain Home Loans.

Sec.

45-80. Priority of security instruments securing certain home loans.

ARTICLE 2A.

Sales under Power of Sale.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

Editor's Note. —

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

Waiver of Notice. — Where a party to a foreclosure hearing argues that he received no notice of the hearing, but the record on appeal shows that he was present at the hearing and participated in it, that party waived notice of the foreclosure hearing. In re Norton, 41 N.C. App. 529, 255 S.E.2d 287 (1979).

Cited in Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980).

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

Applied in Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980).

Cited in Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979).

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

Applied in Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

Editor's Note. —

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

This section is not available as a defense to nonmortgagor defendants in an action to recover the balance due on a promissory note. Only a party with an interest in the mortgaged property may assert this section as a bar to the action. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

Editor's Note. —

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For note on purchase-money mortgages and suit on the note, see 15 Wake Forest L. Rev. 822 (1979).

The benefits of this section cannot be waived; it effects the broad public purpose of abolishing deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient fund to satisfy the indebtedness secured, and the protection it offers is afforded to all purchasers of realty who secure any part of the purchase price with a deed of trust on the realty they are purchasing. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

The protection of the anti-deficiency judgment statute was designed for the benefit of the general public and was not intended to be merely a right which could be waived, or which purchasers could be compelled to waive as a prerequisite for obtaining financing. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

And the doctrine of estoppel will not deprive a defendant of his right to assert this section in his defense to a deficiency proceeding; where a purchaser able, either by his action or by contract, to deny to himself the protection afforded him by the legislature, it would be to allow by indirection that which was directly forbidden. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

Leasehold Interest Is Outside Scope of Section. — The protection provided by this section only applies to transactions involving the sale of real property; where there was no sale of real property, but only an assignment for valuable consideration of a leasehold interest, the protection provided by this section does not apply. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638, cert. granted, 297 N.C. 698, 259 S.E.2d 295 (1979).

A lease is a species of personal property and is therefore outside the scope of the anti-deficiency statute. Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980).

Thus, this section does not prohibit an in personam action based upon an underlying obligation secured by a mortgage on a leasehold interest. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638, cert. granted, 297 N.C. 698, 259 S.E.2d 295 (1979).

Where a note and deed of trust cross-refer to each other, and incorporate each other by reference, and only one of the documents clearly indicates the purchase money nature of the transaction, the other document may be deemed to include the same language indicating the nature of the transaction; therefore, a note which has been executed but not marked as a "purchase money note" may still conform to the statutory prerequisites for asserting this section as a defense. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

A defendant's guaranty of the obligations of a corporation under a lease/purchase agreement will not remove him from the protection of the anti-deficiency statute and make him liable for the entire face amount of the note, where the option to purchase was assigned to defendant personally, and defendant exercised it by taking title to the property in himself and personally signing the note and deed of trust; all of the obligations and promises merged in defendant who became an ordinary purchaser of realty who financed his acquisition of the property by a purchase money note and deed of trust. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

Cited in First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

ARTICLE 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-68. Requirements.

Editor's Note. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 45-70. Priority of security instrument.

Editor's Note. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§§ 45-75 to 45-79: Reserved for future codification purposes.

ARTICLE 8.

Instruments to Secure Certain Home Loans.

§ 45-80. Priority of security instruments securing certain home loans. — (a) Notwithstanding any other provision of law, a deed of trust or mortgage which secures a loan that complies with subsection (b) below shall have priority and continue to have priority from the time and date of registration thereof to the extent of all principal and interest secured by said deed of trust or mortgage notwithstanding that the loan may be renewed or extended one or more times and notwithstanding that the interest rate may be increased or decreased from time to time. Interest which accrues pursuant to changes in the interest rate made pursuant to a method agreed to as provided in subsection (b) below (whenever such changes are made) shall be secured and have priority from the registration of the deed of trust or mortgage and not from the time changes are made.

(b) With respect to a loan referred to in subsection (a) above:

(1) The parties must provide in a written instrument agreed to by the borrower at or before registration of the deed of trust or mortgage that the loan may be renewed or extended in accordance with stated terms and that the interest rate may be increased or decreased according to a stated method; and

(2) The loan must be a loan described in G.S. 24-1.1A(a)(1) or (2).

(c) The provisions of this section shall not be deemed exclusive and no deed of trust or mortgage or other security instrument which is otherwise valid shall be invalidated by failure to comply with the provision of this section. (1979, 2nd Sess., c. 1182.)

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

§ 46-3. Petition by cotenant or personal representative of cotenant.

I. IN GENERAL.

Tenancy in common is necessary, etc. — In accord with 2nd paragraph in original. See Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

Chapter 47.

Probate and Registration.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

Sec.

47-108.11. Validation of recorded instruments where seals have been omitted.

Article 1.

Probate.

§ 47-14. Register of deeds to pass on certificate and register instruments; order by judge; instruments to which register of deeds is a party.

Cited in Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

Article 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

Improperly Acknowledged Deed Held Invalid. — Where a deed was not properly acknowledged in that the grantors did not actually appear before the notary public as recited on the face of the deed, the deed was invalid and, therefore, not admissible in evidence to prove an essential link in the record chain. Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

§ 47-18. Conveyances, contracts to convey, options and leases of land.

I. IN GENERAL.

Editor's Note. —
For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

IV. RIGHTS OF PERSONS PROTECTED.

Heir Not Protected. — The recording act protects only creditors of the grantor, bargainor, or lessor, and purchasers for value, against an unregistered conveyance of land. The same reasoning which prevents a party from introducing into evidence against a lien creditor or purchaser for value a deed invalidly registered does not apply to exclude an invalidly registered deed introduced against a party claiming interest to the land by descent. An heir is not a purchaser for value entitled to the protection of the recording act. Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.

I. IN GENERAL.

Editor's Note. —
For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 47-26. Deeds of gift.

Applied in High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979).

Cited in Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979).

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-108.11. Validation of recorded instruments where seals have been omitted. — In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1980, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c.1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "1980" for "1977" in the second paragraph.

Session Laws 1979, 2nd Sess., c. 1185, s. 2, provides: "This act is effective upon ratification, but does not affect pending litigation."

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.

Editor's Note. —

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

Applied in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

Chapter 48.

Adoptions.

Sec.
48-5. When parent is not necessary party to adoption proceedings.
48-6. When consent of parents not necessary.

§ 48-1. Legislative intent; construction of chapter.

Applied in In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

§ 48-2. Definitions.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

Mere Failure to Contribute to Support of Child, etc. —

In accord with original. See In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

But Continued Willful Failure to Support, etc. —

In accord with original. See In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Parent May Not Dissipate Effects, etc. —

Legal abandonment is not a transitory concept that may be recessed at the whim of the transgressor. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Conduct Amounting to Abandonment. —

In accord with original. See In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Failure to Provide for Medical Attention. — Where a child was in need of medical attention and father failed to provide funds or otherwise show concern about his condition, this tends to be some evidence of willful abandonment. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Money Sent after Filing of Petition Irrelevant. — Where records indicate that the father sent money for the child's care after the filing of the petition for a declaration of abandonment, these funds are irrelevant to the issue of whether the child had been abandoned as alleged in the petition and, therefore, this evidence would not be admissible. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

§ 48-5. When parent is not necessary party to adoption proceedings.

(c) In all cases where a district court has entered an order pursuant to G.S. 7A-288 or Article 24B of Chapter 7A terminating the parental rights with respect to a child adjudicated to be neglected or dependent, the parent whose parental rights with respect to such child may have been terminated shall not be a necessary party to any proceeding under this Chapter nor shall the consent of such parent or parents be required.

(d) In the event that a district court has not heretofore entered an order terminating parental rights as provided for in G.S. 7A-288 or Article 24B of Chapter 7A, then on written notice of not less than 10 days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment as defined in G.S. 48-2(3a) and (3b) has taken place.

Editor's Note. —

Subsections (c) and (d) of this section are set out above to correct a typographical error by substituting "or" for "of" preceding "Article 24B" in both subsections.

As the rest of the section was not affected, only subsections (c) and (d) are set out.

§ 48-6. When consent of parents not necessary. — (a) The court shall determine whether the parent or parents of a child must give written consent to adoption of said child in accordance with the following provisions:

(1) If a parent who has been served with notice pursuant to G.S. 48-7 fails to appear at the hearing by the date and time specified in the notice, and has not given a written consent to adoption, the clerk shall enter an order with supporting findings of fact allowing the adoption to proceed without the said parent's consent.

(2) If a putative father appears at the hearing and cannot establish a parental right in accordance with subsection (3) below as to why his consent should be necessary, the court shall enter an order with supporting findings of fact allowing the adoption to proceed without the said putative father's consent.

(3) In the case of a child born out of wedlock the consent of the putative father shall not be required unless prior to the filing of the adoption petition:

a. Paternity has been judicially established or acknowledged by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed; or

c. The putative father has provided substantial financial support or consistent care with respect to the child and mother.

(1979, 2nd Sess., c. 1088, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment, ratified June 16, 1980, and effective 90 days after ratification, added in subdivision (a) (3)a the language beginning "which has been filed" and ending "certified reply."

§ 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.

Applied in Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Stated in In re Norwood, 43 N.C. App. 356, 258 S.E.2d 869 (1979).

§ 48-12. Nature of proceeding; venue.

Jurisdiction over Custody Matters Not Exclusively Vested in Clerk. — In an adoption proceeding, the fact that the child had been placed by its mother with the department of social services and that the mother had signed a general consent for his adoption, did not vest subject matter jurisdiction over all matters pertaining to the child's custody exclusively in the clerk of superior court or in the superior court itself. Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

§ 48-17. Interlocutory decree of adoption.

Cited in In re Norwood, 43 N.C. App. 356, 258 S.E.2d 869 (1979).

§ 48-21. Final order of adoption; termination of proceeding within three years.

Cited in In re Norwood, 43 N.C. App. 356, 258 S.E.2d 869 (1979).

§ 48-22. Contents of final order.

Applied in Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

§ 48-23. Legal effect of final order.

Right of Adopted Child to Inherit. — Taken in conjunction with each other, subdivisions (1) and (3) of this section give an adopted person the right to succeed to the estate of the adoptive parent upon intestacy, and to take under the will of the adoptive parent if the parent so provides. This result comes from a recognition of the absolute necessity, given the prevalence of adoptions in modern society, that adoption effect a complete substitution of families. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Right of Adopted Child to Take under Will. — Subdivision (3), in providing that "descendant" includes any adopted person, "unless the contrary plainly appears by the terms thereof," provides a clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Subdivision (3) applies to the orders of adoption from other states, as well as those under North Carolina law. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

§ 48-25. Record and information not to be made public; violation a misdemeanor.

Failure to Grant Protective Order Held Not Error. — An appellate court could not hold that a district court in a child custody proceeding erred in failing to grant the defendant county department of social services a "protective order based upon confidentiality of records as set out in § 48-25" where the record on appeal did not reveal exactly what type of "protective order" was requested by the defendant and did not even clearly reveal that the district court, after being presented with a proper motion by the defendant for any such order, refused to grant it. Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Sufficiency of Summons Issued under Section. — See State v. Walton, 41 N.C. App. 281, 254 S.E.2d 661 (1979).

§ 49-7. Issues and orders.

Applied in State v. White, 42 N.C. App. 320, 256 S.E.2d 505 (1979).

Quoted in State v. Walton, 41 N.C. 281, 254 S.E.2d 661 (1979).

Cited in State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

Article 2.

Legitimation of Illegitimate Children.

§ 49-12. Legitimation by subsequent marriage.

Section 49-13 in Pari Materia. — This section and § 49-13 regulate the family circle and define the rights and responsibilities of members of the circle, and must be construed in pari materia. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

"Reputed Father". —

In accord with 2nd paragraph in original. See Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

§ 49-13. New birth certificate on legitimation.

Section 49-12 in Pari Materia. — Section 49-12 and this section regulate the family circle and define the rights and responsibilities of members of the circle, and must be construed in pari materia. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Estoppel from Collateral Attack on Admission of Paternity. — Despite the fact that defendant-husband apparently made a false affidavit of paternity in obtaining a new birth certificate for the child under this section, he was estopped from collaterally attacking his admission of paternity in a later proceeding for support. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Article 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

No Violation of Equal Protection Clause. —

The statutory scheme established by § 29-19 and the other statutes referred to therein (§§ 49-14 through 49-16, and § 52-6(c)) does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth

Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Summary Judgment Where Allegations of Complaint Not Denied. — In an action for judicial determination that defendant was the father of plaintiff's illegitimate child, and asking for custody and child support for the child, defendant's argument that summary judgment is improper under the peculiar requirement of subsection (b) that a plaintiff must prove paternity of the defendant beyond a reasonable doubt cannot succeed where defendant failed to deny the basic, essential allegation of paternity set out in the complaint. Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979).

§ 49-15. Custody and support of illegitimate children when paternity established.

No Violation of Equal Protection Clause. — The statutory scheme established by § 29-19 and the other statutes referred to therein (§§ 49-14 through 49-16, and § 52-6(c)) does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Cited in Joyner v. Lucas, 42 N.C. App. 541, 257 S.E.2d 105 (1979).

§ 49-16. Parties to proceeding.

No Violation of Equal Protection Clause. — The statutory scheme established by § 29-19 and the other statutes referred to therein (§§ 49-14 through 49-16, and § 52-6(c)) does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Cited in Joyner v. Lucas, 42 N.C. App. 541, 257 S.E.2d 105 (1979).

Chapter 50.

Divorce and Alimony.

§ 50-3. Venue; removal of action.

Amendment Pertaining to Removal Mandatory. — The language of this section as amended is mandatory. If the defendant makes the motion for change of venue, the judge shall grant it. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

And Applies Retroactively. — The retroactive application of this section to causes of action which accrued prior to the effective date of the statute is proper. No vested right is destroyed, nor does a question of construction arise where a venue statute, by its own provisions, is declared to apply to transactions entered into prior to the passage of the statute. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

But Not to Action Settling Venue before Effective Date. — The amendment of this section providing for removal of an action for divorce or alimony, upon motion of defendant, to the county in which defendant resides where plaintiff has ceased to be a resident of this State is mandatory and may be applied retroactively and even to actions pending on its effective date. However, it would not be applicable to an action for divorce from bed and board where it became effective after the trial court made a decision settling the question of venue. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

Applied in Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

§ 50-5. Grounds for absolute divorce.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

Proper Parties to Divorce. — The only persons who may bring an action for absolute divorce are those persons who are lawfully married to one another. Where there are children born to a marriage it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. There are but two necessary parties to an action for divorce: husband and wife. Likewise, the only necessary parties in an action to set aside an absolute divorce decree after the husband's death are the surviving spouse and the personal representative of the deceased spouse. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

§ 50-6. Divorce after separation of one year on application of either party.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For note on the effect of resumed marital relations on separation agreements, see 1 Campbell L. Rev. 131 (1979).

Constitutionality. — There is no merit in defendant's contention that this section as amended is unconstitutional because it violates the equal protection clauses contained in the Fourteenth Amendment to the federal Constitution and in Art. 1, § 19, of the State Constitution. The argument that the amended section violates equal protection by preserving a dependent spouse's right to alimony without at the same time preserving all other property rights incident to continuation of the marital status is beside the mark. The equal protection clauses of the State and federal Constitutions prohibit the denial of the equal protection of the laws to persons, not to rights. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

No Fault. — As to divorces grounded on a one-year separation of the parties, this State is a "no-fault" jurisdiction; i.e., a showing that the parties have achieved the required periods of residency and separation is all that is necessary to obtain a divorce in this State under this section. Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

Proper Parties. — The only persons who may bring an action for absolute divorce are those persons who are lawfully married to one another. Where there are children born to a

marriage it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. There are but two necessary parties to an action for divorce: husband and wife. Likewise, the only necessary parties in an action to set aside an absolute divorce decree after the husband's death are the surviving spouse and the personal representative of the deceased spouse. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Applicability of § 50-10. — The application to divorces under this section of the § 50-10 requirement that the factual allegations supporting the divorce must be deemed denied requires a finding of the necessary facts. While it remains sound public policy not to allow the granting of such divorces on the pleadings, it would, nevertheless, appear that it would make good jurisprudential sense to clearly remove divorces under this section from the more cumbersome jury procedure and provide that all such cases be heard by the judge without a jury. Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

Recrimination does not constitute a bar to plaintiff's action for divorce based on one year's separation. Smith v. Smith, 42 N.C. App. 246, 256 S.E.2d 282 (1979).

Even if Acts Occurred Prior to Effective Date of Amendment. — Recrimination cannot be asserted as a defense in actions for absolute divorce based on a year's separation brought after July 31, 1977. Therefore, since plaintiff's action was begun on August 30, 1978, the defense of recrimination in the form of abandonment would not be available to defendant even though the alleged abandonment occurred prior to the effective date of the statute. Boone v. Boone, 44 N.C. App. 79, 259 S.E.2d 921 (1979).

Or if Acts Occurred after Separation. — The defense of recrimination cannot be asserted in actions for absolute divorce instituted in this State after 31 July, 1977, even if the alleged adulterous acts on the part of the plaintiff occurred after the separation of the parties. Edwards v. Edwards, 43 N.C. App. 296, 259 S.E.2d 11 (1979).

A stay of plaintiff's action for absolute divorce was not required pending resolution of defendant's counterclaim for alimony in plaintiff's earlier action for divorce from bed and board, since defendant's claim for alimony, having been asserted in the prior action, will not be affected by an absolute divorce obtained by plaintiff in the action for absolute divorce. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Applied in Gerringer v. Gerringer, 42 N.C. App. 580, 257 S.E.2d 98 (1979); In re Hayes, 43 N.C. App. 515, 259 S.E.2d 327 (1979); Wilhelm v. Wilhelm, 43 N.C. 549, 259 S.E.2d 319 (1979).

Cited in Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570 (1979).

§ 50-7. Grounds for divorce from bed and board.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

Applied in Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

The obvious reason for this requirement, etc. —

In accord with original. See Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

The reason for the requirement of this section for a pleading relating to minor children is to bring to the attention of the court any minor children that might be affected by the divorce, and not to establish jurisdiction. Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

An action for permanent alimony is a permissive counterclaim and is not required to be verified. Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; parties cannot testify to adultery; procedure same as ordinary civil actions.

Purpose of Section. —

In accord with 1st paragraph in original. See Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

A summary judgment may not be entered granting an absolute divorce in this State.

Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

A summary judgment should be entered only where it is shown that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. By virtue of this section material facts in a divorce action are "deemed denied by the defendant, whether the same shall actually be denied by pleading or not." Thus, in a divorce action the statute creates a genuine issue as to the material facts whether or not the parties raise such an issue and even where they attempt to admit or stipulate the facts. If it is necessary for the court or the jury to find the material facts, as this section makes mandatory in a divorce action, summary judgment may not be entered. Therefore, a divorce decree may not be granted by way of a summary judgment. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Decree by Consent, Stipulation, or Admissions Prohibited. — This section itself raises issues in a divorce action as to all material facts, regardless of whether the parties by their pleadings have raised any issue and even where all material facts are admitted. Thus, this section has the effect of prohibiting entry of a divorce decree by consent, stipulation, or admissions of the parties, and requires instead that all material facts be found, either by a jury where the right to a jury trial has been preserved as provided in 1A-1, Rules 38 and 39, or by the court in case a jury trial has been waived. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Right to Jury Trial Preserved. — Where the defendant in apt time and manner demanded a jury trial and did not thereafter waive but continued to assert her right to a jury trial, although it may seem futile for defendant to insist upon a trial by jury when, but for this section, no real issue exists, this section gives her the right to do so, and it would be error for the trial court to deny her right to have the facts found in a trial by jury. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Applied in Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

§ 50-11. Effects of absolute divorce.

Award Where Plaintiff Unable to Defray Expenses. — An award under either § 50-13.6 for "reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit" or under subsection (c) of this section and § 50-16.4 applying the doctrine of Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972), is appropriate upon a finding by the trial court in the exercise of its discretion that the plaintiff is unable to defray the expense of the suit. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Applied in Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570 (1979).

§ 50-12. Resumption of maiden name or adoption of name of prior deceased husband.

Editor's Note. — The catchline to this section is set out above to correct an error in the 1979 Cumulative Supplement.

§ 50-13.1. Action or proceeding for custody of minor child.

Claim Not Precluded by Consent to Adoption. — Where petitioner signed a consent to the adoption of his children by their grandparents, the petitioner was rendered a stranger to the blood, but this in no way precludes his right to claim custody as an "other person" within the meaning of this section. In re Rooker, 43 N.C. App. 397, 258 S.E.2d 828 (1979).

Cited in Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979).

§ 50-13.2. Who entitled to custody; terms of custody; taking child out of state.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

The welfare of the child, etc. —

In custody determinations, the best interest of the child is the overriding factor. Wilson v.

Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

But Trial Court Has Wide Discretion. — In accord with 3rd paragraph in original. See Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

Where trial judge enters a custody order that in his judgment is in the best interest of the child, the appellate division should not reverse that judgment and hold that, as a matter of law, the trial judge is obliged to have reached a different opinion in the absence of a clear showing of abuse of discretion. Decision in custody cases are never easy, and the trial judge has the opportunity to see the parties in person and to hear the witnesses. He can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges. Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979).

Effect of Prior Order of Incompetence. — In a controversy between husband and wife for custody of minor children of the marriage, it is error for the trial court to award custody to the husband on the sole ground that the wife has prior to the time been judged mentally incompetent. A prior court order which judicially declares a parent to be incompetent is not sufficient in and of itself to establish a parent's present unfitness to have a child or children; rather this section requires a full, factual determination of all the circumstances in the case before a proper order may be entered by the court. Price v. Price, 42 N.C. App. 66, 255 S.E.2d 652 (1979).

Or Separation Agreement. —

When a case is properly before it, the court has the duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. Thus, the existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Though Presumption Exists, etc. — There is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon in a separation agreement is just and reasonable. Winborne v. Winborne 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

But provisions of a valid separation agreement, etc. —

A valid separation agreement cannot be ignored or set aside by the court without the consent of the parties. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Custody May Be Granted to Third Person. —

While it is presumed that it is in the child's best interest to be placed with a natural parent, this presumption may be rebutted by a circumstance which would substantially affect the child. Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

Homosexual Father's Visitation Rights. — The trial court did not err in granting a father who is homosexual unsupervised overnight visitation rights with his minor son. Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979).

§ 50-13.3. Enforcement of order for custody.

Applied in Morris v. Morris, 42 N.C. App. 222, 256 S.E.2d 302 (1979).

§ 50-13.4. Action for support of minor child.

Mother May Have Duty of Contribution. — Under subsection (b) of this section, the duty of the father to provide support is primary. However, the mother also may have a duty of contribution upon proof of proper circumstances. Coble v. Coble, 44 N.C. App. 327, 261 S.E.2d 34 (1979).

Separation Agreements Are Not Binding, etc. —

When a case is properly before it, the court has the duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. Thus, the existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial

determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

But Separation Agreement Cannot Be Ignored. —

A valid separation agreement cannot be ignored or set aside by the court without the consent of the parties. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Amount Set by Agreement, etc. —

There is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon in a valid separation agreement is just and reasonable. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Award Where Father Has Substantial Income. — In an action for child support, the court, in making its award, should keep in mind that children of a man of substantial income are entitled to live accordingly. McLeod v. McLeod, 43 N.C. App. 66, 258 S.E.2d 75 (1979).

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979); Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979).

Cited in Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

§ 50-13.5. Procedure in actions for custody or support of minor children.

Jurisdiction of Court in Which Divorce Suit, etc. —

The court in which the suit for divorce is pending has exclusive jurisdiction of proceedings for custody and child support, and once they are commenced, maintains it after the divorce decree is entered. Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

Jurisdiction of Divorce Court Continues after Divorce. —

In accord with 2nd paragraph in original. See Morris v. Morris, 42 N.C. App. 222, 256 S.E.2d 302 (1979).

And Issue of Custody and Support Remains in Fieri. —

In accord with original. See Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

Applied in Francis v. Durham County Dep't. of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Rhoney v. Sigmon, 43 N.C. App. 11, 257 S.E.2d 691 (1979); Misero v. Misero, 43 N.C. App. 523, 259 S.E.2d 346 (1979).

Cited in McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

Requirement of Insufficient Means. — Before attorney's fees may be awarded in an alimony case to the dependent spouse under §§ 50-16.3 and 50-16.4 and before attorney's fees may be awarded to the interested party in a custody, support, or custody and support suit under this section, that person must have insufficient means to defray the expense of the suit; that is, as interpreted by cases of the Supreme Court of this State, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Proof Required to Support Award in Custody, and Custody and Support Suits. — In a custody suit or a custody and support suit, the trial judge, pursuant to the first sentence in this section, has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorney's fees. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Reviewable Question of Law in Custody, and Custody and Support Suits. — Whether the requirements of this section for a custody suit or a custody and support suit have been met is a question of law reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Amount of Award within Discretion of Court. — When the statutory requirements for a custody suit or a custody and support suit have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Reviewable Question of Law in Support Suit. — A finding of fact supported by competent evidence must be made on the issue of whether the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or

proceeding, in addition to meeting the requirements of "good faith" and "insufficient means" before attorney's fees may be awarded in a support suit. This issue is a question of law, reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Applied in Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Cited in Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979).

§ 50-13.7. Modification of order for child support or custody.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

The control and custody of minor children cannot be determined finally. —

In accord with 4th paragraph in original. See Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

And Judgment in Custody Suit Is Not Final. —

In accord with 6th paragraph in original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

The wishes of a child, etc. —

In accord with original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

A change in circumstances must be shown, etc. —

In accord with 5th paragraph in original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

The changed circumstances with which the courts are concerned are those which relate to child-oriented expenses. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The modification of a custody decree must be supported, etc. —

In accord with original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

Burden of Showing Changed Circumstances. —

In accord with 1st paragraph in original. See Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Standing of County in Modification Action. — Where plaintiff mother who receives public assistance under the Aid to Families with Dependent Children Program assigned to a county her right to receive any support on behalf of her children, the county, by virtue of the assignment pursuant to § 110-137, has an interest in the order for the support of plaintiff's children. Therefore, under subsection (a) of this section, the county has standing to make a motion in an action between plaintiff mother and defendant father to modify a child support order to require that the support be paid to the county. Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979).

Court's Findings of Facts Are Conclusive. —

In accord with 3rd paragraph in original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order. Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

Expenses to Which Defendant Voluntarily Obligated Himself. — It was error for the trial court to reduce the amount of child support payments required of defendant by one-third where defendant's showing of changed circumstances related almost exclusively to the additional expenses to which defendant had obligated himself, including sending a child who had reached majority to college, the expenses of a new home and family, and additional travel and telephone expense incident to visting his children from out-of-state, and where defendant made no showing with respect to changed circumstances affecting the remaining minor children and made no showing that the expenses relating to one of the children's maintenance and support decreased by one-third when one of the children reached majority. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The fact that defendant voluntarily has assumed the financial burden to send his eldest child to a high-tuition, out-of-state university does not justify the court in considering this factor in lowering child support payments. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Applied in Pritchard v. Pritchard, 45 N.C. App. 189, 262 S.E.2d 836 (1980).

Cited in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 50-16.1. Definitions.

Subdivision (1) Contemplates "Permanent Alimony". — While the word "permanent" is not included in the definition of "alimony" in subdivision (1) of this section, the definition obviously contemplates what is commonly referred to as "permanent alimony." Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

"Dependent Spouse". —

The legislative intent in the use of the phrase "actually substantially dependent" in subdivision (4) is clear. This term implies that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation. Thus, to qualify as a "dependent spouse" under subdivision (3), one must be actually without means of providing for his or her accustomed standard of living. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

"Maintenance and Support" in Subdivision (3). — The term "accustomed standard of living of the parties" in § 50-16.5(a) completes the contemplated legislative meaning of "maintenance and support" in subdivision (3). The latter phrase clearly means more than a level of mere economic survival. Plainly it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

For a discussion of the legislative intent as to judicial determinations of dependency under subdivision (3) in light of § 50-16.5, see Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Applied in Love v. Love, 41 N.C. App. 308, 254 S.E.2d 642 (1979); Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Quoted in Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979).

Cited in Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979); Southern v. Southern, 43 N.C. App. 159, 258 S.E.2d 422 (1979); Wilhelm v. Wilhelm, 43 N.C. App. 549, 259 S.E.2d 319 (1979); Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

§ 50-16.2. Grounds for alimony.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

"Abandonment". —

In accord with 1st paragraph in original. See Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Purpose of Alimony. —

In accord with original. See Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979).

Applied in Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979); Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979).

§ 50-16.3. Grounds for alimony pendente lite.

Findings of Fact Required. —

In accord with 1st paragraph in 1979 Cum. Supp. See Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Setting Forth Findings of Fact. —

In accord with 1st paragraph in original. See Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

In accord with 3rd paragraph in original. See Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979).

The mere fact that the wife, etc. —

In accord with 1979 Cum. Supp. See Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Prerequisite to Award of Attorney Fees. — Before attorney's fees may be awarded in an alimony case to the dependent spouse under this section and § 50-16.4 and before attorney's fees may be awarded to the interested party in a custody, support, or custody and support suit under § 50-13.6, that person must have insufficient means to defray the expense of the suit; that is, as interpreted by cases of the Supreme Court of this State, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Reviewable Question of Law in Award of Attorney Fees. — The facts required by this section and § 50-16.4 must be alleged and proved to support an order for attorney's fees. Whether these requirements have been met is a question of law that is reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Amount of Attorney Fees within Court's Discretion. — If attorney's fees may be properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Applied in Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

Cited in Wilhelm v. Wilhelm, 43 N.C. App. 549, 259 S.E.2d 319 (1979).

§ 50-16.4. Counsel fees in actions for alimony.

The purpose of the allowance, etc. — The purpose of the allowance of attorney's fees in an alimony case is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Elements to Be Considered. — Before attorney's fees may be awarded in an alimony case to the dependent spouse under this section and § 50-16.3 and before attorney's fees may be awarded to the interested party in a custody, support, or custody and support suit under § 50-13.6, that person must have insufficient means to defray the expense of the suit; that is, as interpreted by cases of the Supreme Court of this State, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Award of "Expenses" Not Authorized. — This section provides only for the award of "reasonable counsel fees," making no mention of "expenses." Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979).

Reviewable Question of Law. — The facts required by this section and § 50-16.3 must be alleged and proved to support an order for attorney's fees. Whether these requirements have been met is a question of law that is reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Amount of Award within Discretion of Court. — If attorney's fees may be properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Applied in Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Stated in Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

§ 50-16.5. Determination of amount of alimony.

Discretion of Judge. —

In accord with 3rd paragraph in original. See Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979).

In accord with 4th paragraph in original. See Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659 (1980).

In accord with 13th paragraph in original. See Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979).

For a discussion of the legislative intent as to judicial determinations of dependency under § 50-16.1(3) in light of this section, see Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Meaning of "Maintenance and Support" in Light of Section. — The term "accustomed standard of living of the parties" in subsection (a) of this section completes the contemplated legislative meaning of "maintenance and support" in § 50-16.1(3). The latter phrase clearly means more than a level of mere economic survival. Plainly it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Where plaintiff-husband has substantial income as compared to the limited income of the defendant-wife, the court is required by subsection (a) of this section to award the wife such alimony as will allow her to live as the wife of a man of plaintiff's income is entitled to live. McLeod v. McLeod, 43 N.C. App. 66, 258 S.E.2d 75 (1979).

Applied in Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979).

Cited in Blair v. Blair, 44 N.C. 605, 261 S.E.2d 301 (1980).

§ 50-16.6. When alimony not payable.

Editor's Note. — For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

Court Need Not Order Transfer of Property. — While the court has authority to order a transfer of title or possession of real property under subsection (a) of this section and § 50-17, these sections do not require it to do so. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659 (1980).

Power to Transfer Personalty Dependent on Alimony Power. — Although subsection (a) of this section clearly vests the court with power to order a transfer of personalty, that power does not exist independently of the court's power to order alimony for the dependent spouse. This section contemplates such transfers only in terms of satisfaction of the obligation to support. Where the court was not ordering a transfer of property as payment of alimony, the statute is, therefore, inapplicable. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659 (1980).

Applied in Love v. Love, 41 N.C. App. 308, 254 S.E.2d 642 (1979); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

§ 50-16.9. Modification of order.

Editor's Note. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

But May Be Modified or Vacated, etc. — In accord with 1979 Cum. Supp. See Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979).

New Order for Alimony Not Authorized. — Although an order granting alimony may be modified, when a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter a new order for alimony. Baugh v. Baugh, 44 N.C. App. 50, 260 S.E.2d 161 (1979).

Adoption of Consent Agreement. — Where a court adopts the agreement of the parties as its own determination of the rights of the parties and orders the husband to pay alimony, the consent judgment is a decree of the court and is modifiable and enforceable by contempt. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

Modification of Consent Judgment. — For a court to have power to modify a consent judgment, the judgment must be an order of the court, and the order must be one to pay alimony. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

An agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. However, if the support provision and the division of property 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. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

Periodic Support Payments, etc. — Even though denominated as "alimony," periodic support payments to a dependent spouse may not be alimony within the meaning of this section if the provisions for the property divisions between the parties constitute reciprocal consideration for each other. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

Cited in Russ v. Russ, 43 N.C. App. 74, 257 S.E.2d 676 (1979).

§ 50-17. Alimony in real estate, writ of possession issued.

Transfer Not Required. — While the court has authority to order a transfer of title or possession of real property under § 50-16.7(a) and this section, these sections do not require it to do so. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659 (1980).

Chapter 51.

Marriage.

Article 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

Editor's Note. —
For article, "An Evolutionary Consideration of the Marriage Formalities of Licensure and Solemnization in Contemporary English and North Carolinian Statutory Law," see 10 N.C. Cent. L.J. 1 (1978).

Article 2.

Marriage Licenses.

§ 51-6. Solemnization without license unlawful.

Editor's Note. —
For article, "An Evolutionary Consideration of the Marriage Formalities of Licensure and Solemnization in Contemporary English and North Carolinian Statutory Law," see 10 N.C. Cent. L.J. 1 (1978).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-4. Remedies additional to those now existing.

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-10. Contents of complaint for support.

Failure to Include Name of Employer and Amount of Earnings. — Where complaint contained the name, address and circumstances of the defendant, as well as allegations that the plaintiff was entitled to child support payments from the defendant, it was not made defective by its failure to contain the name of the defendant's employer or the amount of the defendant's earnings. County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-19. Rules of evidence.

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-21. Application of payments.

Intent as to Changed Circumstances. — The legislature apparently intended that its enactment of this section would provide authority to the courts of this State to apply the Uniform Reciprocal Enforcement of Support Act so as to provide for the support of a minor child independent of and without regard for any other support judgments or whether there had been a change of circumstances of either the child or its parents; therefore, it is not necessary that the complaint for child support contain allegations of facts constituting changed circumstances. County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-25. Additional remedies.

Foreign Support Orders Entered before Oct. 1, 1975. — The registration provisions of the North Carolina Uniform Reciprocal Enforcement of Support Act (§§ 52A-25 through 30) apply so as to allow enforcement in North Carolina of foreign state support orders entered prior to Oct. 1, 1975. See opinion of Attorney General to Honorable Larry T. Black, District Court Judge, 26th Judicial District, Aug. 28, 1979.

§ 52A-32. Interpretation of Chapter.

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

Chapter 53.

Banks.

Article 3.

Dissolution and Liquidation.

Sec.
53-18. Voluntary liquidation.
53-20. Liquidation of banks.

Article 6.

Powers and Duties.

53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats.

Article 8.

Commissioner of Banks and State Banking Commission.

Sec.
53-96. Salary of Commissioner; legal assistance and compensation.

Article 3.

Dissolution and Liquidation.

§ 53-18. Voluntary liquidation. — A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this State by the affirmative votes of its stockholders owning two thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence 10 days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the Commissioner of Banks for his approval. If the Commissioner of Banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the Commissioner of Banks until said Commissioner of Banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the Commissioner of Banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in this Chapter. When the Commissioner of Banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the city, town, or county in which such bank is located, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the Commissioner of Banks, and shall furnish such reports from time to time as may be called for by the Commissioner of Banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of Chapter 116B. Whenever the Commissioner of Banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and approved by the Commissioner of Banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract

of sale and transfer, shall be filed with the Commissioner of Banks. Whenever voluntary liquidation shall be approved by the Commissioner of Banks or the sale and transfer of the assets of any bank shall be approved by the Commissioner of Banks, a certified copy of such approval under seal of the Commissioner of Banks, filed in the office of the Secretary of State, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this Chapter and the general law relative to corporations. (1921, c. 4, s. 15; C. S., s. 218(a); 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5; 1979, 2nd Sess., c. 1311, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective January 1, 1981, substituted "Chapter 116B" for "this Chapter as hereinafter provided" at the end of the eighth sentence.

§ 53-20. Liquidation of banks.

(x) Unlocated Depositor. Any funds due a known but unlocated person shall be disposed in accordance with Chapter 116B of the General Statutes, except where the provisions of this Chapter specifically provide otherwise. (1921, c. 4, s. 17; C. S., s. 218(c); 1927, c. 113; 1931, c. 243, s. 5, cc. 385, 405; 1933, c. 175, s. 2, c. 546; 1935, c. 81, s. 4, c. 231, s. 1, c. 277; 1939, c. 91; 1947, c. 621, s. 1; 1971, c. 1135, s. 4; 1979, 2nd Sess., c. 1311, s. 4.)

I. GENERAL CONSIDERATION.

Editor's Note. — The 1979, 2nd Sess., amendment, effective January 1, 1981, added subsection (x).

As the rest of the section was not changed by the amendment, only subsection (x) is set out.

ARTICLE 6.

Powers and Duties.

§ 53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats. — (a) If the rental due on a safe-deposit box has not been paid for one year, the lessor may send a notice by registered mail to the last known address of the lessee stating that the safe-deposit box will be opened and its contents stored at the expense of the lessee unless payment of the rental is made within 30 days. If the rental is not paid within 30 days from the mailing of the notice, the box may be opened in the presence of an officer of the lessor and of a notary public who is not a director, officer, employee or stockholder of the lessor. The contents shall be sealed in a package by the notary public who shall write on the outside the name of the lessee and the date of the opening. The notary public shall execute a certificate reciting the name of the lessee, the date of the opening of the box and a list of its contents. The certificate shall be included in the package and a copy of the certificate shall be sent by registered mail to the last known address of the lessee. The package shall then be placed in the general vaults of the lessor at a rental not exceeding the rental previously charged for the box.

(b) Any property, including documents or writings of a private nature, which has little or no apparent value, need not be sold but may be destroyed by the Treasurer or by the lessor, if retained by the lessor pursuant to a determination by the Treasurer under G.S. 116B-27(c).

(c) If the contents of the safe-deposit box have not been claimed within two years of the mailing of the certificate, the lessor may send a further notice to the last known address of the lessee stating that, unless the accumulated

charges are paid within 30 days, the contents of the box will be delivered to the State Treasurer as abandoned property under the provisions of Chapter 116B.

(d) The lessor shall submit to the Treasurer a verified inventory of all of the contents of the safe-deposit box upon delivery of the contents of the box or such part thereof as shall be required by the Treasurer under G.S. 116B-27(c); but the lessor may deduct from any cash of the lessee in the safe-deposit box an amount equal to accumulated charges for rental and shall submit to the Treasurer a verified statement of such charges and deduction. If there is no cash, or insufficient cash to pay accumulated charges, in the safe-deposit box, the lessor may submit to the Treasurer a verified statement of accumulated charges or balance of accumulated charges due, and the Treasurer shall remit to the lessor the charges or balance due, up to the value of the property in the safe-deposit box delivered to him, less any costs or expenses of sale; but if the charges or balance due exceeds the value of such property, the Treasurer shall remit only the value of the property, less costs or expenses of sale. Any accumulated charges for safe-deposit box rental paid by the Treasurer to the lessor shall be deducted from the value of the property of the lessee delivered to the Treasurer.

(e) Repealed by Session Laws 1979, 2nd Session, c. 1311, s. 5.

(f) A copy of this section shall be printed on every contract for rental of a safe-deposit box. (1967, c. 789, s. 7; 1979, 2nd Sess., c. 1311, s. 5.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective January 1, 1981, rewrote subsections (b), (c), and (d), and deleted former subsection (e), which read: "The deposits or proceeds from sales referred to in the preceding paragraph shall be subject to all the provisions of G.S. 116A-6, relating to the escheat of bank deposits."

Article 8.

Commissioner of Banks and State Banking Commission.

§ 53-96. Salary of Commissioner; legal assistance and compensation. — The salary of the Commissioner of Banks shall be fixed by the Governor subject to the approval of the Advisory Budget Commission. The Governor may in his discretion appoint and assign to the Commissioner of Banks such legal assistance as in his judgment may be necessary. Compensation shall be within the salary classification for attorneys established by the State Personnel Commission. (1931, c. 243, s. 6; 1957, c. 541, s. 3; 1979, 2nd Sess., c. 1137, s. 53.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted "and compensation therefor, when permanent, shall be fixed in like manner" at the end of the second sentence and added the third sentence.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

Article 10.

Penalties.

§ 53-129. Misapplication, embezzlement of funds, etc.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-173. Maximum rate of charge; computation of charges; limitation on interest after judgment; limitation on interest after maturity of the loan; inapplicability of other sections.

Editor's Note. —

For note discussing the appropriate disclosure of inconsistent federal and state requirements with regard to credit terms, see 15 Wake Forest L. Rev. 793 (1979).

Chapter 54.

Cooperative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

Article 2A.

Savings Accounts.

Sec.
54-18.3. Savings accounts authorized; terms of payment and withdrawal.

Article 3.

Loans.

54-21.2. Investments.
54-21.5. Parity of interest rates.

Article 4.

Under Control of Administrator of the Savings and Loan Division.

Sec.
54-33.3. Certain powers granted to State associations.

SUBCHAPTER V. MARKETING ASSOCIATIONS.

Article 21.

Powers, Duties, and Liabilities.

54-152. Marketing contract.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

Article 2A.

Savings Accounts.

§ 54-18.3. Savings accounts authorized; terms of payment and withdrawal. — (a) Notwithstanding any other provisions of law, any building and loan association or savings and loan association incorporated under the laws of this State or any federal savings and loan association having its principal office in North Carolina is authorized to raise capital in the form of such savings deposits or savings accounts as are authorized by its charter or by regulation of the Administrator of the Savings and Loan Division and may issue such passbooks, time certificates of deposit, or other evidence of savings accounts as are so authorized. Holders of savings accounts and obligors of an association shall to such extent as may be provided by its charter or by regulations of the Administrator of the Savings and Loan Division, be members of the association, and shall have such voting rights and such other rights as are thereby provided. Except as may be otherwise authorized by the association's charter or regulation of the Administrator of the Savings and Loan Division in the case of savings accounts for fixed or minimum terms of not less than 30 days, the payment of any savings account shall be subject to the right of the association to require such advance notice, not less than 30 days, as shall be provided for by the charter of the association or the regulations of the Administrator of the Savings and Loan Division. The payment of withdrawals from savings accounts in the event an association does not pay all withdrawals in full (subject to the right of the association to require notice) shall be subject to such rules and procedures as may be prescribed by the Association's charter or by regulation of the Administrator of the Savings and Loan Division. The Administrator of the Savings and Loan Division may by regulation provide for withdrawal or transfer of savings accounts upon nontransferable order or authorization. To such extent as the Administrator of the Savings and Loan Division may authorize by regulation or advice in writing, an association may borrow, may given security, and may issue such

notes, bonds, debentures, or other obligations, or other securities as the Administrator of the Savings and Loan Division may so authorize.

(b) Notwithstanding any other provisions of law, the Administrator of the Savings and Loan Division shall, by regulation, authorize savings and loan associations to accept deposits to savings accounts which may be withdrawn or transferred on or by negotiable or transferable order or authorization to the association. (1969, c. 449, s. 1; 1971, c. 864, s. 17; 1979, 2nd Sess., c. 1147, ss. 1, 2.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective December 31, 1980, designated the former provisions of this section as subsection (a), and added subsection (b). The amendment also deleted "Savings accounts shall not be subject to check or to withdrawal or transfer on negotiable or transferable order or authorization to the association, but" at the beginning of the fifth sentence of subsection (a).

ARTICLE 3.

Loans.

§ 54-21.2. Investments.

(b) Subject to such rules as the Administrator of the Savings and Loan Division may prescribe, any such association is authorized and permitted to make any loan or investment permitted to be made by any federal savings and loan association by the Congress of the United States, Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation. All investments made by State-chartered savings and loan associations after 1958 and prior to June 20, 1980, shall for all purposes be considered to have been permitted investments if such investments were permitted to be made by federal savings and loan associations at the time they were made by the State-chartered savings and loan association.

(1975, c. 410; 1977, c. 593; 1979, c. 484; 1979, 2nd Sess., c. 1147, s. 4.)

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "June 20, 1980," for "April 30, 1979" near the beginning of the second sentence of subsection (b).

The 1979, 2nd Sess., amendment was ratified June 20, 1980.

§ 54-21.5. Parity of interest rates. — Notwithstanding any other provision of law, any savings and loan association in North Carolina may contract for interest on any loan, purchase money loan, advance, commitment for a loan or forbearance at any rate permitted by federal law to a savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. (1979, 2nd Sess., c. 1147, s. 5.)

ARTICLE 4.

Under Control of Administrator of the Savings and Loan Division.

§ 54-33.3. Certain powers granted to State associations. — In addition to all the powers granted under this Subchapter, any savings and loan association incorporated under the laws of this State and operating under the provisions of this Subchapter is herein authorized to:

(6) Subject to such regulations as the Administrator of the Savings and Loan Division may prescribe, a State-chartered savings and loan association is authorized to issue credit cards, extend credit in connection therewith, and otherwise engage in or participate in credit card operations;

(7) Subject to such regulations as the Administrator of the Savings and Loan Division may prescribe, a State-chartered savings and loan association may act as a trustee, executor, administrator, guardian or in any other fiduciary capacity permitted for federal savings and loan associations by the Congress of the United States, Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation;

(8) a. In accordance with rules and regulations issued by the Administrator of the Savings and Loan Division, mutual capital certificates may be issued by State-chartered savings and loan associations and sold directly to subscribers or through underwriters, and such certificates shall constitute part of the general reserve and net worth of the issuing association. The Administrator, in the rules and regulations relating to the issuance and sale of mutual capital certificates, shall provide that such certificates:

1. Shall be subordinate to all savings accounts, savings certificates, and debt obligations;
2. Shall constitute a claim in liquidation on the general reserves, surplus and undivided profits of the association remaining after the payment in full of all savings accounts, savings certificates, and debt obligations;
3. Shall be entitled to the payment of dividends; and
4. May have a fixed or variable dividend rate.

b. The Administrator shall provide in the rules and regulations for charging losses to the mutual capital certificate, reserves, and other net worth accounts. (1971, c. 632; c. 864, s. 17; 1975, c. 55; 1977, c. 473, ss. 1, 2; c. 1111, ss. 1, 2; 1979, 2nd Sess., c. 1147, s. 3.)

Editor's Note. —

The 1979, 2nd Sess., amendment added subdivisions (6), (7), and (8).

As the rest of the section was not changed by the amendment, only the introductory language and subdivisions (6), (7), and (8) are set out.

SUBCHAPTER III. CREDIT UNIONS.

ARTICLE 14D.

Membership.

§ 54-109.26. "Membership" defined.

Legislative Intent as to "Common Bond" Requirement. — The clear legislative intent of this section is to invest the credit union incorporators with the prerogative to establish and describe the "common bond" of its members within the bounds of the three permissible groups described in subsection (b) of this section. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

Public employees are united by the common bond of similar occupation for the simple reason that they are all employed in the service of the community, whether that community be narrowly defined as is the case with local public employees, or broadly

delineated as in the case of State public employees. They all occupy positions in public service. Moreover, such employees are all paid from public funds generated by taxing the citizenry. They serve the public; the public pays their salaries. These factors provide sufficient similarity of occupation, despite the individual place and position of the employee, to meet the "common bond" requirement of this section. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

SUBCHAPTER V. MARKETING ASSOCIATIONS.

ARTICLE 21.

Powers, Duties, and Liabilities.

§ 54-152. Marketing contract. — (a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including dividends on preferred stock, not exceeding ten percent (10%) per annum, and reserve for retiring the stock, if any; and other proper reserves; and dividends not exceeding ten percent (10%) per annum upon common stock.

(1979, 2nd Sess., c. 1302, ss. 1, 2.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective retroactively to June 25, 1975, substituted "dividends" for "interest" and "ten percent (10%)" for "eight percent (8%)" in two places near the end of the second sentence of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Chapter 55.

Business Corporation Act.

Article 5.

Corporate Finance.

Sec.

55-45. Sale of shares and options to employees.

Article 6.

Shareholders.

55-56. Preemptive rights.

Article 9.

Dissolution and Liquidation.

Sec.

55-130. Disposition of amounts due to unavailable shareholders and creditors.

Article 3.

Formation, Name and Registered Office.

§ 55-9. Requirement before commencing business.

Applied in Keels v. Turner, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 55-11. Organization meeting of directors.

Cited in Keels v. Turner, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 55-12. Corporate name.

"Homestead Builders" Insufficient. — Where a contract or sale entered into by a purported corporation used only the name "Homestead Builders," and, similarly, the bank account of the purported corporation was opened in the name of "Homestead Builders," the corporate name did not comply with subsection (a) of this section. Keels v. Turner, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 55-16. Bylaws.

Editor's Note. — For note on the effect of unanimous approval on corporate bylaws, see 1 Campbell L. Rev. 153 (1979).

Article 4.

Powers and Management.

§ 55-32. Liability of directors in certain cases.

Cited in Keels v. Turner, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 55-33. Jurisdiction over and service on nonresident director.

Editor's Note. — For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

§ 55-35. Duty of directors and officers to corporation.

Cited in Stone v. McClam, 42 N.C. App. 393, 257 S.E.2d 78 (1979).

Article 5.

Corporate Finance.

§ 55-45. Sale of shares and options to employees. — (a) Subject to the provisions contained in this Chapter or in its charter or bylaws, a corporation may provide for and carry out a plan for the sale or other disposition of its unissued or treasury shares, including but not limited to the issuance of rights or options to acquire such shares, to its employees or to the employees of its subsidiary corporations or to a trustee on their behalf. Such plan may include provisions, among others, for the kind and amount of consideration, payment in installments or at one time; aiding any such employees in paying for such shares by compensation for services, by loans, or otherwise; limiting the transferability of such shares, rights or options; the fixing of eligibility for participation in the plan; the class and price of shares to be sold under the plan; the number of shares which may be purchased, the method of payment therefor, the reservation of title until full payment; the effect of termination of employment; an option or obligation on the part of the corporation to repurchase the shares; and the time limits and termination of the plan; provided, however, that if the corporation providing for any such plan has fewer than 10 shareholders, such plan shall be approved by a majority of the outstanding shares of such corporation unless the charter of the corporation provides that such approval is not required. The term "employees," as used in this section, includes officers in the full-time employment of the corporation, but nothing in this section is intended to permit financial aid to such officers in violation of G.S. 55-22.

(b) In any actions by, against or in behalf of a corporation to challenge the validity of any stock option granted to any employee, the situs of the option is deemed to be at the registered office of the corporation, and such action may be brought as an action quasi in rem with service of process by publication or outside the State as provided by law. Such action may also be brought as an action in personam. If two or more grantees of stock options are necessary or proper parties, they may be joined in accordance with the provisions of law applicable to class actions. (1955, c. 1371, s. 1; 1959, c. 1316, s. 12; 1973, c. 469, s. 14; 1975, c. 303; 1979, c. 508, s. 1.)

Editor's Note. —

The 1979 amendment, effective April 1, 1980, substituted "Subject to the provisions contained in this Chapter or in its charter or bylaws" for "Unless otherwise provided in the charter" at the beginning of the first sentence in subsection (a), inserted "or other disposition" and "including but not limited to the issuance of rights or options to acquire such shares" near the middle of that sentence, deleted the former second sentence, which read, "Such plan shall be adopted at a special or annual meeting by vote of a majority of the shares entitled to vote," substituted "limiting the transferability of such shares, rights or options" for "granting of options, which may, if so provided by the plan, be nontransferable otherwise than by will or the laws of descent and distribution" near the beginning of the present second sentence and added the proviso to that sentence, and rewrote subsection (b).

ARTICLE 6.

Shareholders.

§ 55-56. Preemptive rights.

(c) Unless otherwise stated in the charter, there shall be no preemptive rights to acquire:

(1) Shares issued within one year or to be issued pursuant to subscriptions accepted within one year, after the filing of the articles of incorporation, or

(2) Shares issued or to be issued for considerations, other than money, deemed by the board of directors in good faith to be advantageous to the corporation's business, or

(3) Shares released from preemptive rights by vote of two thirds of the shares entitled to such preemptive rights, or

(4) Shares sold or agreed to be sold to employees or rights or options for shares granted to employees as provided in G.S. 55-45, provided a plan for such sales or options is approved by the affirmative vote of a majority of the outstanding shares entitled to vote, or

(5) Shares issued or to be issued as a share dividend, or

(6) Shares issued or to be issued to satisfy conversion rights or option rights theretofore granted by the corporation, or

(7) Shares with respect to which the notice required by subsection (g) of this section has been given but which have not been purchased or subscribed within the prescribed time and which are thereafter sold or optioned to any other person or persons at a price no lower than and upon the other terms and conditions stated in such notice.

(1979, c. 508, s. 2.)

Editor's Note. — The 1979 amendment, effective April 1, 1980, inserted "or rights" near the beginning of subdivision (4) of subsection (c) and "provided a plan for such sales or options is approved by the affirmative vote of a majority of the outstanding shares entitled to vote" at the end of subdivision (4).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 55-73. Shareholders' agreements.

Editor's Note. —

For note on the amendment of shareholder agreements of close corporations in North Carolina, see 15 Wake Forest L. Rev. 531 (1979).

For note on the effect of unanimous approval on corporate bylaws, see 1 Campbell L. Rev. 153 (1979).

ARTICLE 9.

Dissolution and Liquidation.

§ 55-125. Power of courts to liquidate and decree involuntary dissolution.

Cited in Osmar v. Crosland-Osmar, Inc., 43 N.C. App. 721, 259 S.E.2d 771 (1979).

§ 55-130. Disposition of amounts due to unavailable shareholders and creditors. — Upon liquidation of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found shall be disposed of in accordance with Chapter 116B. (1947, c. 613; c. 621, s. 1; G. S., s. 55-132; 1955, c. 1371, s. 1; 1971, c. 1135, s. 4; 1979, 2nd Sess., c. 1311, s. 6.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective January 1, 1981, rewrote this section.

Article 10.

Foreign Corporations.

§ 55-131. Right to transact business.

Cases Decided under § 55-144 Relevant. — The definition of "transacting business" set forth in this section is applicable to § 55-144, and any cases determined under the latter statute are relevant in considering the applicability of this section. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Test of Interstate Commerce. — Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

All interstate commerce is not sales of goods. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

The sale of services can constitute interstate commerce. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Franchisor of Employment Agencies Engaged in Interstate Commerce. — Where plaintiff foreign corporation, a franchisor of employment agencies, maintained no offices in this State, and had no officers or employees residing in this State, and where its activities in this State consisted of: (1) soliciting franchise agreements and promoting sales of its business forms, (2) training and instructing its franchisees and inspecting the premises, books and records of its franchisees, and (3) controlling the business methods of its franchisees to protect its service mark and to ensure an accurate accounting of profits by its franchisees, plaintiff was transacting business in interstate commerce within the meaning of subdivision (b)(8) and was not required to obtain a Certificate of Authority from the Secretary of State as a prerequisite to bringing suit in this State, since plaintiff's activities were incidental to its interstate franchise contracts and were, therefore, interstate in nature. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

§ 55-144. Suits against foreign corporations transacting business in the State without authorization.

The definition of "transacting business" set forth in § 55-131 is applicable to this section, and any cases determined under this section are relevant in considering the applicability of § 55-131. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Chapter 55A.

Nonprofit Corporation Act.

Article 1.

General Provisions.

§ 55A-1. Title.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 55A-3. Applicability of Chapter.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

Article 3.

Formation, Name and Registered Office.

§ 55A-5. Purposes.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

Article 4.

Powers and Management.

§ 55A-15. General powers.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

Article 6.

Fundamental Changes.

§ 55A-37.1. Restated charter.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

Chapter 57.

Hospital, Medical and Dental Service Corporations.

Article 1.

In General.

Sec.
57-21 to 57-29. [Reserved.]

Article 2.

Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act.

57-30. Title.
57-31. Purpose.
Sec.
57-32. Scope of application.
57-33. Definitions.
57-34. Format requirements.
57-35. Flesch scale analysis readability score; procedures.
57-36. Filing requirements; duties of the Commissioner.
57-37. Application to policies; dates; duties of the Commissioner.
57-38. Construction.

Article 1.

In General.

§ 57-7. Subscribers' contracts; required and prohibited provisions.

Cross Reference. — As to the Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act, see §§ 57-30 through 57-38.

§§ 57-21 to 57-29: Reserved for future codification purposes.

Article 2.

Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act.

§ 57-30. Title. — This Article is known and may be cited as the "Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act." (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-31. Purpose. — The purpose of this Article is to provide that insurance certificates and subscriber contracts under this Chapter be readable by a person of average intelligence, experience, and education. All insurers are required by this Article to use certificate and contract forms and, where applicable, benefit booklets that are written in simple and commonly used language, that are logically and clearly arranged, and that are printed in a legible format. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-32. Scope of application. — (a) Except as provided in subsection (b) of this section, the provisions of this Article apply to the certificates and contracts of direct insurance and health care coverage that are described in G.S. 57-7(a) and (b).

(b) Nothing in this Article applies to:

(1) Any group contract or certificate, nor any group certificate delivered or issued for delivery outside of this State;

(2) Insurers who issue benefit booklets on group and nongroup bases explaining the certificates or contracts issued under G.S. 57-7. In such

cases, the provisions of this Article apply only to the benefit booklets furnished to the persons insured, and not to the certificates.

(c) No other provision of the General Statutes setting language simplification standards shall apply to any certificate forms covered by this Article.

(d) Any non-English language certificate delivered or issued for delivery in this State shall be deemed to be in compliance with this Article if the insurer certifies that such certificate is translated from an English language certificate which does comply with this Article. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-33. Definitions. — As used in this Article, unless the context clearly indicates otherwise:

(1) "Benefit booklet" means any written explanation of insurance coverages or benefits issued by an insurer and which is supplemental to and not a part of an insurance certificate or subscriber contract.

(2) "Commissioner" means the Commissioner of Insurance.

(3) "Flesch scale analysis readability score" means a measurement of the case of readability of an insurance certificate or contract made pursuant to the procedures described in G.S. 57-35.

(4) "Insurance certificate or contract" or "policy" or "certificate" means an agreement as defined by G.S. 57-7.

(5) "Insurer" means every corporation providing contracts or certificates of coverage of insurance as described in G.S. 57-1. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-34. Format requirements. — (a) All certificates and contracts covered by G.S. 57-37 must be printed in a type face at least as large as 10 point modern type, one point leaded, be written in a logical and clear order and form, and contain the following items:

(1) On the cover, first, or insert page of the certificate a statement that the certificate is a legal contract between the certificate owner and the insurer, and the statement, printed in larger or other contrasting type or color, "Read your certificate carefully";

(2) An index of the major provisions of the certificate, which may include the following items:

a. The person or persons insured by the certificate;

b. The applicable events, occurrences, conditions, losses, or damages covered by the certificate;

c. The limitations or conditions on the coverage of the certificate;

d. Definitional sections of the certificate;

e. Provisions governing the procedure for filing a claim under the certificate;

f. Provisions governing cancellation, renewal, or amendment of the certificate by either the insurer or the subscriber;

g. Any options under the certificate; and

h. Provisions governing the insurer's duties and powers in the event that suit is filed against the subscriber.

(b) In determining whether or not a certificate is written in a logical and clear order and form the Commissioner must consider the following factors:

(1) The extent to which sections or provisions are set off and clearly identified by titles, headings, or margin notations;

(2) The use of a more readable format, such as narrative or outline forms;

(3) Margin size and the amount and use of space to separate sections of the policy; and

(4) Contrast and legibility of the colors of the ink and paper, and the use of contrasting titles or headings for sections. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-35. Flesch scale analysis readability score; procedures. — (a) A Flesch scale analysis readability score will be measured as provided in this section.

(b) For certificates containing 10,000 words or less of text, the entire certificate must be analyzed. For certificates containing more than 10,000 words, the readability of two 200-word samples per page may be analyzed in lieu of the entire certificate. The samples must be separated by at least 20 printed lines. For the purposes of this subsection a word will be counted as five printed characters or spaces between characters.

(c) The number of words and sentences in the text must be counted and the total number of words divided by the total number of sentences. The figure obtained must be multiplied by a factor of 1.015. The total number of syllables must be counted and divided by the total number of words. The figure obtained must be multiplied by a factor of 84.6. The sum of the figures computed under this subsection subtracted from 206.835 equals the Flesch scale analysis readability score for the certificate.

(d) For the purposes of subsection (c) of this section the following procedures must be used:

(1) A contraction, hyphenated word, or numbers and letters, when separated by spaces, will be counted as one word;

(2) A unit of words ending with a period, semicolon, or colon, but excluding headings, and captions will be counted as a sentence; and

(3) A syllable means a unit of spoken language consisting of one or more letters of a word as divided by an accepted dictionary. Where the dictionary shows two or more equally acceptable pronunciations of a word, the pronunciation containing fewer syllables may be used.

(e) The term "text" as used in this section includes all printed matter except the following:

(1) The name and address of the insurer; the name, number or title of the certificate; the table of contents or index; captions and subcaptions; specification pages, schedules or tables; and

(2) Any certificate language that is drafted to conform to the requirements of any law, regulation, or agency interpretation of any state or the federal government; any certificate language required by any collectively bargained agreement; any medical terminology; and any words that are defined in the certificate: Provided, however, that the insurer submits with his filing under G.S. 57-36 a certified document identifying the language or terminology that is entitled to be excepted by this subdivision. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-36. Filing requirements; duties of the Commissioner. — (a) No insurer may make, issue, amend or renew any certificate or contract after the dates specified in G.S. 57-37 for the applicable type of insurance unless the certificate is in compliance with the provisions of G.S. 57-34 and 57-35, and unless the certificate is filed with the Commissioner for his approval. The policy will be deemed approved 90 days after filing unless disapproved within the 90-day period. The Commission [Commissioner] may not unreasonably withhold his approval. Any disapproval must be delivered to the insurer in writing and must state the grounds for disapproval. Any certificate filed with the Commissioner must be accompanied by a certified Flesch scale readability analysis and test score and by the insurer's certification that the policy is, in the insurer's judgment, readable based on the factors specified in G.S. 57-34 and 57-35.

(b) The Commissioner must disapprove any certificate covered by subsection (a) of this section if he finds that:

(1) It is not accompanied by a certified Flesch scale analysis readability score of 50 or more;
(2) It is not accompanied by the insurer's certification that the certificate is, in the judgment of the insurer, readable under the standards of this Article; or
(3) It does not comply with the format requirements of G.S. 57-34. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-37. Application to policies; dates; duties of the Commissioner. — (a) The filing requirements of G.S. 57-36 apply to all subscribers' contracts of hospital, medical, and dental service corporations as described in G.S. 57-7(a) and (b) that are made, issued, amended or renewed after July 1, 1983; and

(b) The Commissioner must make the following reports to the Legislative Research Commission and the General Assembly:

(1) On or before March 31, 1980, a report detailing and evaluating the efforts made by the Commissioner and insurers to implement the provisions of subdivision (a)(1) of this section, and particularly examining the feasibility and practicality of requiring certificates to comply with the provisions of this Article and in the time prescribed;
(2) On or before March 31, 1981, a report detailing and evaluating:
a. The operation of and the extent of compliance with the provisions of this Article;
b. The efforts made by the Commissioner and insurers to implement the provisions of subdivision (a)(2) of this section. (1979, 2nd Sess., c. 1161, s. 1.)

Editor's Note. — The references to "subdivision (a)(1)" and "subdivision (a)(2)" in subsection (b) of this section are erroneous, since subsection (a) of this section contains no subdivisions.

§ 57-38. Construction. — (a) The provisions of this Article will not operate to relieve any insurer from any provision of law regulating the contents or provisions of insurance certificates or contracts nor operate to reduce an insured's, beneficiary's or subscriber's rights or protection granted under any statute or provision of the law.

(b) The provisions of this Article shall not be construed to mandate, require, or allow alteration of the legal effect of any provision of any insurance certificate or contract.

(c) In any action brought by a subscriber or claimant arising out of a certificate approved pursuant to this Article, the subscriber or claimant may base such an action on either or both (i) the substantive language prescribed by such other statute or provision of law, or (ii) the wording of the approved certificate. (1979, 2nd Sess., c. 1161, s. 1.)

Chapter 58.

Insurance.

SUBCHAPTER I. INSURANCE DEPARTMENT.

Article 3.

General Regulations for Insurance.

Sec.
58-31.2. No presumption as to loss under burglary or theft policy.
58-41.1. Examinations for license.

Article 4.

Insurance Premium Financing.

58-59. Limitations on service charges; computation; minimum charges.

SUBCHAPTER III. FIRE INSURANCE.

Article 18B.

Fair Access to Insurance Requirements.

58-173.27. Termination; outstanding obligations; revival and extension.

Article 19.

Fire Insurance Policies.

Sec.
58-176. Fire insurance contract; standard policy provisions.
58-177. Standard policy; permissible variations.

SUBCHAPTER IV. LIFE INSURANCE.

Article 24A.

Mutual Burial Associations.

58-241.15. Unclaimed funds of defunct burial associations.

SUBCHAPTER IX. READABLE INSURANCE POLICIES.

Article 33.

Readable Insurance Policies.

58-370. Filing requirements; duties of the Commissioner.
58-371. Application to policies; dates; duties of the Commissioner.

SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 2.

Commissioner of Insurance.

§ 58-9.4. Court review of rates and classification.

Substantial evidence has been described, etc. —

In accord with 1979 Cum. Supp. See State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Substantial evidence is more than a scintilla, etc. —

In accord with 1979 Cum. Supp. See State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-9.6. Extent of review under § 58-9.4.

"Material and Substantial Evidence." —

In accord with 2nd paragraph in 1977 Cum. Supp. See State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

It is proper for the Commissioner to consider investment earnings on capital invested by insurers in reviewing the rate-making formula. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 295 S.E.2d 922 (1979).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-16. Examinations to be made.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-21. Annual statements to be filed with Commissioner.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-22. Punishment for making false statement.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-25. Record of business kept by companies and agents; Commissioner may inspect.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-25.1. Commissioner may require special reports.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Article 3.

General Regulations for Insurance.

§ 58-30.3. Discriminatory practices prohibited.

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

The new classification plan required by § 58-30.4 was intended to put into effect this section, ending classifications based on age or sex. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

§ 58-30.4. Revised classifications and rates.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Purpose of This Section and § 58-30.3. — The new classification plan required by this section was intended to put into effect § 58-30.3, ending classifications based on age or sex. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 295 S.E.2d 922 (1979).

§ 58-31.2. No presumption as to loss under burglary or theft policy. — In any action for recovery under a burglary or theft insurance policy, as that term is defined in G.S. 58-72(7), there shall be no presumptions that the alleged loss was caused by theft or by mysterious disappearance. (1979, 2nd Sess., c. 1327, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1327, s. 2, provides: "This act is effective upon ratification, but does not affect pending litigation." The 1979, 2nd Sess., act was ratified June 25, 1980.

§ 58-41.1. Examinations for license.

(c) Each examination shall be as the Commissioner prescribes, shall be of sufficient scope to test the applicants' knowledge of:

(1) The terms and provisions of the policies or contracts of insurance he proposes to effect; or

(2) The types of claims or losses he proposes to adjust; and

(3) The duties and responsibilities of such a license; and

(4) The current laws of this State applicable to such a license.

(e) The Commissioner shall collect in advance the examination fee provided in G.S. 105-228.7. The Commissioner shall make or cause to be made available to all applicants, for a reasonable fee to offset the costs of production, materials that he deems necessary for the applicants' proper preparation for such exams. The Commissioner is hereby empowered to contract directly with publishers and other suppliers for the production of such preparatory materials, and contracts so let by the Commissioner shall not be subject to Article 3, Chapter 143 of the General Statutes.

(1979, 2nd Sess., c. 1320, ss. 1, 2.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote subsection (c), and added the second and third sentences of subsection (e).

As the rest of the section was not changed by the amendment, only subsections (c) and (e) are set out.

Article 4.

Insurance Premium Financing.

§ 58-59. Limitations on service charges; computation; minimum charges.

(c) The service charge provided for in this section shall be computed on the principal balance of the insurance premium finance agreement from the inception date of the insurance contract, the premiums for which are advanced or to be advanced under the agreement unless otherwise provided under rules and regulations prescribed by the Commissioner, to and including the date when the final installment of the insurance premium finance agreement is payable, at a rate not exceeding twelve dollars ($12.00) per one hundred dollars ($100.00) per annum; plus a non-refundable origination fee which shall not exceed ten dollars ($10.00) per premium finance agreement.

(f) A premium service agreement may provide for the payment by the insured of a delinquency and collection charge on each installment in default for a period of not less than five days in an amount of one dollar ($1.00) or a maximum of five percent (5%) of such installment, whichever is greater, provided that only one such delinquency and collection charge may be collected

on any such installment regardless of the period during which it remains in default. (1963, c. 1118; 1967, c. 824; 1979, 2nd Sess., c. 1083, ss. 1, 2.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote subsection (c), and added subsection (f). As the rest of the section was not changed by the amendment, only subsections (c) and (f) are set out.

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 6.

General Domestic Companies.

§ 58-79.1. Investments; fire, casualty and miscellaneous.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

ARTICLE 12A.

Insurer Holding Registration and Disclosure Act.

§ 58-124.4. Examination.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

ARTICLE 12B.

North Carolina Rate Bureau.

§ 58-124.17. North Carolina Rate Bureau created.

Editor's Note. —

The line "(This Article expires September 1, 1980.)" under the article heading in the 1979 Cumulative Supplement should be deleted. The provision in Session Laws 1977, c. 828, for expiration of this Article was deleted by Session Laws 1979, c. 824, s. 8.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.19. Method of rate making; factors considered.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 295 S.E.2d 922 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.20. Filing rates, plans with Commissioner; public inspection of filings.

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.21. Disapproval; hearing, order; adjustment of premium, review of filing.

Purpose of Notice. — The purpose of the provision of this section that when a filing is made "the Commissioner may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply" with the law is to provide the Bureau a reasonable opportunity to prepare and offer evidence, and to prevent surprise at the hearing. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

The Commissioner is not required, etc. — The enactment of this section did not transfer the burden of proof to the Commissioner; there is no burden upon the Commissioner to disprove the filing; the burden upon him is that of being certain that material and substantial evidence exists in the record to support his findings. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

The Commissioner may not submit his own proposals, whether they be deemed "modifications" or "substitutions," nor may he order his scheme into effect. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 43 N.C. App. 715, 295 S.E.2d 922 (1979).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.22. Appeal of Communication's order.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 58-124.26. Cap on insurance rate increases.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 18.

General Regulations of Business.

§ 58-158. Limitation as to amount and term; indemnity contracts for difference in actual value and cost of replacement.

Replacement Cost Not Recoverable Where No Repair Performed. — In an action to recover fire insurance for loss of a home under a homeowner's policy which included a replacement cost provision, plaintiffs were entitled to recover only the actual cash value of the home at the time of the fire rather than the replacement cost of the home, where they did not repair or rebuild the home but bought another home, and they were not entitled to recover anything more from defendant insurer where they failed to show that the actual cash value of the property destroyed was greater than the amount they had been paid by defendant. Edmund v. Firemen's Fund Ins. Co., 42 N.C. App. 237, 256 S.E.2d 268 (1979).

§ 58-159. Limit of liability on total loss.

Replacement Cost Not Recoverable Where No Repair Performed. — In an action to recover fire insurance for loss of a home under a homeowner's policy which included a replacement cost provision, plaintiffs were entitled to recover only the actual cash value of the home at the time of the fire rather than the replacement cost of the home, where they did not repair or rebuild the home but bought another home, and they were not entitled to recover anything more from defendant insurer where they failed to show that the actual cash value of the property destroyed was greater than the amount they had been paid by defendant. Edmund v. Firemen's Fund Ins. Co., 42 N.C. App. 237, 256 S.E.2d 268 (1979).

Article 18B.

Fair Access to Insurance Requirements.

§ 58-173.27. Termination; outstanding obligations; revival and extension. — This Article shall expire on December 31, 1983, or after the expiration of the Urban Property Protection and Reimbursement Act of 1968, whichever shall first occur, except that rights and obligations incurred by the Association and its members to be established pursuant to the provisions of this Chapter shall not be impaired by the expiration of this Article, and such association shall be continued for the purpose of performing such obligations. If the Urban Property Protection and Reimbursement Act of 1968 expires at any time and is subsequently revived or extended, this Article shall be revived and extended and shall be and remain effective simultaneously with the effective dates of the Urban Property Protection and Reimbursement Act of 1968. (1969, c. 1284; 1973, c. 1440, s. 1; 1977, c. 109; 1979, 2nd Sess., c. 1159.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "1983" for "1980" near the beginning of the first sentence.

Article 18C.

North Carolina Health Care Liability Reinsurance Exchange.

§ 58-173.34. Declarations and purpose of the Article.

The decision holding this Article unconstitutional should be given retroactive effect. American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

Binder Issued under Compulsion of Article Void. — A binder for medical malpractice insurance issued by plaintiff insurer to defendant physicians only because they were required to write such insurance by Health Care Liability Reinsurance Exchange Act was null and void from its inception where the binder was issued solely as result of the compulsion of the unconstitutional statute and not as a voluntary act of the plaintiff acting under any mistaken assumption as to validity of the statute. American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

§ 58-173.37. Definitions.

Quoted in American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

§ 58-173.38. North Carolina Health Care Liability Reinsurance Exchange; creation; membership.

Cited in American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

§ 58-173.42. General obligations of insurers.

Binder Issued under Compulsion of Article Void. — A binder for medical malpractice insurance issued by plaintiff insurer to defendant physicians only because they were required to write such insurance by Health Care Liability Reinsurance Exchange Act was null and void from its inception where the binder was issued solely as result of the compulsion of the unconstitutional statute and not as a voluntary act of the plaintiff acting under any mistaken assumption as to validity of the statute. American Mfrs. Mut. Inc. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

Article 19.

Fire Insurance Policies.

§ 58-176. Fire insurance contract; standard policy provisions. —

(b) No policy or contract of fire insurance except contracts of automobile fire, theft, comprehensive and collision, marine and inland marine insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this State, unless it conforms in substance with all of the provisions, stipulations, agreements, and conditions of the policy form in subsection (c) of this section.

There shall be printed at the head of said policy the name of the insurer or insurers issuing the policy; the location of the home office thereof; a statement whether said insurer or insurers are stock or mutual corporations or are reciprocal insurers. No provisions of this section limit a company to the use of any particular size or manner of folding the paper upon which the policy is printed; provided, however, that any company organized under special charter provisions may so indicate upon its policy, and may add a statement of the plan under which it operates in this State.

The standard fire insurance policy provided for herein need not be used for effecting reinsurance between insurers.

(c) The form of the standard fire insurance policy for North Carolina (with permission to substitute for the word "company" a more accurate descriptive term for the type of insurer and with permission to change the manner of folding the policy and arrangement of the pages and the arrangement of the wording of page 1, page 3, and the back of the policy and relocation of the signatures, and any other relocations or rearrangement of the contents of the policy, with the approval of the Commissioner) shall be in substance as follows:

Standard Fire Insurance Policy for Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

No._____
REPLACES POLICY NO.

COVERAGE AFFORDED BY THIS POLICY IS PROVIDED BY THE COMPANY INDICATED BELOW

SPACE FOR COMPANY NAME, INSIGNIA, AND LOCATION

Insured's Name and Mailing Address

SPECIMEN

Inception (Mo. Day Yr.) Expiration (Mo. Day Yr.) Years

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

INSURANCE IS PROVIDED AGAINST ONLY THOSE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW BY A PREMIUM CHARGE AND AGAINST OTHER PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO.

AMOUNT	RATE	PREPAID TERM PREMIUM DUE AT INCEPTION	ANNUAL PAYMENT DUE UNDER DEF. PREM. PAY. PLAN	PERIL(S) Insured Against and Coverage(s) Provided (Insert Name of Each)
$	$	$	$	FIRE AND LIGHTNING
xxxxxxx	$	$	$	EXTENDED COVERAGE
	$	$	$	
	$	$	$	
$ TOTAL PREMIUM FOR POLICY TERM UNDER D. P. P. P.	TOTAL(S)	$	$	

Item No.	Amount Fire or Fire and Extended Coverage, or Other Peril	Per Cent of Co-Insurance Applicable	DESCRIPTION AND LOCATION OF PROPERTY COVERED Show construction, type of roof and occupancy of building(s) covered or containing the property covered. If occupied as a dwelling state number of families.
1. - $			

Subject to Form No(s). **attached hereto.**

Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to:

Agency at

Countersignature Date

_____Agent

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO AND OF the premium above specified, this Company, for the term of *years specified above* from *inception date shown above* At Noon (Standard Time) to *expiration date shown above* At Noon (Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure *the insured named above* and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all **DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED,** to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

FP 1002.2

ATTACH FORM BELOW THIS LINE

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss**, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

INSERT SIGNATURES AND TITLES OF PROPER OFFICERS

STATE EXCEPTIONS

FLORIDA AND WISCONSIN: The words "five days'" in line 62 are changed to "ten days'".
KANSAS: The words "demand and" in line 58 and "on demand" in lines 65 and 67 are deleted. The words "twelve months" in line 161 are changed to "sixty months".
MAINE: The words "five days'" in line 62 are changed to "ten days'." The words "twelve months" in line 161 are changed to "two years".
MONTANA: The words "twelve months" in line 161 are changed to "eight years".
NORTH CAROLINA: The words "twelve months" in line 161 are changed to "three years".
NORTH DAKOTA: The words "twelve months" in line 161 are changed to "thirty-six months".
OREGON: This policy shall be effective and shall terminate at 12:01 A.M. (Standard Time) on the inception and expiration dates specified in this policy.
VIRGINIA: The words "twelve months" in line 161 are changed to "two years".

(1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4760; 1915, c. 109, s. 9; C. S., s. 6437; 1945, c. 378; 1951, c. 767; 1955, c. 622; c. 807, s. 2; 1977, c. 828, s. 3; 1979, c. 755, ss. 2-4.)

I. GENERAL CONSIDERATION.

Editor's Note.—

Attention is directed to the amendment to line 161, stated in the margin on page 3 of the form.

The 1979 amendment, effective July 1, 1980, substituted "conforms in substance with all of the provisions, stipulations, agreements and conditions of the policy form in subsection (c) of this section" for "shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy, except as provided in G.S. 58-126.1" at the end of the first paragraph of subsection (b), deleted the former fourth paragraph of subsection (b), relating to the size of type, form and arrangement of the policy, and inserted "in substance" following "shall be" near the end of subsection (c).

As subsection (a) was not changed by the amendment, it is not set out.

Applied in Collins v. Quincy Mut. Fire Ins. Co., 297 N.C. 680, 256 S.E.2d 718 (1979).

§ 58-177. Standard policy; permissible variations. — No fire insurance company shall issue fire insurance policies, except policies of automobile fire, theft, comprehensive and collision, marine and inland marine insurance, on property in this State other than those of the substance of the standard form as set forth in G.S. 58-176 except as follows:

(6) Appropriate forms of supplemental contract or contracts or extended coverage endorsements and other endorsements whereby the interest in the property described in such policy shall be insured against one or more of the perils which the company is empowered to assume, in addition to the perils covered by said standard fire insurance policy may be approved by the Commissioner, and their use in connection with a standard fire insurance policy may be authorized by him. In his discretion the Commissioner may authorize the printing of such supplemental contract or contracts or extended coverage endorsements and other endorsements in the substance of the form of the standard fire insurance policy. The first page of the policy may in form approved by the Commissioner be arranged to provide space for listing of amounts of insurance, rates and premiums, description of construction, occupancy and location of property covered for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached or printed therein, and such other data as may be conveniently included for duplication on daily reports for office records.

(7) A company may print on or in its policy, with the approval of the Commissioner, any provisions which it is required by law to insert in its policies not in conflict with the substance of provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to Be Inserted in This Policy." (1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4759; 1907, c. 800, s. 1; 1915, c. 109, s. 10; C. S., s. 6436; 1925, c. 70, s. 5; 1945, c. 378; 1949, c. 418; 1951, c. 767; c. 781, s. 5; 1955, c. 807, s. 3; 1979, c. 755, ss. 5-7.)

Editor's Note.—

The 1979 amendment, effective July 1, 1980, inserted "substance of the" near the end of the introductory paragraph, deleted "and as provided in G.S. 58-126.1" near the end of the introductory paragraph, inserted "substance of the" in the second sentence of subdivision (6), and inserted "substance of" in the first sentence of subdivision (7).

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivisions (6) and (7) are set out.

SUBCHAPTER IV. LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-211. Group life insurance standard provisions.

Grace Period Does Not Extend Period of Coverage. — The provision in this section that the policyholder of a group life insurance policy is entitled to a grace period of 31 days for the payment of any premium due except the first only extends the time in which a premium may be paid; it does not extend the period of coverage. Conner v. Occidental Life Ins. Co., 41 N.C. App. 610, 255 S.E.2d 420 (1979).

Where group life insurance policy had expired at the time of insured's death, and the policy contained no provisions for extension or renewal, no payment for any premium was or could have been due after that date and no extension of the period of coverage arose; although the insured died within 31 days of the expiration of the policy, the policy was not in effect on and after that date of expiration notwithstanding the provisions of this section. Conner v. Occidental Life Ins. Co., 41 N.C. App. 610, 255 S.E.2d 420 (1979).

ARTICLE 24A.

Mutual Burial Associations.

§ 58-241.15. Unclaimed funds of defunct burial associations. — All unclaimed funds of any burial association that is no longer in operation shall be disposed of in accordance with Chapter 116B. (1969, c. 1083; 1975, c. 837; 1979, 2nd Sess., c. 1311, s. 7.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective January 1, 1981, rewrote this section.

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-248.35. Procedure for cession provided in plan of operation.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979).

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-251.1. Accident and health policy provisions.

Applied in Hooks v. Colonial Life & Accident Ins. Co., 43 N.C. App. 606, 259 S.E.2d 567 (1979).

§ 58-251.4. Policies to cover newborn infants.

Effect of Application for Policy after Birth. — Where a hospital, medical and surgical expense policy issued to a named insured was in effect when she gave birth to a son, and the insured applied after the birth of her son to have the coverage of the policy extended to the son, and the policy was thereafter endorsed to extend coverage to the son, and the premium increased to reflect this new coverage, the provisions of this section did not cause the policy to extend coverage to insured's son back to the moment of his birth, since this section applies only where there is a policy in effect at the birth of a child which provides coverage for the child. Norris v. Home Security Life Ins. Co., 42 N.C. App. 719, 257 S.E.2d 647 (1979).

SUBCHAPTER IX. READABLE INSURANCE POLICIES.

ARTICLE 33.

Readable Insurance Policies.

§ 58-370. Filing requirements; duties of the Commissioner.

(b) The Commissioner must disapprove any policy covered by subsection (a) of this section if he finds that:

(1) It is not accompanied by a certified Flesch scale analysis readability score of 50 or more.

(2) It is not accompanied by the insurer's certification that the policy is, in the judgment of the insurer, readable under the standards of this Article; or

(3) It does not comply with the format requirements of G.S. 58-368. (1979, c. 755, s. 1; 1979, 2nd Sess., c. 1161, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment rewrote subdivision (1) of subsection (b). As the rest of the section was not changed by the amendment, only the introductory language and subsection (b) are set out.

§ 58-371. Application to policies; dates; duties of the Commissioner. —

(a) The filing requirements of G.S. 58-370 apply as follows:

(1) As described in Article 12B of this Chapter, to all policies of private passenger nonfleet motor vehicle insurance, to all policies of insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof and valuable interest therein, and other insurance coverages written in connection with the sale of such property insurance, that are made, issued, amended, or renewed after March 1, 1981; and

(2) To all policies of life insurance as described in Article 22 of this Chapter, to all benefit certificates issued by fraternal orders and societies as described in Subchapter VII of this Chapter, to all policies of accident and health insurance as described in Subchapter VI of this Chapter, to all subscribers' contracts of hospital, medical, and dental service corporations as described in General Statutes Chapter 57, and to all health maintenance organization evidences of coverage as described in General Statutes Chapter 57A, that are made, issued, amended, or renewed after July 1, 1983.

(1979, 2nd Sess., c. 1161, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "March 1, 1981" for "July 1, 1980" near the end of subdivision (1) of subsection (a), and substituted "1983" for "1981" at the end of subdivision (2) of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Chapter 59.

Partnership.

Article 1.

Uniform Limited Partnership Act.

Sec.
59-1. Limited partnership defined.

ARTICLE 1.

Uniform Limited Partnership Act.

§ 59-1. Limited partnership defined. — A limited partnership is a partnership formed by two or more individuals, partnerships, corporations or other associations under the provisions of G.S. 59-2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. (1941, c. 251, s. 1; 1979, c. 97, s. 1.)

Editor's Note.— This section is set out above to correct a typographical error in the 1979 Cumulative Supplement.

§ 59-10. Rights of a limited partner.

No Right to Bring Suit on Behalf of Partnership. — This section, allowing limited partners the right to a "dissolution and winding up" does not include bringing a lawsuit on behalf of the limited partnership. Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355 (1980).

Where plaintiff limited partners are suing for damages to their interest in a partnership based on the negligence of the defendants, there is no necessity that they be allowed to sue on behalf of the limited partnership. Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355 (1980).

§ 59-26. Parties to actions.

Where plaintiff limited partners are suing for damages to their interest in a partnership based on the negligence of the defendants, there is no necessity that they be allowed to sue on behalf of the limited partnership. Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355 (1980).

ARTICLE 2.

Uniform Partnership Act.

Part 2. Nature of a Partnership.

§ 59-36. Partnership defined.

"Profit" Relates to Purpose of Business. — There was no merit to defendant's contention that since he and his associates never achieved a "profit" in their business dealings, there could be no partnership, since the word "profit," as it is used in subsection (a) of this section, relates to the purpose of the business, not to whether the business actually produced a net gain. Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

§ 59-37. Rules for determining the existence of a partnership.

Instruction as to Statutory Rules. — The trial court's instructions on the law applicable to the formation of partnerships were inadequate where the court did not give the jury the benefit of the applicable statutory rules for determining the existence of a partnership that are set out in this section. Hardesty v. Ferrell, 44 N.C. App. 354, 260 S.E.2d 925 (1979).

Quoted in Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-42. Partnership charged with knowledge of or notice to partner.

Applied in Browning v. Maurice v. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355 (1980).

§ 59-45. Nature of partner's liability.

Quoted in Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

Article 3.

Surviving Partners.

§ 59-81. Procedure for purchase by surviving partner.

Cited in Lewis v. Boling, 42 N.C. App. 597, 257 S.E.2d 486 (1979).

Chapter 62.

Public Utilities.

Article 1.

General Provisions.

Sec.

62-3. Definitions.

Article 7.

Rates of Public Utilities.

62-156. Power sales by small power producers to public utilities.

Sec.

62-157 to 62-159. [Reserved.]

Article 16.

Security Provisions.

62-333. Screening employment applications.

Article 1.

General Provisions.

§ 62-3. Definitions. — As used in this Chapter, unless the context otherwise requires, the term:

(27a) "Small power producer" means a person or corporation owning or operating an electrical power production facility with a power production capacity which, together with any other facilities located at the same site, does not exceed 80 megawatts of electricity and which depends upon renewable resources for its primary source of energy. For the purposes of this section, renewable resources shall mean: hydroelectric power. A small power producer shall not include persons primarily engaged in the generation or sale of electricity from other than small power production facilities.

(1979, 2nd Sess., c. 1219, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment added subdivision (27a).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (27a) are set out.

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Applied in State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Article 3.

Powers and Duties of Utilities Commission.

§ 62-31. Power to make and enforce rules and regulations for public utilities.

Applied in State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979).

§ 62-32. Supervisory powers; rates and service.

I. GENERAL CONSIDERATION.

Applied in State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

§ 62-37. Investigations.

Applied in State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

§ 62-51. To inspect books and records of corporations affiliated with public utilities.

Applied in State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Article 4.

Procedure before the Commission.

§ 62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.

Findings Must Be Supported by Competent Evidence. — Since the commission is required to render its decisions upon questions of law and of fact in the same manner as a court of record, its findings must be, as a matter of law, supported by competent evidence. State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

§ 62-79. Final orders and decisions; findings; service; compliance.

Findings Must Be Supported by Competent Evidence. — Since the commission is required to render its decisions upon questions of law and of fact in the same manner as a court of record, its findings must be, as a matter of law, supported by competent evidence. State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Article 5.

Review and Enforcement of Orders.

§ 62-94. Record on appeal; extent of review.

Commission's Findings Are Conclusive, etc. —

In accord with 3rd paragraph in original. See State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 622, 259 S.E.2d 791 (1979).

Minimal Consideration of Competent Evidence Correctable on Appeal. — Although it is not for an appellate court to dictate to the commission what weight it should give to material facts before it, a summary disposition which indicates that the commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

The question of whether the case "is to be a general rate case" under the terms of § 62-137 is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be

required to furnish. Even at that stage, however, the commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

Rates Must Be Fixed Prospectively. — The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to subsection (a) of this section and rates must be fixed prospectively from their effective date. Section 62-136(a) provides that the commission shall determine rates to be thereafter observed and in force. The commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979).

An annual "true up" of the curtailment tracking rate of a natural gas company was not a change in the general fixed rate, since the curtailment tracking rate merely creates an estimated rate based on projected gas availability. Therefore, the "true up" of the CTR is a correction of an estimated rate, and does not constitute retroactive general rate making. State ex rel. Utilities Comm'n v. CF Indus., Inc., 299 N.C. 504, 263 S.E.2d 559 (1980).

§ 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 62-133. How rates fixed.

I. GENERAL CONSIDERATION.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Cited in State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

II. UTILITIES COMMISSION.

Power to Compel Adequate Service, etc. —
In accord with original. See State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Commission Intended to Fix Rates, etc. —
In accord with original. See State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

§ 62-134. Change of rates; notice; suspension and investigation.

Cited in State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

§ 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.

The Commission may not fix rates retroactively, etc. —
The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to

the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to § 62-130(a) and rates must be fixed prospectively from their effective date. Subsection (a) of this section provides that the commission shall determine rates to be thereafter observed and in force. The commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979).

§ 62-137. Scope of rate case.

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

The question of whether the case "is to be a general rate case" under the terms of this section is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

§ 62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.

Collection of Surcharge before Tariff Effective. — The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to § 62-130(a) and rates must be fixed prospectively from their effective date. Section 62-136(a) provides that the commission shall determine rates to be thereafter observed and in force. The commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979).

§ 62-140. Discrimination prohibited.

Giving Preference to Parent Corporation. —

A power company which is a subsidiary may not be allowed to structure its economic affairs or physical operations in such a way as to effect an unreasonable preference or advantage to anyone, including its parent. State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

§ 62-156. Power sales by small power producers to public utilities. — (a) In the event that a small power producer and an electric utility are unable to mutually agree to a contract for the sale of electricity or to a price for the electricity purchased by the electric utility, the commission shall require the utility to purchase the power, under rates and terms established as provided in subsection (b) of this section.

(b) No later than March 1, 1981, and at least every two years thereafter, the commission shall determine the rates to be paid by electric utilities for power purchased from small power producers, according to the following standards:

(1) Term of Contract. — Long-term contracts for the purchase of electricity by the utility from small power producers shall be encouraged in order to enhance the economic feasibility of small power production facilities.

(2) Avoided Cost of Energy to the Utility. — The rates paid by a utility to a small power producer shall not exceed, over the term of the purchase power contract, the incremental cost to the electric utility of the electric energy which, but for the purchase from a small power producer, the utility would generate or purchase from another source. A determination of the avoided energy costs to the utility shall include a consideration of the following factors over the term of the power contracts: the expected costs of the additional or existing generating capacity which could be displaced, the expected cost of fuel and other operating expenses of electric energy production which a utility would otherwise incur in generating or purchasing power from another source, and the expected security of the supply of fuel for the utilities' alternative power sources.

(3) Availability and Reliability of Power. — The rates to be paid by electric utilities for power purchased from a small power producer shall be established with consideration of the reliability and availability of the power. (1979, 2nd Sess., c. 1219, s. 2.)

§§ 62-157 to 62-159: Reserved for future codification purposes.

ARTICLE 12.

Motor Carriers.

§ 62-262. Applications and hearings.

Applied in State ex rel. Utilities Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979).

ARTICLE 14.

Fees and Charges.

§ 62-300. Particular fees and charges fixed; payment.

Cited in State ex rel. Utilities Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

ARTICLE 16.

Security Provisions.

§ 62-333. Screening employment applications. — The Chief Personnel Officer or his designee of any public utility franchised to do business in North Carolina shall be permitted to obtain from the State Bureau of Investigation a confidential copy of criminal history record information for screening an applicant for employment with or an employee of a utility or utility contractor

where the employment or job to be performed falls within a class or category of positions certified by the North Carolina Utilities Commission as permitting or requiring access to nuclear power facilities or access to or control over nuclear material.

The State Bureau of Investigation shall charge a reasonable fee to defray the administrative costs of providing criminal history record information for purposes of employment application screening. The State Bureau of Investigation is authorized to retain fees charged pursuant to this section and to expend those fees in accordance with the Executive Budget Act for the purpose of discharging its duties under this section. (1979, c. 796; 1979, 2nd Sess., c. 1212, s. 10.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective retroactively to March 30, 1980, inserted "in accordance with the Executive Budget Act" near the end of the second sentence of the second paragraph, and deleted "provided that all such fees received after March 30, 1980 shall be credited to the General Fund" at the end of the second sentence of the second paragraph.

Session Laws 1979, 2nd Sess., c. 1212, s. 15 contains a severability clause.

Chapter 63.

Aeronautics.

Article 1.

Municipal Airports.

§ 63-2. Cities and towns authorized to establish airports.

Quoted in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 63-3. Counties authorized to establish airports.

Proprietary Function. — The operation of an airport by a county is a proprietary function. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 63-5. Airport declared public purpose; eminent domain.

Quoted in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Article 6.

Public Airports and Related Facilities.

§ 63-50. Airports a public purpose.

Quoted in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 63-53. Specific powers of municipalities operating airports.

Constitutionality. — Subdivisions (2), (3) and (5) of this section are not violative of equal protection as being devoid of appropriate standards. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Although the standard set out in subdivision (2) of this section for the enactment of managerial rules and regulations is limited to the word "needful," such a standard is sufficiently definite to serve as a reasonable and workable guide to an administrative body, whose activities require flexibility and a practical approach, without leaving that body to its own unfettered discretion. The standard for municipal action with respect to safety ordinances is definite enough to withstand constitutional scrutiny. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Subdivision (3) of this section is not constitutionally infirm on its face. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

The operation of an airport by a county is a proprietary function. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

The proviso at the end of subdivision (3) contemplates that limits of some sort will be placed upon the activities of municipalities while engaged in the proprietary activity of operating a publicly owned airport. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Federal Antitrust Scrutiny of Exclusive Grant. — The legislative intent behind this section was not to direct or authorize a grant by a county of an exclusive fixed base operator status at an airport. Thus federal antitrust scrutiny of such an alleged arrangement would be proper. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Chapter 65.

Cemeteries.

Article 5.

Removal of Graves.

§ 65-13. Removal of graves; who may disinter, move and reinter; notice; certificate filed; reinterment expenses; due care required.

Section Not Exclusive Grounds for Disinterment. — This statute does not provide the exclusive grounds for the disinterment of a body. The statute speaks to the situation where a body had been properly interred, but for some reason justified by the public interest or by some compelling private interests it is necessary to effect a disinterment, removal, and reinterment. This statute nowhere provides for the situation where there has been an improper interment. Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325, cert. denied, 298 N.C. 304, 259 S.E.2d 917 (1979).

Article 9.

North Carolina Cemetery Act.

§ 65-46. Short title.

Cited in Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979).

§ 65-49. The North Carolina Cemetery Commission.

Duties Quasi-Judicial and Quasi-Legislative. — The duties of the Commission are neither political nor executive. They are predominantly quasi-judicial and quasi-legislative. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

Commission Must Act with Impartiality. — Since it is charged "with the power and duty to adopt rules and regulations to be followed in the enforcement" of the North Carolina Cemeteries Act, including the licensing of cemeteries operating in this State, it must act with entire impartiality. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

Members are required to exercise the judgment of experts in the field appointed by law and informed by experience. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

§ 65-50. Cemetery Commission; members, selection, quorum.

Administrative Procedure Act Not Applicable to Removal. — This section gives the Governor the power to remove a member of the Cemetery Commission for cause "according to the provisions of § 143B-13 of the Executive Organization Act of 1973." There is no reference to the Administrative Procedure Act. Nor does § 143B-13(d), which gives the Governor power to remove for cause any member of a commission, refer to the Administrative Procedure Act. Had the General Assembly intended for the Governor to be bound by the provisions of the Administrative Procedure Act, it could have referred to that act rather than the Executive Organization Act. Absent a specific legislative enactment requiring removals by the Governor to be subject to the Administrative Procedure Act, the act is not applicable to removals by the Governor. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

Chapter 66.

Commerce and Business.

Article 11.

Government in Business.

Sec.

66-58. Sale of merchandise by governmental units.

Article 9C.

Collection Agencies.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2. The 1977 act also repeals, with postponed effective dates. numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

Article 11.

Government in Business.

§ 66-58. Sale of merchandise by governmental units.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.

(2) The Department of Human Resources or the Department of Agriculture for the sale of serums, vaccines, and other like products.

(3) The Department of Administration, except that said agency shall not exceed the authority granted in the act creating the agency.

(4) The State hospitals for the insane.

(5) The Department of Human Resources.

(6) The North Carolina School for the Blind at Raleigh.

(7) The North Carolina School for the Deaf at Morganton.

(8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Carolina, nor to the Coliseum of North Carolina State College, and the other schools and colleges for higher education maintained or supported by the State, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.

(9) The Department of Natural Resources and Community Development, except that said Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.

(10) Child-caring institutions or orphanages receiving State aid.

(11) Highlands School in Macon County.

(12) The North Carolina State Fair.

(13) Rural electric memberships corporations.

(13a) State Farm Operations Commission.

(13b) The Department of Agriculture with regard to its lessees at farmers' markets operated by the Department.

(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided such leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for such tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase such supplies.

(16) Laundry services performed by the Department of Corrections may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Corrections, or for which services have been contracted or applied for in writing, as of May 22, 1973.

Such services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by such institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by such institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Corrections, be processed by a dry-cleaning method.

(1979, c. 830, s. 4.)

Editor's Note. — The 1979 amendment, effective July 1, 1980, added the second sentence of subdivision (b)(9). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Chapter 69.

Fire Protection.

Article 3A.

Rural Fire Protection Districts.

§ 69-25.10. Means of abolishing tax district.

Local Modification. —
Orange County: 1979, 2nd Sess., c. 1167.

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

The common law on restraint of trade, etc. —

Because § 75-2 incorporates the common law on restraint of trade into this section, the common law is determinative of at least the minimum scope of this section. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

An actionable conspiracy to restrain trade must operate to the prejudice of the public, in keeping with the common law's "Rule of Reason." United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Accordingly, public damage must be alleged and proven. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Actual Competition Need Not Be Shown. — So long as the defendant in a restraint of trade case willfully engaged in acts that are calculated to destroy competition in a particular market, it is irrelevant whether the defendant is actually engaged in the market. Only an intention and capacity to compete against is essential; actual competition need not be shown. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Cited in Harris v. Atlantic-Richfield Co., 469 F. Supp. 759 (E.D.N.C. 1978); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

Editor's Note. —

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For article, "The Ombudsman, or Citizens' Defender — The North Carolina Experience," see 10 N.C. Cent. L.J. 227 (1979).

The 1977 amendments to this section constituted a substantive revision intended to expand the potential liability for certain proscribed acts. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Actual Competition Not Necessary. — This section nowhere states a requirement that the plaintiff and defendant be in actual competition with each other in a particular market. Actual competition is not necessary. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

No Standard Requiring Inducement of Sale. — In order for an activity to be covered by the Unfair Trade Practices Act, it need only "surround" or "affect" a sale; it need not meet the stricter standard of also inducing a sale. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

And Court Determines Whether, etc. — In accord with 1st paragraph in 1979 Cum. Supp. See Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

Bulk Sale of Business' Assets — This section would apply to a bulk sale of a business' assets as much as it would to a consumer sale. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Statute of Limitations Prior to Enactment of § 75-16.2. — See Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

Applied in Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979); Kleinfelter v. Northwest Bldr. & Developers, Inc., 44 N.C. App. 561, 261 S.E.2d 498 (1980).

Quoted in Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979).

Cited in Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977); B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 234 (1980); Taylor v. Hayes, 45 N.C. App. 119, 262 S.E.2d 383 (1980); CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 614 F.2d 33 (4th Cir. 1980).

§ 75-2. Any restraint in violation of common law included.

The common law is determinative of at least the minimum scope of § 75-1. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

§ 75-4. Contracts to be in writing.

This section is consistent with the other "statute of frauds" provisions in the law which require only that the writing be "signed by the party charged therewith," § 22-1, or require that the writing be signed by "the party against whom enforcement is sought," § 25-2-201(a). Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Person Seeking Enforcement Not Required to Sign. — A covenant not to compete in a contract signed by defendant was valid since this section establishes that contracts or agreements limiting the rights of persons to do business in this State may be enforceable if put in writing "duly signed by the party who agrees not to enter into any such business within such territory" and it is not necessary that the person seeking enforcement of the terms required to be in writing also sign the writing. Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

§ 75-5. Particular acts prohibited.

Cited in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 75-14. Action to obtain mandatory order.

Stated in Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

§ 75-15.1. Restoration of property and cancellation of contract.

Stated in Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

§ 75-15.2. Civil penalty.

Cited in Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

§ 75-16. Civil action by person injured; treble damages.

Section Not Intended as Penalty. — It would not be proper for the North Carolina Appeals Court to strain to infer that the General Assembly meant this section to be a penalty where, in the preceding statutory section, the General Assembly has expressly created a "penalty" denominated as such and reserved the authority to enforce the "penalty" to the State's chief law enforcement officer. The language of § 75-15.2 is sufficiently particular for the court to conclude that had the General Assembly intended its sister provision, § 75-16, also to be a "penalty," the General Assembly would have expressly provided for a second "penalty." Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

This section is punitive in nature. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Statute of Limitations Prior to Enactment of § 75-16.2. — An action under this section to recover treble damages for a

violation of the unfair trade practices statute, § 75-1.1, instituted prior to the enactment of the four-year statute of limitations of § 75-16.2 on June 12, 1969, is governed by the three-year limitation of § 1-52(2), not the one-year limitation of § 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

Applied in Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

Cited in Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 234 (1980); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

§ 75-16.1. Attorney fee.

"Prevailing Party" Must Have Suffered Actual Injury. — In a private action to recover damages for a violation of § 75-1.1, the plaintiff, in order to be the "prevailing party" within the meaning of this section, must prove not only a violation of § 75-1.1 by the defendant, but also that plaintiff has suffered actual injury as a result of that violation. Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

Applied in United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1979).

Cited in Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 134 (1980).

§ 75-16.2. Limitation of actions.

Applicable Statute Prior to Enactment of Section. — An action under § 75-16 to recover treble damages for a violation of the unfair trade practices statute, § 75-1.1, instituted prior to the enactment of the four-year statute of limitations of this section on June 12, 1969, is governed by the three-year limitation of § 1-52(2), not the one-year limitation of § 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979).

Article 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

Editor's Note. —

Article 9, Chapter 66, of the General Statutes, referred to in subdivision (3) of this section, was rewritten by Session Laws 1979, c. 835, and has been recodified as Article 9C, § 66-49.24 et seq., of Chapter 66.

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

Sec.

75A-16. [Repealed.]

Article 1.

Boating Safety Act.

§ 75A-16: Repealed by Session Laws 1979, c. 830, s. 9, effective July 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of Chapter 113.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

Chapter 78A.

North Carolina Securities Act.

Article 4.

Registration of Securities.

Sec.

78A-28. Provisions applicable to registration generally.

Article 5.

Registration of Dealers and Salesmen.

78A-36. Registration requirement.

Article 6.

Administration and Review.

Sec.

78A-50. Administrative files and opinions.

Article 1.

Title and Definitions.

§ 78A-1. Title.

Editor's Note. — For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

Article 3.

Exemptions.

§ 78A-17. Exempt transactions.

Editor's Note. — For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

§ 78A-18. Denial and revocation of exemptions.

Editor's Note. — For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

Article 4.

Registration of Securities.

§ 78A-28. Provisions applicable to registration generally.

(b) Every person filing a registration statement shall pay a filing fee of twenty-five dollars ($25.00), plus a registration fee of one tenth of one percent (1/10 of 1%) of the maximum aggregate offering price at which the registered securities are to be offered in this State, but the registration fee shall in no case be less than twenty-five dollars ($25.00) or more than two hundred fifty dollars ($250.00). When a registration statement is withdrawn before the effective date or a preeffective stop order is entered under G.S. 78A-29, the Administrator shall retain the filing fee. In the case of a registration statement

relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company, unit investment trust, mutual fund or limited partnership interest, the Administrator may by rule or order prescribe the maximum amount of securities, but in no event less than two hundred fifty thousand dollars ($250,000), that may be offered upon payment of the maximum registration fee, and prescribe different amounts for different classes of issuers.

(j) A registration statement filed in accordance with subsection (j) of this section may be amended after its effective date so as to increase the securities specified as proposed to be offered. Such an amendment becomes effective when the Administrator so orders. Every person filing such an amendment shall pay a registration fee, calculated in the manner specified in subsection (b), and such filing fee not to exceed twenty-five dollars ($25.00) as the Administrator may by rule or order require, with respect to the additional securities proposed to be offered. (1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective January 1, 1981, substituted "unit investment trust, mutual fund or limited partnership interest," for "or unit investment trust, as those terms are defined in the Investment Company Act of 1940," and made a minor change in punctuation in the last sentence of subsection (b), and substituted "filed in accordance with subsection (j) of this section" for "relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company or unit investment trust, as those terms are defined in the Investment Company Act of 1940," in the first sentence of subsection (j).

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

Article 5.

Registration of Dealers and Salesmen.

Repeal of Article. — Session Laws 1979, 2nd Sess., c. 1097, deleted this Article from the list of statutes repealed by § 143-34.12.

§ 78A-36. Registration requirement. — (a) It is unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter. No dealer shall be eligible for registration under this Chapter, or for renewal of registration hereunder, unless such dealer is at the time registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934; any dealer specializing in church securities may be registered to offer or sell only those securities which are issued by churches located within this State.

(1979, 2nd Sess., c. 1148, s. 2.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective January 1, 1981, added at the end of subsection (a) "any dealer specializing in church securities may be registered to offer or sell only those securities which are issued by churches located within this State."

As subsections (b) and (c) were not changed by the amendment, they are not set out.

ARTICLE 6.

Administration and Review.

§ 78A-50. Administrative files and opinions.

(e) The Administrator in his discretion may honor requests from interested persons for interpretative opinions. When an exemption is claimed in writing, cites the section relied upon, and is considered eligible upon the showing made, a "no action" letter will be furnished upon request and upon the payment of a fee of ten dollars ($10.00). (1925, c. 190, s. 17; 1927, c. 149, s. 17; 1955, c. 436, s. 8; 1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective January 1, 1981, added the second sentence of subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Chapter 78B.

Tender Offer Disclosure Act.

§ 78B-1. Title.

Cited in Eure v. NVF Co., 481 F. Supp. 639 (E.D.N.C. 1979).

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-4.1. Limited practice of out-of-State attorneys.

Conditional Application for Admission for Limited Purpose. — This section does not permit an out-of-State attorney to move for admission for a limited purpose in this State on a conditional basis. The requirement of subdivision (3) of this section calls for a firm commitment from the movant which is contrary in spirit to a conditional application for admission for a limited purpose. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

Effect of Court Order Waiving Local Counsel. — Even if the trial judge has no discretion to waive the requirement for local counsel found in subdivision (5) of this section, before permitting a foreign attorney to practice on a limited basis in this State, the court's order waiving local counsel, permitting foreign counsel to appear in a case, and ordering that foreign counsel appear for trial on a certain date would be merely erroneous, not void ab initio, and could be the basis for contempt proceedings against the attorney because of his failure to appear as ordered. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

Article 3.

Arguments.

§ 84-14. Court's control of argument.

Editor's Note. —
For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

Article 4.

North Carolina State Bar.

§ 84-23. Powers of Council.

Cited in In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979).

§ 84-28.1. Disciplinary hearing commission.

Cited in North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979).

§ 84-32. Records and judgments and their effect; restoration of licenses.

Constitutionality. — This section, giving the State Bar Council the discretion to reinstate the license to practice law of a disbarred attorney is not an unconstitutional delegation of legislative power. In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979).

The council did not err in the denial of petitioner's application for reinstatement of

his license to practice law where there was evidence that petitioner had compromised four of the six civil judgments rendered against him but had failed to make restitution for two outstanding judgments against him in excess of $30,000, which he had been unable to compromise, and that petitioner also renounced funds which would have enable him to help satisfy the judgments against him. Petitioner's willingness to satisfy only the judgments that could be compromised, while failing to satisfy those not the subject of compromise, is evidence of the lack of proper reformation required by the statute. In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979).

Chapter 85C.

Bail Bondsmen and Runners.

Repeal of Chapter. — This Chapter is repealed effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

The above note is set out to correct an error in the 1979 Cumulative Supplement.—Ed. note.

Chapter 90.

Medicine and Allied Occupations.

Article 2.

Dentistry.

Sec.
90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.
90-29. Necessity for license; dentistry defined; exemptions.
90-29.1. Extraoral services performed for dentists.
90-29.5. Instructor's license.
90-39. Fees.
90-41. Disciplinary action.
90-43. Compensation and expenses of Board.
90-47. [Repealed.]
90-48.2 to 90-48.6. [Reserved.]

Article 2A.

Dental Peer Review Protection Act.

90-48.7. Title.
90-48.8. Immunity of a member.
90-48.9. Immunity of witnesses before dental peer review committee.
Sec.
90-48.10. Confidentiality of review organization's proceedings and records.
90-48.11. No limitation on previous privileges and immunities.

Article 5.

North Carolina Controlled Substances Act.

90-95. Violations; penalties.

Article 16.

Dental Hygiene Act.

90-223. Powers and duties of Board.

Article 18A.

Practicing Psychologists.

90-270.11. Licensing and examination.

Article 20.

Nursing Home Administrator Act.

90-280. Fees; display of license; duplicate license; inactive list.

Article 1A.

Treatment of Minors.

§ 90-21.3. Performance of surgery on minor; obtaining second opinion as to necessity.

Cited in Brigham v. Hicks, 44 N.C. App. 152, 260 S.E.2d 435 (1979).

Article 1B.

Medical Malpractice Actions.

§ 90-21.11. Definition.

Editor's Note. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 111 (1979).

§ 90-21.12. Standard of health care.

Editor's Note. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 111 (1979).

Applied in Vassey v. Burch, 45 N.C. App. 222, 262 S.E.2d 865 (1980).

Stated in Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979).

§ 90-21.14. First aid or emergency treatment; liability limitation.

Quoted in Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979).

Article 2.

Dentistry.

§ 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled for the unexpired term by a majority vote of the remaining members of the Board, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently

employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

(2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental hygienists shall constitute the registration list for elections to the appropriate seats on the Board.

(3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.

(4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: Provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope . . . . . .
Signature of Voter . . . . . .
Address of Voter . . . . . .
. . . . . .

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: Provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge

may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9) If more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected. If only two of the nominees receive a majority of the votes cast, they shall be declared elected. If only one of the nominees shall receive a majority of the votes cast, he shall be declared elected and the Board of Dental Elections shall thereupon order a second election to determine a contest between the two remaining nominees receiving the highest number of votes. If no candidate shall receive a majority of the votes cast, the said Board shall order a second election to determine a contest between the four candidates receiving the highest number of votes. In any election if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: Provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.

(12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Dental 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 of North Carolina.

(15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

(1979, 2nd Sess., c. 1195, ss. 1-5.)

Editor's Note. —

The 1979, 2nd Sess., amendment rewrote subsection (b), substituted "successors to those members whose terms are expiring in the year of the election, each successor" for "two members of the Board of Dental Examiners, each" in the first sentence of subdivision (c)(1) and added the second sentence of subdivision (c)(1), rewrote subdivisions (c)(2) and (c)(4), making them applicable to dental hygienists as well as dentists and to dentists practicing in North Carolina as well as dentists residing in North Carolina, and substituted "person entitled to vote in the election being conducted" for "dentist licensed to practice in North Carolina and residing in North Carolina" in the second sentence of subdivision (c)(6).

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

§ 90-29. Necessity for license; dentistry defined; exemptions.

(c) The following acts, practices, or operations, however, shall not constitute the unlawful practice of dentistry:

(1) Any act by a duly licensed physician or surgeon performed in the practice of his profession;

(2) The practice of dentistry, in the discharge of their official duties, by dentists in any branch of the military service of the United States or in the full-time employ of any agency of the United States;

(3) The teaching or practice of dentistry, in dental schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, by any person or persons licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction;

(4) The practice of dentistry in dental schools or colleges in this State approved by the North Carolina State Board of Dental Examiners by students enrolled in such schools or colleges as candidates for a doctoral degree in dentistry when such practice is performed as a part of their course of instruction and is under direct supervision of a dentist who is either duly licensed in North Carolina or qualified under subdivision (3) above as a teacher; additionally, the practice of dentistry by such students at State or county institutions with resident populations, hospitals, State or county health departments, area health education centers and State or county-owned nursing homes; subject to review and approval or disapproval by the said Board of Dental Examiners when in the opinion of the dean of such dental school or college or his designee, the students' dental education and experience are adequate therefor, and such practice is a part of the course of instruction of such students, is performed under the direct supervision of a duly licensed dentist acting as a teacher or instructor, and is without remuneration except for expenses and subsistence all as defined and permitted by the rules and regulations of said Board of Dental Examiners. Should the Board disapprove a specific program, the Board shall within 90 days inform the dean of its actions. Nothing herein shall be construed to permit the teaching of, delegation to or performance by any dental hygienist, dental assistant, or other auxiliary relative to any program of extramural rotation, of any function not heretofore permitted by the Dental Practice Act, the Dental Hygiene Act or by the rules and regulations of the Board;

(5) The temporary practice of dentistry by licensed dentists of another state or of any territory or country when the same is performed, as clinicians, at meetings of organized dental societies, associations, colleges or similar dental organizations, or when such dentists appear in emergency cases upon the specific call of a dentist duly licensed to practice in this State;

(6) The practice of dentistry by a person who is a graduate of a dental school or college approved by the North Carolina State Board of Dental Examiners and who is not licensed to practice dentistry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Dental Examiners pursuant to the terms and provisions of this Article, and when such practice of dentistry complies with the conditions of said intern permit, or provisional license;

(7) Any act or acts performed by a dental hygienist when such act or acts are lawfully performed pursuant to the authority of Article 16 of this Chapter 90 or the rules and regulations of the Board promulgated thereunder;

(8) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(9) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board;

(10) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(11) The extraoral construction, manufacture, fabrication or repair of prosthetic dentures, bridges, appliances, corrective devices, or other structures designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, by a person or entity not licensed to practice dentistry in this State, when the same is done or performed solely upon a written work order in strict compliance with the terms, provisions, conditions and requirements of G.S. 90-29.1 and 90-29.2.

(12) The use of a dental x-ray machine in the taking of dental radiographs by a dental hygienist, certified dental assistant, or a dental assistant who can show evidence of satisfactory performance on an equivalency examination, recognized by the Board of Dental Examiners, based on seven hours of instruction in the production and use of dental x rays and an educational program of not less than seven hours in clinical dental radiology.

(13) A dental assistant, or dental hygienist who shows evidence of education and training in Nitrous Oxide — Oxygen Inhalant Conscious Sedation within a formal educational program may aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental assistant who can show evidence of having completed an educational program recognized by the Board of not less than seven clock hours on Nitrous Oxide — Oxygen Inhalant Conscious Sedation may also aid and assist

a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental hygienist or dental assistant who has been employed in a dental office where Nitrous Oxide — Oxygen Inhalant Conscious Sedation was utilized, and who can show evidence of performance and instruction of not less than one year prior to July 1, 1980, qualifies to aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. (1935, c. 66, s. 6; 1953, c. 564, s. 3; 1957, c. 592, s. 2; 1961, c. 446, s. 2; 1965, c. 163, ss. 1, 2; 1971, c. 755, s. 2; 1977, c. 368; 1979, 2nd Sess., c. 1195, ss. 10, 15.)

Editor's Note. —

The 1979, 2nd Sess., amendment inserted "or practice" near the beginning of subdivision (3) of subsection (c), deleted a proviso in that subdivision relating to persons licensed outside the United States and added subdivisions (12) and (13) to subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 90-29.1. Extraoral services performed for dentists. — Licensed dentists may employ or engage the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, or other replacements for a part of a tooth, a tooth, or teeth. A person, firm, or corporation so employed or engaged, when constructing or repairing such dentures, bridges, or replacements, exclusively, directly, and solely on the written work order of a licensed member of the dental profession as hereafter provided, and not for the public or any part thereof, shall not be deemed or considered to be practicing dentistry as defined in this Article. (1957, c. 592, s. 3; 1961, c. 446, ss. 3, 4; 1979, 2nd Sess., c. 1195, s. 6.)

Editor's Note. — The 1979, 2nd Sess., amendment, deleted the former last four sentences of the section, relating to advertising and announcements by persons, etc., engaged in performing extraoral services for dentists.

§ 90-29.5. Instructor's license. — The Board may issue an instructor's license to a person who is not otherwise licensed to practice dentistry in the State, but whom the Board finds to be qualified by professional training and experience and upon the same examination as that offered to licensed dentists in North Carolina plus an oral examination. An instructor's license will authorize him to teach and to practice dentistry in or on behalf of a dental school or college offering a doctoral degree in dentistry, operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, but only within the confines of the principal facility of the school or college and of any teaching hospital adjacent thereto. Application for an instructor's license shall be made in accordance with rules and regulations of the North Carolina State Board of Dental Examiners. A person holding an instructor's license shall have, within the scope of his authorized practice, all the duties and responsibilities of any dentist who has been licensed upon examination by the North Carolina State Board of Dental Examiners, and shall be subject to those various disciplinary measures and penalties set forth in G.S. 90-41 upon a determination by the Board that he has violated any of the terms or provisions of this Article. An instructor's license shall be subject to annual renewal by the North Carolina State Board of Dental Examiners, as provided in G.S. 90-31. (1979, 2nd Sess., c. 1195, s. 11.)

§ 90-39. Fees. — In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and

collect fees established by its rules and regulations not exceeding the following:

(1) Each application for general dentistry examination $75.00

(2) Each general dentistry license renewal, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dentist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dentist $50.00

(3) Each provisional license $50.00

(4) Each intern permit or renewal thereof $50.00

(5) Each certificate of license to a resident dentist desiring to change to another state or territory $15.00

(6) Each license issued to a practitioner of another state or territory to practice in this State $75.00

(7) Each license to resume the practice issued to a dentist who has retired from the practice of dentistry or has removed from and returned to this State $75.00

(8) Each instructor's license or renewal thereof . . . . . $50.00.

(1935, c. 66, s. 12; 1953, c. 564, s. 1; 1961, c. 446, s. 8; 1965, c. 163, s. 3; 1971, c. 755, s. 8; 1979, 2nd Sess., c. 1195, s. 12.)

Editor's Note. — The 1979, 2nd Sess., amendment added subdivision (8).

§ 90-41. Disciplinary action. — (a) The North Carolina State Board of Dental Examiners shall have the power and authority to

(1) Refuse to issue a license to practice dentistry;

(2) Refuse to issue a certificate of renewal of a license to practice dentistry;

(3) Revoke or suspend a license to practice dentistry; and

(4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;

(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;

(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;

(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

(8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;

(10) Has engaged in such immoral conduct as to discredit the dental profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of dentistry;

(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;

(14) Is incompetent in the practice of dentistry;

(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(17) Has committed any fraudulent or misleading acts in the practice of dentistry;

(18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;

(20) Has used or permitted another to use his name, as a dentist, in promoting the sale or advertisement of any product or service;

(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;

(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;

(23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;

(24) Is a menace to the public health by reason of having a serious communicable disease;

(25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or

(26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(1979, 2nd Sess., c. 1195, ss. 7, 8.)

Editor's Note. — The 1979, 2nd Sess., amendment, rewrote subdivisions (8) and (18) of subsection (a). As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 90-43. Compensation and expenses of Board. — Each member of the North Carolina State Board of Dental Examiners shall receive as compensation for his services in the performance of his duties under this Article a sum not exceeding the amount provided in G.S. 93B-5(a) for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said Board, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the Board who shall likewise draw voucher payable to himself for the salary fixed for him by the Board.

The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this Article, and employ such personnel as it may deem requisite to assist in carrying out the administrative functions required by this Article and by the Board. (1935, c. 66, s. 15; 1965, c. 163, s. 5; 1971, c. 755, s. 11; 1979, 2nd Sess., c. 1195, s. 9.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "the amount provided in G.S. 93B-5(a)" for "twenty dollars ($20.00)" near the middle of the first paragraph and deleted the former second paragraph, relating to compensation and expenses of the secretary-treasurer of the Board.

§ 90-47: Repealed by Session Laws 1979, 2nd Session, c. 1195, s. 13.

§§ 90-48.2 to 90-48.6: Reserved for future codification purposes.

Article 2A.

Dental Peer Review Protection Act.

§ 90-48.7. Title. — G.S. 90-48.7 through G.S. 90-48.11 may be cited as the "Dental Peer Review Protection Act." (1979, 2nd Sess., c. 1192, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1192, s. 2, provides: "This act is effective January 1, 1981, and does not apply to actions taken or recommendations made prior to that ratification."

§ 90-48.8. Immunity of a member. — No member of a dental peer review committee of a State or local dental society shall be held liable in damages to any person for any action taken or recommendation made within the scope of the functions of that committee, except with regard to Medicare and Medicaid charges or payments if the committee member acts without malice and in reasonable belief that the action or recommendation was warranted by the facts known to him after reasonable effort to obtain the facts of the matter as to which the action was taken or recommendation was made. (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.9. Immunity of witnesses before dental peer review committee. — Notwithstanding any other provision of law, no person providing information to any dental peer review committee or organization shall be held, by reason of having provided such information, to have violated any criminal law, or to be civilly liable under any law unless:

(1) The information is unrelated to the performance of the duty or function of the peer review committee or organization, or
(2) The information is false, and the person providing the information knew, or had good reason to believe that the information was false. (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.10. Confidentiality of review organization's proceedings and records. — The proceedings and records of a dental review committee except those concerning the investigation and consideration of Medicare and Medicaid charges or payments, shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action arising out of the matters which are the subject of evaluation and review by the committee; and no person who was in attendance at a meeting of the committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or any members thereof, except with regard to Medicare and Medicaid charges or payments: Provided, however, that information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of a committee, nor should any person who testifies before a committee or who is a member of a committee be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before a committee or opinions formed by him as a result of the committee hearings, except with regard to Medicare and Medicaid charges or payments. (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.11. No limitation on previous privileges and immunities. — Nothing in this G.S. 90-48.7 through G.S. 90-48.11 shall be deemed to annul, abridge, or limit in any manner any privileges or immunities heretofore existing under the laws of this State. (1979, 2nd Sess., c. 1192, s. 1.)

Article 5.

North Carolina Controlled Substances Act.

§ 90-87. Definitions.

The plain meaning of the exception in subdivision (15) which excepts "preparation or compounding of a controlled substance by an individual for his own use," is to avoid making an individual liable for the felony of manufacturing controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (i.e., rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (i.e., making the so-called "Alice B. Toklas" brownies containing marijuana). State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

The exception in subdivision (16) relating to sterilized seeds implies an affirmative act by which presumptively vital seeds are rendered sterile, rather than the naturally occurring sterile seeds resulting from a lack of fertilization by pollination. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

State Entitled to Assume Marijuana Seeds Are Vital. — Where the defendant does not make any showing as to the fertility of the marijuana seeds, and offers no proof that they were in any different state from that in which they naturally occurred, the State is entitled to assume that the seeds are vital and to proceed upon that assumption until the contrary is shown by defendant's evidence. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

Quoted in State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654 (1979).

§ 90-89. Schedule I controlled substances.

Cited in State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

§ 90-92. Schedule IV controlled substances.

Applied in State v. King, 44 N.C. App. 31, 259 S.E.2d 919 (1979).

§ 90-95. Violations; penalties.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than 10 years or fined not more than ten thousand dollars ($10,000), or both in the discretion of the court;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1);

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars ($2,000), or both in the discretion of the court; but if the quantity of the controlled substance, or combination of the controlled substances, exceeds 100 tablets, capsules or other dosage units, or equivalent quantity, including one-half gram or more of phencyclidine or one gram or more of cocaine, the violation shall be a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both, in the discretion of the court;

(3) A controlled substance classified in Schedule V shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00), or both in the discretion of the court;

(4) A controlled substance classified in Schedule VI shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars ($100.00); but if the quantity of the controlled substance exceeds one ounce (avoirdupois) of marijuana or one tenth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated

from the resin of marijuana, the violation shall be a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both in the discretion of the court.

(h) Notwithstanding any other provisions of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance

a. Is in excess of 50 pounds, but less than 100 pounds, such person shall, upon conviction, be punished by imprisonment for not less than two years nor more than five years in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 100 pounds or more, but less than 2,000 pounds, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units or equivalent quantity, but less than 5,000 dosage units or equivalent quantity, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units or equivalent quantity, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine) or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substances or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, naloxone and naltrexone, and their respective salts), including heroin, or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall, upon conviction, be punished by imprisonment for not less than eight years nor more than 20 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall, upon conviction, be punished by imprisonment for not less than 20 years nor more than 50 years in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(5) Notwithstanding any other provision of law, except as provided in G.S. 90-95(h) (6), any person who has been convicted of a violation of this subsection shall serve the applicable minimum prison term provided by this subsection before either unconditional release or parole.

(6) A person sentenced under this subsection is not eligible for early release or early parole if the person is sentenced as a committed youthful offender and the sentencing judge may not suspend the sentence or place the person sentenced on probation. However, the sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(7) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any other sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, 2nd Sess., c. 1251, ss. 4-6.)

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

Session Laws 1979, 2nd Sess., c. 1251, ss. 4, 5 and 6 added "Except as provided in subsections (h) and (i) of this section," at the beginning of subsections (b) and (d) and added subsections (h) and (i).

Session Laws 1979, 2nd Sess., c. 1251, s. 8, reads as follows: "Nothing in Sections 6 or 7 hereof shall be construed to render lawful any acts committed prior to the effective dates of those sections respectively and unlawful at the time said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under Section 6 hereof and pending on the effective date of Section 7 hereof."

Session Laws 1979, 2nd Sess., c. 1251, s. 9, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsections (b), (d), (h) and (i) are set out.

Amendment Effective March 1, 1981. —

Session Laws 1979, 2nd Sess., c. 1251, s. 7, will rewrite subsection (h) to read as follows:

"(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

"(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as 'trafficking in marijuana' and if the quantity of such substance involved:

"a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be sentenced to a term of at least five years in the State's prison and shall be fined not less than five thousand dollars ($5,000);

"b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

"c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

"d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

"(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in methaqualone' and if the quantity of such substance or mixture involved:

"a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

"b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

"c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

"(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in cocaine' and if the quantity of such substance or mixture involved:

"a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

"b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

"c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

"(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, naloxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in opium or heroin' and if the quantity of such controlled substance or mixture involved:

"a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

"b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a term of at least 18 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

"c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a term of at least 45 years in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

"(5) A person sentenced under this subsection is not eligible for early release or early parole if the person is sentenced as a committed youthful offender and the sentencing judge may not suspend the sentence or place the person sentenced on probation. However, the sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

"(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder."

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Establishing Possession. —

The crime of possession requires that the contraband be in the custody and control of the defendant and subject to his disposition. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979).

Burden on State in Proving Manufacture by Preparation or Compounding. — The burden is on the State to prove from the evidence beyond a reasonable doubt that, in cases where the defendant is charged with manufacture of a controlled substance and the activity constituting manufacture is preparation or compounding, that the defendant intended to distribute the controlled substance. In proving such intent, the State would be able to rely upon ordinary circumstantial evidence (e.g., the amount of the controlled substance possessed, the nature of its packaging, labeling and storage, if any, the activities of the defendant with reference to the controlled substance) as evidence pertinent to intent. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

To aid or abet one in the crime of possession the act or encouragement must be done knowingly with the intent to aid the possessor obtain or retain possession. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979).

Applied in State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979); State v. King, 44 N.C. App. 31, 259 S.E.2d 919 (1979).

Cited in State v. King, 42 N.C. App. 210, 256 S.E.2d 247 (1979); State v. Williams, 299 N.C.

529, 263 S.E.2d 571 (1980); State v. Beam, 45 N.C. App. 82, 262 S.E.2d 350 (1980).

§ 90-95.1. Cooperation between law-enforcement agencies.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 90-97. Other penalties.

Editor's Note. — For article, "Prior Crimes as Evidence in Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

§ 90-98. Attempt and conspiracy; penalties.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

§ 90-108. Prohibited acts; penalties.

Editor's Note. —
Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 7.

Osteopathy.

Repeal of Article. —
Session Laws 1979, 2nd Sess., c. 1173, s. 1, transferred this Article from the list of statutes repealed effective July 1, 1981 under § 143-34.12, to § 143-34.13, which makes the repeal effective July 1, 1983.

ARTICLE 9.

Nurse Practice Act.

§ 90-158. Definitions.

Administration of Additional Doses of Caudal Analgesia. — Following the setting in place of the needle for the injection of caudal analgesia and the administration of such analgesia to the patient, it is permissible for a registered nurse to administer additional dosage of the same medication pursuant to direct orders from the attending physician. See opinion of the Attorney General to Mr. Bryant D. Paris, Jr., Executive Secretary, North Carolina Board of Medical Examiners, Dec. 17, 1979.

ARTICLE 10.

Midwives.

Repeal of Article. — Session Laws 1979, 2nd Sess., c. 1173, s. 2, transferred this Article from the list of statutes repealed effective July 1, 1981 under § 143-34.12 to § 143-34.13, which makes the repeal effective July 1, 1983.

ARTICLE 12A.

Podiatrists.

§ 90-202.2. "Podiatry" defined.

Quoted in Whitehurst v. Boehm, 41 N.C. App. 670, 255 S.E.2d 761 (1979).

§ 90-202.5. Applicants to be examined; examination fee; requirements.

Educational Requirements Not Comparable with Those of Medicine. — The practice of podiatry is a narrowly restricted one; this allied health profession is not at all comparable with the practice of medicine and surgery; the educational requirements for a podiatrist are less demanding than those for physicians and surgeons. Whitehurst v. Boehm, 41 N.C. App. 670, 255 S.E.2d 761 (1979).

§ 90.202.8. Revocation of certificate; grounds for; suspension of certificate.

Cited in Boehm v. North Carolina Bd. of Podiatry Exmrs., 41 N.C. App. 567, 255 S.E.2d 328, cert. denied, 298 N.C. 294, 259 S.E.2d 298 (1979).

ARTICLE 13A.

Practice of Funeral Service.

§ 90-210.25. Licensing.

Cited in Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979).

ARTICLE 16.

Dental Hygiene Act.

§ 90-223. Powers and duties of Board.

(b) The Board shall have the authority to make or amend rules and regulations not inconsistent with this Article governing the practice of dental hygiene and the granting, revocation and suspension of licenses and provisional licenses of dental hygienists.

(1) Any rule promulgated or amended under this Article shall be filed and distributed in accordance with the provisions of Article 5 of Chapter 150A of the General Statutes of North Carolina. A copy must be distributed to all licensed dentists and all licensed dental hygienists within 30 days of final approval by the Board.

(2) The Board shall issue every two years a compilation or supplement of the Dental Hygiene Act and the Board rules and regulations, and, upon written request therefor, a directory of dental hygienists to each licensed dentist and dental hygienist.

(1979, 2nd Sess., c. 1195, s. 14.)

Editor's Note. — The 1979, 2nd Sess., amendment rewrote subdivision (1) of subsection (b). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Article 17.

Dispensing Opticians.

§ 90-236. What constitutes practicing as a dispensing optician.

Applied in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-249. Powers of the Board.

Constitutionality. — This section and § 90-255, insofar as they affect advertising, are patently unconstitutional under the First Amendment. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-250. Sale of optical glasses.

Applied in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-252. Necessity for dispensing optician to supervise place of business; false and deceptive advertising.

Cited in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-253. Exemptions from Article.

Constitutionality. — Classifications in this section, exempting physicians, optometrists and ophthalmic wholesalers from this chapter's requirement, that eyeglasses be dispensed only by licensed dispensing opticians, based on the presumption that these individuals possess such advanced training and skill that it would be illogical to require that they dispense glasses through a licensed optician, bear a rational relationship to the state's objective of forestalling the evils that could result from untrained and unlicensed personnel fitting and dispensing optical goods and thus are not violative of equal protection. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-254. General penalty for violation.

Cited in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-255. Gifts, premiums or discounts unlawful; refund of fees; illegal advertising.

Constitutionality. — Section 90-249 and this section, insofar as they affect advertising, are patently unconstitutional under the First Amendment. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

ARTICLE 18A.

Practicing Psychologists.

§ 90-270.11. Licensing and examination.

(b) Psychological Associate. —

(1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars ($50.00) and an additional examination fee of fifty dollars ($50.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

a. Is at least 21 years of age;

b. Is of good moral character;

c. Has received a master's degree in psychology from an accredited educational institution;

d. Has not within the preceding six months failed an examination given by the Board.

(2) The Board shall not prescribe any educational requirements other than the master's degree in psychology required by this subsection. (1979, 2nd Sess., c. 1176.)

Editor's Note. — The 1979, 2nd Sess., amendment added subdivision (2) to subsection (b). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 20.

Nursing Home Administrator Act.

§ 90-280. Fees; display of license; duplicate license; inactive list.

(d) Any person licensed as a nursing home 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 the amount of twenty-five dollars ($25.00). (1969, c. 843, s. 1; 1977, c. 652; 1979, 2nd Sess., c. 1282.)

Editor's Note. — The 1979, 2nd Sess., amendment added subsections (d) and (e). As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

Article 23.

Right to Natural Death; Brain Death.

§ 90-322. Procedures for natural death in the absence of a declaration.

This section has no application to a homicide case. The procedures in subsection (a) and (b) and the exculpatory clause in subsection (d) are not for the protection of criminal assailants. The statute provides a legal procedure for physicians to terminate life support systems where no brain function exists which, if followed, would protect the physician from civil or criminal liability. State v. Holsclaw, 42 N.C. App. 696, 257 S.E.2d 650 (1979).

Chapter 93.

Public Accountants.

Sec.

93-12. Board of Certified Public Accountant Examiners.

Repeal of Chapter. —
Session Laws 1979, 2nd Sess., c. 1087, s. 3, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the provision repealing this Chapter.

§ 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:
(1979, 2nd Sess., c. 1087, ss. 1, 2.)

Editor's Note. —
The 1979, 2nd Sess., amendment substituted "seven" for "five", "five" for "four" and "two persons" for "one person" in the second sentence of the introductory paragraph and added the fourth sentence of the introductory paragraph.

As the subdivisions (1) to (15) were not changed by the amendment, only the introductory paragraph is set out.

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Chapters 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

Sec.

93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

Article 2.

Real Estate Recovery Fund.

93A-27 to 93A-31. [Reserved.]

Article 3.

Private Real Estate Schools.

93A-32. Definitions.

93A-33. Real Estate Licensing Board to administer Article; authority of Board to conduct investigations, issue licenses, and promulgate regulations.

93A-34. License required; application for license; fees; requirements for issuance of license.

93A-35. Duration and renewal of licenses; transfer of school ownership.

93A-36. Execution of bond required; applicability to branch schools; actions upon bond.

93A-37. Contracts with unlicensed schools and evidences of indebtedness made null and void.

93A-38. Suspension, revocation or denial of license.

Article 1.

Real Estate Brokers and Salesmen.

93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions. — (a) Any person, partnership, association, or corporation hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesman shall make written application for such license to the Board on such forms as are prescribed by the Board. Each applicant for a license as a real estate broker or real estate salesman shall be at least 18 years of age. Each applicant for a license as a real estate broker shall have been actively engaged as a licensed real estate salesman in this State for at least 24 months on a full-time basis prior to making application for a license as a real estate broker, or shall furnish evidence satisfactory to the Board of experience in real estate transactions which the Board shall find equivalent to such 24 months' experience as a licensed real estate salesman, or shall furnish evidence satisfactory to the Board of completion of at least 90 hours of classroom instruction which shall include the study of: real estate broker responsibilities, mortgages, easements, leases, liens, taxation, zoning, real property insurance, real estate appraising, agency contracts, land contracts, government regulation of land transfers and such other topics as the Board determines, at a school approved by the Board. Each applicant for a license as a real estate salesman shall furnish evidence satisfactory to the Board of completion of 30 classroom hours of such courses of education in real estate subjects at a school approved by the Board as the Board shall by regulation prescribe or shall furnish evidence satisfactory to the Board of experience in real estate transactions which the Board shall find equivalent to such real estate education. Each application for license as a real estate broker shall be accompanied by a fee, fixed by the Board but not to exceed thirty dollars ($30.00). Each application for license as a real estate salesman shall be accompanied by a fee, fixed by the Board but not to exceed twenty dollars ($20.00) and shall state the name and address of the real estate broker with whom the applicant is to be associated.

(1979, c. 614, s. 6.)

Editor's Note. — Session Laws 1979, c. 614, s. 6, effective Jan. 1, 1981, substituted "90" for "60" preceding "hours of classroom instruction" in the third sentence of subsection (a).

As the rest of the section was not changed, only subsection (a) is set out.

Article 2.

Real Estate Recovery Fund.

§§ 93A-27 to 93A-31: Reserved for future codification purposes.

Article 3.

Private Real Estate Schools.

§ 93A-32. Definitions. — As used in this Article:

(1) "Board" means the North Carolina Real Estate Licensing Board.

(2) "Private real estate school" means any real estate educational institution or organization which is privately owned and operated for profit by an individual, partnership, corporation or association, and which is devoted exclusively to the teaching of real estate courses for which tuition is charged, and wherein the purpose of any of such courses is to qualify applicants under G.S. 93A-4(a) to sit for the licensing examinations for real estate brokers or salesmen. (1979, 2nd Sess., c. 1193, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1193, s. 3, makes the act effective October 1, 1980.

Session Laws 1979, 2nd Sess., c. 1193, s. 2, reads as follows: "The North Carolina State Board of Education is directed to transfer all records in its possession relating to the licensing of private real estate schools to North Carolina Real Estate Licensing Board, such transfer to be accomplished not later than September 30, 1980."

§ 93A-33. Real Estate Licensing Board to administer Article; authority of Board to conduct investigations, issue licenses, and promulgate regulations. — The Board shall have authority to administer and enforce this Article and to issue licenses to private real estate schools as defined herein which have complied with the requirements of this Article and regulations promulgated by the Board. Through licensing applications, periodic reports required of licensed schools, periodic investigations and inspections of schools, and appropriate regulations, the Board shall exercise general supervisory authority over private real estate schools, the object of such supervision being to protect the public interest and to assure the conduct of quality real estate education programs. To this end the Board is authorized and directed to promulgate such regulations as it deems necessary which are not inconsistent with the provisions of this Article and which relate to the subject areas set out in G.S. 93A-34(c). (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-34. License required; application for license; fees; requirements for issuance of license. — (a) No person, partnership, corporation or association shall operate or maintain or offer to operate in this

State a private real estate school as defined herein unless a license is first obtained from the Board in accordance with the provisions of this Article and the rules and regulations promulgated by the Board under this Article. For licensing purposes, each branch location where a school conducts courses shall be considered a separate school requiring a separate license.

(b) Application for a license shall be filed in the manner and upon the forms prescribed by the Board for that purpose. Such application shall be accompanied by a nonrefundable application fee of two hundred fifty dollars ($250.00) in the form of a certified check or money order payable to the North Carolina Real Estate Licensing Board, shall be signed by the applicant, and shall contain the following:

(1) Name and address of the applicant and the school;
(2) Names, biographical data, and qualifications of director, administrators and instructors;
(3) Description of school facilities and equipment;
(4) Description of course(s) to be offered and instructional materials to be utilized;
(5) Information on financial resources available to equip and operate the school;
(6) Information on school policies and procedures regarding administration, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct;
(7) Copies of bulletins, catalogues and other official publications;
(8) Copy of bond required by G.S. 93A-36;
(9) Such additional information as the Board may deem necessary to enable it to determine the adequacy of the instructional program and the ability of the applicant to operate a school in such a manner as would best serve the public interest.

(c) After due investigation and consideration by the Board, a license shall be issued to the applicant when it is shown to the satisfaction of the Board that the applicant and school are in compliance with the following standards, as well as the requirements of any supplemental regulations of the Board regarding these standards:

(1) The program of instruction is adequate in terms of quality, content and duration.
(2) The director, administrators and instructors are adequately qualified by reason of education and experience.
(3) There are adequate facilities, equipment, instructional materials and instructor personnel to provide instruction of good quality.
(4) The school has adopted adequate policies and procedures regarding administration, instruction, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct.
(5) The school publishes and provides to all students upon enrollment a bulletin, catalogue or similar official publication which is certified as being true and correct in content and policy by an authorized school official, and which contains the following information:
    a. Identifying data and publication date;
    b. Name(s) of school and its full-time officials and faculty;
    c. School's policies and procedures relating to entrance requirements, registration, grades, student progress, attendance, student conduct and refund of tuition and fees;
    d. Detailed schedule of tuition and fees;
    e. Detailed course outline of all courses offered.
(6) Adequate records as prescribed by the Board are maintained in regard to grades, attendance, registration and financial operations.

(7) Institutional standards relating to grades, attendance and progress are enforced in a satisfactory manner.
(8) The applicant is financially sound and capable of fulfilling educational commitments made to students.
(9) The school's owner(s), director, administrators and instructors are of good reputation and character.
(10) The school complies with all applicable local, State and federal laws and regulations regarding safety and sanitation of facilities.
(11) The school does not utilize advertising of any type which is false or misleading, either by actual statement, omission or intimation.
(12) Such additional standards as may be deemed necessary by the Board to assure the conduct of adequate instructional programs and the operation of schools in a manner which will best serve the public interest. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-35. Duration and renewal of licenses; transfer of school ownership. — (a) All licenses issued shall expire on June 30 following the date of issuance.

(b) Licenses shall be renewable annually on July 1, provided a renewal application accompanied by a certified check or money order for the renewal fee in the amount of one hundred dollars ($100.00) payable to the North Carolina Real Estate Licensing Board has been filed in the form and manner prescribed by the Board; and provided further that the applicant and school are found to be in compliance with the standards established for issuance of an original license.

(c) In the event a school is sold or ownership is otherwise transferred, the license issued to the original owner is not transferable to the new owner. Such new owner must make application for an original license as prescribed by this Article and Board regulations. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-36. Execution of bond required; applicability to branch schools; actions upon bond. — (a) Before the Board shall issue a license the applicant shall execute a bond in the sum of five thousand dollars ($5,000), payable to the State of North Carolina, signed by a solvent guaranty company authorized to do business in the State of North Carolina, and conditioned that the principal in said bond will carry out and comply with each and every contract or agreement, written or verbal, made and entered into by the applicant's school acting by and through its officers and agents with any student who desires to enter such school and to take any courses offered therein and that said principal will refund to such students all amounts collected in tuition and fees in case of failure on the part of the party obtaining a license from the Board to open and operate a private real estate school or to provide the instruction agreed to or contracted for. Such bond shall be required for each school or branch thereof for which a license is required and shall be first approved by the Board and then filed with the clerk of superior court of the county in which the school is located, to be recorded by such clerk in a book provided for that purpose.

(b) In any and all cases where the party licensed by the Board fails to fulfill its obligations under any contract or agreement, written or verbal, made and entered into with any student, then the State of North Carolina, upon the relation of the student(s) entering into said contract or agreement, shall have a cause of action against the principal and surety on the bond herein required for the full amount of payments made to such party, plus court costs and six percent (6%) interest from the date of payment of said amount. Such suits shall be brought in Wake County Superior Court within one year of the alleged default. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-37. Contracts with unlicensed schools and evidences of indebtedness made null and void. — All contracts or agreements entered into on or after October 1, 1980 by private real estate schools, as defined in this Article, with students or prospective students, and all promissory notes or other evidence of indebtedness taken on or after October 1, 1980 in lieu of cash payments by such schools, shall be null and void unless such schools are duly licensed as required by this Article on the date of such contract or agreement or taking of any promissory note or other evidence of indebtedness. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-38. Suspension, revocation or denial of license. — The board shall have the power to suspend, revoke, deny issuance, or deny renewal of license to operate a private real estate school. In all proceedings to suspend, revoke or deny a license, the provisions of Chapter 150A of the General Statutes shall be applicable. The Board may suspend, revoke, or deny such license when it finds:

(1) That the applicant for or holder of such license has refused or failed to comply with any of the provisions of this Article or the rules or regulations promulgated thereunder;

(2) That the applicant for or holder of such license has knowingly presented to the Board false or misleading information relating to matters within the purview of the Board under this Article;

(3) That the applicant for or holder of such license has presented to its students or prospective students false or misleading information relating to its instructional program, to the instructional programs of other institutions or to employment opportunities;

(4) That the applicant for or holder of such license has failed to comply with the provisions of any contract or agreement entered into with a student;

(5) That the applicant for or holder of such license has at any time refused to permit authorized representatives of the Board to inspect the school, or failed to make available to them upon request full information relating to matters within the purview of the Board under the provisions of this Article or the rules or regulations promulgated thereunder; or

(6) That the applicant for or holder of such license or any officer of a corporate licensee or corporation applying for a license, or any partner of a partnership licensee or partnership applying for a license, has pleaded guilty, entered a plea of nolo contendere or been found guilty of a crime involving moral turpitude in any state or federal court. (1979, 2nd Sess., c. 1193, s. 1.)

Chapter 95.

Department of Labor and Labor Regulations.

Article 2A.

Wage and Hour Act.

§ 95-25.14. Exemptions.

Cited in Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980).

Article 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-97. Employees of units of government prohibited from becoming members of trade unions or labor unions.

Cited in City of Winston-Salem v. Chauffeurs Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Cited in City of Winston-Salem v. Chauffeurs Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

§ 95-100. No provisions of Article 10 of Chapter 95 applicable to units of government or their employees.

Cited in City of Winston-Salem v. Chauffeurs Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

Article 16.

Occupational Safety and Health Act of North Carolina.

§ 95-136. Inspections.

Cited in Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec.
96-4. Administration.

ARTICLE 1.

Employment Security Commission.

§ 96-2. Declaration of State public policy.

Applied in In re Vinson, 42 N.C. App. 28, 255 S.E.2d 644 (1979).

Cited in In re Werner, 44 N.C. App. 723, 263 S.E.2d 4 (1980).

§ 96-4. Administration.

(g) Records and Reports. —

(1) Each employing unit shall keep true and accurate employment records, containing such information as the Commission may prescribe. Such records shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. Any employing unit doing business in North Carolina shall make available in this State to the Commission, such information with respect to persons, firms, or other employing units performing services for it which the Commission deems necessary in connection with the administration of this Chapter. The Commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the Commission deems necessary for the effective administration of this Chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties including the information required to be obtained pursuant to G.S. 128-27(e), G.S. 135-5(e), and G.S. 143-166(y)) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the Commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. Any individual may be supplied with information as to his potential benefit rights from such records. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than 90 days, or both. All reports, statements, information and communications of every character so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the employing unit's books and records shall be absolute privileged communications in any civil or criminal proceedings other than proceedings instituted pursuant to this

Chapter and proceedings involving the administration of this Chapter: Provided, nothing herein contained shall operate to relieve any employing unit from disclosing any information required by this Chapter or as prescribed by the Commission involving the administration of this Chapter.

(2) If the Commission finds that any employer has failed to file any report or return required by this Chapter or any regulation made pursuant hereto, or has filed a report which the Commission finds incorrect or insufficient, the Commission may make an estimate of the information required from such employer on the basis of the best evidence reasonably available to it at the time, and make, upon the basis of such estimate, a report or return on behalf of such employer, and the report or return so made shall be deemed to be prima facie correct, and the Commission may make an assessment based upon such report and proceed to collect contributions due thereon in the manner as set forth in G.S. 96-10(b) of this Chapter: Provided, however, that no such report or return shall be made until the employer has first been given at least 10 days' notice by registered mail to the last known address of such employer: Provided further, that no such report or return shall be used as a basis in determining whether such employing unit is an employer within the meaning of this Chapter.

(1979, 2nd Sess., c. 1212, s. 2.)

Editor's Note. —

The 1979, 2nd Sess., amendment effective July 1, 1980, inserted "including the information required to be obtained pursuant to G.S. 128-27(e), G.S. 135-5(e), and G.S. 143-166(y)" at the end of the parenthetical phrase in the fifth sentence of subdivision (1) of subsection (g).

Session Laws 1979, 2nd Sess., c. 1212, s. 15 contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (g) is set out.

Article 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

Effect of Reinstatement of Liability after Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action, and by legislative action that exemption is subsequently terminated, and, additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Employment Security Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640 (1979).

Employing Unit Became Employer. — By reading subdivisions (4), (5) and (6) of this section and subdivisions (a)(1) and (b)(1) of § 96-9 together, it may be deduced that (for the purposes of the statute prior to January 1, 1972) when an employing unit has four or more individuals in its employ, and the services performed by those individuals constituted employment as defined by this Chapter, the employing unit became an employer and thus becomes subject to the provisions of this Chapter. State ex rel. Employment Security Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640 (1979).

Project Headstart is a school within the ordinary meaning of the term, and the situation of an employee of Project Headstart is one of those addressed by the "secondary school provision" of this section, excluding from unemployment benefits those who are subject to school-related seasonal unemployment. In re

Huntley, 42 N.C. App. 1, 255 S.E.2d 574, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

§ 96-9. Contributions.

Effect of Reinstatement of Liability after Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Employment Security Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640 (1979).

§ 96-11. Period, election, and termination of employer's coverage.

Effect of Reinstatement of Liability after Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Employment Security Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640 (1979).

§ 96-13. Benefit eligibility conditions.

Availability requirement, etc. —

To be available for work a person must be in a position so that prospective employers will hire him for work of which he is capable of performing. In re Yarboro, 42 N.C. App. 684, 257 S.E.2d 658 (1979).

The Commission erred in awarding unemployment benefits without making findings as required by subdivisions (a)(1) and (2) that claimant has registered for work and continued to report to an employment office and that he has made a claim for benefits in accordance with § 96-15(a). The commission's finding that three separate claim series were started for claimant was insufficient to meet the statutory requirements. In re George, 42 N.C. App. 490, 256 S.E.2d 826 (1979).

Claimant Not Available While Awaiting Sentencing. — Where a claimant for unemployment compensation plead guilty to a charge of selling a controlled substance and testified that he was not hired because prospective employers were "waiting to see what my sentence will be," the Commission could conclude from this that claimant was not in a position that prospective employers would hire him and he was not "available for work." In re Yarboro, 42 N.C. App. 684, 257 S.E.2d 658 (1979).

Employee of Project Headstart. — Project Headstart is a school within the ordinary meaning of the term, and the situation of an employee of Project Headstart is one of those addressed by the "secondary school provision" of this section, excluding from unemployment benefits those who are subject to school-related seasonal unemployment. In re Huntley, 42 N.C. App. 1, 255 S.E.2d 574, cert. denied, 298 N.C. 297, 259 S.E.2d 913 (1979).

§ 96-14. Disqualification for benefits.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

When Resignation Involuntary. — Employees who quit or resign employment because they are asked to do so by their employer do not leave "voluntarily" within the meaning of subdivision (1) of this section. Where the employer recommended that the employee resign, and clearly implied that the employee would be discharged if she failed to offer her resignation, this would constitute an involuntary separation. In re Werner, 44 N.C. App. 723, 263 S.E.2d 4 (1980).

Refusal to Report to Work Held Misconduct. — A claimant's deliberate and unjustifiable refusal to report to work, when the employer has the right to insist on the employee's presence and when the claimant knows that his refusal would cause logistical problems for the employer, constitutes misconduct sufficient to disqualify claimant from receiving benefits under subdivision (2) of this section. In re Cantrell, 44 N.C. App. 718, 263 S.E.2d 1 (1980).

Applied in In re Vinson, 42 N.C. App. 28, 255 S.E.2d 644 (1979).

§ 96-15. Claims for benefits.

Applied in In re George, 42 N.C. App. 490, 256 S.E.2d 826 (1979).

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

§ 97-1. Short title.

Cross Reference. — As to application of this chapter to incapacitated State law-enforcement officers, see § 143-166.14.

Editor's Note. —

For note discussing the nonexistence of a private right of action for retaliatory discharge resulting from pursuit of workmen's compensation benefits, see 15 Wake Forest L. Rev. 139 (1979).

§ 97-2. Definitions.

I. IN GENERAL.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the use of age, education, and work experience in determining disability in workmen's compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

Stated in Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

B. Accident.

Accident and injury are considered separate, etc. —

In accord with 3rd paragraph in original. See Reams v. Burlington Indus., 42 N.C. App. 54, 255 S.E.2d 586 (1979).

In accord with 4th paragraph in original. See Reams v. Burlington Indus., 42 N.C. App. 54, 255 S.E.2d 586 (1979).

"Accident" Defined. —

In accord with 2nd paragraph in original. See Reams v. Burlington Indus., 42 N.C. App. 54, 255 S.E.2d 586 (1979).

C. Arising Out of and in the Course of Employment.

1. In General.

"In the Course of" the Employment Construed. —

In accord with 4th paragraph in original. See Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

The phrase "in the course of" employment deals with time, place, and circumstance. "Time and Place" do not necessarily mean the regular hours of employment and on the premises of the employer. If the employee is doing work at the direction and for the benefit of the employer, the time and place of work are for the benefit of the employer and a part of the employment of the employee. This satisfies the condition of time and place although the work is done off the premises of the employer and after regular working hours. In respect to "circumstance," compensable accidents are those sustained while the employee is doing what a man so employed may reasonably do within a time he is employed, and at a place where he may reasonably be during the time to do that thing. Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

"Out of" and "in the Course of" Distinguished. —

The phrases "arising out of" and "in the course of" in subdivision (6) of this section are not synonymous and both must be fulfilled in order for the plaintiff to recover. Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

"Arising Out of" Defined. —

In accord with 17th paragraph in original. See Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

Mixed Question of Law and Fact. —

Whether an accident grew out of the employment is a mixed question of law and fact which the court has the right to review on appeal. If the detailed findings of fact force a conclusion opposite that reached by the commission, it is the duty of the court to reverse the commission. Warren v. City of Wilmington, 43 N.C. App. 748, 259 S.E.2d 786 (1979).

2. Origin and Cause of Accident.

a. Risks Incident to the Employment Generally.

Nurse Turning Obese Patient. — Plaintiff's injury suffered during the course of her employment was not the result of an accident within the meaning of subdivision (6) of this section where the injury occurred while plaintiff nurse was turning an unconscious, obese patient, where turning patients was part of plaintiff's job, and there was no evidence that the hospital room and its condition were any different than plaintiff was used to working in and the patient, although obese, did not present an exceptional condition to plaintiff. Artis v. N.C. Baptist Hosps., 44 N.C. App. 64, 259 S.E.2d 789 (1979).

3. Time, Place and Circumstances of Accident

b. Injuries While Going to and from Work.

(1) General Rule.

Injury Suffered Going to or Returning from Work. —

In accord with 1st paragraph in original. See Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979).

Where Going to and from Meetings Part of Duties. — Plaintiff's accident on a city street as she was returning home to write a report about a work-related meeting she had just attended was an accident in the course of her employment, where going to and from the meetings was a part of plaintiff's job duties for which she was paid the same as when actually in the office or at community meetings. Warren v. City of Wilmington, 43 N.C. App. 748, 259 S.E.2d 786 (1979).

(4) Where Employer Furnishes Transportation.

Where Employer Furnishes Transportion as Incident, etc. —

In accord with 1st paragraph in original. See Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979).

The test in such cases, etc. —

In accord with original. See Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979).

Isolated Instance of Permission to Drive Company Truck Home. — In an action for workmen's compensation, where the deceased employee had permission to drive the company truck home the day of the accident, the permission given the deceased on this single, isolated occasion would not make the operation of the pickup truck an incident of his contract of employment. Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979).

5. Miscellaneous Illustrative Cases.

Injury at Annual Department Picnic. — Plaintiff was not entitled to workmen's compensation for a broken ankle suffered while playing volleyball at an annual picnic for faculty members in the radiology department in defendant school, where it was not clear that the radiology department in fact sponsored the picnic; attendance at the picnic was voluntary; no record of attendance was taken; participants were not paid for the time spent at the picnic, nor was any employee required to work at the medical school if he did not attend; the picnic, while certainly an annual custom, was not an event that employee regarded as being a benefit to which he was entitled as a matter of right, and the radiology department did not utilize the picnic as an opportunity to give a "pep" talk or grant awards. Chilton v. Bowman Gray School of Medicine, 45 N.C. App. 13, 262 S.E.2d 347 (1980).

V. DISABILITY.

"Disability" Signifies Impairment of Wage-Earning Capacity. —

In accord with 2nd paragraph in original. See Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

§ 97-3. Presumption that all employers and employees have come under provisions of Article.

Cited in Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

§ 97-6. No special contract can relieve an employer of obligations.

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the nonexistence of a private right of action for retaliatory discharge resulting from pursuit of workmen's compensation benefits, see 15 Wake Forest L. Rev. 139 (1979).

Cited in Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

§ 97-9. Employer to secure payment of compensation.

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 97-10.1. Other rights and remedies against employer excluded.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 97-17. Settlements allowed in accordance with Article.

Setting Aside Settlement. —
This statutory provision clearly grants the industrial commission the authority to rehear and .set aside prior orders approving settlements on any one of the stated grounds, i.e., fraud, misrepresentation, undue influence or mutual mistake. Graham v. City of Hendersonville, 42 N.C. App. 456, 255 S.E.2d 795 (1979).

§ 97-22. Notice of accident to employer.

Application of Section in Occupational Disease Cases under § 97-58(6). See Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Effect of Personal Knowledge of Employer. — The failure of plaintiff faculty member to file a written claim within the time set forth in this section did not bar his claim to workmen's compensation where several members of the faculty had personal knowledge of plaintiff's injury the second it happened, and there is evidence that the dean of the school knew of plaintiff's injury. Chilton v. Bowman Gray School of Medicine, 45 N.C. App. 13, 262 S.E.2d 347 (1980).

Appeal of Notice Issue. — An employer who fails to raise the issue of notice at the hearing before the compensation board may not raise it on appeal. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

To allow an employer to raise the issue of notice for the first time on appeal would deprive the claimants of the benefits of that determination and could easily lead to a denial of compensation in a case where the facts would justify a finding of no prejudice. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

§ 97-24. Right to compensation barred after two years; destruction of records.

Cross Reference. —
As to filing of claim for compensation by incapacitated State law-enforcement officer whose salary has been paid for two years following inception of incapacity, see § 143-166.16.

§ 97-25. Medical treatment and supplies.

Emergency Treatment. — Treatment received by a plaintiff employee in a workmen's compensation case can be of an emergency nature even though it extended over a 17-month period of time. Schofield v. Great Atl. & Pac. Tea Co., 43 N.C. Supp. 567, 259 S.E.2d 338 (1979).

"Emergency" Function of Circumstances. — This section does not define an emergency. What may be an emergency

under one set of circumstances may not qualify as such under another. Schofield v. Great Atl. & Pac. Tea Co., 43 N.C. Supp. 567, 259 S.E.2d 338 (1979).

Substitute Physician Must Be Approved. — In order for the defendant to be responsible for the costs of a substitute physician, the Industrial Commission must approve of the change, but there is no requirement that such approval must be in advance of the change — only that the change must be approved. Schofield v. Great Atl. & Pac. Tea Co., 43 N.C. Supp. 567, 259 S.E.2d 338 (1979).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

Cross Reference. — As to application of this section to incapacitated State law-enforcement officers, see § 143-166.15.

§ 97-29. Compensation rates for total incapacity.

Cross Reference. — As to payment of full salary in lieu of compensation to incapacitated State law-enforcement officers, see § 143-166.16.

Editor's Note.—

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the use of age, education, and work experience in determining disability in workmen's compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

The 1973 amendment to this section governing the maximum weekly workmen's compensation benefit applies to § 97-38 so that § 97-38 no longer limits recovery for death claims to $80.00 per week. Andrews v. Nu-Woods, Inc., 43 N.C. App. 591, 259 S.E.2d 306 (1979).

§ 97-30. Partial incapacity.

Cross Reference. —

As to payment of full salary in lieu of compensation to incapacitated State law-enforcement officers, see § 143-166.16.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 97-31. Schedule of injuries; rate and period of compensation.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the use of age, education, and work experience in determining disability in workmen's compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Section Criticized. See Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

The 1973 amendment to § 97-29 governing the maximum weekly workmen's compensation benefit applies to this section so that this section no longer limits recovery for death claims to $80.00 per week. Andrews v. Nu-Woods, Inc., 43 N.C. App. 591, 259 S.E.2d 306 (1979).

No Finding of Permanent Disability Required for Disabled Widow. — The provision in this section for compensation for life or until remarriage for the disabled widow of an employee who dies under compensable circumstances does not on its face require a finding of permanent disability. Hedrick v. Southland Corp., 41 N.C. App. 431, 255 S.E.2d 198 (1979).

Date of "Accident" in Occupational Disease Case. — Where employee died 15 months after he became totally disabled by serum hepatitis, the claim of deceased employee's dependents for death benefits was not barred by this section providing compensation if death results from an accident within two years or, while total disability continues, within six years after the accident, since the date of the "accident" in cases involving occupational disease is treated as the date on which disablement occurs and not as the date employee contracted the disease. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

§ 97-52. Occupational disease made compensable; "accident" defined.

Only Injury Leading to Disablement Compensable. — Under this section an injury resulting from occupational disease is compensable only when it leads to disablement, and until that time the employee has no cause of action and the employer has no liability. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

Date of "Accident" in Occupational Disease Cases. — Where employee died 15 months after he become totally disabled by serum hepatitis, the claim of deceased employee's dependents for death benefits was not barred by § 97-38 providing compensation if death results from an accident within two years or, while total disability continues, within six years after the accident, since the date of the "accident" in cases involving occupational disease is treated as the date on which disablement occurs and not as the date employee contracted the disease. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

§ 97-53. Occupational diseases enumerated; when due to exposure of chemicals.

Claims for "Brown Lung Disease". — Session Laws 1979, 2nd Sess., c. 1305, provides:

"Section 1. Claims for "brown lung disease," which can be proved under G.S. 97-53(13) shall be compensable regardless of the employee's date of last injurious exposure.

"Sec. 2. This act is effective upon ratification. [June 25, 1980].

"Sec. 3. This act will expire April 30, 1981; however, this provision does not apply to any claims filed prior to April 30, 1981."

Legislative Intent. — The clear intent of the General Assembly in enacting the current version of this section was to bring North Carolina in line with the vast majority of states by providing comprehensive coverage for occupational diseases. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

When Illness Compensable. — An illness is compensable under this section, whether mentioned specifically in the statute or falling within the general definition in subdivision (13) of this section, only if it also comes within "well understood definitions of the term 'occupational diseases.'" Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Findings of Fact. — In determining whether a given illness falls within a definition set out in this section, it is the duty of the commission to consider all of the competent evidence, make definitive findings, draw its conclusions of law from these findings, and enter the appropriate award. In making its findings, the commission's function is to weigh and evaluate the entire evidence and determine as best it can where the truth lies. Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830 (1980).

Applicability of Amended Subdivision (13). — The current version of subdivision (13) applies to all claims for disablement in which the disability occurs after the effective date of subdivision (13), as amended, i.e., July 1, 1971, since under § 97-52 of the Workmen's Compensation Act injury resulting from occupational disease is compensable only when it leads to disablement, and until that time the employee has no cause of action and the employer has no liability. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

Subdivision (13) Intended to Define "Occupational Disease". — Except for those diseases specifically named in the statute, the legislature intended the present version of subdivision (13) to define the term "occupational disease." To the extent that this statute conflicts with prior judicial definitions of the term "occupational disease," the older definitions must give way. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Whether a given illness falls within the general definition set out in subdivision (13) presents a mixed question of fact and law. The Commission must determine first the

nature of the disease from which the plaintiff is suffering — that is, its characteristics, symptoms and manifestations. Ordinarily, such findings will be based on expert medical testimony. Having made appropriate findings of fact, the next question the Commission must answer is whether or not the illness plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830 (1980).

Where, in a hearing before the industrial commission on a claim for workmen's compensation benefits, the critical issue raised by the evidence is whether the calcification of tendons and ligaments in plaintiff's shoulders, resulting in a 10 percent permanent partial disability to both arms, is an occupational disease within the meaning of subdivision (13), this issue engenders two distinct findings of fact which must be made: (1) an explicit description of plaintiff's duties in performing her occupation, and (2) a determination of whether such duties caused the calcification and resulting disability to either or both of plaintiff's arms. Cannady v. Gold Kist, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

Determination of When Disablement Occurred Required. — Given plaintiff's allegation that she was disabled after the effective date of the present version of subdivision (13), it is incumbent upon the Commission to determine when plaintiff became disabled before it decides which law applies to her claim. Where the Commission heard no evidence on this point and made no factual determination as to the date of disablement, the case must be remanded for a determination of that issue. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

When Disease "Characteristic" of Profession. — To be compensable under subdivision (13) of this section, a disease must, inter alia, be "characteristic of and peculiar to a particular trade, occupation or employment." A disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Qualifying Disease Compensable Even if Also "Injury by Accident". — If an employee contracts an infectious disease as a result of his employment and it falls within either the schedule of diseases set out in the statute or the general definition of "occupational disease" in subdivision (13), it should be treated as a compensable event regardless of the fact that it might also qualify as an "injury by accident" under § 97-2(6). Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Circumstances Showing Connection Between Disease and Occupation. — In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence. Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

When Serum Hepatitis Compensable Injury. — Because serum hepatitis is not expressly mentioned in the schedule of diseases contained in this section, it is a compensable injury only if it falls within the general definition set out in subdivision (13). Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Serum Hepatitis Held Compensable Injury. See Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Judicial Notice as to Essential Characteristics of Byssinosis Inappropriate. — The Commission erred in assuming that byssinosis is an irritation of the pulmonary air passages without hearing evidence and making findings of fact as to the nature of claimant's illness, which is required of the Commission in determining whether a given illness falls within the general definition set out in subdivision (13). The causes and development of byssinosis, and the structural and functional changes produced by the disease, are still the subject of scientific debate, and the Supreme Court has never before considered a case involving byssinosis. Under these circumstances judicial notice as to the essential characteristics of the disease is inappropriate. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.

The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of

the circumstances surrounding the injury. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Report and Notice, etc. —

Reading subsection (b) in conjunction with § 97-22, a claim for compensation under the act is barred if the employer is not notified within 30 days of the date the claimant is informed of the diagnosis unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Appeal of Notice Issue. —

An employer who fails to raise the issue of notice at the hearing before the compensation board may not raise it on appeal. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

The dependents' claim for compensation would not be barred by the employee's failure to file within the statutory period where the dependents were not parties to the proceeding brought by the employee. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

Applied in Taylor v. J.P. Stevens & Co., 43 N.C. App. 216, 258 S.E.2d 426 (1979).

§ 97-71. Filing report; right of hearing on report.

Cited in Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830 (1980).

§ 97-84. Determination of disputes by Commission or deputy.

Proper Exercise of Fact-Finding Authority Essential. —

In accord with original. See Cannady v. Gold Kist, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

Specific findings of fact, etc. —

Specific findings covering the crucial questions of fact upon which a plaintiff's right to compensation depends are required, and the importance of this responsibility cannot be overstated. Cannady v. Gold Kist, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

§ 97-85. Review of award.

Applied in Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

Cited in Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830 (1980).

Chapter 99B.

Products Liability.

Sec.

99B-5 to 99B-9. [Reserved.]
99B-10. Immunity for donated food.

§§ 99B-5 to 99B-9: Reserved for future codification purposes.

§ 99B-10. Immunity for donated food. — (a) Notwithstanding the provisions of Article 12 of Chapter 106 of the General Statutes, or any other provision of law, any person, including but not limited to a seller, farmer, processor, distributor, wholesaler or retailer of food, who donates an item of food for use of distribution by a nonprofit organization or nonprofit corporation shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food, unless it is established that the donor knew or had reasonable grounds to believe that the food was adulterated as defined in G.S. 106-129 at the time the donor made the gift.

(b) Nothing in this section limits the liability of the donee organization or corporation accepting the food. (1979, 2nd Sess., c. 1188, s. 1.)

Chapter 100.

Monuments, Memorials and Parks.

Article 1.

Approval of Memorials, Works of Art, etc.

Sec.
100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.
100-3. Approval of design, etc., of certain bridges and other structures.
100-4. Governor to accept works of art approved by North Carolina Historical Commission.
100-5. Duties as to buildings erected or remodeled by State.
100-6. Disqualification to vote on work of art, etc.; vacancy.
100-7. Construction.
100-8. Memorials to persons within 25 years of death; acceptance of commemorative funds for useful work.

Article 1.

Approval of Memorials, Works of Art, etc.

§ 100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers. — No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by the North Carolina Historical Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the North Carolina Historical Commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the Board of Transportation in cooperation with the Department of Natural Resources and Community Developments and the Department of Cultural Resources as provided by Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 2; 1957, c. 65, s. 11; 1973, c. 476, s. 48; c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1306, ss. 3, 4.)

Editor's Note. —

The 1979 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in the first and second sentences. The amendment also corrected an error by substituting "statue" for "statute" in the third sentence.

§ 100-3. Approval of design, etc., of certain bridges and other structures. — No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the State treasury, or which is to be placed on or allowed to extend over any property belonging to the State, shall be begun unless the design and proposed location thereof shall have been submitted to the North Carolina Historical Commission and approved by it. Furthermore, no existing structures of the kind named and described in the

preceding part of this section owned by the State, shall be removed or remodeled without submission of the plans therefor to the North Carolina Historical Commission and approval of said plans by the North Carolina Historical Commission. This section shall not be construed as amending or repealing Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 3; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in three places.

§ 100-4. Governor to accept works of art approved by North Carolina Historical Commission. — The Governor of North Carolina is hereby authorized to accept, in the name of the State of North Carolina, gifts to the State of works of art as defined in G.S. 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to the North Carolina Historical Commission and by it judged worthy of acceptance. (1941, c. 341, s. 4; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in the second sentence.

§ 100-5. Duties as to buildings erected or remodeled by State. — Upon request of the Governor and the Board of Public Buildings and Grounds, the North Carolina Historical Commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the State. The term "building" as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in the first sentence.

§ 100-6. Disqualification to vote on work of art, etc.; vacancy. — Any member of the North Carolina Historical Commission who shall be employed by the State to execute a work of art or structure of any kind requiring submission to the North Carolina Historical Commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the Governor. (1941, c. 341, s. 6; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in two places.

§ 100-7. Construction. — The provisions of this Article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions

with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, the North Carolina Historical Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1981, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in the second sentence.

§ 100-8. Memorials to persons within 25 years of death; acceptance of commemorative funds for useful work. — No monument, statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from State funds or shall be placed in or upon or allowed to extend over State property within 25 years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this Article shall be interpreted as prohibiting the acceptance of funds by State agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque honoring the life and memory of the late Lionel Weil of Wayne County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Morrow Mountain State Park an appropriate tablet or plaque honoring the life and memory of the late James McKnight Morrow of Stanly County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque, of such size and containing such language, as may be agreed upon by the donors and Director of State Parks, honoring the Whitfield heirs for their contributions to the establishment of the said park. (1941, c. 341, s. 8; 1957, c. 181; 1961, c. 976; 1963, c. 1128; 1979, 2nd Sess., c. 1306, s. 4.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, corrected an error by substituting "statue" for "statute" near the beginning of the first sentence.

Chapter 101.

Names of Persons.

§ 101-2. Procedure for changing name; petition; notice.

Cross References. — As to effect of changing name upon registration to vote, see G.S. § 163-69.1.

Chapter 103.

Sundays, Holidays and Special Days.

Sec.

103-2. Hunting on Sunday.

§ 103-2. Hunting on Sunday. — If any person shall, except in defense of his own property, hunt on Sunday, having with him a shotgun, rifle, or pistol, he shall be guilty of a misdemeanor and pay a fine not exceeding fifty dollars ($50.00) or [be] imprisoned not exceeding 30 days. Provided, that the provisions hereof shall not be applicable to military reservations, the jurisdiction of which is exclusively in the federal government. Wildlife protectors are granted authority to enforce the provisions of this section. (1868-9, c. 18, ss. 1, 2; Code, s. 3783; Rev., s. 3842; C. S., s. 3956; 1945, c. 1047; 1967, c. 1003; 1979, c. 830, s. 13.)

Editor's Note. — The 1979 amendment, effective July 1, 1980, added the last sentence of the section.

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

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105-75.1. Municipal license tax on barbershops and beauty salons.

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Schedule B-C. Intoxicating Liquors Tax.

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Schedule H. Intangible Personal Property.

105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.

105-214. Minimum tax for requirement of filing returns.

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105-242. Warrant for collection of taxes; certificate or judgment for 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.

Article 26.

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105-368. Procedure for attachment and garnishment.

SUBCHAPTER V. GASOLINE TAX.

Article 36.

Gasoline Tax.

105-436.1. Taxation of alcohol fuels.

105-446.3:1. Refund of taxes paid on gasohol.

Article 36A.

Special Fuels Tax.

105-449.10. Records and reports required of user-seller or user.

105-449.16. Levy of tax; purposes; special provisions for gasohol and non-anhydrous ethanol.

Sec.
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Article 36B.

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105-449.39. Credit for payment of motor fuel tax.
105-449.42. Payment of tax.
Sec.
105-449.45. Reports of carriers.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

Article 39.

Local Governmental Sales and Use Tax.

105-472. Disposition and distribution of taxes collected.

SUBCHAPTER I. LEVY OF TAXES.

ARTICLE 1.

Schedule A. Inheritance Tax.

§ 105-2. General Provisions.

Editor's Note. —
For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

§ 105-4. Rate of tax — Class A.

(b) (1) The surviving spouse of a decedent shall be allowed a credit of three thousand one hundred fifty dollars ($3,150) against the taxes imposed under this Article. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article.

(2) If there is no surviving spouse or to the extent that a surviving spouse has not used all of the credit allowed under subdivision (1) of this subsection, the remainder of the credit shall be allowed on a pro rata basis according to tax liability to each child under 18 years of age and each child 18 years of age or older, who is mentally incapacitated, or by reason of physical disability is unable to support himself, is unmarried and residing with the decedent in his home at the time of the decedent's death, or who is then institutionalized on account of such mental incapacity or physical disability. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article.

(3) To the extent that minor children and physically and mentally disabled children have not used all of the credit allowed under subdivision (2) of this subsection, the remainder of the credit shall be allowed on a pro rata basis according to tax liability to each of the other Class A beneficiaries. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article. (1939, c. 158, s. 3; 1957, c. 1340, s. 1; 1965, c. 583; 1967, c. 1222; 1971, c. 651; 1973, c. 49, s. 1; c. 1142, s. 1; c. 1287, s. 2; 1977, c. 1004; 1979, c. 75; c. 801, ss. 20, 21; 1979, 2nd Sess., c. 1183, s. 1.)

Editor's Note.—
The 1979, 2nd Sess., amendment, effective as to estates of decedents dying on or after July 1, 1980, deleted, the end of subdivision (3) of subsection (b), "except lineal ancestors of the decedent."

As subsection (a) was not changed by the amendment, it is not set out.

For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

§ 105-7. Estate tax.

Editor's Note.—
For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

§ 105-9.1. As of what date property valued.

Editor's Note.—
For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

§ 105-13. Life insurance proceeds.

Editor's Note.—
For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

§ 105-15. When all heirs, legatees, etc., are discharged from liability.

Editor's Note. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

Article 2.

Schedule B. License Taxes.

§ 105-75: Repealed by Session Laws 1979, 2nd Session, c. 1304, s. 1, effective July 1, 1981.

Cross Reference. — For present section covering the subject matter of the repealed section, see § 105-75.1.

§ 105-75.1. Municipal license tax on barbershops and beauty salons. — Cities and towns may levy a license tax on every person, firm, or corporation engaged in the business of conducting a barbershop, beauty salon, or other shop of like kind for the privilege of conducting such business at a rate not to exceed the following:

For each barber, manicurist, cosmetologist, beautician, or other operator employed in such barbershop or beauty shop or parlor — $2.50. (1979, 2nd Sess., c. 1304, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1304, s. 3, makes the act effective July 1, 1981.

ARTICLE 2B.

Schedule B-B. Soft Drink Tax.

§ 105-113.61. Criminal acts.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 29, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section by substituting "Class I felony" for "felony punishable by a fine of not more than five thousand dollars ($5,000) or imprisonment in the State prison for not more than five years, or both, in the discretion of the court" at the end of subsection (b).

ARTICLE 2C.

Schedule B-C. Intoxicating Liquors Tax.

§ 105-113.72. Manufacturers and bottlers of fortified wines and spirituous liquors.

(c) Any person, firm, or corporation authorized to manufacture fuel alcohol under G.S. 18A-69 shall pay an annual license tax of ten dollars ($10.00). (1979, 2nd Sess., c. 1329, s. 2.)

Editor's Note.— The 1979, 2nd Sess., amendment, effective October, 1, 1980, and applicable to all persons holding or obtaining federal permits on or after that date, added subsection (c). As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 105-113.83. Annual State license to sell unfortified wine at retail. — Every person who intends to engage in the business of selling unfortified wines shall procure an annual State license for such business, which license shall in all cases be issued under the same restrictions, rules and regulations as set out in this Article for the issuance of license for the sale of malt beverages, and for which license the following schedule of taxes is hereby levied:

(1) For an "on-premises" license, twenty-five dollars ($25.00);

(2) For an "off-premises" license, twenty dollars ($20.00).

Such retail license shall authorize the sale of the unfortified wine only on the premises described in the license, and if the same person operates more than one place at which unfortified wine is sold at retail, he shall obtain a license for each such place and pay therefor the license tax provided in this section.

If the license issued to any person by any municipality or county to sell the beverages referred to in this Article shall be revoked by the proper officers of such municipality or county, or by any court, it shall be the duty of the Secretary of Revenue to revoke the State license of such licensee; and in such event, the licensee shall not be entitled to a refund of any part of the license tax paid. It shall be unlawful for any wholesale licensee to make any sale or delivery of unfortified wine to any person except persons who have been licensed to sell such beverages at retail or wholesale as prescribed in this Article.

It shall be unlawful for any retail licensee to purchase any unfortified wine from any person except wholesale licensees maintaining a place of business within this State and duly licensed under the provisions of this Article. (1939, c. 158, s. 516; 1941, c. 339, s. 4; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1975, c. 722, s. 2; 1979, c. 801, s. 28.)

Editor's Note. — The 1979 amendment, effective May 1, 1980, substituted "twenty dollars ($20.00)" for "five dollars ($5.00)" at the end of subdivision (2).

§ 105-113.84. Annual retail malt beverage State license. — Every person who intends to engage in the business of retail sales of malt beverages shall also apply for and procure an annual State license from the Secretary of Revenue. Twenty dollars ($20.00) shall be charged for the license for each location at which such business shall be engaged in. (1939, c. 158, s. 515; 1967, c. 162, s. 2; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1975, c. 654, s. 3; 1979, c. 801, s. 29.)

Editor's Note. — The 1979 amendment, effective May 1, 1980, rewrote the fee provisions of this section.

§ 105-113.86. Additional tax.

(p) From the taxes collected annually under subsection (a) an amount equivalent to forty-seven and one-half percent (47½%) thereof, and from the taxes collected annually under subsection (o) an amount equivalent to sixty-two percent (62%) thereof, and from the taxes collected annually under G.S. 105-113.95 an amount equivalent to twenty-two percent (22%) thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold at retail under the provisions of this Article. The amount distributable to each county and municipality entitled to the same under the provisions of this subsection shall be determined upon the basis of population therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. Where such beverages may be licensed to be sold at retail in both county and municipality, allocation of such amounts shall be made to both the county and the municipality on the basis of population. Where such beverages may be licensed to be sold at retail in a municipality in a county wherein the sale of such beverages is otherwise prohibited, allocation of such amounts shall be made to the municipality on the basis of population; provided, however, that where the sale of such beverages is prohibited within defined areas within a county or municipality, the amounts otherwise distributable to such county or municipality on the basis of population shall be reduced in the same ratio that such areas bear to the total area of the county or municipality, and the amount of such reduction shall be retained by the State: Provided, further, that if said area within a county is a municipality for which the population is shown by the most recent annual estimate of population as certified to the Secretary of Revenue by the State Budget Officer, reduction of such amounts shall be based on such population rather than on area. The Secretary of Revenue shall determine the amounts distributable to each county and municipality, for the period July 1, 1947, to September 30, 1947, inclusive, and shall distribute such amounts within 60 days thereafter; and the Secretary of Revenue annually thereafter shall determine the amounts distributable to each county and municipality for each 12-month period ending September 30 and shall distribute such amounts within 60 days thereafter.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act.

(1979, 2nd Sess., c. 1137, s. 51.)

Editor's Note.—

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "State Budget Officer" for "Secretary of the North Carolina Department of Administration" at the end of the second sentence and for "Secretary of Administration" in the proviso to the fourth sentence in subsection (p).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subsections were not changed by the amendment, only subsection (p) is set out.

Article 4.

Schedule D. Income Tax.

Division I. Corporation Income Tax.

§ 105-130.26. Credit against corporate income tax for conversion of industrial boiler to wood fuel. — Any corporation which modifies or replaces an oil or gas-fired boiler or kiln and the associated fuel and residue handling equipment used in the manufacturing process of a manufacturing business located in this State with one which is capable of burning wood shall be allowed as a credit against the tax imposed by this division, an amount equal to fifteen percent (15%) of the installation and equipment cost of such conversion; provided, that in order to secure the credit allowed by this section, the taxpayer must own or control the business in which such boiler or kiln is used at time of such conversion and payment in part or in whole for such installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed; and the amount of credit allowed for any one income year shall be limited to fifteen percent (15%) of such costs paid during the year; 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. (1979, c. 801, s. 35; 1979, 2nd Sess., c. 1318, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "and the associated fuel and residue handling equipment" near the beginning of the section.

§ 105-130.27. Credit against corporate income tax for construction of a fuel ethanol distillery. — (a) Any corporation which constructs in North Carolina a distillery to make ethanol from agricultural of forestry products for use as a motor fuel 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, and an additional ten percent (10%) of those costs if the distillery is powered primarily by use of an alternative fuel source. In order to secure the credit allowed by this section, the taxpayer must own or control the distillery at the time of construction, and payment for the installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed. The amount of the credit allowed for any one income year shall be limited to twenty percent (20%) of the costs paid during the year, or thirty percent (30%) of those costs if the distillery is powered primarily by use of an alternative fuel source. Invoices or receipts shall be furnished to substantiate a claim or a credit under this section if requested by the Secretary of Revenue. 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) For purposes of this section, "alternative fuel source" includes agricultural and forestry products, waste petroleum products, and peat, but does not include other petroleum products, coal, or natural gas.

(c) The amount of credit allowed under this section may be carried over for the next succeeding five years. (1979, 2nd Sess., c. 1265, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1265, s. 3, makes the act effective with respect to taxable years beginning on and after July 1, 1980.

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 officer; 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 in certain camps 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 thousand dollars ($100,000) (not to exceed fifty thousand dollars ($50,000) 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. (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.)

Local Modification. — New Hanover County School Employees' Retirement Fund: 1979, 2nd Sess., c. 1307.

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "July 27, 1978," for "January 1, 1979," at the end of the introductory language in paragraph a of subdivision (26) of subsection (b).

The second 1979, 2nd Sess., amendment, applicable to taxable years beginning on or after January 1, 1980, added subdivision (28) to subsection (b).

Session Laws 1979, 2nd Sess., c. 1301, s. 2, amended Session Laws 1979, c. 801, so as to change the effective date of subdivision (26) of this section as enacted by the 1979 act from January 1, 1979, to July 27, 1978.

As the rest of the section was not changed by the amendment, only subsection (b) is 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. 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.

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.

Editor's Note. — The introductory language and subdivision (1) of this section are set out above to correct an erroneous reference to the Internal Revenue Code in paragraph f of the subdivision in the replacement volume. As the rest of the section was not affected, only the introductory language and subdivision (1) are set out.

§ 105-151.5. Credit against personal income tax for conversion of industrial boiler to wood fuel. — Any person who modifies or replaces an oil or gas-fired boiler or kiln and the associated fuel and residue handling equipment used in the manufacturing process of a manufacturing business located in this State with one which is capable of burning wood shall be allowed as a credit against the tax imposed by this Division, an amount equal to fifteen percent (15%) of the installation and equipment cost of such conversion; provided, that in order to secure the credit allowed by this section, the taxpayer must own or control the business in which such boiler or kiln is used at time of such conversion and payment in part or in whole for such installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed; and the amount of credit allowed for any one income year shall be limited to fifteen percent (15%) of such costs paid during the year; 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. (1979, c. 801, s. 68; 1979, 2nd Sess., c. 1318, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "and the associated fuel and residue handling equipment" near the beginning of the section.

§ 105-151.6. Credit against personal income tax for construction of a fuel ethanol distillery. — (a) Any person who constructs in North Carolina a distillery to make ethanol from agricultural or forestry products for use as a motor fuel 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, and an additional ten percent (10%) of those costs if the distillery is powered primarily by use of an alternative fuel source. In order to secure the credit allowed by this section, the taxpayer must own or control the distillery at the time of construction and payment for the installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed. The amount of the credit allowed for any one income year shall be limited to twenty percent (20%) of the costs paid during the year, or thirty percent (30%) of those costs if the distillery is powered primarily by use of an alternative fuel source. Invoices or receipts shall be furnished to substantiate a claim of a credit under this section if requested by the Secretary of Revenue. 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) For purposes of this section, "alternative fuel source" includes agricultural and forestry products, waste petroleum products, and peat, but does not include other petroleum products, coal, or natural gas.

(c) The amount of credit allowed under this section may be carried over for the next succeeding five years. (1979, 2nd Sess., c. 1265, s. 3.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1265, s. 3, makes the act effective with respect to taxable years beginning on and after July 1, 1980.

§ 105-154. Information at the source.

Applied in Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

Division IV. Manufacturer's Income Tax.

§ 105-163.01. Short title.

Editor's Note. —
For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

Division V. Poultry or Livestock Producer's Income Tax Credit.

§ 105-163.05. Credit for local property taxes paid by producer upon poultry and livestock. — (a) A credit against the income tax imposed in this Article may be claimed by any producer of poultry or livestock for that portion of annual property taxes due and paid on a timely basis during the income year by such producer to counties and municipalities in this State upon poultry and livestock.

(b) The poultry and livestock producer's income tax credit shall be applied against the income tax due from the producer for the taxable year in which the property tax which is the basis for the credit was actually paid. If such credit, when combined with all other credits allowed by this Article, exceeds the income tax due from, or if a loss is sustained by the producer for such taxable

year, the excess credit may be carried forward for not more than five taxable years next succeeding the taxable year in which the credit first became available to the producer. In such case, the excess credit shall be applied against income tax due in the earliest taxable year possible and to its maximum extent before any excess credit may be carried forward to a latter taxable year.

(c) For purposes of this section, "property taxes" shall have the same meaning as in G.S. 105-163.02(8). (1979, 2nd Sess., c. 1179, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1179, s. 2, provides that the act shall apply to taxable years beginning on and after January 1, 1981.

Article 5.

Schedule E. Sales and Use Tax.

Division I. Title, Purpose and Definitions.

§ 105-164.2. Purpose.

Quoted in Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979).

§ 105-164.3. Definitions.

Applied in Young Roofing Co. v. North Carolina Dep't of Revenue, 42 N.C. App. 248, 256 S.E.2d 306 (1979).

Cited in Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979).

Division II. Taxes Levied.

Part 1. Retail Sales Tax.

§ 105-164.4. Imposition of tax; retailer.

Applied in Young Roofing Co. v. North Carolina Dep't of Revenue, 42 N.C. App. 248, 256 S.E.2d 306 (1979).

Cited in Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979).

Part 3. Use Tax.

§ 105-164.6. Imposition of tax. — An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price, to wit:

(3) There is hereby levied and there shall be collected from every person, firm, or corporation, an excise tax of three percent (3%) of the purchase price of all tangible personal property purchased or used which shall enter into or become a part of any building or other kind of structure in this State, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any

manner become a part thereof. Said tax shall be levied against the purchaser of such property. Provided, that where the purchaser is a contractor, the contractor and owner shall be jointly and severally liable for said tax, but the liability of the owner shall be deemed satisfied if before final settlement between them the contractor furnishes to the owner an affidavit certifying that said tax has been paid. Provided further, that where the purchaser is a subcontractor, the contractor and subcontractor shall be jointly and severally liable for said tax, but the liability of the contractor shall be deemed satisfied if before final settlement between them the subcontractor furnishes to the contractor an affidavit certifying that said tax has been paid. (1979, 2nd Sess., c. 1175.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective October 1, 1980, rewrote all of subdivision (3) following the first sentence.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (3) are set out.

Amendment Effective July 1, 1981. — Session Laws 1979, 2nd Sess., c. 1100, s. 1., effective July 1, 1981, amends this section by adding at the end of subdivision (4) a new sentence reading as follows: "No credit shall be given under this subdivision for sales or use taxes paid in another state if that state does not grant similar credit for sales taxes paid in North Carolina."

Cited in Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979).

Division III. Exemptions and Exclusions.

§ 105-164.13. Retail sales and use tax. — The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:

Exempt Status Group.

(33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through

out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

(1979, 2nd Sess., c. 1099, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment rewrote subdivision (33). Session Laws 1979, c. 1099 s. 2, provides: "This act shall become effective October 1, 1980, but shall not affect any transaction before such date."

As the rest of this section was not changed by the amendment, only the introductory language and subdivision (33) are set out.

§ 105-164.13A. Service charges on food, beverages, or meals. — When a service charge is imposed on food, beverages, or meals, so much of said service charge as does not exceed fifteen percent (15%) of the sales price is specifically exempted from the tax imposed by this Article when the service charge:

(1) Is separately stated in the price list, menu, or written proposal and also in the invoice or bill; and

(2) Is turned over to the personnel directly involved in the service of the food, beverages, or meals, in accordance with G.S. 95-25.6.

Such service charge shall be considered to be a tip. (1979, c. 801, s. 76; 1979, 2nd Sess., c. 1101.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective October 1, 1980, rewrote this section, which formerly exempted only the service charge imposed on prearranged group meals at approved facilities.

Division V. Records Required to Be Kept.

§ 105-164.29. Application for licenses by wholesale merchants and retailers. — Every application for a license by a wholesale merchant or retailer shall be made upon a form prescribed by the Secretary and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the Secretary may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some other person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Provided, however, that persons, firms, or corporations, whose business extends into more than one county shall be required to secure only one license under the provisions of this Article which license shall cover all operations of such company throughout the State of North Carolina.

When the required application has been made the Secretary shall grant and issue to each applicant such license. A license is not assignable and is valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall be at all times conspicuously displayed at the place of which issued.

A retailer whose license has been previously suspended or revoked shall pay the Secretary the sum of five dollars ($5.00) for the reissuance or renewal of such license. A wholesale merchant whose license has been previously suspended or revoked shall pay the Secretary the sum of ten dollars ($10.00) for the reissuance or renewal of such license for the year or fraction thereof for which said license is reissued or renewed.

Whenever any wholesale merchant or retailer fails to comply with any provision of this Article or any rule or regulation of the Secretary relating

thereto, the Secretary, upon hearing, after giving the wholesale merchant or retailer 10 days' notice in writing, specifying the time and place of hearing and requiring him to show cause why his license should not be revoked, may revoke or suspend the license held by such wholesale merchant or retailer. The notice may be served personally or by registered mail directed to the last known address of the person. All provisions with respect to review and appeals of the Secretary's decisions as provided by G.S. 105-241.2, 105-241.3, and 105-241.4 of the General Statutes shall be applicable to this section.

Any wholesale merchant or retailer who engages in business as a seller in this State without a license or after his license has been suspended or revoked, and each officer of any corporation which so engages in business shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500.00) for each such offense. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1084.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the fee in the first sentence of the third paragraph from $1.00 to $5.00.

Article 6.

Schedule G. Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.

Editor's Note. —

For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

Article 7.

Schedule H. Intangible Personal Property.

§ 105-202. Bonds, notes, and other evidences of debt.

Applied in In re Alamance Mem. Park, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

§ 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.

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.

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 taxes levies made for the various funds and and activities of the taxing unit receiving said allotment.

(b) For purposes of this section, the term "municipality" includes any urban service district defined by the governing board of a consolidated city-county, and the amounts due thereby shall be distributed to the government of the consolidated city-county. (1939, c. 158, s. 715; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1957, c. 1340, s. 7; 1967, c. 1196, s. 5; 1971, c. 298, s. 3; 1973, c. 476, s. 193; c. 500, s. 3; c. 537, s. 4; c. 1287, s. 11; 1979, 2nd Sess., c. 1137, s. 48.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "State Budget Officer" for "Secretary of the North Carolina Department of Administration" at the end of the first sentence in the fourth paragraph.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 105-214. Minimum tax for requirement of filing returns. — When the combined tax of any taxpayer required to be paid under G.S. 105-200, 105-201, 105-202, 105-203, 105-204 and 105-205 does not exceed a tax of fifteen dollars ($15.00), no return shall be required to be filed. This section shall not be construed to affect the provisions of G.S. 105-199, and the minimum tax herein provided shall not apply to said section. (1963, c. 1010; 1979, 2nd Sess., c. 1131, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective with respect to taxable years beginning on and after January 1, 1980, increased the tax in the first sentence from $5.00 to $15.00.

Article 9.

Schedule J. General Administration; Penalties and Remedies.

§ 105-241.2. Administrative review.

Cited in In re Alamance Mem. Park, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

§ 105-242. Warrant for collection of taxes; certificate or judgment for taxes.

(b) Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this Subchapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon it if were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this Subchapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the setoff of any matured or unmatured indebtedness of the taxpayer to the garnishee; provided, however, the garnishee shall not become liable for any sums represented by or held pursuant to any negotiable instrument issued and delivered by the garnishee to the taxpayer and negotiated by the taxpayer to a bona fide holder in due course, and whenever any sums due by the taxpayer and subject to garnishment are so held or represented, the garnishee shall hold such sums for payment to the Secretary of Revenue upon the garnishee's receipt of such negotiable instrument, unless such instrument is presented to the garnishee for payment by a bona fide holder in due course in which event such sums may be paid in accordance with such instrument to such holder in due course. To effect such attachment or garnishment the Secretary of Revenue shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Secretary of Revenue or by any officer having authority to serve summonses. Provided, if the taxpayer no longer resides within North Carolina or cannot be located therein the notice may be served upon the taxpayer by registered or certified mail, return receipt requested, and such service shall be conclusively presumed to have been made upon the exhibition of the return receipt. Said notice shall show:

(1) The name of the taxpayer, and if known his Social Security number or federal tax identification number and his address;

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of said notice, answer the same by sending to the Secretary of Revenue by registered or certified mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Secretary with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Secretary upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or setoff, he shall state the same in writing under oath, and, within 10 days after service of said notice, shall send two copies of said statement to the Secretary by registered or certified mail; if the Secretary admits such defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or setoff, and any amount attached or garnished hereunder which is not affected by such defense or setoff shall be remitted to the Secretary as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Secretary shall not admit the defense or setoff, he shall set forth in writing his objections thereto and shall

send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the Secretary of Revenue by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or setoff of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than 10 percent of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Secretary of Revenue or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in this Subchapter, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Secretary, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by law in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Secretary at any time within 12 months after said intangible is paid to him and if the Secretary finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by G.S. 105-267.1, and if such payment is denied, said party may appeal from the determination of the Secretary under the provisions of G.S. 105-241.4; provided, that in taking an appeal to the superior court, said party may appeal either to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Secretary is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied.

This subsection shall be applicable with respect to the wages, salary or other compensation of officials and employees of this State and its agencies and instrumentalities, officials and employees of political subdivisions of this State and their agencies and instrumentalities, and also officials and employees of the United States and its agencies and instrumentalities insofar as the same is permitted by the Constitution and laws of the United States. In the case of State or federal employees, the notice shall be served upon such employee and upon the head or chief fiscal officer of the department, agency, instrumentality or institution by which the taxpayer is employed. In case the taxpayer is an employee of a political subdivision of the State, the notice shall be served upon such employee and upon the chief fiscal officer, or any officer or person charged

with making up the payrolls, or disbursing funds, of the political subdivision by which the taxpayer is employed. Such head or chief officer or fiscal officer or other person as specified above shall thereafter, subject to the limitations herein provided, make deductions from the salary or wages due or to become due the taxpayer and remit same to the Secretary until the tax, penalty, interest and costs allowed by law are fully paid. Such deductions and remittances shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.

(1979, 2nd Sess., c. 1085, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective October 1, 1980, inserted "or certified" near the beginning of the first and second sentences in the second paragraph of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 105-262. Rules and Regulations.

Interpretation of Secretary Prima Facie Correct. —

In accord with original. See In re Alamance Mem. Park, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

§ 105-267. Taxes to be paid; suits for recovery of taxes.

Applied in Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979).

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

ARTICLE 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.

Editor's Note. —

For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

§ 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:

(25) Tangible personal property shipped into this State for the purpose of repair, alteration, maintenance or servicing and reshipment to the owner outside this State. This classification shall not include raw materials, supplies, or goods in process of manufacture in this State. (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.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective January 1, 1981, added subdivision (25).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (25) are set out.

For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

§ 105-278.1. Exemption of real and personal property owned by units of government.

Editor's Note. —
For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

Article 13.

Standards for Appraisal and Assessemnt.

§ 105-283. Uniform appraisal standards.

Editor's Note. —
For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

The actual value of a note, bond, or other evidence of debt is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell; it is synonymous with the "market value," or the "true value." In re Alamance Mem. Park, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

County tax assessment valuation method held not arbitrary. See In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

Article 14.

Time for Listing and Appraising Property for Taxation.

§ 105-286. Time for general reappraisal of real property.

Cited in In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

Article 17.

Administration of Listing.

§ 105-302. In whose name personal property is to be listed.

Editor's Note. —
For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 105-312. Discovered property; appraisal; penalty.

Editor's Note. —
For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

ARTICLE 19.

Administration of Real and Personal Property Appraisal.

§ 105-317. Appraisal of real property; adoption of schedules, standards, and rules.

County tax assessment valuation method held not arbitrary. See In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

Where county appraisers considered soil quality and whether the land was cropland, pasture, or woodland, and set varying land values on this basis, and also took into consideration that part of the land was swampland, the potential uses and income of the land were adequately considered. In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

ARTICLE 26.

Collection and Foreclosure of Taxes.

§ 105-355. Creation of tax lien; date as of which lien attaches.

Editor's Note. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 105-356. Priority of tax liens.

Editor's Note. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.

Applied in In re Foreclosure of Deed of Trust, 41 N.C. App. 563, 255 S.E.2d 260 (1979).

§ 105-368. Procedure for attachment and garnishment.

(c) If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of the notice answer it by sending to the tax collector by registered or certified mail a statement to that effect, and if the amount demanded by the tax collector is then due to the taxpayer or subject to his demand, the garnishee shall remit it to the tax collector with his statement; but if the amount due to the taxpayer or subject to his demand is to mature in the future, the garnishee's statement shall set forth that fact, and the demand shall be paid to the tax collector upon maturity. Any payment by the garnishee under the provisions of this subsection (c) shall completely satisfy any liability therefor on his part to the taxpayer.

(d) If the garnishee has a defense or setoff against the taxpayer, he shall state it in writing under oath, and, within 10 days after service of the garnishment notice, he shall send two copies of his statement to the tax collector by registered or certified mail. If the tax collector admits the defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of the garnishee's statement, and the attachment or garnishment shall thereupon be discharged to the amount required by the defense or setoff, and

any amount attached or garnished which is not affected by the defense or setoff shall be remitted to the tax collector as provided in subsection (c), above.

If the tax collector does not admit the defense or setoff, he shall set forth in writing his objections thereto and send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time the tax collector shall file a copy of the notice of garnishment, a copy of the garnishee's statement, and a copy of the tax collector's objections thereto in the appropriate division of the General Court of Justice of the county in which the garnishee resides or does business, where the issues made shall be tried as in civil actions. (1979, 2nd Sess., c. 1085, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective October 1, 1980, inserted "or certified" near the beginning of the first sentence in subsection (c) and near the end of the first sentence in subsection (d).

As the rest of the section was not changed by the amendment, only subsections (c) and (d) are set out.

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

Construed together, § 160A-233(c) and subsection (i) of this section, provide for an award of one reasonable attorney's fee, in the court's discretion, in a foreclosure of an assessment lien by action in nature of action to foreclose a mortgage. Guilford County v. Boyan, 42 N.C. App. 627, 257 S.E.2d 463 (1979).

ARTICLE 27.

Refunds and Remedies.

§ 105-381. Taxpayer's remedies.

Applied in Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260 (1980).

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-436.1. Taxation of alcohol fuels. — (a) Sale, distribution, and use of a blend of motor fuel and a minimum of ten percent (10%) anhydrous ethanol are subject to the tax described in G.S. 105-434 except:

(1) From January 1, 1981, through June 30, 1981, the tax is five cents (5¢);

(2) From July 1, 1981, through June 30, 1982, the tax is six cents (6¢);

(3) From July 1, 1982, through June 30, 1983, the tax is seven cents (7¢);

(4) From July 1, 1983, through June 30, 1984, the tax is eight cents (8¢).

No refund or rebate allowed under this Article for the purchase of such a blend shall exceed the motor fuels tax on that blend, reduced by one cent (1¢).

(b) Non-anhydrous ethanol is exempt from the tax described in this section and in G.S. 105-434 if that ethanol is not for sale or distribution. (1979, 2nd Sess., c. 1187, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1187, s. 6, provides: "This act shall become effective on January 1, 1981, and shall cease to be effective on July 1, 1984."

§ 105-446.3:1. Refund of taxes paid on gasohol. — (a) Any person, association, firm, or corporation not licensed as a distributor with the North Carolina Department of Revenue who purchases motor fuel and blends it with a minimum of 10 percent (10%) anhydrous ethanol and who pays more tax thereon than is required by G.S. 105-436.1 is entitled to reimbursement for the overpayment upon the following conditions and in the following manner:

(1) All claims for refunds under this section shall be filed with the Secretary of Revenue on forms prescribed by him on or before the last day of January, April, July, and October of each year, covering motor fuel purchased during the quarterly period immediately preceding the month in which the application is filed. In all applications for reimbursement, the applicant shall state whether or not he has filed a North Carolina income tax return with the Secretary of Revenue, and all applications shall be made upon oath or affirmation. Each application shall show on its face that the purchase price has been secured to the seller's satisfaction. Refunds made pursuant to claims filed after the dates specified above are subject to the following late filing penalties: applications filed within 30 days after those dates, twenty-five percent (25%); applications filed after 30 days but within six months, fifty percent (50%); but refunds applied for after six months following those dates are barred.

(2) The Secretary of Revenue has authority to issue rules as to how claims are filed and the information that is submitted with the claims and the records required to support the claims.

(3) If, upon the filing of an application, the Secretary of Revenue is satisfied that it is made in good faith and the motor fuel upon which the tax refund is requested has been or is to be used exclusively for purposes set forth in the application, he shall issue to the applicant a warrant upon the State Treasurer for the tax refund.

(4) If the Secretary of Revenue is satisfied that the applicant for any refund authorized by this section has collected or sought to collect any refund of tax on motor fuel which has not been blended with a minimum of ten percent (10%) anhydrous ethanol, he shall issue to the applicant notice to show cause why the application should not be disallowed. The notice shall state a time and place of hearing upon the notice. If, at the hearing, the Secretary finds as a fact that the applicant has collected or sought to collect any refund on motor fuel not so blended, he shall disallow the application in its entirety and the applicant shall be required to pay all tax which has been refunded to him on the application.

(5) Any applicant for a refund may seek administrative review or appeal from the decision of the Secretary of Revenue under the provisions of G.S. 105-241.2, G.S. 105-241.3, and G.S. 105-241.4.

(6) If at any time in the opinion of the Secretary there is reason to doubt the accuracy of the facts set forth in any application for a tax refund, he may refer the matter to any agent of the Department of Revenue, and that agent shall make a careful investigation of all the facts and circumstances relating to the application in the use of the motor fuels therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuels products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Secretary of Revenue.

(7) If any court of last resort holds that the provisions for refund in this section render the levying and collecting of the tax under this Article invalid, it is the intention of the General Assembly that these provisions for refund shall be annulled and the tax shall be levied without any provisions for refund and that this Article shall be so construed.

(b) Any person making a false application or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section is guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding two years. (1979, 2nd Sess., c. 1187, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1187, s. 6, provides: "This act shall become effective on January 1, 1981, and shall cease to be effective on July 1, 1984."

Article 36A.

Special Fuels Tax.

§ 105-449.10. Records and reports required of user-seller or user. — Each user-seller or user licensed under this Article shall keep such records and make such reports to the Secretary as shall be prescribed under regulations promulgated by the Secretary. Such records and reports shall be such as are adequate to show all purchases, sales, deliveries and use of fuel by such seller or user, provided that persons licensed as users shall file such reports quarterly on or before the last day of the month immediately following the end of the quarter. The provision of this section shall not apply to users whose use of diesel fuel is limited to private passenger vehicles and other vehicles licensed under the motor vehicle laws at 6,000 pounds or less. (1955, c. 822, s. 1; 1965, c. 1120, s. 2; 1973, c. 476, s. 193; 1979, c. 13, s. 2; 1979, 2nd Sess., c. 1086, s. 1.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted "last day" for "twenty-fifth day" near the end of the second sentence.

§ 105-449.16. Levy of tax; purposes; special provisions for gasohol and non-anhydrous ethanol. — (a) A tax at the rate of nine cents (9¢) per gallon is hereby imposed upon all fuel sold or delivered by any supplier to any licensed user-seller, or used by any such supplier in any motor vehicle owned, leased or operated by him, or delivered by such supplier directly into the fuel supply tank of a motor vehicle, or imported by a user-seller into, or acquired tax free by a user-seller or user in this State for resale or use for the propulsion of a motor vehicle. For the purpose of this section, "imported" shall not include fuels brought into this State in the usual tank or receptacle connected with the engine of a motor vehicle. The primary purposes of this levy and this Article are to provide a more efficient and effective method of collecting the tax now imposed and collected pursuant to G.S. 105-435, by providing for the collection of said tax from the supplier instead of the user. The tax herein provided for is levied for the same purposes as the tax provided for in G.S. 105-435. It is not intended that the tax collected pursuant to this Article shall be in addition to that provided in G.S. 105-435, but the payment of the tax as provided by this Article shall be deemed conclusively to constitute a compliance with the provisions of G.S. 105-435. The nine cents (9¢) per gallon tax, hereinabove provided for, shall be subject to the provisions of § 13 of Chapter 1250 of the

Session Laws of 1949, relating to G.S. 105-435, in that one cent (1¢) out of every said nine cents (9¢) tax per gallon shall be applied exclusively to the payment of the principal of and the interest on the two hundred million dollars ($200,000,000) State of North Carolina Secondary Road Bonds therein provided for and as further provided in said Chapter 1250 of the Session Laws of 1949.

(b) Sale, distribution, and use of a blend of gasoline or fuel and a minimum of ten percent (10%) anhydrous ethanol, which is not subject to taxation under Article 36 of this Chapter, are subject to the tax described in subsection (a) of this section except:

(1) From January 1, 1981, through June 30, 1981, the tax is five cents (5¢);

(2) From July 1, 1981, through June 30, 1982, the tax is six cents (6¢);

(3) From July 1, 1982, through June 30, 1983, the tax is seven cents (7¢);

(4) From July 1, 1983, through June 30, 1984, the tax is eight cents (8¢).

(c) Non-anhydrous ethanol is exempt from the tax described in this section if that ethanol not for sale or distribution. (1955, c. 822, s. 1; 1969, c. 600, s. 21; 1979, 2nd Sess., c. 1187, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, designated the former provisions of this section as subsection (a) and added subsections (b) and (c). Session Laws 1979, 2nd Sess., c. 1187, s. 6, provides: "This act shall become effective January 1, 1981, and shall cease to be effective on July 1, 1984."

§ 105-449.24. Exemptions, rebates and refunds. — The provisions of G.S. 105-439, G.S. 105-446.1, G.S. 105-446.3, G.S. 105-446.3:1, G.S. 105-446.5 and G.S. 105-449 relating to exemption from, and rebates and refunds of tax levied on gasoline shall also apply to the taxes levied by this Article on special fuels. No refund or rebate allowed under this Article for the purchase of a blend of gasoline or fuel and a minimum of ten percent (10%) anhydrous ethanol shall exceed the special fuels tax on that blend, reduced by one cent (1¢). (1967, c. 1110, s. 15; 1971, c. 1221, s. 2; 1979, c. 801, s. 93; 1979, 2nd Sess., c. 1187, ss. 4, 5.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective January 1, 1981, inserted the reference to § 105-446.3:1 in the first sentence and added the second sentence. Session Laws 1979, 2nd Sess., c. 1187, s. 6, provides: "This act shall become effective on January 1, 1981, and shall cease to be effective on July 1, 1984."

Article 36B.

Tax on Carriers Using Fuel Purchased outside State.

§ 105-449.39. Credit for payment of motor fuel tax. — Every motor carrier subject to the tax hereby imposed shall be entitled to a credit on such tax equivalent to nine cents (9¢) per gallon on all gasoline or other motor fuels purchased, on and after July 1, 1969, by such carrier in this State for use in their operations either within or without this State and upon which gasoline or other motor fuels the tax imposed by the laws of this State have been paid by such carrier. Carriers who have inventory on hand as of 12:01 A.M., July 1, 1969, on which the seven cents (7¢) tax has been paid shall take credit for seven cents (7¢) per gallon on all such gasoline and other motor fuels when filing tax report required under G.S. 105-449.45. Evidence of the payment of such tax in such form as may be required by, or is satisfactory to, the Secretary shall be furnished by each such carrier claiming the credit herein allowed. When the amount of the credit herein provided to which any motor carrier is

entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Secretary be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters; or upon application within 180 days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Secretary and supported by such evidence as may be satisfactory to the Secretary, such excess may be refunded to said motor carrier.

Unless the Secretary of Revenue exercises his discretion as hereinafter provided, or as provided in G.S. 105-449.40, he shall allow such refund only after an audit of the applicant's records. However, he may, in his sole discretion, make refunds without prior audit or without having been furnished a bond pursuant to G.S. 105-449.40 if the motor carrier has complied with the provisions of this Subchapter and rules and regulations promulgated thereunder for a period of one full prior registration year. (1955, c. 823, s. 3; 1969, c. 600, s. 22; c. 1098; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1098.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote the second paragraph, which formerly read: "The Secretary shall not allow such refund except after an audit of the applicant's records and shall audit the records of an applicant at least once a year.

§ 105-449.42. Payment of tax. — For the purposes of making payment of taxes pursuant to this Article and making reports pursuant to this Article, the year is divided into four quarters of three consecutive months each, and the first quarter shall consist of the months of January, February and March. The tax herein imposed shall be paid by each motor carrier to the Secretary on or before the last day of the month immediately following the quarter with respect to which tax liability hereunder accrues and shall be calculated upon the amount of gasoline or other motor fuel used in its operations within this State by each such carrier during the quarter ending with the last day of the preceding month. A lessee of a motor vehicle, and not the lessor thereof, shall make such reports and be liable for any pay such taxes as may become due under this Article with respect to all operations by a lessee pursuant to any lease of a motor vehicle. (1955, c. 823, s. 6; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1086, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted "last day" for "twentieth day" near the middle of the second sentence.

§ 105-449.45. Reports of carriers. — 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.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted "last day" for "twentieth day" preceding "of April" near the beginning of the first sentence.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

ARTICLE 39.

Local Governmental Sales and Use Tax.

§ 105-467. Sales tax imposed; limited to items on which the State now imposes a three percent sales tax.

Editor's Note. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

§ 105-468. Use tax imposed; limited to items upon which the State now imposes a three percent use tax.

Amendment Effective July 1, 1981. — Session Laws 1979, 2nd Sess., c. 1100, s. 2, effective July 1, 1981, amends this section by adding at the end of the third paragraph a new sentence reading as follows: "No credit shall be given under this section for sales or use taxes paid in a taxing jurisdiction outside this State if that taxing jurisdiction does not grant similar credit for sales taxes paid under this Article."

§ 105-472. Disposition and distribution of taxes collected. — With respect to the counties in which he shall collect and administer the tax, the Secretary of Revenue shall, on a quarterly basis, distribute to each taxing county and to the municipalities therein the net proceeds of the tax collected in that county under this Article which amount shall be determined by deducting taxes refunded, the cost to the State of collecting and administering the tax in the taxing county and such other deductions as may be properly charged to the taxing county, from the gross amount of the tax remitted to the Secretary of Revenue from the taxing county. The Secretary shall determine the cost of collection and administration, and that amount shall be retained by the State before distribution of the net proceeds of the tax. For the purposes of this Article, "municipalities" shall mean "incorporated cities and towns."

The board of county commissioners shall, in the resolution levying the tax, determine that the net proceeds of the tax shall be distributed in one of the following methods and thereafter said proceeds shall be distributed in accordance therewith:

(1) The amount distributable to a taxing county and to the municipalities therein from the net proceeds of the tax collected therein shall be determined upon the following basis: The net proceeds of the tax collected in a taxing county shall be distributed to that taxing county and to the municipalities therein upon a per capita basis according to the total population of the taxing county, plus the total population of the municipalities therein; provided, however, that "total population" of a municipality lying within more than one county shall be only that part of its population which lives within the taxing county. For this

purpose, the Secretary of Revenue shall determine a per capita figure by dividing the net proceeds of the tax collected under this Article for the preceding quarter within a taxing county by the total population of that taxing county plus the total population of all municipalities therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. The per capita figure thus derived shall be multiplied by the population of the taxing county and each respective municipality therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer, and each respective product shall be the amount to be distributed to each taxing county and to each municipality therein. The State Budget Officer shall annually cause to be prepared and shall certify to the Secretary of Revenue such reasonably accurate population estimates of all counties and municipalities in the State as may be practicably developed; or

(2) The net proceeds of the tax collected in a taxing county shall be divided between the county and the municipalities therein in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding such distribution. For purposes of this section, the amount of the ad valorem taxes levied by such county or municipality shall include any ad valorem taxes levied by such county or municipality in behalf of a taxing district or districts and collected by the county or municipality. In computing the amount of tax proceeds to be distributed to any county or municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distributable share of the sales and use tax levied under this Article shall in turn immediately share the proceeds with any district or districts in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality. Any county or municipality which fails to provide the Department of Revenue with information concerning ad valorem taxes levied by that county or municipality adequate to permit a timely determination of the appropriate share of that county or municipality of tax proceeds collected under this Article may be excluded by the Secretary from each quarterly distribution with respect to which such information was not provided in a timely manner, and such tax proceeds shall then be distributed only to the governmental unit or units whose information was provided in a timely manner.

Where local use taxes, levied pursuant to this Article, or to any other local sales tax act, which cannot be identified as being attributable to any particular taxing county are collected and remitted to the Secretary, he shall apportion said taxes to the taxing counties in the same proportion that the local sales and use taxes collected each month in a taxing county bears to the total local sales and use taxes collected in all taxing counties each month during the quarter for which a distribution is to be made, and the total net proceeds shall then be distributed as above provided.

The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the next succeeding fiscal year. In order for such resolution to be effective, a certified copy thereof must be delivered to the Secretary of Revenue at his office in Raleigh within 15 calendar days after its adoption. If the board fails to adopt any resolution or if it fails to adopt a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to

the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year. (1971, c. 77, s. 2; 1973, c. 476, s. 193; c. 752; 1979, c. 12, s. 1; 1979, 2nd Sess., c. 1134, s. 49.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "State Budget Officer" for "Director of the North Carolina Department of Administration" in three places in subdivision (1).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 105-474. Definitions; construction of Article; remedies and penalties.

Editor's Note. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

Chapter 106.

Agriculture.

Article 1.

Department of Agriculture.

Part 3. Powers and Duties of Department and Board.

Sec.

106-21.2. Food Bank information and referral service.

Article 12.

Food, Drugs and Cosmetics.

106-141.1. Inspections of donated food.

Article 19B.

Plant Protection and Conservation Act.

Sec.

106-202.19. Unlawful acts; penalties; enforcement.

Article 1.

Department of Agriculture.

Part 3. Powers and Duties of Department and Board.

§ 106-21.2. Food Bank information and referral service. — The Department of Agriculture may maintain an information and referral service for persons and organizations that have notified the department of their desire to donate food to a nonprofit organization or a nonprofit corporation. (1979, 2nd Sess., c. 1188, s. 2.)

Article 12.

Food, Drugs and Cosmetics.

§ 106-141.1. Inspections of donated food. — (a) The Department of Agriculture is authorized to inspect for compliance with the provisions of Article 12 of Chapter 106 of the North Carolina General Statutes, food items donated for use or distribution by nonprofit organizations or nonprofit corporations, and may establish procedures for the handling of the food items, including reporting procedures concerning the donation of food.

(b) The Department of Agriculture may apply to Superior Court for injunctive relief restraining the violation of this section.

(c) Nothing in this section shall limit the duties or responsibilities of the Commission for Health Services or the local boards of health. (1979, 2nd Sess., c. 1188, s. 3.)

Article 19B.

Plant Protection and Conservation Act.

§ 106-202.19. Unlawful acts; penalties; enforcement. — (a) It is unlawful:

(1) To uproot, dig, take or otherwise disturb or remove for any purpose from the lands of another, any plant on a protected plant list without a written permit from the owner which is dated and valid for no more than 180 days and which indicates the species or higher taxon of plants for which permission is granted; except that the incidental disturbance

of protected plants during agricultural, forestry or development operations is not illegal so long as the plants are not collected for sale or commercial use;

(2) To sell, barter, trade, exchange, export, offer for sale, barter, trade, exchange or export or give away for any purpose including advertising or other promotional purpose any plant on a protected plant list, except as authorized according to the rules and regulations of the Board; including those promulgated pursuant to G.S. 106-202.15(1);

(3) To perform any act specifically prohibited by the rules and regulations of the Board promulgated pursuant to its authority under G.S. 106-202.15.

The illegal movement or distribution of each plant, pursuant to this subsection shall constitute a separate violation.

Each person convicted of violating the provisions of this Article, shall be fined not less than one hundred dollars ($100.00), upon the first conviction and not less than five hundred dollars ($500.00) upon a subsequent conviction.

(b) The Commissioner or any employee of the Department of Agriculture designated by the Commissioner to enforce the provisions of this Article, may enter any place within the State at all reasonable times where plant materials are being grown, transported or offered for sale and require the presentation for inspection of all pertinent papers and records relative to the provisions of this Article, after giving notice in writing to the owner or custodian of the premises to be entered. If he refuses to consent to the entry, the Commissioner may apply to any district court judge and the judge may order, without notice, that the owner or custodian of the place permit the Commissioner to enter the place for the purposes herein stated and failure by any person to obey the order may be punished as for contempt.

(c) The Commissioner of Agriculture is authorized to apply to the superior court for, and the court shall have jurisdiction upon hearing and, for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of G.S. 106-202.19(a), regardless of whether there exists an adequate remedy at law. (1979, c. 964, s. 1.)

Editor's Note. — This section is set out above to correct erroneous section references in the 1979 Cumulative Supplement.

Article 28B.

Regulation of Production, Distribution, etc., of Milk and Cream.

§ 106-266.8. Powers of Commission.

Constitutionality. — That part of subdivision (3) conferring upon the commission power to require a distributor of milk, reconstituted from milk powder produced in another state, to make "equalization" payments for the benefit of North Carolina milk producers, with whom it has no dealings, violates Art. I, § 19, of the Constitution of North Carolina, and the commerce clause of the U.S. Constitution. In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Chapter 108.

Social Services.

Article 2.

Programs of Public Assistance.

Part 4. Financing of Programs of Public Assistance.

Sec.

108-54. Determination of State and county financial participation.

Part 5. Medical Assistance.

108-61.2. Subrogation rights; withholding of information a misdemeanor.

108-61.4. Acceptance of medical assistance constitutes assignment to the State of right to third party benefits; recovery procedure.

Article 2.

Programs of Public Assistance.

Part 3. The Administration of Aid to Families with Dependent Children.

§ 108-48. Fraudulent misrepresentation.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 24, effective March 1, 1981, and applicable to offenses committed on or after that date, amends subsection (b) of this section to read as follows: "(b) Any person whether provider or recipient who willfully and knowingly with the intent to deceive makes a false statement or representation or fails to disclose a material fact and as a result of making a false statement or representation or failing to disclose a material fact, obtains for himself or another person, attempts to obtain for himself or another person, or continues to receive or enables another person to continue to receive public assistance in an amount of more than four hundred dollars ($400.00) is guilty of a Class I felony."

Part 4. Financing of Programs of Public Assistance.

§ 108-54. Determination of State and county financial participation. — Before February 15 of each year, the Secretary of Human Resources shall, as best can be determined, notify the director of social services of each county of the amount of State and federal moneys available to that county for programs of public assistance, as well as the percentage of county participation expected to be required for the budget for the succeeding fiscal year. In odd-numbered years, in making such notification, the Secretary of Human Resources shall notify the counties of any changes in funding levels, formulas or programs relating to public assistance proposed by the Governor to the General Assembly in the proposed budget and budget report submitted under the Executive Budget Act. This paragraph shall not be construed to in any way restrict the right of the General Assembly to amend such budget.

Before March 15 of each year the director of social services for every county shall compile and submit to the county board of social services an estimated budget of total county funds required to finance each program of public assistance, including all administrative expenses, within the county in the next fiscal year on forms furnished by the Department of Human Resources. The county board of social services shall review, modify, and approve such estimated budget and transmit it before April 1 to the board of county commissioners, which shall review, modify and approve it before April 15 for

transmittal by said date to the Department of Human Resources. The Department of Human Resources shall review the estimated budget submitted by each county and shall notify the board of county commissioners by June 1 of the approval or disapproval of the county's estimated budget of total county funds necessary to support and administer adequate programs of public assistance.

If the Department of Human Resources approves the estimated budget submitted by the county, and if administrative and program expenditures for that year in the county's aid to families with dependent children, medical assistance, State-county special assistance for adults, WIN single administrative Unit, WIN day care, and State boarding home fund for foster care programs exceed the approved estimate of administrative and program costs for said programs, or if the administrative expenditures for that year in the county's food stamp program exceed the approved estimate of administrative costs for said program, then the county shall be eligible to borrow the required additional county share from the "State Public Assistance Contingency Fund" established in G.S. 108-54.1.

If the Department of Human Resources disapproves the estimated budget of the county, it shall recommend an appropriate budget of total county funds necessary to sustain and administer adequate programs of public assistance whose acceptance by the board of county commissioners shall be a condition precedent to borrowing any moneys from the "State Public Assistance Contingency Fund" established in G.S. 108-54.1; provided that, if the board of county commissioners disputes the budget recommended by the Department of Human Resources as appropriate to sustain and administer adequate programs of public assistance within that county, the Secretary of Human Resources shall make a final determination that shall be binding upon the county.

Upon final determination of the county budget for all programs of public assistance within that county for the next fiscal year, the board of county commissioners shall levy taxes sufficient to provide for the payment of the county's share of such budget as well as for repayment of any amount borrowed from the "State Public Assistance Contingency Fund." (1937, c. 288, ss. 9, 21, 39, 51; 1943, c. 505, s. 8; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 1418, s. 1; 1977, c. 1089, s. 1; 1977, 2nd Sess., c. 1219, s. 21; 1979, 2nd Sess., c. 1198.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, added the first paragraph.

Part 5. Medical Assistance.

§ 108-61.2. Subrogation rights; withholding of information a misdemeanor. — (a) Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of such assistance, or of his personal representative, his heirs, or the administrator or executor of his estate, against any person. It shall be the responsibility of the county attorney or an attorney retained by the county and/or the State to enforce this section, and said attorney shall be compensated for his services in accordance with the attorneys' fee arrangements approved by the Department of Human Resources. The United States and the State of North Carolina shall be entitled to share in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.
(1979, 2nd Sess., c. 1312, ss. 1, 2.)

Editor's Note. — The 1979, 2nd Sess., amendment rewrote the first and second sentences of subsection (a).

As subsection (b) was not changed by the amendment, it is not set out.

§ 108-61.4. Acceptance of medical assistance constitutes assignment to the State of right to third party benefits; recovery procedure. — (a) Notwithstanding any other provisions of the law, by accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled.

It shall be the responsibility of the county attorney of the county from which the medical assistance benefits are received or an attorney retained by that county and/or the State to enforce this subsection, and said attorney shall be compensated for his services in accordance with the attorneys' fee arrangements approved by the Department of Human Resources.

(1979, 2nd Sess., c. 1312, ss. 3-5.)

Editor's Note. — The 1979, 2nd Sess., amendment deleted "insurance" preceding "benefits" in the catchline, added "Notwithstanding any other provisions of the law," at the beginning of the first sentence of subsection (a), substituted "benefits, contractual or otherwise," for "insurance benefits" near the end of the first sentence of subsection (a) and added the second sentence of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 108-61.5. Medicaid fraud.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 25, effective March 1, 1981, and applicable to offenses committed on or after that date, rewrites subsection (c) of this section to read as follows: "(c) Any person who violates a provision of this section shall be guilty of a Class I felony."

§ 108-61.6. Protection of patient property.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, s. 26, effective March 1, 1981, and applicable to offenses committed on or after that date, amends subsection (b) of this section to read as follows: "(b) A violation of subdivision (a)(1) of this section shall be a misdemeanor punishable by a fine of not more than two thousand dollars ($2,000) or imprisonment for not more than two years, or both, in the discretion of the court. A violation of subdivision (a)(2) of this section shall be a Class I felony."

ARTICLE 3.

Inspection and Licensing Authority.

Part 1A. Licensing of Public Solicitation.

§ 108-75.1. Short title.

Provisions of Article Held Unconstitutional. —

Section 108-75.7(a)(1), which exempts from compliance with the provisions of this article all religious organizations except those whose "financial support is derived primarily from contributions solicited from persons other than its own members" deprives the article of that neutrality toward religion required by the Establishment Clause of the First Amendment

and Art. I, §§ 13 and 19, of the North Carolina Constitution. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.2. Purpose.

Quoted in Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.3. Definitions.

Cited in Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.4. Authority to license.

Stated in Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.6. Application for licensing.

Constitutionality. — The primary effect of the proviso in subdivision (6) is to place the full range of burdens attendant to the licensing procedure, including the audit requirement, solely upon those religious organizations which primarily go to the public with their religious messages and requests for the financial support needed to propagate them. The result is an inhibition by the State of a specific mode of religious practice — that of spreading one's religious beliefs via personal visitations, use of the news media, and distribution of literature among the public at large — and as such the proviso is violative of Art. I, §§ 13 and 19, of the State Constitution. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.7. Exemptions from licensing.

Subdivision (a)(1) Creates, etc. —

As applied to religious organizations, the enforcement of subdivision (a)(1) of this section, §§ 108-75.12 and 108-75.18(4)-(6) inevitably entangles the State and its agencies in a persistent inquiry into whether particular expenditures of a religious organization are secular or religious in nature, or whether the religious expenditures support the same religious purposes represented in the organization's license application. Such entanglement effects an unconstitutional establishment of religion under Art. I, §§ 13 and 19 of the State Constitution. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Subdivision (a)(1) of this section grants an exemption from the licensing and reporting requirements to a broadly defined class of religious organizations. The proviso, however, which immediately follows in the same section denies the benefits of the exemption to those religious organizations which derive their financial support "primarily" from contributions solicited from "persons other than [their] own members." The effect of the proviso is to alter the original exemptions' religious neutrality. The result is a qualified exemption which favors only those religious organizations which solicit primarily from their own members. This qualification to the general exemption works an impermissible establishment of religion. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Subdivision (a)(1) of this section, which exempts from compliance with the provisions of this article all religious organizations except those whose "financial support is derived primarily from contributions solicited from persons other than its own members" deprives the article of that neutrality toward religion required by the Establishment Clause of the First Amendment and Art. I, §§ 13 and 19, of

the North Carolina Constitution. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.9. Information filed to become public records.

Stated in Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.12. Records to be kept by charitable organizations.

Constitutionality. — As applied to religious organizations, the enforcement of this section, and §§ 108-75.7(a)(1) and 108-75.18(4)-(6) inevitably entangles the State and its agencies in a persistent inquiry into whether particular expenditures of a religious organization are secular or religious in nature, or whether the religious expenditures support the same religious purposes represented in the organization's license application. Such entanglement effects an unconstitutional establishment of religion under Art. I, §§ 13 and 19 of the State Constitution. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.18. Denial, suspension or revocation of license.

Subdivisions (4) through (6) Effect Establishment of Religion. — As applied to religious organizations, the enforcement of subdivisions (4) through (6) of this section, and §§ 108-75.7(a)(1) and 108-75.12 inevitably entangles the State and its agencies in a persistent inquiry into whether particular expenditures of a religious organization are secular or religious in nature, or whether the religious expenditures support the same religious purposes represented in the organization's license application. Such entanglement effects an unconstitutional establishment of religion under Art. I, §§ 13 and 19 of the State Constitution. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

§ 108-75.22. Enforcement and penalties.

Applied in Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Chapter 110.

Child Welfare.

Article 7.

Day-Care Facilities.

§ 110-85. Legislative intent and purpose.

Quoted in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

§ 110-86. Definitions.

Quoted in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

§ 110-91. Mandatory standards for a license.

Stated in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

§ 110-93. Licensing procedure.

Stated in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

§ 110-104. Injunctive relief.

Action for Declaratory Judgment Not Barred. — The spirit and intent of this section do not permit, much less compel, a conclusion that the Day-Care Facilities Act is intended to restrict the general statewide jurisdiction of the superior court or to limit the scope of relief normally available in declaratory judgment actions. The mere existence of an alternate adequate remedy under this section will not be held to bar an appropriate action for declaratory judgment. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

Article 9.

Child Support.

§ 110-132. Acknowledgement of paternity and agreement to support.

Standing of County in Action to Modify Support Order. — Where plaintiff mother who receives public assistance under the Aid to Families with Dependent Children Program assigned to a county her right to receive any support on behalf of her children, the county, by virtue of the assignment pursuant to this section, has an interest in the order for the support of plaintiff's children. Therefore, under § 50-13.7(a), the county has standing to make a motion in an action between plaintiff mother and defendant father to modify a child support

order to require that the support be paid to the county. Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979).

§ 110-135. Debt to State created.

Cited in Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979).

§ 110-136. Garnishment for enforcement of child-support obligation.

Editor's Note. —

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

A city does not have immunity from garnishment proceedings brought for child support under this section. See opinion of Attorney General to Mr. Rufus C. Boutwell, Jr., Assistant City Attorney, City of Durham, Oct. 9, 1979.

§ 110-139. Location of absent parents.

Applied in Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979).

Chapter 111.

Aid to the Blind.

Article 1.

General Duties of Department of Human Resources.

§ 111-11. Definition of visually handicapped person.

Applicability. — The restrictive definition of "visually handicapped" in this section should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities," Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in this section to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in this section would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

Chapter 112.

Confederate Homes and Pensions.

Article 1.

Confederate Woman's Home.

§ 112-1. Incorporation and powers of Association.

Editor's Note. —
In the Editor's note under this section in the 1979 Cumulative Supplement, "July 1, 1984," should be substituted for "January 1, 1984."

Chapter 113.

Conservation and Development.

SUBCHAPTER II. STATE FORESTS AND PARKS.

Article 2.

Acquisition and Control of State Forests and Parks.

Sec.

113-39. License fees for hunting and fishing on government-owned property unaffected.

SUBCHAPTER III. GAME LAWS.

Article 7.

North Carolina Game Law of 1935.

113-84. [Repealed.]
113-95. [Repealed.]
113-95.2. [Repealed.]
113-95.5, 113-95.6. [Repealed.]
113-96.1. [Repealed.]

Article 10B.

Liability of Landowners to Authorized Users.

113-120.5, 113-120.6. [Repealed.]

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

Article 12.

General Definitions.

113-128. Definitions relating to agencies and their powers.
113-129. Definitions relating to resources.

Article 13.

Jurisdiction of Conservation Agencies.

113-133.1. Limitations upon local regulation of wildlife resources; certain local acts retained.

Article 21.

Licenses and Permits Issued by the Wildlife Resources Commission.

Sec.

113-270.2. Hunting licenses.
113-270.3. Special activity licenses; big game kill reports.
113-271. Hook-and-line licenses in inland fishing waters.
113-272. Special trout licenses.
113-272.1. [Repealed.]
113-272.5. Captivity license.

Article 22.

Regulation of Wildlife.

113-291.1. Manner of taking wild animals and wild birds.
113-291.2. Seasons and bag limits on wild animals and birds; including animals and birds taken in bag; possession and transportation of wildlife after taking.
113-291.3. Possession, sale, and transportation of wildlife.

Article 22A.

Use of Poisons and Pesticides.

113-300.1. Use of poisons and pesticides in general.

Article 23.

Administrative Provisions; Regulatory Authority of Wildlife Resources Commission.

113-301.1. Wildlife Resources Commission obligated to make efforts to notify members of the public who may be affected by operative provisions of statutes and regulations; filing of new and amended regulations.

SUBCHAPTER II. STATE FORESTS AND PARKS.

Article 2.

Acquisition and Control of State Forests and Parks.

§ 113-39. License fees for hunting and fishing on government-owned property unaffected. — No wording in G.S. 113-307.1(a), or any other North Carolina statute or law, or special act, shall be construed to abrogate the vested

rights of the State of North Carolina to collect fees for license for hunting and fishing on any government-owned land or in any government-owned stream in North Carolina including the license for county, State or nonresident hunters or fishermen; or upon any lands or in any streams hereafter acquired by the federal government within the boundaries of the State of North Carolina. The lands and streams within the boundaries of the Great Smoky Mountains National Park to be excepted from this section. (1933, c. 537, s. 2; 1979, c. 830, s. 6.)

Editor's Note. — The 1979 amendment, effective July 1, 1980, substituted "G.S. 113-307.1(a)" for "G.S. 113-113" near the beginning of the first sentence.

The reference to "G.S. 113-301.1(a)" in the 1979 Cumulative Supplement is incorrect.

SUBCHAPTER III. GAME LAWS.

ARTICLE 7.

North Carolina Game Law of 1935.

§ 113-84: Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980, and August 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of this Chapter.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§ 113-95: Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980, and August 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of this Chapter.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may

administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§ 113-95.2: Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980, and August 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of this Chapter.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§§ 113-95.5, 113-95.6: Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980, and August 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of this Chapter.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§ 113-96.1: Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980, and August 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of this Chapter.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

Article 10B.

Liability of Landowners to Authorized Users.

§§ 113-120.5, 113-120.6: Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980, and August 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of this Chapter.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

ARTICLE 12.

General Definitions.

§ 113-128. Definitions relating to agencies and their powers. — The following definitions and their cognates apply to powers and administration of agencies charged with the conservation of marine and estuarine and wildlife resources:

(1) Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980.

(1979, c. 830, s. 1.)

Editor's Note. —

Session Laws 1979, c. 830, s. 1, effective July 1, 1980, repealed subdivision (1).

As the other subdivisons were not changed, they are not set out.

§ 113-129. Definitions relating to resources. — The following definitions and their cognates apply in the description of the various marine and estuarine and wildlife resources:

(1d) Boating and Fishing Access Area. — An area of land providing access to public waters and which is owned, leased, controlled, or managed by the Wildlife Resources Commission.

(1979, 2nd Sess., c. 1285, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, inserted "and which is" in subdivision (1d).

As the rest of the section was not changed by the amendment, only the introductory language and subdivison (1d) are set out.

ARTICLE 13.

Jurisdiction of Conservation Agencies.

§ 113-133.1. Limitations upon local regulation of wildlife resources; certain local acts retained.

(e) Because of strong community interest expressed in their retention, the local acts or portions of local acts listed in this section are not repealed. The following local acts are retained to the extent they apply to the county for which listed:

Alleghany: Session Laws 1951, Chapter 665; Session Laws 1977, Chapter 526; Session Laws 1979, Chapter 556.

Anson: Former G.S. 113-111, as amended by Session Laws 1955, Chapter 286.

Ashe: Former G.S. 113-111; Session Laws 1951, Chapter 665.

Avery: Former G.S. 113-122.

Beaufort: Session Laws 1947, Chapter 466, as amended by Session Laws 1979, Chapter 219; Session Laws 1957, Chapter 1364; Session Laws 1971, Chapter 173; Session Laws 1977, Chapter 90.

Bertie: Session Laws 1955, Chapter 1376; Session Laws 1975, Chapter 287.

Bladen: Public-Local Laws 1933, Chapter 550, Section 2 (as it pertains to fox seasons); Session Laws 1961, Chapter 348, (as it applies to Bladen residents

fishing in Robeson County); Session Laws 1961, Chapter 1023; Session Laws 1971, Chapter 384.

Brunswick: Session Laws 1975, Chapter 218.

Buncombe: Public-Local Laws 1917, Chapter 658, Section 2; Public-Local Laws 1933, Chapter 308; Public Laws 1935, Chapter 107, Section 2, as amended by Public Laws 1935, Chapter 238.

Burke: Public-Local Laws 1921, Chapter 454; Public-Local Laws 1921 (Extra Session), Chapter 213, Section 3 (with respect to fox seasons); Public-Local Laws 1933, Chapter 422, Section 3; Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68; Session Laws 1977, Chapter 636.

Caldwell: Former G.S. 113-122; Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68; Session Laws 1977, Chapter 636; Session Laws 1979, Chapter 507.

Camden: Session Laws 1955, Chapter 362 (to the extent it applies to inland fishing waters); Session Laws 1967, Chapter 441; Session Laws 1979, Chapter 582.

Carteret: Session Laws 1955, Chapter 1036; Session Laws 1977, Chapter 695.

Caswell: Public-Local Laws 1933, Chapter 311; Public-Local Laws 1937, Chapter 411.

Catawba: Former G.S. 113-111, as amended by Session Laws 1955, Chapter 1037.

Chatham: Public-Local Laws 1937, Chapter 236; Session Laws 1963, Chapter 271.

Chowan: Session Laws 1979, Chapter 184; Session Laws 1979, Chapter 582.

Cleveland: Public Laws 1907, Chapter 388; Session Laws 1951, Chapter 1101; Session Laws 1979, Chapter 587.

Columbus: Session Laws 1951, Chapter 492, as amended by Session Laws 1955, Chapter 506.

Craven: Session Laws 1971, Chapter 273, as amended by Session Laws 1971, Chapter 629.

Cumberland: Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 471.

Currituck: Session Laws 1959, Chapter 545; Session Laws 1977, Chapter 494; Session Laws 1979, Chapter 582.

Dare: Session Laws 1973, Chapter 258; Session Laws 1973, Chapter 259; Session Laws 1979, Chapter 582.

Davie: Former G.S. 113-111, as amended by Session Laws 1947, Chapter 333.

Duplin: Session Laws 1965, Chapter 774; Session Laws 1973 (Second Session 1974), Chapter 1266; Session Laws 1979, Chapter 466.

Edgecombe: Session Laws 1961, Chapter 408.

Gates: Session Laws 1959, Chapter 298; Session Laws 1973, Chapter 124, amending Session Laws 1969, Chapter 121; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748.

Granville: Session Laws 1963, Chapter 670.

Greene: Session Laws 1975, Chapter 219; Session Laws 1979, Chapter 360.

Halifax: Public-Local Laws 1925, Chapter 571, Section 3 (with respect to fox-hunting seasons); Session Laws 1947, Chapter 954; Session Laws 1955, Chapter 1376; Session Laws 1959, Chapter 1304.

Harnett: Former G.S. 113-111, as modified by Session Laws 1977, Chapter 636.

Haywood: Former G.S. 113-111, as modified by Session Laws 1963, Chapter 322.

Henderson: Former G.S. 113-111.

Hertford: Session Laws 1959, Chapter 298; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 67.

Hoke: Session Laws 1963, Chapter 267.

Hyde: Public-Local Laws 1929, Chapter 354, Section 1 (as it relates to foxes); Session Laws 1951, Chapter 932; Session Laws 1977, Chapter 412.

Iredell: Session Laws 1979, Chapter 577.

Jackson: Session Laws 1965, Chapter 765; Session Laws 1971, Chapter 424.

Johnston: Session Laws 1975, Chapter 342.

Jones: Session Laws 1979, Chapter 441.

Lee: Session Laws 1963, Chapter 271; Session Laws 1977, Chapter 636.

Lenoir: Session Laws 1979, Chapter 441.

Lincoln: Public-Local Laws 1925, Chapter 449, Sections 1 and 2; Session Laws 1955, Chapter 878.

Madison: Public-Local Laws 1925, Chapter 418, Section 4; Session Laws 1951, Chapter 1040.

Martin: Session Laws 1955, Chapter 1376; Session Laws 1977, Chapter 636; Session Laws 1979, Chapter 568.

Mitchell: Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68.

Montgomery: Session Laws 1955, Chapter 692; Session Laws 1977 (Second Session 1978), Chapter 1142.

Moore: Session Laws 1955, Chapter 692.

Nash: Session Laws 1961, Chapter 408.

New Hanover: Session Laws 1971, Chapter 559; Session Laws 1975, Chapter 95.

Northampton: Session Laws 1955, Chapter 1376; Session Laws 1959, Chapter 1304; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 67; Session Laws 1979, Chapter 548.

Onslow: Public-Local Laws 1939, Chapter 606.

Orange: Public-Local Laws 1913, Chapter 547.

Pamlico: Session Laws 1977, Chapter 636.

Pasquotank: Session Laws 1979, Chapter 582.

Pender: Session Laws 1961, Chapter 333; Session Laws 1967, Chapter 229; Session Laws 1969, Chapter 258, as amended by Session Laws 1973, Chapter 420; Session Laws 1977, Chapter 585; Session Laws 1977, Chapter 805; Session Laws 1979, Chapter 546.

Perquimans: Former G.S. 113-111; Session Laws 1973, Chapter 160; Session Laws 1973, Chapter 264; Session Laws 1979, Chapter 582.

Polk: Session Laws 1975, Chapter 397; Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 167.

Randolph: Public-Local Laws 1919, Chapter 76; Public-Local Laws 1941, Chapter 246; Session Laws 1947, Chapter 920.

Robeson: Public-Local Laws 1924 (Extra Session), Chapter 92; Session Laws 1961, Chapter 348.

Rockingham: Former G.S. 113-111; Public-Local Laws 1933, Chapter 310.

Rowan: Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 106, and Session Laws 1977, Chapter 500; Session Laws 1979, Chapter 556.

Rutherford: Session Laws 1973, Chapter 114; Session Laws 1975, Chapter 397.

Sampson: Session Laws 1979, Chapter 373.

Scotland: Session Laws 1959, Chapter 1143; Session Laws 1977, Chapter 436.

Stokes: Former G.S. 113-111; Public-Local Laws 1933, Chapter 310; Session Laws 1977, Chapter 434; Session Laws 1979, Chapter 556.

Surry: Public-Local Laws 1925, Chapter 474, Section 6 (as it pertains to fox seasons); Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 167.

Swain: Public-Local Laws 1935, Chapter 52; Public Laws 1935, Chapter 107, Section 2, as amended by Public Laws 1935, Chapter 238, as modified by Session Laws 1949, Chapter 228; Session Laws 1953, Chapter 270; Session Laws 1965, Chapter 765.

Transylvania: Public Laws 1935, Chapter 107, Section 2, as amended by Public Laws 1935, Chapter 238.

Tyrrell: Former G.S. 113-111; Session Laws 1953, Chapter 685; Session Laws 1979, Chapter 582.

Wake: Session Laws 1973 (Second Session 1974), Chapter 1382.

Washington: Session Laws 1947, Chapter 620; Session Laws 1979, Chapter 582.

Wayne: Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 342, as amended by Session Laws 1977, Chapter 43; Session Laws 1975, Chapter 343, as amended by Session Laws 1977, Chapter 45; Session Laws 1977, Chapter 695.

Wilkes: Former G.S. 113-111, as amended by Session Laws 1971, Chapter 385; Session Laws 1951, Chapter 665; Session Laws 1973, Chapter 106; Session Laws 1979, Chapter 507.

Yadkin: Former G.S. 113-111, as amended by Session Laws 1953, Chapter 199; Session Laws 1979, Chapter 507.

Yancey: Session Laws 1965, Chapter 522.

(g) Notwithstanding G.S. 113-133.1(b), Chapter 565 of the Session Laws of 1977 is retained in effect. The following local conservation act that specifies that it must be specifically repealed is so repealed: Chapter 441 of the Session Laws of 1977. To provide for their retention or repeal in accordance with provisions applying to all other local wildlife acts, the following acts are amended to repeal the cited sections: Section 11, chapter 258, Session Laws of 1969; Section 4, Chapter 434, Session Laws of 1977; and Section 4, Chapter 585, Session Laws of 1977. (1979, c. 830, ss. 1, 14; 1979, 2nd Sess., c. 1285, ss. 2, 11; c. 1324, s. 2.)

Editor's Note. — The first 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Session Laws 1979, Chapter 556" for "Session Laws 1979, Chapter 578" in the paragraph relating to Alleghany County, substituted "Public-Local Laws 1925" for "Public-Local Laws 1929" in the paragraph relating to Halifax County, added the paragraph relating to Johnston County, deleted "Public-Local Laws 1917, Chapter 673" in the paragraph relating to New Hanover County, substituted "Session Laws 1979, Chapter 556" for "Session Laws 1979, Chapter 578" in the paragraph relating to Rowan County, and substituted "Session Laws 1979, c. 556" for "Session Laws 1979, Chapter 578" in the paragraph relating to Stokes County, all in subsection (e). In subsection (g), the amendment deleted a reference to Session Laws 1977, c. 443, in the first sentence and added the reference to Session Laws 1977, c. 434, s. 4, in the third sentence.

The second 1979, 2nd Sess., amendment deleted a reference to Session Laws 1979, c. 146, in the paragraphs relating to Rutherford, Cleveland and Polk counties. The second 1979, 2nd Sess., amendatory act also repealed Session Laws 1979, c. 146.

As the rest of the section was not changed by the amendment, only subsections (e) and (g) are set out.

Article 16.

Cultivation of Oysters and Clams.

§ 113-202. New leases and renewal leases of oyster and clam bottoms; termination of leases issued prior to January 1, 1966.

Requested Fee Increase after First Renewal Term Permissible. — Where plaintiff and State, parties to a lease of oyster bottoms, did not intend to create a perpetual

lease, a third renewal of the lease was within the discretion of the State, and a requested increase in the rental fee, pursuant to this section, after the first renewal term had ended, was constitutionally permissible and did not impair the State's obligation of its lease contract with plaintiff. Oglesby v. McCoy, 41 N.C. App. 735, 255 S.E.2d 733, cert. denied, 298 N.C. 299, 259 S.E.2d 301 (1979).

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.

The purpose of this section is to serve the overall purpose of the public interest in the preservation of the natural resources and to protect the rights of owners of riparian property that may be affected by such project. In re Milliken, 43 N.C. App. 382, 258 S.E.2d 856 (1979).

Permit Applications Reviewed Prospectively. — The statutory purpose can only be effected by reviewing a project prior to its completion. A request by the department of the applicant to file an "after-the-fact" application for a permit defies the logic and purpose of the statute. Permit applications must be reviewed prospectively, taking into consideration the work already completed. In re Milliken, 43 N.C. App. 382, 258 S.E.2d 856 (1979).

Private Interests Not Favored over Public. — The Court of Appeals cannot accept a construction of this statute that allows the State to favor private interests over public interests. In re Gales Creek Community Ass'n, 44 N.C. App. 554, 261 S.E.2d 510 (1980).

The Marine Fisheries Commission acted arbitrarily and capriciously in denying a permit to dredge or fill in estuarine waters for the purpose of constructing a public boat ramp where all of the evidence developed in the case related exclusively to the effect that the use of the ramp and its approaches by the public would have on the idiosyncratic sensitivities of four individuals, in that the influx of people with boats, and the possible littering and noise, would adversely affect their enjoyment of their property, and there is no evidence that the use of the ramp and its approaches, or the operation of boats on the waters, would have any adverse effect on the environment of the estuarine resources of the riparian owners' land. In re Gales Creek Community Ass'n, 44 N.C. App. 554, 261 S.E.2d 510 (1980).

Article 21.

Licenses and Permits Issued by the Wildlife Resources Commission.

§ 113-270.2. Hunting licenses.

(c) The hunting licenses issued by the Wildlife Resources Commission are as follows:

(1) Resident sportsman combination license — $27.50. This license is valid only for use by an individual resident of the State.

(2) Resident combination hunting-fishing license — $12.50. This license is valid only for use by an individual resident of the State.

(3) Resident State hunting license — $9.50. This license is valid only for use by an individual resident of the State.

(4) Resident county hunting license — $4.50. This license is valid for use by an individual resident of the State within the county in which he resides.

(5) Controlled shooting preserve hunting license — $10.00. This license is valid only for use by an individual hunting in special controlled shooting preserves licensed in accordance with this Subchapter.

(6) Nonresident sportsman combination license — $55.00. This license is valid for use by an individual within the State.

(7) Nonresident State hunting license — $31.00. This license is valid for use by an individual within the State.

(8) Nonresident six-day hunting license — $25.00. This license is valid only for use on six consecutive hunting days by an individual within the State. Consecutive hunting days do not include Sundays except on military reservations where Sunday hunting is permitted.

(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.

(1979, 2nd Sess., c. 1178, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the license fees in subsections (1), (2), (3), (4), (6), (7) and (8) of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 113-270.3. Special activity licenses; big game kill reports.

(b) The special activity licenses issued by the Wildlife Resources Commission are as follows:

(1) Resident big game hunting license — $4.50. This license is valid only for use by an individual resident of the State and must be procured before taking any big game within the State.

(2) Nonresident big game hunting license — $18.50. This license is valid for use by an individual within the State and, unless the resident big game hunting license has been validly procured, must be procured before taking any big game within the State.

(3) Primitive weapons hunting license — $6.00. This license is valid for use by an individual within the State and must be procured before taking any wild animals or birds with a primitive weapon during any special season for hunting with primitive weapons established by the Wildlife Resources Commission. During the regular season, a primitive weapon may be used without any special license unless its use is prohibited. For the purposes of this section a "primitive weapon" includes a bow and arrow, muzzle-loading firearm, and any other primitive weapon specified in the regulations of the Wildlife Resources Commission.

(4) Game land license — $8.00. This license is valid for use by an individual within the State and must be procured before hunting or trapping on game lands or fishing in managed waters on game lands.

Managed waters include public mountain trout waters and other public waters, or private ponds, lying wholly or partly on game lands and designated as managed waters by the Wildlife Resources Commission. Possession of this license does not exempt its holder from payment of any applicable special use fees that may be prescribed by the Wildlife Resources Commission under the authority of G.S. 113-264(a), such as fees for field trials on game lands.

(5) Falconry license — $10.00. This license is valid for use by an individual within the State and must be procured before:

a. Taking, importing, transporting, or possessing a raptor; or

b. Taking wildlife by means of falconry.

The Wildlife Resources Commission may issue classes of falconry licenses necessary to participate in the federal/State permit system, require necessary examinations before issuing licenses or permits to engage in various authorized activities related to possession and maintenance of raptors and the sport of falconry, and regulate licenses as required by governing federal law and regulations. To defray the costs of administering required examinations, the Wildlife Resources Commission may charge reasonable fees upon giving them. To meet minimum federal standards plus other State standards in the interests of conservation of wildlife resources, the Wildlife Resources Commission may impose all necessary controls, including those set out in the sections pertaining to collection licenses and captivity licenses, and may issue permits and require reports, but no collection license or captivity license is needed in addition to the falconry license.

(e) Any individual who possesses a current and valid resident or nonresident comprehensive daily fishing license may at lawful times and places fish in managed waters on game lands without the game land license required by subdivision (4) of subsection (b). (1969, c. 1042, s. 7; 1973, c. 1097, s. 1; 1975, c. 171; c. 197, ss. 5, 7; c. 673, s. 1; 1977, c. 746, s. 1; 1979, c. 830, s. 1; 1979, 2nd Sess., c. 1178, ss. 2, 5.)

Editor's Note. —

The 1977, 2nd Sess., amendment increased the license fees in subdivisions (1), (2) and (3) of subsection (b) and added subsection (e). The amendments to subsection (b) are effective July 1, 1980, and subsection (e) is effective January 1, 1981.

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

§ 113-271. Hook-and-line licenses in inland fishing waters.

(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. It is valid during the period set for annual hunting licenses in G.S. 113-270.2.

(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.

(2) Resident combination hunting-fishing license — $12.50. This license is valid only for use by an individual resident of the State. It is valid during the period set for annual hunting licenses in G.S. 113-270.2.

(2a) Resident State fishing license — $9.50. 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. It is valid during the period set for annual hunting licenses in G.S. 113-270.2.

(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.

(1979, c. 830, s. 1; 1979, 2nd Sess., c. 1178, ss. 3, 5.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the fees in subdivisions (1a), (2), (2a), (3), (4a) and (5) in subsection (d), rewrote subdivision (4) so as to provide for a resident daily license fee of $1.25 rather than a resident three-day license fee of $3.00 and rewrote subdivision (6) so as to provide for a nonresident daily license with a fee of $2.25 rather than a nonresident three-day license fee of $5.50. The amendment also added subdivisions (1b) and (4b) to subsection (d), effective January 1, 1981.

As the rest of the section was not changed by the amendment, only subsection (d) is set out above.

§ 113-272. Special trout licenses.

(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. It is valid during the period set for annual hunting licenses in G.S. 113-270.2.

(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.

(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. It is valid during the period set for annual hunting licenses in G.S. 113-270.2.

(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.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the fees in subdivisions (1a), (1b), (1c) and (2) of subsection (d), and, effective January 1, 1981, added subdivisions (1a1) and (1d) to subsection (d). As the rest of the section was not changed by the amendment, only subsection (d) is set out above.

§ 113-272.1: Repealed by Session Laws 1979, c. 830, s. 1, effective July 1, 1980, and August 1, 1980.

§ 113-272.5. Captivity license. — (a) In the interests of humane treatment of wild animals and wild birds that are crippled, tame, or otherwise unfit for immediate release into their natural habitat, the Wildlife Resources Commission may license qualified individuals to hold at a specified location one or more of any particular species of wild animal or wild bird alive in captivity. Before issuing this license, the Executive Director must satisfy himself that issuance of the license is appropriate under the objectives of this Subchapter, and that the wild animal or wild bird was not acquired unlawfully or merely as a pet. Upon refusing to issue the captivity license, the Executive Director may either take possession of the wild animal or wild bird for appropriate disposition or issue a captivity permit under G.S. 113-274(c)(1b) for a limited period until the holder makes proper disposition of the wild animal or wild bird.

(1979, 2nd Sess., c. 1285, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "at a specified location one or more of any particular species of" for "a particular" in the first sentence of subsection (a). As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 22.

Regulation of Wildlife.

§ 113-291.1. Manner of taking wild animals and wild birds. — (a) Except as otherwise provided, game may only be taken between a half hour before sunrise and a half hour after sunset and only by one or a combination of the following methods:

(1) With a rifle.

(2) With a shotgun not larger than number 10 gauge.

(3) With a bow and arrow of a type prescribed in the regulations of the Wildlife Resources Commission.

(4) With the use of dogs.

(5) By means of falconry.

Fur-bearing animals may be taken at any time during open trapping season with traps authorized under G.S. 113-291.6, and rabbits may be box-trapped in accordance with regulations of the Wildlife Resources Commission. Nongame animals and birds open to hunting may be taken during the hours authorized by regulation during any open season by the methods for taking game. Use of pistols in taking wildlife is governed by subsection (g). The Wildlife Resources Commission may prescribe the manner of taking wild animals and wild birds on game lands and public hunting grounds.

(c) It is a misdemeanor punishable in the discretion of the court for any person taking wildlife to have in his possession any:

(1) Firearm equipped with a silencer or any device designed to silence, muffle, or minimize the report of the firearm. The firearm is considered equipped with the silencer or device whether it is attached to the firearm or separate but reasonably accessible for attachment during the taking of the wildlife.

(2) Weapon of mass death and destruction as defined in G.S. 14-288.8.

The Wildlife Resources Commission may prohibit individuals training dogs or taking particular species from carrying axes, saws, tree-climbing equipment, and other implements that may facilitate the unlawful taking of wildlife, except tree-climbing equipment may be carried and used by persons lawfully taking raccoons and opossums during open season.

(g) If a season is open permitting such method of taking for the species in question, a hunter may take rabbits, squirrels, opossum, raccoons, fur-bearing animals, and nongame animals and birds open to hunting with a pistol of .22 caliber with a barrel not less than six inches in length and loaded with long-rifle ammunition. In addition, a hunter or trapper lawfully taking a wild animal or wild bird by another lawful method may use a knife, pistol, or other swift method of killing the animal or bird taken. The Wildlife Resources Commission may, however, restrict or prohibit the carrying of firearms during special seasons or in special areas reserved for the taking of wildlife with primitive weapons or other restricted methods.

(1979, 2nd Sess., c. 1285, ss. 4-6.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, added "and rabbits may be box-trapped in accordance with regulations of the Wildlife Resources Commission" at the end of the second sentence of subsection (a) and added the second sentence of subsection (c) and the last sentence of subsection (g).

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

§ 113-291.2. Seasons and bag limits on wild animals and birds; including animals and birds taken in bag; possession and transportation of wildlife after taking. — (a) In accordance with the supply

of wildlife and other factors it determines to be of public importance, the Wildlife Resources Commission may fix seasons and bag limits upon the wild animals and wild birds authorized to be taken that it deems necessary or desirable in the interests of the conservation of wildlife resources. The authority to fix seasons includes the closing of seasons completely when necessary and fixing the hours of hunting. The authority to fix bag limits includes the setting of season and possession limits. Different seasons and bag limits may be set in differing areas; early or extended seasons and different or unlimited bag limits may be authorized on controlled shooting preserves, game lands, and public hunting grounds; and special or extended seasons may be fixed for those engaging in falconry, using primitive weapons, or taking wildlife under other special conditions. Unless modified by regulations of the Wildlife Resources Commission, the seasons, shooting hours, bag limits, and possession limits fixed by the United States Department of Interior or any successor agency for migratory game birds in North Carolina must be followed, and a violation of the applicable federal regulations is hereby made unlawful.

(1979, 2nd Sess., c. 1285, s. 7.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, added the last sentence of subsection (a). As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 113-291.3. Possession, sale, and transportation of wildlife.

(b) With respect to dead wildlife:

(1) Lawfully taken wildlife may be possessed and transported as provided in G.S. 113-291.2. Wildlife possessed under any dealer license may be possessed and transported in accordance with the provisions of law and regulations applicable to the license, and wildlife may be sold to qualified persons if authorized under provisions governing the license. In other situations, except as this subchapter may expressly provide, possession and transportation of wildlife may be regulated by the Wildlife Resources Commission.

(2) Unless there is a specific restriction on the transfer of the species in question, an individual may accept the gift of wildlife lawfully taken within North Carolina if taking possession does not cause him to exceed applicable possession limits. If he notes and preserves in writing the name and address of the donor and under what license or exemption from license requirements the wildlife was taken, he may possess that wildlife without a permit in the places possession without a permit would be authorized in G.S. 113-291.2 had he taken the wildlife.

(3) A licensed taxidermist or other licensed dealer taking temporary possession of wildlife of another may possess the wildlife that he is authorized to handle under his license in accordance with the regulations of the Wildlife Resources Commission. A person not a dealer operating a preservation or processing facility, whether commercially or not, may possess the wildlife owned by another without any permit or license if he ascertains that the wildlife was lawfully taken within the State and keeps a written record of:

a. The name and address of the owner of the wildlife and an adequate description of the wildlife left with him. If the description of the wildlife changes as the result of processing, the new description must be recorded.

b. The date, serial number, and type of the license under which the wildlife was taken or the applicable exemption from license requirements which the taker met.

c. The date all wildlife left with him is received and returned to the owner. If the receiving or returning of possession is to an agent or common carrier or otherwise occurs under circumstances in which permit requirements may apply, the type and date of the permit which authorizes the transaction must also be recorded.

(4) The sale of rabbits and squirrels and their edible parts not for resale is permitted. If the Wildlife Resources Commission finds that affected game populations would not be endangered, it may authorize the sale of heads, antlers, horns, hides, skins, plumes, feet, and claws of one or more game animals or birds. In addition, it may authorize the sale of bobcats, opossums, and raccoons, and their parts, following their taking as game animals. No part of any bear or wild turkey may be sold under the above provisions, however, and no part of any fox taken in North Carolina may be sold except as provided in G.S. 113-291.4. In regulating sales, the Wildlife Resources Commission may impose necessary permit requirements.

(5) Lawfully taken fur-bearing animals and their parts, including furs and pelts, may, subject to any tagging and reporting requirements, be possessed, transported, bought, sold, given or received as a gift, or otherwise disposed of without restriction. The Wildlife Resources Commission may regulate the importation of wildlife from without the State by fur dealers, and may regulate the sale of fox fur and other wildlife hides taken within the State if sale of them is authorized. Fox furs lawfully taken without the State may be imported, possessed, transported, bought, sold, and exported in accordance with reasonable regulations of the Wildlife Resources Commission. Processed furs acquired through lawful channels within or without the State by persons other than fur dealers are not subject to regulation.

(6) Nongame animals and birds open to hunting and nongame fish lawfully taken, except as this subchapter and its implementing regulations expressly provide otherwise, may be possessed, transported, bought, sold, given or received as a gift, or otherwise disposed of without restriction.

(7) The possession and disposition of wild animals and wild birds killed accidentally or to prevent or halt depredations to property are governed by G.S. 113-274(c)(1a).

(1979, 2nd Sess., c. 1285, s. 8.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "G.S. 113-274(c)(1a)" for "G.S. 113-274(1a)" at the end of subdivision (7) of subsection (b). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Article 22A.

Use of Poisons and Pesticides.

§ 113-300.1. Use of poisons and pesticides in general. — No one may take any wild animal or bird with the use of any poison or pesticide except as provided in this Article. The taking of fish by the use of poison is governed by G.S. 113-261 and G.S. 113-262, and the prohibitions of those sections against the taking of wildlife by poison apply unless specifically permitted under this Article. Otherwise, the Wildlife Resources Commission may, by regulations

consistent with the North Carolina Pesticide Law of 1971 and the Structural Pest Control Act of 1955, regulate, prohibit, or restrict the use of poisons or pesticides upon or severely affecting wildlife resources. (1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, s. 9.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted "the" preceding "wildlife" in the second sentence.

Article 23.

Administrative Provisions; Regulatory Authority of Wildlife Resources Commission.

§ 113-301.1. Wildlife Resources Commission obligated to make efforts to notify members of the public who may be affected by operative provisions of statutes and regulations; filing of new and amended regulations.

(e) Pending full implementation by the Attorney General of the publication requirements of Article 5 of Chapter 150A of the General Statutes, the Wildlife Resources Commission may in its discretion continue to file with the clerks of superior court of all counties affected the text of any new regulation or amending or rewritten regulation. (1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, s. 10.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, added subsection (e). As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Chapter 113A.

Pollution Control and Environment.

Article 4.

Sedimentation Pollution Control Act of 1973.

Sec.
113A-54. Powers and duties of the Commission.

Article 13.

Toxic Substances Task Force and Incident Response Procedures.

Sec.
113A-202, 113A-203. [Repealed.]

Article 4.

Sedimentation Pollution Control Act of 1973.

§ 113A-54. Powers and duties of the Commission.

(b) The Commission shall develop and adopt and shall revise as necessary from time to time, rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities. The Commission shall adopt or revise its rules and regulations in accordance with the rulemaking procedures set forth in Article 2 of Chapter 150A of the General Statutes. (1979, c. 922, s. 2.)

Editor's Note. —
Subsection (b) of this section is set out above as rewritten by the 1979 amendment. In the 1979 cumulative supplement, the amendment was erroneously treated as rewriting only the introductory paragraph in subsection (b).

As the other sections were not affected, only subsection (b) is set out.

Article 7.

Coastal Area Management.

Part 1. Organization and Goals.

§ 113A-100. Short title.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Article 13.

Toxic Substances Task Force and Incident Response Procedures.

§§ 113A-202, 113A-203: Repealed by Session Laws 1979, 2nd Session, c. 1310, s. 3.

Cross Reference. — As to powers and duties of the Secretary of Crime Control and Public Safety with regard to man-made or natural disasters or accidents, see § 143B-476.

Chapter 114.

Department of Justice.

Article 1.

Attorney General.

Sec.

114-4.2E. Assignment of attorney to Commission.

Article 4.

State Bureau of Investigation.

Sec.

114-13. Director of the Bureau; personnel.

Article 1.

Attorney General.

§ 114-4.2E. Assignment of attorney to Commission. — The Attorney General is hereby authorized to employ an attorney and assign him full time to the North Carolina Commission on Code Recodification. Such attorney shall be subject to all provisions of Chapter 126 of the General Statutes relating to the State Personnel System. Such attorney shall also perform such additional duties as may be assigned to him by the Attorney General. (1979, 2nd Sess., c. 1210, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1210, s. 2, makes the act effective July 1, 1980.

Article 4.

State Bureau of Investigation.

§ 114-13. Director of the Bureau; personnel. — The Attorney General shall appoint a Director of the Bureau of Investigation, who shall serve at the will of the Attorney General, and whose salary shall be fixed by the Department of Administration under G.S. 143-36 et seq. He may further appoint a sufficient number of assistants and stenographic and clerical help, who shall be competent and qualified to do the work of the Bureau. The salaries of such assistants shall be fixed by the Department of Administration under G.S. 143-36 et seq. The salaries of clerical and stenographic help shall be the same as now provided for similar employees in other State departments and bureaus. (1937, c. 349, s. 4; 1939, c. 315, s. 6; 1955, c. 1185, s. 1; 1957, c. 269, s. 1; 1979, 2nd Sess., c. 1272, s. 3.)

Cross Reference. — As to payment of salaries of certain State law-enforcement officers incapacitated as the result of injury by accident or occupational disease arising out of and in the course of performance of their duties, see § 143-166.13 et seq.

Editor's Note. —

The 1979, 2nd Sess., amendment deleted the former second paragraph, relating to application of subsections (b) through (e) of § 20-185 to officers and special agents of the State Bureau of Investigation.

Session Laws 1979, 2nd Sess., c. 1272, s. 5, provides: "This act is effective upon ratification and shall apply to persons injured or contracting an occupational disease on or after January 1, 1981."

Chapter 115.

Elementary and Secondary Education.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

State Plan for Public Education.

Sec.
115-1.1. State policy.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION.

Article 5.

County and City Board of Education.

115-39. Requirements and limitations of board in selecting superintendent and his term of office.

SUBCHAPTER VII. EMPLOYEES.

Article 17.

Principals' and Teachers' Employment and Contracts.

115-142.01. Uniform performance standards and criteria for professional employees.

Article 17A.

Interstate Agreement on Qualifications of Educational Personnel.

115-151.11 to 115-151.15. [Reserved.]

Article 17B.

Personnel Administration Commission for Public School Employees.

115-151.16. Commission established; purpose.
Sec.
115-151.17. Commission membership; meetings; compensation.
115-151.18. Responsibilities of the Commission.

SUBCHAPTER IX. SCHOOL TRANSPORTATION.

Article 22.

School Buses.

115-185. School bus drivers; monitors.

SUBCHAPTER X. INSTRUCTION.

Article 27A.

Vocational Education Program.

115-235.9. Federal funds division.

Article 38B.

Education Expense Grants for Exceptional Children.

115-315.7 to 115-315.12. [Repealed.]

SUBCHAPTER XIII. SPECIAL EDUCATION.

Article 46.

Nondiscrimination in Education.

115-377. Placements in private schools, out-of-State schools and schools in other local educational agencies.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

State Plan for Public Education.

§ 115-1. General and uniform system of schools.

Property Interest Entitles Students to Due Process. — Students in North Carolina have legitimate claims of entitlement to a public education, since by this section, a uniform system of free public schools is provided throughout the state and students are required to attend by § 115-166. Therefore, students have a property interest in public education and would be entitled to due process in connection with suspension from school. Pegram v. Nelson, 469 F. Supp. 1134 (M.D.N.C. 1979).

§ 115-1.1. State policy.

(b) The General Assembly of North Carolina further declares that the public policy of North Carolina is defined in greater detail to carry out the foregoing stated policies as follows:

(1) The State shall provide for a comprehensive early childhood development program by emphasizing preventative and remedial measures designed to provide the services which will enable children to develop to the maximum level their physical, mental, social, and emotional potentials and to strengthen the role of the family as the first and most fundamental influence on child development. The General Assembly finds that the complexity of early childhood development precludes the enactment of legislation which is of a sufficiently comprehensive nature to encompass all possible implications. The Departments of Public Instruction and Human Resources shall, therefore, jointly develop an early childhood development program plan with flexibility sufficient to meet the State's policy as set forth in this subsection. Said plan shall provide for the operation of a statewide early childhood development program no later than June 30, 1983, and shall be presented to the Commission on Children with Special Needs by February 2, 1976.

(2) The State requires a system of educational opportunities for all children with special needs and requires the identification and evaluation of the needs of children and the adequacy of various education programs before placement of children, and shall provide for periodic evaluation of the benefits of programs to the individual child and the nature of the child's needs thereafter.

(3) The State shall prevent denial of equal educational and service opportunity on the basis of national origin, sex, economic status, race, religion, and physical, mental, social or emotional handicap in the provision of services to any child. Each local education agency shall develop program plans to meet the educational requirements of children with special needs and each local human resources agency shall develop program plans to meet the human service requirements of children with special needs in accordance with program standards and in a planning format as shall be prescribed by the State Board of Education and the Department of Human Resources respectively. The State Board and the Secretary of Human Resources shall present a summary of said present program standards and planning format to the Commission on Children with Special Needs by February 2, 1977, and to the General Assembly for its approval.

The General Assembly intends that the educational program and human service program requirements of Session Laws 1973, Chapter 1293, shall be realized no later than June 30, 1982. The General Assembly further intends that currently imposed barriers to educational and human service opportunities for children with special needs by reason of a single standardized test, income, federal regulations, conflicting statutes, or any other barriers are hereby abrogated; except that with respect to barriers caused by reason of income, it shall be permissible for the State or any local education agency or local human resources agency to charge fees for special services rendered, or special materials furnished to a child with special needs, his parents, guardian or persons standing in loco parentis unless the imposition of such fees would prevent or substantially deter the child, his parents, guardian, or persons standing in loco parentis from availing themselves of or receiving such services or materials.

(4) It is recognized that children have a variety of characteristics and needs, all of which must be considered if the potential of each child is to be realized; that in order to accomplish this the State must develop a full range of service and education programs, and that a program must actually benefit a child or be designed to benefit a particular child in order to provide such child with appropriate educational and service opportunities. The General Assembly requires that all programs employ least restrictive alternatives as shall be defined by the Department of Public Instruction and Human Resources.

(1979, 2nd Sess., c. 1295.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "June 30, 1983" for "June 30, 1980" in the last sentence of subdivision (1) of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION.

ARTICLE 5.

County and City Board of Education.

§ 115-21. City board of education, how constituted; how to employ principals, teachers, janitors and maids.

Superintendent Entitled to Recommend against Rehiring. — A school board's failure to renew a probationary teacher's contract because the principal and superintendent recommended that he not be rehired would not be arbitrary, capricious, or for personal reasons, in violation of § 115-142(m)(2), since the superintendent is entitled to make such recommendations. Hasty v. Bellamy, 44 N.C. App. 15, 260 S.E.2d 135 (1979).

No Claim Based on Failure to Renew Contract. — Plaintiff stated no claim for relief against a school superintendent and principal in an action to recover damages arising from the failure to renew plaintiff's contract as a teacher since the power to hire teachers rests in the school board. Hasty v. Bellamy, 44 N.C. App. 15, 260 S.E.2d 135 (1979).

§ 115-34. Appeals to board of education and to superior court.

Procedures Constitutionally Effective. — The hearing and appeal procedures contemplated by this section provides plaintiff a constitutionally "effective" set of administrative and judicial remedies despite the fact that it gives authority for a hearing only after plaintiff was discharged. Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).

Appeal Must First Be to Board of Education. — This section requires that a party entitled to its provisions must first challenge action taken by school personel by way of an appeal to the appropriate county or city board of education. After a decision by the board "affecting one's character or right to teach," a party may then invoke the appellate jurisdiction of the superior court. Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).

§ 115-35. Powers and duties of county and city board.

Applied in Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 298 N.C. 293, 259 S.E.2d 298 (1979).

§ 115-39. Requirements and limitations of board in selecting superintendent and his term of office. — At a meeting to be held on the first

Monday in April, 1957, or as soon thereafter as practicable, and biennially or quadrennially thereafter during the month of April, the various county boards of education named by the General Assembly which convened in February of such year or elected by the people at the preceding general election, as the case may be, shall meet and elect a county superintendent of schools, subject to the approval of the State Superintendent of Public Instruction and the State Board of Education. Such superintendent shall take office on the following July 1 and shall serve for a term of two or four years, or until his successor is elected and qualified. The superintendent shall be elected for a term of either two or four years, which term shall be in the discretion of the county board of education. The county board of education may, with the written consent of the current superintendent, extend or renew the term of the superintendent's contract at any time during the final year of his term. Provided, however, in any year when new members are to be elected or appointed, the board may not act until after the new members have been sworn in. The term and conditions of employment shall be stated in a written contract which shall be entered into between the board of education and the superintendent. A copy of the contract shall be filed with the State Superintendent of Public Instruction before any person is eligible for this office. A certification to the county board of education by the State Superintendent of Public Instruction showing that the person proposed for the office of county superintendent of schools holds a superintendent's certificate and has had three years' experience in school work in the past 10 years, together with a doctor's certificate showing the person to be free from any contagious or communicable disease, shall make any person eligible for this office: Provided, the requirement of a superintendent's certificate shall not be applicable to persons now serving as superintendents. Immediately after the election, the chairman of the county board of education shall report the name and address of the person elected to the State Superintendent of Public Instruction.

If any board of education shall elect a person to serve as superintendent of schools in any administrative unit who is not qualified, or cannot qualify, according to this section, such election is null and void and it shall be the duty of such board of education to elect a person who can qualify.

In all city administrative units, the superintendent of schools shall be elected by the city board of education of such unit, to serve for a period of either two or four years, which term of office shall be within the discretion of the board; and the qualifications, provisions and approval shall be the same as for county superintendents. The city board of education may, with the written consent of the current superintendent, extend or renew the term of the superintendent's contract at any time during the final year of his term. Provided, however, in any year when new members are to be elected or appointed, the board may not act until after the new members have been sworn in. The election shall be held biennially or quadrennially, as the case may be, during the month of April. (1955, c. 1372, art. 5, s. 22; 1957, c. 686, s. 1; 1967, c. 697; 1973, c. 446; 1979, 2nd Sess., c. 1082, ss. 1, 2.)

Editor's Note. — The 1979 amendment added the fourth and fifth sentences in the first paragraph and the second and third sentences in the third paragraph.

§ 115-53. Liability insurance and waiver of immunity as to torts of agents, etc.

Applied in Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).

SUBCHAPTER VII. EMPLOYEES.

ARTICLE 17.

Principals' and Teachers' Employment and Contracts.

§ 115-142. System of employment for public school teachers.

Rules of Civil Procedure Not Applicable. — The procedures prescribed by this section for the dismissal of a career teacher are essentially administrative rather than judicial. The board is not bound by the formal rules of evidence which would ordinarily obtain in a proceeding in a trial court. Nor are the rules of civil procedure applicable. Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 298 N.C. 293, 259 S.E.2d 298 (1979).

Latitude Permitted in Procedure and Reception of Evidence. — While a board of education conducting a hearing under this section must provide all essential elements of due process, it is permitted to operate under a more relaxed set of rules than is a court of law. Boards of education, normally composed in large part of nonlawyers, are vested under § 115-135(b) with "general control and supervision of all matters pertaining to the public schools in their respective administrative units," a responsibility differing greatly from that of a court. The carrying out of such a responsibility requires a wider latitude in procedure and in the reception of evidence than is allowed a court. Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 298 N.C. 293, 259 S.E.2d 298 (1979).

Evidence of Events More Than Three Years Past Permissible. — While this section prohibits a board of education from basing dismissal "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," there is no prohibition against the board hearing evidence of events which occurred more than three years before the hearing. Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 298 N.C. 293, 259 S.E.2d 298 (1979).

Failure to Rehire Based on Teacher's Refusal to Sign Document. — A failure to rehire a probationary teacher who would have become a career teacher upon the removal of his contract, based solely on the teacher's refusal to sign a document which to a layman might easily appear damaging, though it in fact has no practical effect, may be an arbitrary and capricious cause for not hiring the teacher in violation of subdivision (m) (2) of this section. Hasty v. Bellamy, 44 N.C. App. 15, 260 S.E.2d 135 (1979).

Superintendent's Recommendation against Rehiring Not Violative of Subdivision (m) (2). — A school board's failure to renew a probationary teacher's contract because the principal and superintendent recommended that he not be rehired would not be arbitrary, capricious, or for personal reasons, in violation of subdivision (m) (2) of this section, since the superintendent is entitled to make such recommendations. Hasty v. Bellamy, 44 N.C. App. 15, 260 S.E.2d 135 (1979).

§ 115-142.01. Uniform performance standards and criteria for professional employees. — 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 insure 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, 1981, and may be modified in the discretion of the Board.

Local boards of education shall adopt rules and regulations by July 1, 1981, to provide for annual evaluation of all professional employees defined as teachers by G.S. 115-142(a) (9). Local boards may also adopt rules and regulations requiring annual evaluation of other school employees not specifically covered in this section. All such 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. (1979, 2nd Sess., c. 1137, s. 35.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1137, s. 79, makes this section effective July 1, 1980.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 115-147. Power to suspend and dismiss pupils.

Applied in Pegram v. Nelson, 469 F. Supp. 1134 (M.D.N.C. 1979).

Article 17A.

Interstate Agreement on Qualifications of Educational Personnel.

§§ 115-151.11 to 115-151.15: Reserved for future codification purposes.

Article 17B.

Personnel Administration Commission for Public School Employees.

§ 115-151.16. Commission established; purpose. — There is hereby established a Personnel Administration Commission for Public School Employees which shall provide advice and recommendations to the Governor and the State Board of Education in regard to personnel administration practices and policies for public school employees. (1979, 2nd Sess., c. 1236.)

§ 115-151.17. Commission membership; meetings; compensation. — (a) The Personnel Administration Commission for Public School Employees shall consist of nine members to be appointed by the Governor on or before September 1, 1980. Of the nine members of the Commission, one shall be appointed from each of the eight educational districts of the State as established in G.S. 115-3, and the chairman, who shall be designated by the Governor, shall be an at-large member. To assure continuity of membership, initial appointments to the Commission shall be made as follows: three members, including the chairman, for terms of three years; three members for terms of two years; and three members for terms of one year. All appointments after the initial appointments shall be for terms of three years. Vacancies on the Commission shall be filled by the Governor for the unexpired term.

(b) In making his appointments to the Commission, the Governor shall assure that the membership of the Commission consists of persons interested in education and persons possessing knowledge and skills in personnel administration. However, no person shall be eligible for appointment to the Commission if he is a member of the General Assembly, officer or employee of any organization or association of public school employees, or a person whose employment would be directly affected by recommendations of the Commission.

(c) Within 30 days after the appointment of the Commission, the chairman shall convene the Commission for an initial meeting. At this meeting, the Commission shall elect such officers, in addition to the chairman, as it deems necessary and establish a regular meeting schedule.

(d) Members of the Commission shall be entitled to receive per diem and reimbursement for travel and subsistence expenses incurred in the performance of their duties as specified in G.S. 138-5 or 138-6, whichever is applicable to the individual member. Funds for this purpose shall be made available to the State Board of Education from funds appropriated to

implement Special Provision 36 of the Appropriations Act. (1979, 2nd Sess., c. 1236.)

§ 115-151.18. Responsibilities of the Commission. — (a) The primary function of the Commission shall be to review the classification of positions and to make written recommendations to the Governor and the State Board of Education concerning proper compensation, salary and benefits, and such other proper personnel matters as to encourage the development of employees with a high degree of necessary skills and to stimulate a high degree of employee morale. In addition, the Commission shall provide advice and make recommendations to the Governor and the State Board of Education in such other areas of personnel management as may be requested by either the Governor or the State Board.

(b) The State Board of Education is authorized and directed to receive periodic reports and recommendations from the Commission and is empowered to implement recommendations of the Commission.

(c) The State Board of Education and the State Superintendent of Public Instruction shall provide necessary staff services to the Commission in the performance of its responsibilities. (1979, 2nd Sess., c. 1236.)

SUBCHAPTER VIII. PUPILS.

ARTICLE 20.

General Compulsory Attendance Law.

§ 115-166. Parent or guardian required to keep child in school; exceptions.

Property Interest Entitles Students to Due Process. — Students in North Carolina have legitimate claims of entitlement to a public education, since by § 115-1, a uniform system of free public schools is provided throughout the state and students are required to attend by this section. Therefore, students have a property interest in public education and would be entitled to due process in connection with suspension from school. Pegram v. Nelson, 469 F. Supp. 1134 (M.D.N.C. 1979).

SUBCHAPTER IX. SCHOOL TRANSPORTATION.

ARTICLE 22.

School Buses.

§ 115-185. School bus drivers; monitors. — (a) Each county or city school board, which elects to operate a school bus transportation system, shall employ the necessary drivers for such school buses. The drivers shall have all qualifications prescribed by the regulations of the State Board of Education herein provided for and must have at least six months driving experience as a licensed operator of a motor vehicle before employment as a regular or substitute driver, but the selection and employment of each driver shall be made by the county or city board of education, and the driver shall be the employee of the county or city administrative unit. Each county or city board of education shall assign the bus drivers employed by it to the respective schools within the jurisdiction of such board, and the principal of each such school shall assign the drivers to the school buses to be driven by them. No

school bus shall at any time be driven or operated by any person other than the bus driver assigned by such principal to such bus except by the express direction of such principal or in accordance with rules and regulations of the appropriate local board of education.
(1979, 2nd Sess., c. 1156.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective January 1, 1981, substituted "The drivers shall have" for "Such drivers shall possess" at the beginning of the second sentence in subsection (a) and inserted "and must have at least six months driving experience as a licensed operator of a motor vehicle before employment as a regular or substitute driver" near the middle of that sentence.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

SUBCHAPTER X. INSTRUCTION.

ARTICLE 27A.

Vocational Education Program.

§ 115-235.9. Federal funds division. — The division between secondary and post-secondary educational systems and institutions of federal funds for which the State Board of Vocational Education has responsibility shall, within discretionary limits established by law, require the concurrence of the State Board of Education and the State Board of Community Colleges on and after January 1, 1981. The portion of the approved State Plan for post-secondary vocational education required by G.S. 115-235.5 shall be as approved by the State Board of Community Colleges. (1979, 2nd Sess., c. 1130, s. 4.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1130, s. 6, makes this section effective January 1, 1981.

ARTICLE 38B.

Education Expense Grants for Exceptional Children.

§§ 115-315.7 to 115-315.12: Repealed by Session Laws 1979, 2nd Session, c. 1299, s. 1.

Cross Reference. — As to placement of children in private schools, out-of-state schools and schools in other local educational agencies, see § 115-377.

SUBCHAPTER XIII. SPECIAL EDUCATION.

ARTICLE 45.

State Policy.

§ 115-363. Policy.

Editor's Note. — The words "this Article" in this section in the replacement volume should read "this Subchapter."

§ 115-367. Services mandatory; single-agency responsibility; State and local plans; census and registration.

Editor's Note. — The words "this Article" in this section in the replacement volume should read "this Subchapter."

ARTICLE 46.

Nondiscrimination in Education.

§ 115-377. Placements in private schools, out-of-State schools and schools in other local educational agencies. — The Board shall adopt rules and regulations to assure that:

(1) There be no cost to the parents or guardian for the placement of a child in a private school, out-of-State school or a school in other local educational agencies if the child were so placed by the Board or by the appropriate local educational agency as the means of carrying out the requirement of this subchapter or any other applicable law requiring the provision of special education and related services to children within the State.

(2) No child shall be placed by the Board or by the local educational agency in a private or out-of-State school unless the Board has determined that the school meets standards that apply to State and local educational agencies and that the child so placed will have all the rights he would have if served by a State or local educational agency.

(3) If the placement of the child in a private school, out-of-State school or a school in another local educational agency determined by the Superintendent of Public Instruction to be the most cost-effective way to provide an appropriate education to that child and the child is not currently being educated by the Department of Human Resources or the Department of Corrections, the State will bear a portion of the cost of the placement of the child. The local school administrative unit shall pay an amount equal to what it receives per pupil from the State Public School Fund and from other State and federal funds for children with special needs for that child. The State shall pay the full cost of any remainder up to a maximum of fifty percent (50%) of the total cost. The State and local educational agencies shall be excused from payment of the costs of special education and related services in a private school if a child is placed in that school by his parents or guardian against the advice of the State or a local educational agency. (1977, c. 927, s. 1; 1979, 2nd Sess., c. 1299, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote this section.

The words "this Article" in this section in the replacement volume should read "this Subchapter."

ARTICLE 49.

Rules and Regulations.

§ 115-396. Board rules and regulations.

Editor's Note. — The words "this Article" in this section should read "this Subchapter."

ARTICLE 50.

Non-Reduction Provisions.

§ 115-402. Non-reduction.

Editor's Note. — The words "this Article" in this section should read "this Subchapter."

Chapter 115D.

Community Colleges and Technical Institutes.

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Article 1.

General Provisions for State Administration.

§ 115D-2. Definitions. — As used in this Chapter:

(1) The "administrative area" of an institution comprises the county or counties directly responsible for the local financial support and local administration of such institution as provided in this Chapter.

(2) The term "community college" is defined as an educational institution operating under the provisions of this Chapter and dedicated primarily to the educational needs of the particular area for which established, and

a. Which offers the freshmen and sophomore courses of a college of arts and sciences,

b. Which offers organized credit curricula for the training of technicians; curricular courses may carry transfer credit to a senior college or university where the course is comparable in content and quality and is appropriate to a chosen course of study;
c. Which offers vocational, trade, and technical specialty courses and programs, and
d. Which offers courses in general adult education.

(3) The term "institution" refers to a community college or a technical institute.
(4) The term "regional institution" means an institution which serves four or more counties which have been assigned as of July 1, 1973, to the institution by the Department of Community Colleges for purposes of conducting adult education classes.
(5) The term "State Board" refers to the State Board of Community Colleges.
(6) The "tax-levying authority" of an institution is the board of commissioners of the county or all of the boards of commissioners of the counties, jointly, which constitute the administrative area of the institution.
(7) The term "technical institute" is defined as an educational institution operating under the provisions of this Chapter and dedicated primarily to the educational needs of the particular area for which established, and
a. Which offers organized credit curricula for the training of technicians; curricular courses may carry transfer credit to a senior college or university where the course is comparable in content and quality and is appropriate to a chosen course of study;
b. Which offers vocational, trade, and technical specialty courses and programs,
c. Which offers courses in general adult education.
d. The terms "technical institute" and "technical college" are deemed to be synonymous. Local boards of trustees, with concurrence of the respective county commissioners, may elect to use either term. (1963, c. 448, s. 23; 1969, c. 562, s. 2; 1973, c. 590, s. 1; 1979, c. 462, s. 2; c. 553; c. 896, s. 1; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. —
Session Laws 1979, c. 896, s. 1, effective Jan. 1, 1981, rewrote subdivision (5), which formerly defined "State Board of Education."
The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in subdivision (5).

§ 115D-2.1. State Board of Community Colleges. — (a) The State Board of Community Colleges is established.

(b) The State Board of Community Colleges shall consist of 19 members, as follows:

(1) The Lieutenant Governor shall be a member ex officio.
(2) The Treasurer of North Carolina shall be a member ex officio.
(3) The Governor shall appoint to the State Board four members from the State at large and one member from each of the six Trustee Association Regions defined in G.S. 115D-63 [G.S. 115D-62]. The initial appointments by the Governor shall be made effective July 1, 1980, or as soon as feasible thereafter. In order to establish regularly overlapping terms, the initial appointments by the Governor shall be made so that three expire June 30, 1981, three expire June 30, 1983, and four expire June 30, 1985. Each subsequent regular appointment

by the Governor shall be for a term of six years and until a successor is appointed and qualifies. Any vacancy occurring among his appointees before the expiration of term shall be filled by appointment of the Governor; the member so appointed shall meet the same residential qualification, if any, as the member whom he succeeds and shall serve for the remainder of the unexpired term of that member.

(4) The General Assembly shall elect seven members of the State Board from the State at large in the following manner:

a. In 1980, the Senate shall elect three members, one of whom shall serve a term expiring June 30, 1981, one of whom shall serve a term expiring June 30, 1983, and one of whom shall serve a term expiring June 30, 1985. Each subsequent regular election by the Senate shall be for a term of six years and until a successor is elected and qualifies.

b. In 1980, the House of Representatives shall elect four members, one of whom shall serve a term expiring June 30, 1981, one of whom shall serve a term expiring June 30, 1983, and two of whom shall serve a term expiring June 30, 1985. Each subsequent regular election by the House of Representatives shall be for a term of six years and until a successor is elected and qualifies.

c. In 1985, upon expiration of the term of the fourth member elected by the House of Representatives in 1980, that seat shall be filled by election by the Senate of a member to serve a term of six years; and the right to elect to fill that seat on the State Board shall thereafter rotate between the two houses every six years.

d. The initial elections by the two houses of the General Assembly shall be held on or before July 1, 1980.

e. Any vacancy occurring among the members elected by the two houses of the General Assembly before the expiration of term shall be filled when the General Assembly next convenes. The member then elected shall be elected by the same house that elected the member whom he succeeds, and shall serve for the remainder of the unexpired term of that member.

f. At each session of the General Assembly held in an odd-numbered year, the presiding officer of each house shall assign to either a standing or a special committee of that house the duty of receiving from the members of that house suggestions of persons to be considered by that house for election to the State Board. In order for a person to have standing to be considered as a candidate for nomination by either committee, that person shall be formally proposed as a candidate for nomination by a member of that committee. The chairmen of the two committees shall jointly determine a common final date for receiving suggestions from members of that house, a common final date for receiving from members of the committee formal proposals of candidates for nomination, and a common date for reporting to their respective houses their nominations for the State Board. Each committee shall screen the proposed candidates for nomination as to their qualifications, background, lack of statutory disabilities, and willingness and ability to serve if elected. There is no limit on the number of persons a Senator or a Representative may propose as candidates. When the proposing process is closed, each committee shall list all proposed candidates and shall separately vote "aye" or "no" on each proposed candidate to determine whether that person shall be chosen as a candidate for nomination by the committee. The favorable vote of a majority of those members of the committee present and voting shall constitute one a candidate

for nomination. An individual cannot be a candidate for nomination to more than one place. The number of persons nominated by each committee to its house shall be at least twice the number of places to be filled by that house. No person may simultaneously be a candidate for election by both houses, and if one is nominated by both committees, he shall determine to which house he shall be nominated and so advise the chairmen of both committees. The two houses shall, by joint resolution, fix a common date and time for the election of members of the State Board. At the election session in each house, the committee shall report its list of nominees, to which any member of that house may make one or more additional nominations. Each house shall then proceed to an election of members of the State Board. In order to be chosen, a nominee shall receive the votes of a majority of all members present and voting.

When each house has chosen one person for each place to be filled on the State Board, the chairman of the committee shall make a motion for the simultaneous election of those persons by the house to the indicated positions and for the indicated terms. The roll shall then by called electronically. If a majority of those voting shall vote "aye," the persons named in the motion shall be declared to have been elected. Each house may adopt rules consistent with this section 115D-2.1 with respect to the election by that house of members of the State Board.

(c) No person may be appointed or elected to more than two consecutive terms of six years on the State Board.

(d) No member of the General Assembly, no officer or employee of the State, and no officer or employee of an institution under the jurisdiction of the State Board, and no spouse of any of those persons, shall be eligible to serve on the State Board.

(e) The Governor shall convene the membership of the State Board on July 1, 1980, or as soon as feasible thereafter. The State Board at that meeting shall elect from its appointed or elected membership a chairman and such other officers as it may deem necessary.

(f) At is first meeting after July 1, 1981, and every two years thereafter, the State Board shall elect from its appointed or elected membership a chairman and such other officers as it may deem necessary.

(g) Regular meetings of the State Board shall be held monthly on a day fixed by the State Board. Special meetings of the State Board may be set at any regular meeting or may be called by the chairman. Ten members shall constitute a quorum for the transaction of business. (1979, c. 896, s. 2; 1979, 2nd Sess., c. 1130, s. 5.)

Editor's Note. — The 1979, 2nd Sess., amendment rewrote this section.

§ 115D-3. Department of Community Colleges; staff; advisory council. — The Department of Community Colleges shall be a principal administrative department of State government under the direction of the State Board of Community Colleges, and shall be separate from the free public school system of the State and the Department of Public Education. The State Board shall have authority to adopt and administer all policies, regulations, and standards which it may deem necessary for the operation of the Department.

The State Board shall elect a State President of the Department of Community Colleges. He shall be the chief administrative officer of the Department. The compensation of this position shall be fixed by the Governor, upon the recommendation of the State Board, subject to approval by the Advisory Budget Commission.

The State President shall be assisted by such professional staff members as may be deemed necessary to carry out the provisions of this Chapter, who shall be elected by the State Board on nomination of the State President. The State Board shall fix the compensation of the staff members it elects. These staff members shall include such officers as may be deemed desirable by the State President and State Board. Provision shall be made for persons of high competence and strong professional experience in such areas as academic affairs, public service programs, business and financial affairs, institutional studies and long-range planning, student affairs, research, legal affairs, health affairs and institutional development, and for State and federal programs administered by the State Board. In addition, the State President shall be assisted by such other employees as may be needed to carry out the provisions of this Chapter, who shall be subject to the provisions of Chapter 126 of the General Statutes. The staff complement shall be established by the State Board on recommendation of the State President to insure that there are persons on the staff who have the professional competence and experience to carry out the duties assigned and to insure that there are persons on the staff who are familiar with the problems and capabilities of all of the principal types of institutions represented in the system. The State Board shall appoint an advisory council consisting of at least seven members to advise the State Board on matters relating to personnel, curricula, finance, articulation, and other matters concerning institutional programs and coordination with other educational institutions of the State. The State Board of Community Colleges shall have all other powers, duties, and responsibilities delegated to the State Board of Education affecting the Department of Community Colleges not otherwise stated in this Chapter. (1963, c. 448, s. 23; 1971, c. 1244, s. 14; 1975, c. 699, s. 5; 1979, c. 462, s. 2; c. 896, s. 3; 1979, 2nd Sess., c. 1130, ss. 1, 2.)

Editor's Note. —

Session Laws 1979, c. 896, s. 3, effective Jan. 1, 1981, rewrote this section, which formerly provided for administration of the system of community colleges and technical institutes by the State Board of Education.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, rewrote the first sentence in the first paragraph, deleted "establishment and" preceding "operation" in the second sentence in the first paragraph and substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the last sentence of the third paragraph.

§ 115D-4. Establishment and transfer of institutions. — The establishment of all community colleges and technical institutes shall be subject to the prior approval of the State Board of Community Colleges and each institution shall be established only in accordance with the provisions of this Chapter and the regulations, standards, and procedures adopted by the State Board not inconsistent herewith. In no case, however, shall approval be granted by the state board for the establishment of an institution until it has been demonstrated to the satisfaction of the State Board that a genuine educational need exists within a proposed administrative area, that existing public and private post-high school institutions in the area will not meet the need, that adequate local financial support for the institution will be provided, that public schools in the area will not be affected adversely by the local financial support required for the institution, and that funds sufficient to provide State financial support of the institution are available.

The approval of any new institution, or the conversion of any existing institution into a new type of institution, or the expenditures of any State funds for any capital improvements at existing institutions shall be subject to the prior approval of the State Board of Community Colleges, the Governor, and the Advisory Budget Commission. The expenditure of State funds at any institution herein authorized to be approved by the State Board shall be subject to the terms of the Executive Budget Act unless specifically otherwise provided in this Chapter. (1963, c. 448, s. 23; 1965, c. 1028; 1971, c. 1244, s. 14; 1977, c. 154, s. 1; 1979, c. 462, s. 2; c. 896, s. 4; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. —

Session Laws 1979, c. 896, s. 4, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first sentence of the first paragraph and near the end of the first sentence of the second paragraph and inserted "State" preceding "board" near the end of the first sentence of the first paragraph, in two places in the second sentence of the first paragraph and in the second sentence of the second paragraph.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first sentence of the first paragraph and near the end of the first sentence of the second paragraph.

§ 115D-5. Administration of institutions by State Board of Community Colleges; personnel exempt from State Personnel Act; extension courses; tuition waiver; in-plant training; contracting, etc., for establishment and operation of extension units of the community college system; use of existing public school facilities. — (a) The State Board of Community Colleges may adopt and execute such policies, regulations and standards concerning the establishment, administration, and operation of institutions as the State Board may deem necessary to insure the quality of educational programs, to promote the systematic meeting of educational needs of the State, and to provide for the equitable distribution of State and federal funds to the several institutions.

The State Board of Community Colleges shall establish standards and scales for salaries and allotments paid from funds administered by the State Board, and all employees of the institutions shall be exempt from the provisions of the State Personnel Act. The State Board shall have authority with respect to individual institutions: to approve sites, buildings, building plans, budgets; to approve the selection of the chief administrative officer; to establish and administer standards for professional personnel, curricula, admissions, and graduation; to regulate the awarding of degrees, diplomas, and certificates; to establish and regulate student tuition and fees and financial accounting procedures.

(b) In order to make instruction as accessible as possible to all citizens, the teaching of curricular courses and of noncurricular extension courses at convenient locations away from institution campuses as well as on campuses is authorized and shall be encouraged. A pro rata portion of the established regular tuition rate charged a full-time student shall be charged a part-time student taking any curriculum course. In lieu of any tuition charge, the State Board of Community Colleges shall establish a uniform registration fee, or a schedule of uniform registration fees, to be charged students enrolling in extension courses for which instruction is financed primarily from State funds; provided, however, that the State Board of Community Colleges may provide by general and uniform regulations for waiver of tuition and registration fees for training courses for volunteer firemen, local fire department personnel, volunteer rescue and lifesaving department personnel, local rescue and lifesaving department personnel, local law-enforcement officers, patients in State alcoholic rehabilitation centers, and prison inmates. Provided further,

tuition shall be waived for senior citizens attending institutions operating pursuant to this Chapter as set forth in Chapter 115B of the General Statutes, Tuition Waiver for Senior Citizens.

(c) No course of instruction shall be offered by any community college or technical institute at State expense or partial State expense to any captive or co-opted group of students, as defined by the State Board of Community Colleges, without prior approval of the State Board of Community Colleges. Approval by the State Board of Community Colleges shall be presumed to constitute approval of both the course and the group served by that institution. The State Board of Community Colleges may delegate to the State President the power to make an initial approval, with final approval to be made by the State Board of Community Colleges. A course taught without such approval will not yield any full-time equivalent students, as defined by the State Board of Community Colleges.

(d) Community colleges and technical institutes shall assist in the preemployment and in-service training of employees in industry, business, agriculture, health occupation and governmental agencies. The State Board of Community Colleges shall make appropriate regulations including the establishment of maximum hours of instruction which may be offered at State expense in each in-plant training program. No instructor or other employee of a community college or technical institute shall engage in the normal management, supervisory and operational functions of the establishment in which the instruction is offered during the hours in which the instructor or other employee is employed for instructional or educational purposes.

(e) The State Board of Community Colleges is authorized to enter into agreements with local boards of education, upon approval by the Governor and the Advisory Budget Commission, for the establishment and operation of extension units of the community college system. The State Board is further authorized to provide the financial support for matching capital outlay and for operating and equipping extension units as provided in this Chapter for other institutions, subject to available funds.

On petition of a board of education of the school administrative unit in which an extension unit is proposed to be established, the State Board of Community Colleges may approve the use by the proposed institution of existing public school facilities, if the State Board finds:

(1) That an adequate portion of these facilities can be devoted to the exclusive use of the institution, and

(2) That use of these facilities will be consistent with sound educational considerations. (1963, c. 488, s. 23; 1967, c. 652; 1969, c. 1294; 1973, c. 768; 1975, c. 882; 1977, c. 1065; 1979, c. 462, s. 2; c. 896, ss. 5-7; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, ss. 5-7, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" and "the State Board" for "the Board" throughout the section.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" throughout the section.

§ 115D-6. Withdrawal of State support. — The State Board of Community Colleges may withdraw or withhold State financial and administrative support of any institutions subject to the provisions of this Chapter in the event that:

(1) The required local financial support of an institution is not provided;

(2) Sufficient State funds are not available;

(3) The officials of an institution refuse or are unable to maintain prescribed standards of administration or instruction; or

(4) Local educational needs for such an institution cease to exist. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 8; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 8, effective Jan. 1, 1981, substituted "The State Board of Community Colleges and Technical Institutes" for "The State Board of Education" at the beginning of the section.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "The State Board of Community Colleges" for "The State Board of Community Colleges and Technical Institutes" at the beginning of the section.

Article 2.

Local Administration.

§ 115D-14. Board of trustees a body corporate; corporate name and powers; title to property. — The board of trustees of each institution shall be a body corporate with powers to enable it to acquire, hold, and transfer real and personal property, to enter into contracts, to institute and defend legal actions and suits, and to exercise such other rights and privileges as may be necessary for the management and administration of the institution in accordance with the provisions and purposes of this Chapter. The official title of each board shall be "The Trustees of . . . . . ." (filling in the name of the institution) and such title shall be the official corporate name of the institution.

The several boards of trustees shall hold title to all real and personal property donated to their respective institutions by private persons or purchased with funds provided by the tax-levying authorities of their respective institutions. Title to equipment furnished by the State shall remain in the State Board of Community Colleges. In the event that an institution shall cease to operate, title to all real and personal property donated to the institution or purchased with funds provided by the tax-levying authorities, except as provided for in G.S. 115D-14, shall vest in the county in which the institution is located, unless the terms of the deed of gift in the case of donated property provides otherwise, or unless in the case of two or more counties forming a joint institution the contract provided for in G.S. 115D-71 provides otherwise. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the second sentence of the second paragraph.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the second sentence of the second paragraph.

§ 115D-15. Sale, exchange or lease of property. — When in the opinion of the board of trustees of any institution organized under the provisions of this Chapter, the use of any property, real or personal, owned or held by said board of trustees is unnecessary or undesirable for the purposes of said institution, the board of trustees, subject to prior approval of the State Board of Community Colleges, may sell, exchange, or lease such property in the same manner as is provided by law for the sale, exchange, or lease of school property by county or city boards of education or in accordance with provisions of G.S. 160A-274. The proceeds of any such sale or lease shall be used for capital outlay purposes. (1969, c. 338; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first sentence.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first sentence.

§ 115D-17. Compensation of trustees. — Trustees shall receive no compensation for their services but shall receive reimbursement, according to regulations adopted by the State Board of Community Colleges, for cost of travel, meals, and lodging while performing their official duties. The reimbursement of the trustees from State funds shall not exceed the amounts permitted in G.S. 138-5. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first sentence.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first sentence.

§ 115D-19. Removal of trustees. — Should the State Board of Community Colleges have sufficient evidence that any member of the board of trustees of an institution is not capable of discharging, or is not discharging, the duties of his office as required by law or lawful regulation, or is guilty of immoral or disreputable conduct, the State Board shall notify the chairman of such board of trustees, unless the chairman is the offending member, in which case the other members of the board shall be notified. Upon receipt of such notice there shall be a meeting of the board of trustees for the purpose of investigating the charges, at that meeting a representative of the State Board of Community Colleges may appear to present evidence of the charges. The allegedly offending member shall be given proper and adequate notice of the meeting and the findings of the other members of the board shall be recorded, along with the action taken, in the minutes of the board of trustees. If the charges are, by an affirmative vote of two-thirds of the members of the board, found to be true, the board of trustees shall declare the office of the offending member to be vacant.

Nothing in this section shall be construed to limit the authority of a board of trustees to hold a hearing as provided herein upon evidence known or presented to it. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first and second sentences.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first and second sentences.

§ 115D-20. Powers and duties of trustees. — The trustees of each institution shall constitue the local administrative board of such institution, with such powers and duties as are provided in this Chapter and as are delegated to it by the State Board of Community Colleges. The powers and duties of trustees shall include the following:

(1) To elect a president or chief administrative officer of the institution for such term and under such conditions as the trustees may fix, such election to be subject to the approval of the State Board of Community Colleges.

(2) To elect or employ all other personnel of the institution upon nomination by the president or chief administrative officer, subject to standards established by the State Board of Community Colleges. Trustees may delegate the authority of employing such other personnel to its president or chief administrative officer.

(3) To purchase any land, easement, or right-of-way which shall be necessary for the proper operation of the institution, upon approval of the State Board of Community Colleges, if necessary, to acquire land by condemnation in the same manner and under the same procedures as provided in Article 2, Chapter 40 of the General Statutes. For the purpose of condemnation, the determination by the trustees as to the location and amount of land to be taken and the necessity therefor shall be conclusive.

(4) To apply the standards and requirements for admission and graduation of students and other standards established by the State Board of Community Colleges.

(5) To receive and accept donations, gifts, bequests, and the like from private donors and to apply them or invest any of them and apply the proceeds for purposes and upon the terms which the donor may prescribe and which are consistent with the provisions of this Chapter and the regulations of the State Board of Community Colleges.

(6) To provide all or part of the instuctional services for the institution by contracting with other public or private organizations or institutions in accordance with regulations and standards adopted by the State Board of Community Colleges.

(7) To perform such other acts and do such other things as may be necessary or proper for the exercise of the foregoing specific powers, including the adoption and enforcement of all reasonable rules, regulations, and bylaws for the government and operation of the institution under this Chapter and for the discipline of students. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" throughout the section.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Communty Colleges and Technical Institutes" throughout the section.

§ 115D-23. Workers' Compensation Act applicable to institutional employees. — The provisions of Chapter 97 of the General Statutes of North Carolina, the Worker's Compensation Act, shall apply to all institutional employees. The State Board of Community Colleges shall make the necessary arrangements to carry out those provisions of Chapter 97 which are applicable to employees whose wages are paid in whole or in part from State funds. The State shall be liable for compensation, based upon the average weekly wage as defined in the act, of an employee regardless of the portion of his wage paid from other than State funds.

The board of trustees of each institution shall be liable for workers' compensation for employees whose salaries or wages are paid by the board entirely from local public or special funds. Each board of trustees is authorized to purchase insurance to cover workers' compensation liability and to include the cost of insurance in the annual budget of the institution.

The provisions of this section shall not apply to any person, firm or corporation making voluntary contributions to institutions for any purpose, and such a person, firm, or corporation shall not be liable for the payment of

any sum of money under the provisions of this section. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 714, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the second sentence of the first paragraph.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the second sentence of the first paragraph.

§ 115D-25. Purchase of annuity or retirement income contracts for employees. — Notwithstanding any provision of law relating to salaries or salary schedules for the pay of faculty members, administrative officers, or any other employees of community colleges or technical institutes, the board of trustees of any of the above institutions may authorize the finance officer or agent of same to enter into annual contracts with any of the above officers, agents and employees which provide for reductions in salaries below the total established compensation or salary schedule for a term of one year. The financial officer or agent shall use the funds derived from the reduction in the salary of the officer, agent or employee to purchase a nonforfeitable annuity or retirement income contract for the benefit of said officer, agent or employee. An officer, agent or employee who has agreed to a salary reduction for this purpose shall not have the right to receive the amount of the salary reduction in cash or in any other way except the annuity or retirement income contract. Funds used for the purchase of an annuity or retirement income contract shall not be in lieu of any amount earned by the officer, agent or employee before his election for a salary reduction has become effective. The agreement for salary reductions referred to in this section shall be effected under any necessary regulations and procedures adopted by the State Board of Community Colleges and on forms prepared by the State Board of Community Colleges. Notwithstanding any other provisions of this section or law, the amount by which the salary of an officer, agent or employee is reduced pursuant to this section shall not be excluded, but shall be included, in computing and making payroll deductions for social security and retirement system purposes, and in computing and providing matching funds for retirement system purposes. (1965, c. 366; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the next-to-last sentence.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the next-to-last sentence.

Article 3.

Financial Support.

§ 115D-31. State financial support of institutions. — (a) The State Board of Community Colleges shall be responsible for providing from sources available to the Board funds to meet the financial needs of institutions, as determined by policies and regulations of the Board, for the following budget items:

(1) Capital outlay: Furniture and equipment for administrative and instructional purposes, library books, and other items of capital outlay approved by the Board. Provided, the State Board of Community Colleges may, on an equal matching-fund basis from appropriations made by the State for the purpose, grant funds to individual

institutions for the purchase, construction and remodeling of institutional buildings determined by the State Board of Community Colleges to be necessary for the instructional programs or administration of such institutions. For the purpose of determining amounts of matching State funds, local funds shall include local expenditures made prior to the enactment of this Chapter or prior to an institution becoming a community college or technical institute pursuant to the provisions of this Chapter, when such expenditures were made for the purchase, construction, and remodeling of institutional buildings subsequently determined by the State Board of Community Colleges to be necessary as herein specified, and provided such local expenditures have not previously been used as the basis for obtaining matching State funds under the provisions of this Chapter or any other laws of the State.

(2) Current expenses:

a. General administration:

1. Salaries and travel of trustees and administrative staff.
2. Cost of bonding institutional employees for the protection of State funds and property.
3. Office expenses.
4. Other costs of general administration approved by the State Board.

b. Instructional services:

1. Salaries and travel of instructional staff and clerical employees.
2. Instructional supplies and materials.
3. Commencement expenses.
4. Other costs of instructional services approved by the State Board.

c. Maintenance of plant: Maintenance and replacement of furniture and equipment furnished by the State.

d. Fixed charges:

1. Employer's contributions to social security and State retirement funds for the portion of institutional employees' salaries paid from State and federal funds.
2. Cost of workmen's compensation for institutional employees paid in whole or in part from State or federal funds.

e. Auxiliary services:

1. Operation of libraries, including salaries and travel of staff; replacement of books; and costs of supplies, materials, periodicals, and newspapers.
2. Other costs of auxiliary services approved by the Board.

(3) Current expense of operating an institution's motor vehicles to support any of the budget items in subdivision (2) of this subsection shall be reimbursable from State funds.

(4) Additional support for regional institutions as defined in G.S. 115D-2(4) above: Matching funds to be used with local funds to meet the financial needs of the regional institutions for the items set out in G.S. 115D-32. The amount of matching funds to be provided by the State under this section shall be determined as follows: The population of the administrative area in which the regional institution is located shall be called the "local factor"; the combined populations of all the other counties served by the institution shall be called the "State factor." When the budget for the items listed in G.S. 115D-32 has been approved under the procedures set out in G.S. 115D-45, the administrative area in which the regional institution is located shall provide a percentage to be determined by dividing the

local factor by the sum of the local factor and the State factor. The State shall provide a percentage of the necessary funds to meet this budget, the percentage to be determined by dividing the State factor by the sum of the local factor and the State factor. If the local administrative area provides less than its proportionate share, the amount of State funds provided shall be reduced by the same proportion as were the administrative area funds.

Wherever the word "population" is used in this subdivision, it shall mean the population of the particular area in accordance with the latest U.S. census.

(b) The State Board of Community Colleges is authorized to accept, receive, use, or reallocate to the institutions any federal funds or aids that have been or may be appropriated by the government of the United States for the encouragement and improvement of any phase of the programs of the institutions. (1963, c. 448, s. 23; 1973, c. 590, ss. 2, 3; c. 637, s. 1; 1979, c. 462, s. 2; c. 896, s. 13; c. 946, s. 1; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" throughout the section.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" throughout the section.

§ 115D-33. Providing local public funds for institutions established under this Chapter; elections.

(e) The State Board of Community Colleges shall ascertain that authority to provide adequate funds for the establishment and operation of an institution has been approved by the voters of a proposed administrative area before granting final approval for the establishment of an institution.

(1979, c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in subsection (e).

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 115D-36. Elections on question of conversion of institutions and issuance of bonds therefor. — Whenever the board of trustees of an institution requests the State Board of Community Colleges to convert the institution from a technical institute to a community college, the Board shall require, as a prerequisite to such conversion:

(1) The authorization by the voters of the administrative area of an annual levy of taxes within a specified maximum annual rate sufficient to provide the required local financial support for the converted institution, in an election held in accordance with the appropriate provisions of G.S. 115D-33 and 115D-35.

(2) The approval by the voters of the administrative area of the issuance of bonds for capital outlay necessary for the conversion of the institution, in an election held in accordance with the appropriate provisions of G.S. 115D-33 and 115D-35. (1968, c. 443, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the introductory paragraph.

The 1979, 2nd Sess., amendment, effective

Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the introductory paragraph.

§ 115D-39. Student tuition and fees. — The State Board of Community Colleges may fix and regulate all tuition and fees charged to students for applying to or attending any institution pursuant to this Chapter.

The receipts from all student tuition and fees, other than student activity fees, shall be State funds and shall be deposited as provided by regulations of the State Board of Community Colleges.

The legal resident limitation with respect to tuition, set forth in G.S. 116-143.1 and 116-143.2, shall apply to students attending institutions operating pursuant to this Chapter. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first and second paragraphs.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first and second paragraphs.

Article 4.

Budgeting, Accounting, and Fiscal Management.

§ 115D-45. Preparation and submission of institutional budgets. — On or before the first day of May of each year, the trustees of each institution shall prepare and submit a capital outlay budget and a current expense budget, on forms provided by the State Board of Community Colleges, and may prepare in their discretion a supplemental current expense budget. The budgets shall be prepared and submitted for approval according to the following procedures:

(1) Capital outlay budget: The budget shall contain the items of capital outlay, as provided in G.S. 115D-31 and 115D-32, for which funds are requested, from whatever source. The budget shall be submitted first to the tax-levying authority, which shall approve or disapprove, in whole or in part, that portion of the budget requesting local public funds. Upon approval by the tax-levying authority, the budget shall be submitted by the trustees to the State Board of Community Colleges, which may approve or disapprove, in whole or in part, that portion of the budget requesting State or federal funds.

(2) Current expense budget: The budget shall contain the items of current operating expenses, as provided in G.S. 115D-31 and 115D-32, for which funds are requested, from whatever source. The budget shall be submitted first to the tax-levying authority, which shall approve or disapprove, in whole or in part, that portion of the budget requesting local public funds. Upon approval by the tax-levying authority, the budget shall be submitted by the trustees to the State Board of Community Colleges, which may approve or disapprove, in whole or in part, the entire budget. The State Board is authorized to withhold the allocation of State funds to an institution until a budget has been submitted to and approved by the Board.

(3) Supplemental current expense budget: The budget may contain any items of the current expense budget to be financed from State or federal funds which the trustees desire to supplement with local funds. The tax-levying authority shall approve or disapprove, in whole or in part, that portion of the budget requesting local public funds. An

information copy of the budget as approved shall be filed with the State Board of Community Colleges.

(1979, c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the introductory paragraph and in subdivisions (1), (2) and (3).

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the introductory paragraph and in subdivisions (1), (2) and (3).

As subdivisions (4) and (5) were not changed by the amendment, they are not set out.

§ 115D-47. Payment of State and local public funds to boards of trustees. — (a) The State Board of Community Colleges may deposit funds in the State treasury to the credit of each institution in monthly installments, at such time and in such manner as may be necessary to meet the needs of the institution, or the Board may disburse State funds to each institution under policies and regulations established by the Board. Prior to the deposit or disbursement of State funds by the Board it shall be the duty of the board of trustees of each institution to file, on or before the first day of each month, with the State Board of Community Colleges a certified statement, on forms provided by the State Board of Community Colleges, of all expenditures, salaries, and other obligations that may be due and payable in the next succeeding month.

(b) Upon the basis of an approved budget, the county finance officer or corresponding official of all counties of the administrative area of an institution shall determine the proportion of taxes, nontax revenues and other funds accruing to the current expense and capital outlay budgets of the institution and shall credit these funds to the institution as they are collected. The county finance officer or corresponding official of each county shall remit promptly at the end of each month all funds collected for current expenses and capital outlay, except bond funds, to the board of trustees of the institution.

In the event that a greater amount is collected and paid to the board of trustees of an institution than is authorized by its approved budgets for current expenses and capital outlay, the excess shall remain an unencumbered balance to be credited proportionally to those funds in the following fiscal year, and such excess shall not be spent, committed, or obligated unless the budget is revised with the approval of the board of trustees and the tax-levying authority.

(c) Funds received by the trustees of an institution from insurance payments for loss or damage to buildings shall be used for the repair or replacement of such buildings or, if the buildings are not repaired or replaced, to reduce proportionally the institutional indebtedness borne by the counties of the administrative area of the institution receiving the insurance payments. If such payments which are not used to repair or replace institutional buildings exceed the total institutional indebtedness borne by all counties of the administrative area, such excess funds shall remain to the credit of the institution and be applied to the next succeeding capital outlay budgets until the excess fund shall be expended. Funds received by the trustees of an institution for loss or damage to the contents of buildings shall be divided between the board of trustees and the State Board of Community Colleges in proportion to the value of the lost contents owned by the board of trustees and the State, respectively. That portion retained by the trustees shall be applied to the repair or replacement of lost contents or shall remain to the credit of the institution to be applied to the next succeeding capital outlay and current expense budgets, as appropriate, until such funds shall be expended. (1979, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in three places in subsection (a) and in the third sentence of subsection (c).

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in three places in subsection (a) and in the third sentence of subsection (c).

§ 115D-48. Disbursement of institutional funds. — Public funds provided for an institution shall be paid out as follows:

(1) State funds: All State funds received by or deposited to the credit of an institution shall be disbursed only upon warrants drawn on the State Treasurer and signed by two employees of the institution who shall have been designated by the board of trustees and who shall have been approved by the State Board of Community Colleges. Such funds may be disbursed in any other manner provided by regulations of the State Board of Community Colleges.

(2) Local funds: All local public funds received by or credited to an institution shall be disbursed on warrants signed by two employees of the institution who shall have been designated by the board of trustees and who shall have been approved by the State Board of Community Colleges. Such warrants shall be countersigned by the appropriate county finance officer or officers as provided by law, but only if the funds required by such warrant are within the amount of funds remaining to the credit of the institution and are within the unencumbered balance or the appropriation for the item of expenditure according to the approved budgets of the institution: Provided, that in lieu of countersignature by the county finance officer or officers as provided by law, the board of county commissioners which appropriated the local public funds may from time to time, with the approval of the board of trustees of the institution, designate an employee of the institution to countersign the warrants, and the employee so designated shall countersign a warrnat only if the funds required by such warrant are within the amount of funds remaining to the credit of the institution and are within the unencumbered balance of the appropriation for the item of expenditure according to the approved budgets of the institution. Each warrant shall be accompanied by an invoice, statement, voucher, or other basic document which indicates to the satisfaction of the countersigning county finance officer or officers that the issuance of such warrant is proper. (1963, c. 448, s. 23; 1965, c. 488, s. 2; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in two places in subdivision (1) and in the first sentence of subdivision (2).

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in two places in subdivision (1) and in the first sentence of subdivision (2).

§ 115D-49. Purchase of equipment and supplies. — It shall be the duty of the several boards of trustees to purchase all supplies, equipment, and materials in accordance with contracts made by or with approval of the North Carolina Department of Administration. No contract shall be made by any board of trustees for purchases unless provision has been made in the budget of the institution to provide payment therefor, and in order to protect the State purchase contracts, it is the mandatory duty of the board of trustees and administrative officers of each institution to pay for such purchases promptly

in accordance with the contract of purchase. Equipment shall be titled to the State Board of Community Colleges if derived from State or federal funds. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the last sentence.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the last sentence.

§ 115D-50. Audits of institutional accounts. — The State Auditor shall be responsible for conducting annually a thorough post audit of the receipts, expenditures, and fiscal transactions of each institution.

The annual audits shall be completed as near to the close of the fiscal year as practicable and copies of each audit shall be filed with the chairman of the board of trustees, the executive head of the institution, the county auditor of each county of the administrative area, the State Board of Community Colleges, and the chairman of the Local Government Commission, inclusive of all accounts. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the second paragraph.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the second paragraph.

§ 115D-51. Surety bonds. — The State Board of Community Colleges shall determine what State employees and employees of institutions shall give bonds for the protection of State funds and property and the Board is authorized to place the bonds and pay the premiums thereon from State funds.

The board of trustees of each institution shall require all institutional employees authorized to draw or approve checks or vouchers drawn on local funds, and all persons authorized or permitted to receive institutional funds from whatever source, and all persons responsible for or authorized to handle institutional property, to be bonded by a surety company authorized to do business with the State in such amount as the board of trustees deems sufficient for the protection of such property and funds. The tax-levying authority of each institution shall provide the funds necessary for the payment of the premiums of such bonds. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first paragraph.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first paragraph.

ARTICLE 5.

Special Provisions.

§ 115D-59. Multiple-county administrative areas. — Should two or more counties determine to form an administrative area for the purpose of establishing and supporting an institution, the boards of commissioners of all such counties shall jointly propose a contract to be submitted to the State Board of Community Colleges as part of the request for establishment of an institution. The contract shall provide, in terms consistent with this Chapter, for financial support of the institution, selection of trustees, termination of the contract and the administrative area, and any other necessary provisions. The State Board of Community Colleges shall have authority to approve the terms of the contract as a prerequisite for granting approval of the establishment of the institution and the administrative area. (1963, c. 448, s. 23; 1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first and third sentences.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first and third sentences.

ARTICLE 7.

Miscellaneous Provisions.

§ 115D-77. Nondiscrimination policy. — It is the policy of the State Board of Community Colleges and of local boards of trustees of the State of North Carolina not to discriminate among students on the basis of race, gender or national origin.

In the employment of professional and all other personnel for institutions operating pursuant to this Chapter, neither the State Board of Community Colleges nor local boards of trustees shall discriminate on the basis of race, gender or national origin. (1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first and second paragraphs.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first and second paragraphs.

§ 115D-78. Access to information and public records. — In accordance with Chapter 132 of the General Statutes, all rules, regulations and public records of the State Board of Community Colleges, the Department of Community Colleges, and local boards of trustees shall be available for examination and reproduction on payment of fees by any person. (1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education."

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes."

§ 115D-79. Open meetings. — All official meetings of the State Board of Community Colleges and of local boards of trustees shall be open to the public in accordance with the provisions of G.S. 143-318.1 through 143-318.7. (1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education."

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes."

§ 115D-80. Rule-making procedure. — As an agency of the State, the State Board of Community Colleges is subject to the North Carolina Administrative Procedure Act, G.S. 150A-1 through 150A-64. The State Board of Community Colleges' procedures for rule-making, promulgation of rules, and the handling of contested matters shall be as set forth in those sections. Local boards of trustees are exempt from the Administrative Procedure Act. (1979, c. 462, s. 2; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in the first sentence and "State Board of Community Colleges and Technical Institutes' " for "State Board of Education's" in the second sentence.

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in the first sentence and "State Board of Community Colleges' " for "State Board of Community Colleges and Technical Institutes' " in the second sentence.

Chapter 116.

Higher Education.

Article 1.

The University of North Carolina.

Part 2. Organization, Governance and Property of the University.

Sec.

116-11. Powers and duties generally.

Sec.

116-15. Licensing of nonpublic educational institutions; regulation of degrees.

Article 1.

The University of North Carolina.

Part 2. Organization, Governance and Property of the University.

§ 116-11. Powers and duties generally. — The powers and duties of the Board of Governors shall include the following:

(1) The Board of Governors shall plan and develop a coordinated system of higher education in North Carolina. To this end it shall govern the 16 constituent institutions, subject to the powers and responsibilities given in this Article to the boards of trustees of the institutions, and to this end it shall maintain close liaison with the State Board of Community Colleges, the Department of Community Colleges and the private colleges and universities of the State. The Board, in consultation with representatives of the State Board of Community Colleges and of the private colleges and universities, shall prepare and from time to time revise a long-range plan for a coordinated system of higher education, supplying copies thereof to the Governor, the members of the General Assembly, the Advisory Budget Commission and the institutions. Statewide federal or State programs that provide aid to institutions or students of post-secondary education through a State agency, except those related exclusively to the community college system, shall be administered by the Board pursuant to any requirements of State or federal statute in order to insure that all activities are consonant with the State's long-range plan for higher education.

(1979, c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" near the end of the second sentence and near the beginning of the third sentence of subdivision (1).

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" near the end of the second sentence and near the beginning of the third sentence of subdivision (1).

As the rest of the section was not changed by the amendments, only the introductory language and subdivision (1) are set out.

§ 116-15. Licensing of nonpublic educational institutions; regulation of degrees.

(d) The State Board of Community Colleges shall have sole authority to administer and supervise, at the State level, the system of community colleges, technical institutes, and industrial education centers provided in Chapter

115A of the General Statutes, and shall regulate the granting of appropriate awards, two-year degrees, and marks of distinction by those institutions.

(1979, c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1.)

Editor's Note. — Session Laws 1979, c. 896, s. 13, effective Jan. 1, 1981, substituted "State Board of Community Colleges and Technical Institutes" for "State Board of Education" in subsection (d).

The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "State Board of Community Colleges" for "State Board of Community Colleges and Technical Institutes" in subsection (d).

As the rest of the section was not changed by the amendments, only subsection (d) is set out.

Chapter 115A, referred to in this section, was repealed by Session Laws 1979, c. 462. See now Chapter 115D.

§ 116-16. Tax exemptions.

Editor's Note. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

Part 3. Constituent Institutions.

§ 116-36. Endowment fund.

Editor's Note. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

Chapter 116A.

Escheats and Abandoned Property.

§§ 116A-1 to 116A-11: Repealed by Session Laws 1979, 2nd Session, c. 1311, s. 1, effective January 1, 1981.

Cross Reference. — For present provisions covering the subject matter of the repealed article, see §§ 116B-1 through 116B-49.

Chapter 116B.

Escheats and Abandoned Property.

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Escheats.

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Article 1.

Escheats.

§ 116B-1. Escheats to Escheat Fund. — All real estate which has accrued to the State since June 30, 1971, or shall hereafter accrue from escheats, shall be vested in the Escheat Fund. Title to any such real property which has escheated to the Escheat Fund shall be conveyed by deed in the manner now provided by G.S. 146-74 through G.S. 146-78, except as is otherwise provided herein: Provided, that in any action in the superior court of North Carolina wherein the State Treasurer is a party, and wherein said court enters a judgment of escheat for any real property, then, upon petition of the State Treasurer in said action, said court shall have the authority to appoint the State Treasurer or his designated agent as a commissioner for the purpose of selling said real property at a public sale, for cash, at the courthouse door in

the county in which the property is located, after properly advertising the sale according to law. The said commissioner, when appointed by the court, shall have the right to convey a valid title to the purchaser of the property at public sale. The funds derived from the sale of any such escheated real property by the commissioner so appointed shall thereafter be paid by him into the Escheat Fund. (Const., art. 9, s. 7; 1789, c. 306, s. 2; P. R.; R. C., c. 113, s. 11; Code, s. 2626; Rev., s. 4282; C. S., s. 5784; 1947, c. 494; 1961, c. 257; 1971, c. 1135, s. 2; 1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-2. Unclaimed real and personal property escheats to the Escheat Fund. — Whenever the owner of any real or personal property situated or located within this State dies intestate, or dies testate but did not dispose of all real or personal property by will, without leaving surviving any heirs, as defined in G.S. 29-2(3), to inherit said property under the laws of this State, such real and personal property shall escheat. The State Treasurer shall have the right to institute a civil action in the superior court of any county in which such real or personal property is situated, against any administrator, executor, and unknown heirs or unknown claimants as party defendants, which unknown heirs or unknown claimants may be served with summons and notice of such action by publication as is now provided by the laws of this State. If an administrator or executor has been appointed, he shall make a determination that there are no known heirs or unknown claimants and shall inform the State Treasurer of that determination. The superior court in which such civil action is instituted shall have the authority to enter a judgment therein declaring the real and personal property unclaimed as having escheated, and the real property may be sold according to the provisions of G.S. 116B-1. A default final judgment may be entered by the clerk of the superior court in such cases when no answer is filed by the administrator, executor, unknown heirs or unknown claimants to the complaint, or if any answer is filed, the allegations of the complaint are either admitted or not denied by such party defendants, and no claim is made in the answer to the property left by said deceased person. The funds derived from such sale shall be paid into the Escheat Fund where said funds, together with all other escheated funds, shall be held without liability for profit or interest, subject to any just claims therefor. (1957, c. 1105, s. 1; 1971, c. 1135, s. 2; 1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-3. Unclaimed personalty on settlements of decedents' estates to the Escheat Fund. — All sums of money or other personal estate of whatever kind which shall remain in the hands of any administrator, executor, administrator c.t.a., or personal representative when the administration of an estate of a person dying intestate, or partially intestate, without leaving any known heirs to inherit same, is ready to be closed, unrecovered or unclaimed by suit, by creditors, heirs, or others entitled thereto, shall, prior to the closing of the administration of the estate, be paid or delivered by such administrator or executor to the State Treasurer as an escheat and shall be included in the disbursements in the final account of such estate. In such cases as above described, the State Treasurer is authorized to demand, sue for, recover, and collect such unclaimed moneys or other personal estate of whatever kind from any administrator or executor after the estate is ready to be closed, or from the clerk of the superior court if the unclaimed assets have been paid over to him, and the State Treasurer shall hold the same without liability for profit or interest, subject to any just claims therefor. The provisions of this section and G.S. 116B-2 shall apply to the estate of a person missing for seven years and the State Treasurer may bring an action to have an administrator appointed in such case. (1957, c. 1105, ss. 2, 2½; 1971, c. 1135, s. 2; 1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-4. Claim for escheated property. — Any escheated property or proceeds from the sale of escheated property held by the Escheat Fund pursuant to G.S. 116B-27 may be claimed by an heir of the decedent or by a creditor of the decedent who is not barred from presenting a claim under the provisions of Article 19 of Chapter 28A. The claim shall be made on a form prescribed by the Treasurer and shall be presented to the Treasurer. If the Treasurer determines that the claimant is entitled to all or a portion of the escheated property or the proceeds from its sale, he shall make payment of the claim or return of the property. The claimant shall agree to indemnify the State, the State Treasurer and the Escheat Fund from any claim arising out of or in connection with refund of the property claimed. The provisions of G.S. 116B-38(b) and (c) shall apply to a claim under this subsection. (1979, 2nd Sess., c. 1311, s. 1.)

§§ 116B-5 to 116B-9: Reserved for future codification purposes.

Article 2.

Abandoned Property.

§ 116B-10. Definitions. — For the purposes of Articles 2 and 3 of this Chapter, the following words shall have the following meanings, unless a different meaning is required by the context.

(1) Business association. "Business association" shall mean any proprietorship, private corporation, joint stock company, business trust, partnership or association, two or more individuals having joint or common interest, or any other legal or commercial entity engaged in business, including corporations and organizations under the authority of Chapters 53A and 54.

(2) Commissioner. "Commissioner" shall mean the duly elected and serving Commissioner of Insurance of North Carolina or his designated agent.

(3) Financial institution. "Financial institution" shall mean any trust company, savings bank, industrial bank, savings and loan association, building and loan association, commercial bank, credit union, federal association, investment company, or other business association, which is chartered under federal or State law, solicits, receives or accepts money or its equivalent on deposit and loans money as a regular business.

(4) Holder. "Holder" shall mean any person in possession of property subject to this Chapter belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this Chapter.

(5) Insurer. "Insurer" shall mean any business association doing business in this State, as a life, fire, casualty, motor vehicle liability, accident and health or other insurer referred to and regulated under Chapter 58 of the General Statutes.

(6) Owner. "Owner" shall mean a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this Chapter, or his legal representative.

(7) Person. "Person" shall mean any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(8) Terminate. "Terminate" shall mean to end in any manner, including lapse, expire or cease under its terms or otherwise.

(9) Treasurer. "Treasurer" shall mean the duly elected and serving Treasurer of the State of North Carolina or his designated agent.

(10) Utility. "Utility" shall mean any person who owns or operates, for public use, any plant, equipment, property, franchise or license, for transportation of the public, the transmission of communications or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam or gas.

(11) Written instrument. "Written instrument" shall mean a document in writing that evidences a legal right, obligation or interest. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-11. Property subject to custody and control of the State. — Personal property that is deemed unclaimed or abandoned under this Chapter is subject to the custody and control of the State if it is:

(1) Tangible. Tangible and physically located within the State; or

(2) Intangible. Intangible, and

a. the last known address of the owner, as shown by the records of the holder, is within the State; or

b. the last known address of the owner as shown by the records of the holder is within a jurisdiction, the laws of which do not provide for the escheat or custodial taking of the property, and the domicile of the holder is within the State; or

c. no address of the owner appears on the records of the holder and the domicile of the holder is within the State; or

d. no address of the owner appears on the records of the holder and the domicile of the holder is not within the State, but it is proved that the last known address of the owner is in the State; or

e. if the intangible property is a sum payable on a money order, traveler's check or similar written instrument, and

1. the instrument was purchased within the State, as shown by the records of the holder;

2. the place of purchase of the instrument is not shown in the records of the holder and the holder's principal place of business is within the State; or

3. the place of purchase of the instruments, as shown by the records of the holder, is within a jurisdiction, the laws of which do not provide for the escheat or custodial taking of the property, and the holder's principal place of business is within the State. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-12. Property held by financial institutions. — (a) Deposits and funds. Any demand, savings or matured time deposit in a financial institution, or any funds paid toward the purchase of shares or other interest in a financial institution shall be presumed abandoned if the financial institution receives information that the owner no longer resides at the address listed in the holder's records and is unable to locate the owner and if, within the preceding five years, as to any demand deposit, or a savings or time deposit or interest having a value of one thousand dollars ($1,000) or less, or within the preceding 10 years, as to any such savings or time deposit or interest having a value of more than one thousand dollars ($1,000), the owner has not:

(1) increased or decreased the amount of the deposit, shares or claim, or presented to the holder the passbook, evidence of deposit or other appropriate record for the crediting of interest or dividends;

(2) corresponded in writing with the holder concerning the deposit, shares or claim; or

(3) otherwise indicated an interest in the deposit, shares or claim as evidenced by a writing on file with the holder.

The financial institution shall make reasonable efforts to locate the owner and to determine whether its records disclose a different address for the owner.

(b) Written instruments. Any sum payable on a check certified in the State or on any written instrument issued in the State on which a financial institution is directly liable shall be presumed abandoned if, within 10 years from the date payable, or from the date of issuance, if payable on demand, the owner has not:

(1) negotiated the instrument;

(2) corresponded in writing with the financial institution concerning it; nor

(3) otherwise indicated an interest by a writing on file with the financial institution.

(c) Traveler's checks. Any sum payable on a traveler's check, money order or a similar written instrument on which a financial institution or other business association is directly liable shall be presumed abandoned if, within 15 years from the date payable, or from the date of issuance, if payable on demand, the owner has not:

(1) negotiated the instrument;

(2) corresponded in writing with the financial institution or other business association concerning it; nor

(3) otherwise indicated an interest as indicated by a writing on file with the financial institution or other business association.

(d) Safe deposit box. Any funds or other personal property, tangible or intangible, contained in or removed from a safe deposit box or other safekeeping repository shall be presumed abandoned if the owner has not claimed the property within the period established by G.S. 53-43.7 and shall be delivered to the State Treasurer.

(e) Charges, interest or dividends on abandoned property.

(1) Reasonable service charges may be levied against deposits or accounts presumed to be abandoned, provided those charges may not exceed the charges levied against similar active deposits or accounts or the actual cost of administering the account or deposit.

(2) Interest or dividends due on any deposits, accounts, funds or shares presumed to be abandoned shall not be discontinued or diverted because of the inactivity or during the period prior to abandonment. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-13. Property held by life insurers. — (a) Funds owed under a policy or contract. Any funds held or owing by a life insurer that are due and payable under any life or endowment insurance policy or annuity contract which has matured or terminated shall be presumed abandoned if they have not been claimed or paid within 10 years after becoming due or payable as established from the insurer's records. Funds payable according to the insurer's records are deemed due and payable although the policy or contract has not been surrendered as required. The insurer shall make reasonable efforts to locate the insured or annuitant and to determine whether its records disclose a different address for the insured or annuitant.

(b) Presumption of address of beneficiary. If a person other than the insured or annuitant is entitled to the funds and no address of the person is known to the insurer or if it is not definite and certain from the records of the insurer what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the insurer.

(c) Presumption of maturity. A life insurance policy not matured by actual proof of the death of the insured is deemed to be matured, and the proceeds are deemed to be due and payable if the policy was in force when the insured attained the limiting age under the mortality table on which the reserve is based, unless the person appearing entitled thereto has, within the preceding five years, assigned, readjusted or paid premiums on the policy, negotiated a dividend check, made payments on a loan, or corresponded in writing with the life insurer concerning the policy. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-14. Property held by other insurers. — (a) Funds owed under a policy or contract. Any funds held or owing by a fire, casualty, or any other insurer or surety as defined in G.S. 58-2(3) that are due and payable, as established from the records of the insurer or surety either to an insured, a principal, or other claimant under any insurance policy or contract shall be presumed abandoned if they have not been claimed or paid within five years after becoming due or payable. Funds payable according to the insurer's or surety's records are deemed due and payable although the policy or contract has not been surrendered as required.

(b) Presumption of address of beneficiary. If a person other than the insured, the principal or the claimant is entitled to the funds and no address of the person is known to the insurer or surety or if it is not definite and certain from the records of the insurer or surety what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured, the principal or the claimant according to the records of the insurer or surety. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-15. Property held by utilities. — (a) Deposits. Any deposit, advance, toll, collateral, security or other property held by a utility to secure payment or as an advance for services to be furnished shall be presumed abandoned if it has not been claimed or returned within five years after:

(1) it was due to or demandable by the owner under the terms of the agreement; or

(2) the termination of services to the owner.

(b) Refunds. Any funds which a utility has been ordered to refund shall be presumed abandoned if they have not been claimed or paid within five years after the date they became payable in accordance with the final determination or order providing for the refund.

(c) Notice required. Unless other written notice is required by statutory provision or order of a court or other authority having jurisdiction, every utility shall give written notice, mailed or delivered to the last known address of the owner, of each deposit or refund within 30 days after the same shall be due and demandable. Such notice shall be in addition to, and not in lieu of, the notice required by G.S. 116B-28. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-16. Property held by business associations. — (a) Dividends. Any dividend, profit, distribution, interest, payment on principal or other funds held or owing by a business association for or to its shareholder, certificate holder, member, bond holder or other security holder, or a participating patron of a cooperative shall be presumed abandoned if within five years after the date prescribed for delivery or payment, it has not been claimed or the owner has not corresponded in writing with the holder concerning it.

(b) Stocks. Any intangible interest in a business association, as evidenced by stock records or membership records of the association, shall be presumed abandoned if, for five years:

(1) the owner of the interest has not claimed a dividend or other sum referred to in subsection (a); or
(2) the owner of the interest has not corresponded in writing with the association or otherwise indicated an interest as evidenced by a memorandum or other record on file with the association.

(c) Dividends on abandoned stocks. Any dividends or other distributions held for or owing to a person and attached to a stock or security deemed abandoned shall also be presumed abandoned and shall not be diverted or discontinued during the period prior to the abandonment. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-17. Property held in the course of dissolution or following merger. — (a) Dissolution. All property distributable in the course of a voluntary or involuntary dissolution of a business association, financial institution, insurer or utility shall be presumed abandoned if it is unclaimed within six months of the date of final dissolution.

(b) Merger. All shares of stock that are not delivered following the merger of two or more corporations and are not claimed within two years from the date they became deliverable shall be presumed abandoned. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-18. Property held by fiduciary. — (a) Property. All property held in a fiduciary capacity for the benefit of another person shall be presumed abandoned if, within five years of its becoming payable or distributable, the owner has not:

(1) increased or decreased the principal; or
(2) accepted payment of principal or income; or
(3) corresponded in writing with the fiduciary concerning the property; or
(4) otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary.

(b) Income. Any income or increment due on property deemed abandoned under subsection (a) shall also be presumed abandoned and shall not be discontinued or diverted during the period prior to the abandonment. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-19. Property held by governmental agents. — All property not otherwise covered by this Chapter, and held for the owner by a court, public corporation or authority, or agent or instrumentality of the United States, this State or any other state, or by a public officer or political subdivision thereof, shall be presumed abandoned if it is not claimed within five years of becoming payable or distributable. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-20. Salary, wages or other compensation. — Unpaid and unclaimed salary, wages or other compensation held by or owing by any business association which are due to any person or persons shall be presumed abandoned if, within five years after the date that the unpaid and unclaimed salary, wages or other compensation became due and payable, the same have not been claimed by the owner. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-21. Property held in the ordinary course of business. — (a) Property. All property, not otherwise covered in this Chapter, held in the ordinary course of the holder's business, including accounts payable and other obligations, and whether one or more articles of property, accounts payable or obligations, which has a value or an aggregate value of five hundred dollars ($500.00) or more, shall be presumed abandoned if it has not been claimed within five years after becoming payable or distributable.

(b) Income and charges. Any income or increment due on property deemed abandoned under subsection (a) shall also be presumed abandoned and shall not be discontinued or diverted during the period prior to abandonment. Lawful charges may be deducted from property that is presumed to be abandoned, provided the lawful charges are specifically authorized by statute or by a valid enforceable contract. (1979, 2nd Sess., c. 1311, s. 1.)

§§ 116B-22 to 116B-26: Reserved for future codification purposes.

Article 3.

Administration of Abandoned Property.

§ 116B-27. Escheat Fund. — All property escheated or abandoned under the provisions of this Chapter and all property escheated or abandoned since June 30, 1971, under the provisions of former Chapter 116A, as amended, shall be paid into a fund to be administered by the Treasurer, which fund shall be designated the Escheat Fund. No escheated or abandoned property heretofore paid or delivered to The University of North Carolina pursuant to any constitutional provision or statute of this State shall be subject to the provisions of this Chapter. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-28. Notice by holders to owners required. — (a) Insurers. Every insurer required to file a report pursuant to G.S. 116B-29 shall determine, prior to May 1 of each year, all owners who, as of the preceding December 31, appear entitled to property of the value of fifty dollars ($50.00) or more, presumed abandoned under this Chapter, and, on or before May 1, shall mail, first class postage prepaid, a notice to the last known address of each such owner.

(b) Other holders. Every holder, other than insurers, required to file a report pursuant to G.S. 116B-29 shall determine, prior to November 1 of each year, all owners who, as of the preceding June 30, appear entitled to property of the value of fifty dollars ($50.00) or more, presumed abandoned under this Chapter, and, on or before November 1, shall mail, first class postage prepaid, a notice to the last known address of each such owner.

(c) Contents. Each notice required by this section shall contain:

(1) A statement that, according to the records of the holder, property is being held to which the addressee appears entitled and the amount or description of the property;

(2) The name and address of the person holding the property and any necessary information regarding changes of name and address of the holder;

(3) A statement that, if satisfactory proof of claim is not presented by the owner to the holder by the following February 1, or if the holder is an insurer, by the following August 1, the property will be placed in the custody of the State Treasurer, to whom all further claims shall be directed.

(d) Charges for notices. The holder shall be entitled to deduct from the property of each owner to whom notice is sent an amount not to exceed fifty cents (50¢) to defray the expense of mailing notice. If the property is other than cash in the possession of the holder, the holder may submit to the Escheat Fund, with the certification hereinafter provided for, a sworn itemized statement of charges for notices mailed, not to exceed fifty cents (50¢) per notice, which shall be paid by the Escheat Fund within 30 days following receipt of the statement. The Escheat Fund shall charge the accounts of the respective owners with any charges so paid to holders.

(e) Certification of mailing; penalties; right of owners. Every holder filing a report pursuant to G.S. 116B-29 shall certify to the Treasurer therewith that the notices required by subsections (a) and (b) of this section have been mailed to the last known address of every owner named in the report. Failure or refusal to certify after written demand by the Treasurer or filing false certification shall be a misdemeanor, punishable, upon conviction, by a fine of not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000) as the court, in its discretion, shall determine. Any owner who has suffered loss or damage by reason of the failure of a holder to mail the notice required by this section may recover actual loss or damage from the holder in an appropriate action at law.

(f) Other notice. All holders shall make reasonable efforts to locate and communicate with the owner prior to filing the report required by G.S. 116B-30 in order to prevent abandonment from being presumed, including the exercise of due diligence to determine whether he possesses a different address for the owner.

(g) The Department of Revenue may use the dates prescribed in subsection (a) of this section for insurers in mailing notices of unclaimed property. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-29. Report of abandoned property by holder to Commissioner of Insurance or Treasurer. — (a) Reports to Commissioner of Insurance and Treasurer. Every insurer holding property presumed abandoned under the provisions of G.S. 116B-13 or G.S. 116B-14, or both, shall report to the Commissioner of Insurance, with respect to that property; however, payment of such property shall be to the Treasurer in accordance with G.S. 116B-31. Every other person holding funds or other property, tangible or intangible, presumed abandoned under this Chapter shall report to the State Treasurer with respect to that property.

(b) Contents. The report shall be verified and shall include:

(1) the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of twenty-five dollars ($25.00) or more;

(2) in the case of unclaimed funds of an insurer, the full name of the insured or annuitant and his last known address according to the insurer's records;

(3) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under twenty-five dollars ($25.00) each may be reported in the aggregate;

(4) the date when the property became payable, demandable or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) other information which the Treasurer prescribes by rule.

(c) Names of prior holders. If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) Time of filing. The report shall be filed before March 1 of each year as of the prior June 30, but the report of insurers shall be filed before September 1 of each year as of the prior December 31. The Treasurer, in his discretion, may postpone the reporting date for a period not exceeding six months upon written request by any person required to file a report. The Department of Revenue may use the dates prescribed in this subsection for insurers in filing reports of unclaimed property with the State Treasurer.

(e) Verification. Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-30. Preparation of list of owners by State Treasurer. — (a) Listing of names. There shall be delivered to each clerk of superior court prior to November 1 a list prepared by the State Treasurer of escheated and abandoned property, which list shall contain:

(1) The names, if known, in alphabetical order of surname, and last known addresses, if any, of owners of escheated and abandoned property;
(2) The names and addresses of the holders of the abandoned property; and
(3) A statement that claim and proof of legal entitlement to escheated or abandoned property shall be presented by the owner to the Treasurer, and setting forth where further information may be obtained.

(b) Notice. At the time the said lists are distributed to the clerks of superior court, the Treasurer shall cause to be published once each week for two consecutive weeks, in at least two newspapers having general circulation in this State, a notice stating the nature of such lists and that the same are available for inspection at the offices of the respective clerks of superior court, together with such other information as the Treasurer shall deem appropriate to appear in such notice.

(c) Property not required to be listed. The Treasurer is not required to include in any such list any item of a value, as determined by the Treasurer, in his discretion, of less than fifty dollars ($50.00), unless he deems inclusion of items of lesser amounts to be in the public interest.

(d) Lists retained by clerks. The clerks of superior court shall retain such lists on permanent file in their offices and shall make them available for public inspection.

(e) Lists not cumulative. The lists prepared by the Treasurer shall include only escheated and abandoned property reported for the current reporting date and are not required to be cumulative lists of escheated and abandoned property previously reported. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-31. Payment or delivery of abandoned property. — (a) Insurers. Every insurer shall remit or deliver to the Treasurer with the report required to be filed by G.S. 116B-29 any property deemed abandoned under the provisions of this Chapter.

(b) Other holders. All other holders shall remit or deliver to the Treasurer with the report required to be filed by G.S. 116B-29 any property deemed abandoned under the provisions of this Chapter.

(c) Tangible personal property. Prior to the delivery of any tangible personal property to the Treasurer, the holder shall report to the Treasurer the nature, condition and approximate value of each article of such property. The Treasurer may determine that delivery of specific tangible personal property is not in the best interest of the State, either because the sum or value is too small or for other good reason. The Treasurer shall notify the holder of the property of his determination and may refuse to accept delivery and custody of that property. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-32. Relief from liability by payment or delivery. — Upon the payment or delivery of abandoned property to the Treasurer, the State shall assume custody of the property and shall be responsible for its safekeeping. Any person who pays or delivers abandoned property to the Treasurer under this Chapter is relieved of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-33. Income accruing after payment or delivery. — When property is paid or delivered to the Treasurer under this Chapter, the Treasurer shall hold the property without liability for profit or interest. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-34. Periods of limitation not a bar. — The expiration of any period of time specified by statutes or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report under this Chapter or to pay or deliver abandoned property to the Treasurer. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-35. Sale, retention or disposal of abandoned property. — (a) Sale by auction. All abandoned property, other than money or securities or other property sold under subsection (b) or tangible property retained under subsection (c) delivered to the Treasurer under this Chapter shall, within three years after delivery, be sold by him to the highest bidder at public sale in whatever city in the State affords, in his judgment, the most favorable market for the property involved. The Treasurer may decline the highest bid and reoffer the property for sale if he considers the price bid insufficient. He need not offer any property for sale, if in his opinion, the probable cost of sale exceeds the value of the property. The Treasurer, in his discretion, may cause any abandoned or escheated property to be appraised prior to sale by one or more appraisers, but the Treasurer shall not be required to sell any property at the appraised value.

Each sale shall be preceded by a single publication of notice of the sale at least three weeks in advance in two newspapers of general circulation in the State.

(b) Securities and other property.

(1) Securities in which the Treasurer may invest funds of the Escheat Fund may be retained by the Treasurer, in his discretion, as an investment or may be sold by the Treasurer upon receipt or at such time thereafter as he shall deem appropriate. All other securities shall be sold as soon as reasonably possible following receipt. If valid claim is made for any securities in the possession of the Treasurer, he may transfer such securities to the claimant or, in his discretion, pay to the claimant the value thereof as of the date claim is received, determined as hereinafter set out. Securities listed on an established stock exchange may be sold at the prevailing price on such exchange. Other securities may be sold over the counter at prevailing prices or by such other method as the Treasurer may determine to be advisable. United States Government Savings Bonds and United States War Bonds shall be presented to the United States for payment. Notice of sale of securities is not required.

(2) If the property is of a type customarily sold on a recognized market or of a type which is subject to widely distributed standard price quotations, the Treasurer may sell the property without notice by publication or otherwise.

(c) Retention of tangible property with historic value. The Treasurer may retain any tangible property delivered to him, if the property has recognized historic significance. The historic significance shall be certified by the Treasurer, with the advice of the Secretary of Cultural Resources; and a statement of the appraised value of the property shall be filed with the certification. Historic property retained under this subsection may be stored and displayed at any suitable location.

(d) Destruction of valueless property. The Treasurer may destroy or otherwise dispose of any property delivered to him, if the property has no apparent commercial or historic value. The lack of apparent commercial or historic value shall be certified by the State Auditor, and a description of the property shall be filed with the certification.

(e) Title. The purchaser at any sale conducted by the Treasurer pursuant to this Chapter shall receive title to the property purchased, free from all claims of the owner or prior holder thereof and of all persons claiming through or under them. The Treasurer shall execute all documents necessary to complete the transfer of title. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-36. Administration of Escheat Fund; Escheat Account. — (a) Escheat Account. All funds received by the Treasurer as escheated or abandoned property and which were transferred prior to January 1, 1980, to the trust fund created under G.S. 116-209 shall remain in that trust fund and shall be placed in a special fund, designated the "Escheat Account."

(b) Investment and transfer of assets; income. The Treasurer shall be the trustee of the Escheat Account and shall have full power to invest and reinvest the assets of the Escheat Account and the Escheat Fund. Subject to the Treasurer's withholding an amount necessary to accomplish his duties as set out in this Chapter, including subsections (e), (f) and (g) of this section, the Treasurer shall transfer, at least annually, to the Escheat Account all moneys then in his custody received as, or derived from the disposition of, escheated and abandoned property and shall disburse to the State Education Assistance Authority, as provided in G.S. 116B-37, the income derived from the investment of the Escheat Account and the Escheat Fund. All moneys transferred to the Escheat Account under this section shall be accounted for and administered separately from other assets and money in the trust fund created under G.S. 116-209.

(c) Security interest in Escheat Account. The State Education Assistance Authority, in addition to other powers vested under G.S. 116-201 to G.S. 116-209.23, inclusive, is authorized to pledge and vest a security interest in all or any part of the Escheat Account, by resolution adopted or trust agreement approved by it, as security for or insurance respecting the payment of bonds or other obligations, as defined in G.S. 116-201, including principal, interest and redemption premium, if any; provided, that such pledge and security interest in the Escheat Account shall, in the determination of the Authority, constitute a use of the Escheat Fund to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. The Authority may submit to the Treasurer, from time to time as it deems necessary, requisitions for transfers of money in the Escheat Account to pay such bonds and other obligations to the extent necessary under such pledge of, or security interest in, the Escheat Account, or any part thereof, and the Treasurer is authorized and directed to pay such money so requisitioned to the Authority for such purposes.

(d) Limitation on amount of obligations secured. The principal amount of bonds and other obligations insured or secured by the Escheat Account shall not exceed 10 times the amount held for the credit of the Escheat Account, as certified from time to time by the Treasurer, and, in no event, shall exceed three hundred fifty million dollars ($350,000,000). If the amount held for the credit of the Escheat Account, as certified by the Treasurer, shall be ten percent (10%) or less of the principal amount of the bonds and other obligations so insured or secured, the Authority shall not issue any additional bonds or cause additional obligations to be insured or secured by the Escheat Account until such time as the amount held for the credit of the Escheat Account exceeds ten percent (10%) of the principal amount of the bonds and other obligations secured or insured by the Escheat Account.

(e) Use of excess funds. If the amount held for the credit of the Escheat Account at any time shall exceed the sum of thirty-five million dollars ($35,000,000), such excess may be used by the State Education Assistance Authority, with the written approval of the Treasurer, for the purpose of either (i) making student loans or (ii) refunding outstanding bonds or other obligations issued by the Authority and secured by a pledge of, or a security interest in, the Escheat Account. Any excess so used shall be repaid by the Authority to the Escheat Account in the manner agreed between the Authority and the Treasurer.

(f) Refund reserve. The Treasurer shall retain in the Escheat Fund, as a permanent refund reserve, either the sum of five million dollars ($5,000,000) or a sum equal to the total value of escheated or abandoned property received in the preceding fiscal year, whichever is greater, for the purpose of payment of refunds of escheated or abandoned property to persons entitled thereto.

(g) Additional funds for refunds. If at any time the amount of the refund reserve shall be insufficient to make refunds required to be made, the Treasurer, in addition, may use all current receipts derived from escheated or abandoned property, exclusive of earnings and profits on investments of the Escheat Fund and the Escheat Account, for the purpose of making such refunds; and if all such funds shall be inadequate for such refunds, the Treasurer may apply to the Council of State, pursuant to the Executive Budget Act, to the limit of funds available from the Contingency and Emergency Fund, for a loan, without interest, to supply any deficiencies, in whole or in part. No receipts derived from escheated or abandoned property, other than earnings or profits on investments, shall be paid to the Authority until: (i) all valid claims for refund have been paid; (ii) the reserve for refund shall equal five million dollars ($5,000,000); and (iii) the amount loaned from the Contingency and Emergency Fund shall have been repaid by the Escheat Fund.

(h) Expenditures. The Treasurer may expend the funds in the Escheat Fund, other than funds in the Escheat Account, for the payment of claims for refunds to owners, holders and claimants under G.S. 116B-4; for the payment of costs of maintenance and upkeep of abandoned or escheated property; costs of preparing lists of names of owners of abandoned property to be furnished to clerks of superior court; costs of notice and publication; costs of appraisals; fees of persons employed pursuant to G.S. 116B-47; costs involved in determining whether a decedent died without heirs; costs of a title search of real property that has escheated; and costs of auction or sale under this Chapter. All other costs, including salaries of personnel, necessary to carry out the duties of the Treasurer under this Chapter, shall be appropriated from the funds of the Escheat Fund pursuant to the provisions of Article 1, Chapter 143 of the General Statutes.

(i) Records. Before making a deposit to the Escheat Fund, or retaining or destroying property, the Treasurer shall record the name and address of the holder, the name and last known address of each person appearing from the holder's reports to be entitled to the abandoned property, the name and last known address of each insured person or annuitant, the amount or description of the property, and, with respect to each policy or contract listed in the report of an insurer, its number and the name of the corporation. The records shall be available for public inspection at all reasonable business hours. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-37. Distribution of income of fund. — The income derived from the investment or deposit of the Escheat Fund shall be distributed annually on or before July 15th to the State Education Assistance Authority for loans to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. Such loans shall be made

upon terms, consistent with the provisions of this Chapter, pursuant to which the State Education Assistance Authority makes loans to other students under G.S. 116-201 to 116-209.23, Article 23. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-38. Claim for abandoned property paid or delivered. — (a) Filing. Any person claiming an interest in any property delivered to the Treasurer under this Chapter may file a claim to the property or to the proceeds from its sale. The claim shall be on a form prescribed by the Treasurer. The claim shall be made to the person originally holding the property, or to his successor or successors. If such person is satisfied that the claim is valid and that the claimant is the actual and true owner of the property, he shall so certify to the Treasurer by written statement attested by him under oath, or in case of a corporation, by two principal officers, or one principal officer and an authorized employee thereof. The determination of the holder that the claimant is the actual and true owner shall, in the absence of fraud, be binding upon the Treasurer and upon receipt of the certificate of the holder to this effect, the Treasurer shall forthwith authorize and make payment of the claim or return of the property, or if the property has been sold, the amount received from such sale to the owner, or to the holder in the event the owner has assigned the claim to the holder and the certificate of the holder is accompanied by such assignment. In the event the person originally holding the property rejects the claim made against him, the claimant may appeal to the Treasurer.

If the person originally holding the property, or his successor, is not available, the owner may file a claim with the Treasurer on a form prescribed by the Treasurer. In addition to any other information, the claim shall state the facts surrounding the unavailability of the person originally holding the property and the lack of a successor.

(b) Determination. The Treasurer shall consider each claim and make a determination on it within 90 days after it is filed. He may hold a hearing, which shall be held in the manner required by Article 3 of the Administrative Procedure Act, Chapter 150A, and the Treasurer may designate any individual as hearing officer. Each determination shall be in writing, shall state the reasons for the decision and shall be given or sent to the claimant. Each determination may be appealed as provided under Article 4 of Chapter 150A.

(c) Payment. If the claim is allowed, the Treasurer shall make payment forthwith. The claim shall be paid without deduction for costs of notices of sale or for the Treasurer's administrative costs, other than cost of notice provided for in G.S. 116B-29.

(d) Payment by holder. Any holder who has paid moneys to the Treasurer pursuant to this Chapter may make payment to any person appearing to such holder to be entitled thereto, and upon proof of such payment and proof that the payee was entitled thereto, the Treasurer shall forthwith reimburse the holder for the payment.

(e) Indemnification. The claimant or claimants and the holder, if he certifies the claim under subsection (a) or receives reimbursement under subsection (d), shall agree to indemnify, save harmless and defend the State, the Treasurer and the Escheat Fund from any claim arising out of or in connection with refund of the property claimed. In like manner, the claimant or claimants shall also agree to indemnify, save harmless and defend the holder, if the holder certifies the claim under subsection (a) or pays a claim under subsection (d). (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-39. Examination of records. — (a) Treasurer. The Treasurer and the Commissioner with respect to records of insurers, may at reasonable times and upon reasonable notice cause to be examined the records of any person with respect to holding, reporting, paying, or delivering any property that is required to be reported pursuant to this Chapter.

(b) Other examiner. When requested by the Treasurer, an examination shall be conducted by any administrative licensing or regulating agency otherwise empowered to examine the records of a holder. For the purpose of this section, the Commissioner of Banks is vested with full authority to examine the records of any financial institution doing business within the State, including those not organized under the laws or created in this State.

The Treasurer may also receive copies of any reports or forms filed by any person with any State agency, including the Department of Revenue, if he deems it necessary or appropriate to the proper administration of this Chapter. The Treasurer may also receive copies of any such reports or forms when an official of any such State agency is of the opinion that the person has failed to report such property.

(c) Confidentiality of records. Information derived by any examination of records or otherwise communicated to the Treasurer, the Commissioner or their respective representatives concerning abandoned property shall be confidential and not available for public inspection to the extent the Treasurer or the Commissioner finds necessary to protect the interest of the holder, the owner, the State and the public welfare; and, in any event, any such information or record which is confidential under any law of this State or of the United States when in the possession of a person, firm, corporation, agency or other entity named in such law shall also be confidential when revealed to or delivered into the possession of the Treasurer or the Commissioner and shall not be available for public inspection.

(d) Order. The Treasurer, and the Commissioner with respect to reports of insurers, for the purpose of ascertaining the correctness of any report, the necessity of making a report where none has been made or the payment or delivery of property required to be paid or delivered under this Chapter, shall have the power to examine, personally or by an agent designated by him, any books, records, papers or other data which may be relevant to or material to such inquiry; and the Treasurer or the Commissioner may order the person required to make such report or pay or deliver such property, or any officer or employee of such person, or any person having possession, custody, care or control of books, records, papers or other data relevant or material to the matters under inquiry, or any other person having knowledge in the premises, to appear before the Treasurer or the Commissioner or their respective agents, at a time and place named in the order, and to produce such books, records, papers or other data, and to give such testimony under oath as may be material or relevant to such inquiry, and the Treasurer or the Commissioner or their respective agents may administer oaths to such person or persons. If any person so ordered refuses to obey such order or to give testimony when ordered, the Treasurer or the Commissioner may apply to the Superior Court of Wake County for a summons and court order requiring such person or persons to comply with the order of the Treasurer or the Commissioner; and failure to comply with such court order shall be punished as for contempt. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-40. Proceeding to allow examination or compel delivery. — If any person refuses to allow examination of records or to deliver property to the Treasurer as required under this Chapter, the Treasurer, or the Commissioner with respect to records of insurers, may bring an action in a court of appropriate jurisdiction to enforce the examination or delivery. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-41. Penalties. — (a) Failure or refusal to file; false reports. Any holder who shall willfully fail, neglect or refuse to make and file any required

report or files a false report or who shall willfully fail, neglect or refuse to pay or deliver any property to the Escheat Fund shall be liable to the State of North Carolina in the sum of three hundred dollars ($300.00) for each and every such failure, neglect, refusal or false report, and an additional sum of ten dollars ($10.00) for each and every day of the period of default, or a sum equal to one-half of the value of the property, whichever is greater. Such penalty may be recovered by the State in an appropriate legal proceeding instituted by the State upon the relation of the Treasurer. The proceeds of any penalty or judgment recovered in such action shall be paid to the Treasurer to be added to the Escheat Fund.

(b) Compelling compliance. The recovery of such penalty shall not relieve the defendant-holder from the duty of making and filing said reports. The State of North Carolina, upon relation of the State Treasurer or the Commissioner with respect to records of insurers, may bring injunctive proceedings to compel compliance with the requirements of this Chapter relative to the making and filing of said reports, or the Treasurer may compel compliance by suit and/or bill for discovery.

(c) Interest penalty. In addition to any other damages, penalties or fines, any person who fails to render reports, files a false report, refuses to pay or deliver abandoned property to the Treasurer or perform any other duties required under this Chapter shall be charged interest at the rate of twelve percent (12%) per annum on the property or its value from the date the property should have been reported, paid, delivered or the day the false report was filed, until a correct report is filed. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-42. Regulations. — The Treasurer or the Commissioner with respect to insurers, may adopt or amend the regulations necessary to carry out the provisions of this Chapter. These regulations shall be adopted or amended under the procedures of the Administrative Procedures Act, Chapter 150A. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-43. Restriction on agreement to locate reported property. — (a) Limit on fees. No agreement entered into after a report is filed under G.S. 116B-29 is valid if any person undertakes thereby to locate or reveal the whereabouts of property included in that report for a fee or compensation, unless the agreement is:

(1) in writing and duly signed and acknowledged by the property owner; and
(2) clearly states the fee or compensation to be paid, which may not exceed twenty-five percent (25%) of the actual value of the property recovered; and
(3) discloses the nature and value of the property; and
(4) discloses the name and address of the holder; or discloses that the property has been paid or delivered to the Escheat Fund.

(b) Agreements not affected. Subsection (a) shall not apply to any agreement made by any person, including personal representatives, guardians, trustees, and others in a representative capacity, with another to discover property in which such person has an interest for a fixed fee or hourly or daily rate, not contingent upon the discovery of property or the value of property discovered; provided, however, that any agreement entered into under this subsection for the purpose of evading the provisions of subsection (a) shall be invalid and unenforceable.

(c) Excessive consideration. Nothing in this section shall be construed to prevent an owner from asserting, at any time, that any agreement to locate or reveal the whereabouts of properties is based on an excessive or unjust consideration. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-44. Effect of laws of other states. — This Chapter shall not apply to any property that has been presumed abandoned or escheated under the laws of another state prior to the effective date of this Chapter. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-45. Severability. — If any provision of this Chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Chapter which can be given effect without the invalid provisions, and to this end the provisions of this Chapter are severable. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-46. Transition and application. — Any person holding property that was not required to be reported, delivered or paid to any State agency as abandoned property under the laws of this State prior to January 1, 1980, and which, on December 31, 1979, has been held for a period greater than the period for abandonment established by this Chapter, shall not be subject to the reporting provisions of this Chapter. Such property shall be reported and delivered or paid to the Treasurer, however, in such manner and at such time as the Treasurer shall prescribe by rule adopted to promote the identification and delivery or payment of the property and the reasonable convenience of the holders.

Any person holding property that was subject to reporting, delivery or payment to a State agency as abandoned property under the laws of this State prior to January 1, 1980, and that is subject to a shorter period for abandonment under this act, may report and deliver or pay to the Treasurer that property between January 1, 1980, and June 30, 1980.

This act shall not effect any duty to file a report or deliver or pay to any State agency any abandoned property under the laws of this State prior to January 1, 1980. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-47. Employment of persons with specialized skills or knowledge. — The Treasurer may employ the services of such independent consultants, real estate managers and other persons possessing specialized skills or knowledge as he shall deem necessary or appropriate for the administration of this Chapter, including, but specifically not limited to, valuation, maintenance, upkeep, management, sale and conveyance of property and determination of sources of unreported abandoned property. The Treasurer may also employ the services of an attorney to perform a title search or to provide an accurate legal description of real property which he has reason to believe may have escheated. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-48. Agreements to coordinate the collection and administration of abandoned property. — (a) Coordination with United States and other states. The Treasurer is hereby authorized, with the approval of the Governor and Council of State, to enter into agreements with the United States government or any department or agency thereof, or with any state or political subdivision thereof, for the purpose of coordinating and improving the collection and administration of property abandoned or escheated under the laws of this State and collected and administered by the Treasurer with the collection and administration of property abandoned or escheated under the laws of the United States or any other state or political subdivision.

(b) Expenditures to effectuate agreements. The Treasurer, with approval of the Governor and Council of State, is authorized and empowered to undertake such agreements and make such expenditures from the funds of the Escheat Fund as may be necessary to effectuate such agreements. (1979, 2nd Sess., c. 1311, s. 1.)

§ 116B-49. Certification by holders with tax return. — (a) Certification. Every business association, including financial institutions and life insurers, holding property deemed unclaimed and abandoned under this Chapter, shall certify such holding in the income tax return required by Chapter 105 of the North Carolina General Statutes. The certification shall be a part of the tax return with which it is filed. If such business association is not required to file an income tax return under Chapter 105, the certification shall be made in the form and manner required by the Secretary of Revenue.

(b) Certification not confidential. The information appearing on the certification shall not be privileged or confidential, and such information shall be furnished by the Secretary of Revenue to the Escheat Fund on October 1 of each year, or if such date shall fall on a weekend or holiday, on the next regular business day thereafter. (1979, 2nd Sess., c. 1311, s. 1.)

Chapter 118.

Firemen's Relief 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 Asheville: 1979, 2nd Sess., c. 1315, amending 1979, c. 208; City of Burlington: 1979, 2nd Sess., c. 1144; Town of Canton: 1979, 2nd Sess., c. 1105; Town of Forest City: 1979, 2nd Sess., c. 1276; City of Laurinburg: 1979, 2nd Sess., c. 1315.

§ 118-7. Disbursement of funds by trustees.

Local Modification. — Town of Kernersville: 1979, 2nd Sess., c. 1106.

Chapter 120.

General Assembly.

Article 1.

Apportionment of Members; Compensation and Allowances.

Sec.
120-3. Pay of members and officers of the General Assembly.
120-3.1. Subsistence and travel allowances for members of the General Assembly.

Article 6C.

Review of Administrative Rules.

120-30.26. Administrative Rules Review Committee.
120-30.27. Meetings of Committee.
120-30.36 to 120-30.40. [Reserved.]

Article 6D.

Local Government Fiscal Information Act.

120-30.41. Short title.
Sec.
120-30.42. Definitions.
120-30.43. Purpose.
120-30.44. Fiscal note defined.
120-30.45. Fiscal note on legislation.
120-30.46. Fiscal information related to requests for State appropriations.
120-30.47. Legislation introduced by request.
120-30.48. Fiscal impact of administrative actions.

Article 8.

Elected Officers.

120-37. Elected officers; salaries; staff.

Article 14A.

Joint Committee on Pensions and Retirement.

120-111.1. Creation.
120-111.2. Duties.
120-111.3. Analysis of legislation.
120-111.4. Staff and actuarial assistance.

Article 1.

Apportionment of Members; Compensation and Allowances.

§ 120-3. Pay of members and officers of the General Assembly. — The Speaker of the House shall be paid an annual salary of thirteen thousand eight hundred sixty dollars ($13,860), payable monthly, and an expense allowance of three hundred forty-five dollars ($345.00) per month. The President pro tempore of the Senate, the Speaker pro tempore of the House, the minority leader in the House, and the minority leader in the Senate shall each be paid an annual salary of eight thousand six hundred sixty-four dollars ($8,664), payable monthly, and an expense allowance of two hundred thirty dollars ($230.00) per month. Every other member of the General Assembly shall be paid an annual salary of six thousand nine hundred thirty-six dollars ($6,936), payable monthly, and an expense allowance of one hundred seventy-two dollars ($172.00) per month. The salary and expense allowances provided in this section are in addition to any per diem compensation and any subsistence and travel allowance authorized by any other law with respect to any regular or extra session of the General Assembly, and service on any State board, agency, commission, standing committee and study commission. (1929, c. 2, s. 1; 1951, c. 23, s. 1; 1965, c. 917; c. 1157, s. 1; 1967, c. 1120; 1969, c. 1278, s. 1; 1971, c. 1200, s. 5; 1973, c. 1482, s. 1; 1977, 2nd Sess., c. 1249, ss. 1, 2; 1979, 2nd Sess., c. 1137, s. 9.1.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective with the convening of the regular session of the 1981 General Assembly, increased the salaries and expense allowances thoughout the section.

The amendment to this section in Acts 1979, c. 838, effective January 1, 1981, noted under this section in the 1979 Cumulative

Supplement, was repealed by Acts 1979, 2nd Sess., c. 1137, s. 9.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 120-3.1. Subsistence and travel allowances for members of the General Assembly. — (a) In addition to compensation for their services, members of the General Assembly shall be paid the following allowances:

(1) A weekly travel allowance for each week or fraction thereof that the General Assembly is in regular or extra session. The amount of the weekly travel allowance shall be calculated for each member by multiplying the actual round-trip mileage from that member's home to the City of Raleigh by the rate per mile allowed to State employees for official travel.

(2) A travel allowance at the rate allowed by statute for State employees whenever the member is traveling as a representative of the General Assembly or of its committees or commissions, whether in or out of session, when such travel has been authorized by the Legislative Services Commission.

(3) A subsistence allowance in the amount of forty-four dollars ($44.00) per day for each day of the period during which the General Assembly remains in session.

(4) A subsistence allowance in the sum of fifty dollars ($50.00) per day for each day on official legislative business, when the General Assembly is not in session, when traveling as a representative of the General Assembly or of its committees or commissions, with the approval of the Legislative Services Commission.

(1979, 2nd Sess., c. 1137, s. 30.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective with the convening of the regular session of the 1981 General Assembly, increased the subsistance allowance in subdivision (3) of subsection (a) from $44.00 to $50.00 per day.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Article 6C.

Review of Administrative Rules.

§ 120-30.26. Administrative Rules Review Committee. — There is created a permanent committee of the Legislative Research Commission to be known as the Administrative Rules Review Committee. The Committee is composed of nine members. On October 1 of each odd-numbered year, the cochairmen of the Legislative Research Commission shall jointly appoint Committee members from the membership of the General Assembly for terms of two years, and the members appointed shall elect one of their number to serve as chairman. The Committee shall perform all of the duties of the Commission with respect to reviewing rules of administrative agencies except as provided in G.S. 120-30.30. (1977, c. 915, s. 1; 1979, c. 1030, s. 3; 1979, 2nd Sess., c. 1314, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "is" for "shall be" and "nine" for "seven" in the second sentence. The amendment also substituted "On October 1 of each odd-numbered year, the cochairmen of the Legislative Research Commission shall jointly appoint committee members" for "On October 1, 1977, and biennially thereafter, the cochairmen of the Commission shall appoint the Committee members" at the beginning of the third sentence, and deleted "so" preceding

"appointed" near the end of the third sentence.

Session Laws 1979, 2nd Sess., c. 1314, s. 3, provides: "Notwithstanding the provisions of G.S. 120-30.26, the new appointments authorized by this act shall be made not later than July 15, 1980. The term of office of a new appointee shall be from time of appointment until October 1, 1981, or until the appointee ceases to be a member of the General Assembly, whichever occurs first."

§ 120-30.27. Meetings of Committee. — The Committee shall meet at least monthly at times and places specified by the chairman. A quorum of the Committee shall consist of the chairman and three other Committee members, or a majority of the Committee, whichever is fewer. The members of the Committee shall be compensated for attending meetings as provided in G.S. 120-30.18. Professional, clerical or other employees required by the Committee shall be provided in accordance with G.S. 120-32. (1977, c. 915, s. 1; 1979, 2nd Sess., c. 1314, s. 2.)

Editor's Note. —
The 1979, 2nd Sess., amendment added the second sentence.

§§ 120-30.36 to 120-30.40: Reserved for future codification purposes.

Article 6D.

Local Government Fiscal Information Act.

§ 120-30.41. Short title. — This act may be cited as the "Local Government Fiscal Information Act." (1979, 2nd Sess., c. 1262, s. 1.)

Editor's Note. — Session Laws 1979, c. 1262, s. 9, makes the act effective January 1, 1981.

§ 120-30.42. Definitions. — For the purposes of this act, "unit of local government" means counties, cities, towns, and incorporated villages, sanitary districts, mosquito control districts, hospital districts, metropolitan sewerage districts, metropolitan water districts, county water and sewer districts, special airport districts, water and sewer authorities, county boards of education and city boards of education. (1979, 2nd Sess., c. 1262, s. 2.)

§ 120-30.43. Purpose. — It is the purpose of this act to provide procedures for the preparation and distribution of fiscal information on bills, resolutions, amendments to bills and resolutions or rules which if enacted or adopted would have a fiscal impact on the units of local government of this State. (1979, 2nd Sess., c. 1262, s. 3.)

§ 120-30.44. Fiscal note defined. — For purposes of this act, "fiscal note" means a realistic statement of the estimated effect on the expenditures or revenues of units of local government of implementing or complying with a proposed bill, resolution or rule. (1979, 2nd Sess., c. 1262, s. 4.)

§ 120-30.45. Fiscal note on legislation. — At the request of the sponsor of any bill or resolution affecting the expenditures or revenues of units of local government of this State, or of the chairman of the committee to which such a measure is referred, or of any of the chairmen of the Local Government

Committees, or of any of the chairmen of the Appropriations, Finance, Rules, or Senate Ways and Means Committees, the Fiscal Research Division shall prepare a fiscal note containing an estimate of the impact of the measure on the finances of the units of local government affected during the ensuing two fiscal years. The Office of State Budget and Management, the Department of Revenue, the Department of the State Treasurer, the Department of the State Auditor, the State department most directly concerned, and, where appropriate, officials of units of local government, upon the request of Fiscal Research Division, shall assist the Fiscal Research Division in the preparation of the fiscal note.

Copies of fiscal notes prepared by the Fiscal Research Division shall be furnished to the sponsor of the bill or resolution, the chairmen of the Local Government Committees, and the chairmen of the Appropriations, Finance, Rules, or the Senate Ways and Means Committees as appropriate. (1979, 2nd Sess., c. 1262, s. 5.)

§ 120-30.46. Fiscal information related to requests for State appropriations. — Any State department, institution, agency, or other authority making requests for State appropriations to fund changes in existing programs or for implementing new programs shall, if such changes or new programs would require local expenditures, incorporate as a part of the information submitted in support of the request a statement of the estimated fiscal effect on the units of local government. (1979, 2nd Sess., c. 1262, s. 6.)

§ 120-30.47. Legislation introduced by request. — Any State department, institution, agency, or other authority requesting a member or members of the General Assembly to introduce legislation which if enacted would have a fiscal impact on the units of local government of this State shall furnish to such member or members, and to the Fiscal Research Division, a fiscal note containing a realistic estimate of the effect of the measure for the ensuing two fiscal periods. (1979, 2nd Sess., c. 1262, s. 7.)

§ 120-30.48. Fiscal impact of administrative actions. — (a) Any agency as defined in G.S. 150A-2(1) which is subject to Article 2 of Chapter 150A of the General Statutes (the rule-making provisions of the Administrative Procedure Act) shall not conduct any public hearing under G.S. 150A-12 on any proposed rule, or amendment or repeal of a rule, which can affect the expenditures or revenues of a unit of local government without first filing a fiscal note with the Fiscal Research Division, Office of State Budget and Management, the North Carolina Association of County Commissioners, the North Carolina League of Municipalities, and any unit of local government or other person which has requested on an annual basis that copies of fiscal notes be sent to it. The fiscal note shall be made available as provided above at the same time as the notice of a public hearing under G.S. 150A-12, provided, that nothing herein shall void the action of the agency if such fiscal note prepared in good faith is erroneous.

(b) This section shall not affect any emergency rule under G.S. 150A-13. (1979, 2nd Sess. c. 1262, s. 8.)

ARTICLE 8.

Elected Officers.

§ 120-37. Elected officers; salaries; staff.

(c) The principal clerks shall be full-time officers. Each principal clerk shall be paid an annual salary of twenty-four thousand four hundred ninety-two dollars ($24,492), payable monthly. The Legislative Services Commission shall review the salary of the principal clerks prior to submission of the proposed operating budget of the General Assembly to the Governor and Advisory Budget Commission and shall make appropriate recommendations for changes in those salaries. Any changes enacted by the General Assembly shall be by amendment to this paragraph.

(1979, 2nd Sess., c. 1137, s. 8.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the annual salary of principal clerks from $22,260 to $24,492.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 14A.

Joint Committee on Pensions and Retirement.

§ 120-111.1. Creation. — A standing committee is hereby created in the House of Representatives to be known as the Committee on Pensions and Retirement, to consist of a minimum of four members to be appointed by the Speaker of the House of Representatives. A standing committee is hereby created in the Senate to be known as the Committee on Pensions and Retirement, to consist of the following members at the minimum, the President pro tempore of the Senate, the Chairmen of the Senate Committees on Appropriations, Finance and Ways and Means. The Committees on Pensions and Retirement of each house of the General Assembly shall hold joint meetings as the Joint Committee on Pensions and Retirement. The Joint Committee on Pensions and Retirement is designated a joint committee of the General Assembly for purposes of Article 5A of Chapter 120 of the General Statutes, entitled "Committee Activity." The Chairman of the Senate Committee on Pensions and Retirement and the Chairman of the House Committee on Pensions and Retirement shall serve as co-chairman of the joint committee. The Committee on Pensions and Retirement of each house has the right to vote separately in the joint committee, and where separate voting is demanded, a majority of the members present and voting in each separate committee is necessary on the affirmative side of an issue before the question is carried. (1979, 2nd Sess., c. 1250, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1250, s. 2, provides: "This act shall become effective upon the adjournment sine die of the 1979 Session of the General Assembly" [June 25, 1980].

§ 120-111.2. Duties. — With respect to public officers and public employees to whom State-administered retirement benefit or pension plans are applicable, the Joint Committee on Pensions and Retirement shall:

(1) Study the benefits, including those available under Social Security and any other federal programs available to the public officers and employees.

(2) Consider all aspects of retirement and pension financing, planning and operation, including the financing of accrued liabilities of each retirement or pension fund, health program, and other fringe benefits.
(3) Request the Governor, the State Treasurer, the State Auditor and any other agency or department head which has information relevant to these committees' study to prepare any reports deemed necessary by the committee.
(4) Recommend legislation which will insure and maintain sound retirement and pension policy for all funds.
(5) Analyze each item of proposed pension and retirement legislation in accordance with Article 15 of Chapter 120 of the General Statutes, "The Retirement Systems Actuarial Note Act."
(6) Study, analyze, and report on related subjects directed to be studied by joint resolution, resolution of either house of the General Assembly, or by direction of the Speaker of the House or President of the Senate. (1979, 2nd Sess., c. 1250, s. 1.)

§ 120-111.3. Analysis of legislation. — Every bill, which creates or modifies any provision for the retirement of public officers or public employees or for the payment of retirement benefits or of pensions to public officers or public employees, shall, upon introduction in either house of the General Assembly, be referred to the Committee on Pensions and Retirement of that house. When the bill is reported out of committee it shall be accompanied by a written report by the Joint Committee on Pensions and Retirement containing, among other matters which the Joint Committee deems relevant, the actuarial note required by Article 15 of Chapter 120 of the General Statutes, and pursuant to the Rules of the General Assembly, and an evaluation of the proposed legislation's actuarial soundness and adherence to sound retirement and pension policy. (1979, 2nd Sess., c. 1250, s. 1.)

§ 120-111.4. Staff and actuarial assistance. — Upon application of the cochairmen of the Joint Committee on Pensions and Retirement, the Legislative Services Commission shall provide staff, including actuarial assistance, to aid the committee in its work. (1979, 2nd Sess., c. 1250, s. 1.)

Article 15.

Retirement Systems Actuarial Note Act.

§ 120-112. Title.

Cross Reference. — As to the Joint Committee on Pensions and Retirement, see §§ 120-111.1 through 120-111.4.

Chapter 122.

Hospitals for the Mentally Disordered.

Article 3.

Admission of Patients; General Provisions; Patients' Rights.

Part 2. Patients' Rights.

§ 122-55.6. Right to treatment.

Editor's Note. — For note discussing the application of the constitutional right of privacy to a mental patient's refusal of psychotropic medication, see 57 N.C.L. Rev. 1481 (1979).

Article 4.

Voluntary Admission.

§ 122-56.1. Declaration of policy.

Applied in In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

§ 122-56.3. Procedure for voluntary admissions.

Applied in In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

§ 122-56.7. Judicial determination.

Before a court can concur with a voluntary commitment for an incompetent, it must find that the incompetent is mentally ill or an inebriate and is in need of further treatment at the treatment facility. In re Hiatt, 45 N.C. App. 318, 262 S.E.2d 685 (1980).

Article 5A.

Involuntary Commitment.

§ 122-58.1. Declaration of policy.

Purpose of Involuntary Commitment Proceeding. — It is manifest from the declaration of policy in this section and from a reading of the entire Article that one of the purposes, indeed the primary purpose of an involuntary commitment proceeding is to protect the person who, after due process, has been found to be both mentally ill and imminently dangerous by placing such a person in more protected environment where the danger may be minimized and his treatment facilitated; in a real sense the proceeding is an important step in his medical and psychiatric treatment. In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

Applied in In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

§ 122-58.3. Authority of law-enforcement officer.

Effect of § 8-53. — For lengthy discussion of statutory provisions which make it manifest that the physician's role in involuntary commitment proceedings was not intended to be inhibited by § 8-53, see In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

§ 122-58.4. Duties of magistrate.

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

§ 122-58.6. District court hearing.

Effect of § 8-53. — For lengthy discussion of statutory provisions which make it manifest that the physician's role in involuntary commitment proceedings was not intended to be inhibited by § 8-53, see In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

§ 122-58.7. Length of involuntary commitment; rehearing.

Effect of § 8-53. — For lengthy discussion of statutory provisions which make it manifest that the physician's role in involuntary commitment proceedings was not intended to be inhibited by § 8-53, see In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

Service of Record on Appeal on Special Advocate for State. — Where, at a mental health hearing session, the State was represented by an appointed special advocate, which special advocate was present at the hearing, had knowledge of the evidence offered, and was qualified to determine for the State if the proposed record on appeal was accurate, he alone was the "attorney of record" within the meaning of Appellate Rule 26, and the proposed record on appeal should be served on him as special advocate rather than the Attorney General. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

§ 122-58.11. Rehearings.

Effect of § 8-53. — For lengthy discussion of statutory provisions which make it manifest that the physician's role in involuntary commitment proceedings was not intended to be inhibited by § 8-53, see In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

§ 122-58.18. Special emergency procedure for violent persons.

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

§ 122-58.22. Short-term treatment for alcoholic in need of care.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 122-58.23. Long-term residential care for alcoholic who has not progressed in treatment.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 122-58.24. Representation of State's interest by Attorney General.

Staff Attorney Is Opposing Counsel of Record. — Under this section, the staff attorney of the Attorney General who represents the State at a commitment hearing is the opposing counsel of record within the meaning of Appellate Rule 26 and should be served with the proposed record on appeal as required by Appellate Rule 11 where the respondent appeals from an order of commitment. And if the State is not the petitioner in the involuntary commitment proceeding, the proposed record on appeal should be served an opposing counsel of record for the petitioner by the respondent appellant. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

ARTICLE 7B.

Public Intoxication.

§ 122-65.11. Assistance to person who is intoxicated in public.

Editor's Note. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Chapter 122A.

North Carolina Housing Finance Agency.

Sec.

122A-3. Definitions.
122A-8. Bonds and notes.

§ 122A-3. Definitions. — The following words and terms, unless the context clearly indicates a different meaning, shall have the following respective meanings:

(1) "Bonds" or "notes" mean the bonds or the bond anticipation notes or construction loan notes authorized to be issued by the Agency under this Chapter;

(8) "Mortgage" or "mortgage loan" means a mortgage loan for residential housing, including, without limitation, a mortgage loan to finance, either temporarily or permanently, the construction, rehabilitation or improvement of residential housing and a mortgage loan insured or guaranteed by the United States or an instrumentality thereof or for which there is a commitment by the United States or an instrumentality thereof to insure such a mortgage;

(1979, 2nd Sess., c. 1238, s. 1.)

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "mean the bonds or the bond anticipation notes or construction loan notes authorized" for "means the bonds or bond anticipation notes authorized" in subdivision (1), and inserted "without limitation" following "including" and "to finance, either temporarily or permanently, the construction, rehabilitation or improvement of residential housing and" following "a mortgage loan" near the beginning of subdivision (8).

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivisions (1) and (8) are set out.

§ 122A-8. Bonds and notes. — The Agency is hereby authorized to provide for the issuance, at one time or from time to time, of not exceeding seven hundred fifty million dollars ($750,000,000) bonds of the Agency to carry out and effectuate its corporate purposes; provided, however, that not more than fifty million dollars ($50,000,000) bonds shall be issued prior to June 30, 1971. The Agency also is hereby authorized to provide for the issuance, at one time or from time to time of (i) bond anticipation notes in anticipation of the issuance of such bonds and (ii) construction loan notes to finance the making or purchase of mortgage loans to sponsors of residential housing for the construction, rehabilitation or improvement of residential housing; provided, however, that the total amount of bonds, bond anticipation notes and construction loan notes outstanding at any one time shall not exceed seven hundred fifty million dollars ($750,000,000) excluding therefrom any bond anticipation notes for the payment of which bonds shall have been issued. The principal of and the interest on such bonds or notes shall be payable solely from the funds herein provided for such payment. Any such notes may be made payable from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, such notes may be paid from any available revenues or assets of the Agency. The bonds or notes of each issue shall be dated and may be made redeemable before maturity at the option of the Agency at such price or prices and under such terms and conditions as may be determined by the Agency. Any such bonds or notes shall bear interest at such rate or rates as may be determined by the Local Government Commission of North Carolina with the approval of the Agency. Notes shall mature at such

time or times not exceeding 10 years from their date or dates and bonds shall mature at such time or times not exceeding 40 years from their date or dates, as may be determined by the Agency. The Agency shall determine the form and manner of execution of the bonds or notes, including any interest coupons to be attached thereto, and shall fix the denomination or denominations and the place or places of payment of principal and interest, which may be any bank or trust company within or without the State. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or notes or coupons attached thereto shall cease to be such officer before the delivery thereof, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. The Agency may also provide for the authentication of the bonds or notes by a trustee or fiscal agent. The bonds or notes may be issued in coupon or in registered form, or both, as the Agency may determine, and provision may be made for the registration of any coupon bonds or notes as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds or notes of any bonds or notes registered as to both principal and interest, and for the interchange of registered and coupon bonds or notes. Upon the filing with the Local Government Commission of North Carolina of a resolution of the Agency requesting that its bonds and notes be sold, such bonds or notes may be sold in such manner, either at public or private sale, and for such price as said Commission shall determine to be for the best interest of the Agency and best effectuate the purposes of this Chapter provided that such sale shall be approved by the Agency.

The proceeds of any bonds or notes shall be used solely for the purposes for which issued and shall be disbursed in such manner and under such restrictions, if any, as the Agency may provide in the resolution authorizing the issuance of such bonds or notes or in the trust agreement hereinafter mentioned securing the same.

Prior to the preparation of definitive bonds, the Agency may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Agency may also provide for the replacement of any bonds or notes which shall become mutilated or shall be destroyed or lost.

Bonds or notes may be issued under the provisions of this Chapter without obtaining, except as otherwise expressly provided in this Chapter, 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 Chapter and the provisions of the resolution authorizing the issuance of such bonds or notes or the trust agreement securing the same. (1969, c. 1235, s. 8; 1973, ch. 1296, s. 48; 1979, c. 844; 1979, 2nd Sess., c. 1238, s. 2.)

Editor's Note. —
The 1979, 2nd Sess., amendment rewrote the second sentence of the first paragraph.

Chapter 126.

State Personnel System.

Article 1.

State Personnel System Established.

Sec.

126-5. Employees subject to Chapter; exemptions.

ARTICLE 1.

State Personnel System Established.

§ 126-2. State Personnel Board.

Cited in Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); Jones v. Department of Human Resources, 44 N.C. App. 116, 260 S.E.2d 654 (1979).

§ 126-4. Powers and duties of State Personnel Board.

Alteration of Approved Policies. — Since the Governor must approve policies established by the Commission under this statute, the Commission does not have the power to alter such policies by ad hoc decision in each case; the Commission must follow the policy which has been set and as it was approved by the Governor. Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979).

§ 126-5. Employees subject to Chapter; exemptions.

(b) The provisions of this Chapter shall not apply to public school superintendents, principals, teachers, and other public school employees. The Governor and the Lieutenant Governor may, at any time, in their discretion, exempt from the application of the provisions of this Chapter, employees of their respective offices, by means of a letter to the State Personnel Director designating those employees.

(1979, 2nd Sess., c. 1137, s. 40.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "this" for "the" preceding "Chapter" and inserted "and" preceding "other public school" in the first sentence of subsection (b), deleted "and employees of the offices of the Governor and Lieutenant Governor" at the end of that sentence and added the second sentence of subsection (b).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subsections were not changed by the amendment, only subsection (b) is set out.

ARTICLE 2.

Salaries and Leave of State Employees.

§ 126-7. Performance salary increases for State employees.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

ARTICLE 7.

The Privacy of State Employee Personnel Records.

§ 126-22. Personnel files not subject to inspection under § 132-6.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 126-24. Confidential information in personnel files; access to such information.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

ARTICLE 8.

Employee Appeals of Grievances and Disciplinary Action.

§ 126-34. Grievance appeal for State employees.

Cited in Jones v. Department of Human Resources, 44 N.C. App. 116, 260 S.E.2d 654 (1979).

§ 126-35. Written statement of reason for disciplinary action.

"Just Cause". — This section provides that no employee may be reduced in "pay or position, except for just cause"; this section does not define "just cause," but giving the words their ordinary meaning, it would include either the undertaking of a private investigation of a superior or the refusal to answer questions in an investigation within a particular department. Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979).

Failure to Restore Benefits of Employment Held Arbitrary. — Where the State Personnel Commission determined that petitioner was wrongfully discharged from his employment in that the charges against him were not proved and he was not given warnings prior to his dismissal, was dismissed without notice and was not given a statement of the reason for his dismissal and written notice of his appeal rights, the Commission's action in failing to restore to petitioner all benefits of his employment as if he had never been dismissed was arbitrary and inconsistent with the commission's own findings. Jones v. Department of Human Resources, 44 N.C. App. 116, 260 S.E.2d 654 (1979).

§ 126-37. Personnel Director to investigate, hear and recommend settlement; Personnel Commission to hear or review findings and make binding decision.

No Restoration without Finding of Wrongful Treatment. — The provision of this section giving the State Personnel Commission the authority to restore a State employee to a position from which he has been demoted must be read in conjunction with § 126-35, which forbids demotion without just cause, and the Commission therefore does not have the power

to restore a State employee to a position from which he had been demoted without some finding that the employee had been treated wrongfully. Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979).

Failure to Restore Benefits of Employment Held Arbitrary. — Where the State Personnel Commission determined that petitioner was wrongfully discharged from his employment in that the charges against him were not proved and he was not given warnings prior to his dismissal, was dismissed without notice and was not given a statement of the reason for his dismissal and written notice of his appeal rights, the Commission's action in failing to restore to petitioner all benefits of his employment as if he had never been dismissed was arbitrary and inconsistent with the commission's own findings. Jones v. Department of Human Resources, 44 N.C. App. 116, 260 S.E.2d 654 (1979).

Chapter 128.

Offices and Public Officers.

Article 3.

Retirement System for Counties, Cities and Towns.

Sec.

128-27. Benefits.

ARTICLE 3.

Retirement System for Counties, Cities and Towns.

§ 128-27. Benefits.

(e) Reexamination of Beneficiaries Retired on Account of Disability. — Once each year during the first five years following retirement of a member on a disability allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination, such examination to be made at the place of residence of said beneficiary or other place mutually agreed upon, by the physician or physicians designated by the Board of Trustees. Should any disability beneficiary who has not yet attained the age of 60 years refuse to submit to at least one medical examination in any such year by a physician or physicians designated by the Board of Trustees, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one year, all his rights in and to his pension may be revoked by the Board of Trustees.

(1) Should the medical board report and certify to the Board of Trustees that such disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference between his retirement allowance and the average final compensation, and should the Board of Trustees concur in such report, then the amount of his pension shall be reduced to an amount which, together with his annuity and the amount earnable by him, shall equal the amount of his average final compensation. Should his earning capacity be later changed, the amount of his pension may be further modified: Provided, that the new pension shall not exceed the amount of the pension originally granted nor an amount which, when added to the amount earnable by the beneficiary together with his annuity, equals the amount of his average final compensation. A beneficiary restored to active service at a salary less than the average final compensation shall not become a member of the Retirement System.

(2) Should a disability beneficiary under the age of 62 years be restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the contribution rate which is applicable during his subsequent membership service. Any prior service certificate on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect, and in addition, upon his subsequent retirement he shall be credited with all his service as a member, but should he be restored to active service on or after the attainment of the age of 50 years his pension upon subsequent retirement shall not exceed the sum of the pension which he was receiving immediately prior to his last restoration after June 30, 1951,

and the pension that he would have received on account of his service since such last restoration had he entered service at that time as a new entrant.

(3) Notwithstanding the foregoing, a member retired on a disability retirement allowance who is restored to service and subsequently retires on or after July 1, 1971, shall be entitled to an allowance not less than the allowance prescribed in a below reduced by the amount in b below.

a. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement and his creditable service after he was restored to service.

b. The actuarial equivalent of the retirement benefits he previously received.

(4) As a condition to the receipt of the disability retirement allowance provided for in G.S. 128-27(d) (d1) (d2) and (d3) each member retired on a disability retirement allowance shall, on or before April 15 of each calendar year, provide the Board of Trustees with a statement of his or her income received as compensation for services, including fees, commissions or similar items, and income received from business, for the previous calendar year. Such statement shall be filed on a form as required by the Board of Trustees.

The Director of the State Retirement Systems shall contact any State or federal agency which can provide information to substantiate the statement required to be submitted by this subdivision and may enter into agreements for the exchange of information.

(g) Election of Optional Allowance. — With the provision that until the first payment on account of any benefit becomes normally due, or his first retirement check has been cashed, any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent of such retirement allowance in a reduced allowance payable throughout life under the provisions of one of the Options set forth below. The election of Option two or Option three or nomination of the person thereunder shall be revoked if such person nominated dies prior to the date the first payment becomes normally due or the first retirement check has been cashed. Such election may be revoked by the member prior to the date the first payment becomes normally due or his first retirement check has been cashed. Provided, however, any member having elected Options two, three, five, or six and nominated his or her spouse to receive a retirement allowance upon the member's death may, after divorce from his or her spouse, revoke the nomination and elect a new option, effective on the first day of the month in which the new option is elected, providing for a retirement allowance computed to be the actuarial equivalent of the retirement allowance in effect immediately prior to the effective date of the new option.

Option one. (a) In the Case of a Member Who Retires prior to July 1, 1965. — If he dies before he has received in annuity payments the present value of his annuity as it was at the time of his retirement, the balance shall be paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees or, if none, to his legal representative.

(b) In the Case of a Member Who Retires on or after July 1, 1965. — If he dies within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less one one-hundred-twentieth thereof for each month for which he has received a retirement allowance payment, shall be paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees or, if none, to his legal representative; or

Option two. Upon his death his reduced retirement allowance shall be continued throughout the life of and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement, provided that if the person selected is other than his spouse the reduced retirement allowance payable to the member shall not be less than one half of the retirement allowance without optional modification which would otherwise be payable to him; or

Option three. Upon his death, one half of his reduced retirement allowance shall be continued throughout the life of, and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement; or

Option four. Adjustment of Retirement Allowance for Social Security Benefits. — Until the first payment on account of any benefit becomes normally due, any member may elect to convert his benefit otherwise payable on his account after retirement into a retirement allowance of equivalent actuarial value of such amount that with his benefit under Table II of the Federal Social Security Act, he will receive, so far as possible, approximately the same amount per year before and after the earliest age at which he becomes eligible, upon application therefor, to receive a social security benefit. A member who makes an election in accordance with this option shall be deemed to have made a further election of Option one above.

Option five. The member may elect:

(1) To receive a reduced retirement allowance under the conditions of Option two or Option three, as provided for above, with the modification that if both he and the person nominated die within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less 1/120th thereof for each month for which a retirement allowance has been paid, shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees; or

(2) To receive a reduced retirement allowance during his life with provisions for some other benefit to be paid after his death in accordance with a plan submitted to and approved by the Board of Trustees.

Option six. A member may elect either Option two or Option three with the added provision that in the event the designated beneficiary predeceases the member, the retirement allowance payable to the member after the designated beneficiary's death shall be equal to the retirement allowance which would have been payable had the member not elected the option.

(x) Increases in Benefits to Those Persons Who Were Retired prior to July 1, 1978. — From and after July 1, 1980, the monthly benefits to or on account of persons who commenced receiving benefits from the system prior to July 1, 1978, shall be increased by a percentage in accordance with the following schedule:

Period in Which Benefits Commenced	Percentage
on or before June 30, 1959	10%
July 1, 1959, to June 30, 1968	7%
July 1, 1968, to June 30, 1978	2%

This increase shall be calculated independent of any other post-retirement increase, without compounding, otherwise payable from and after July 1, 1980. (1939, c. 390, s. 7; 1945, c. 526, s. 4; 1951, c. 274, ss. 4-6; 1955, c. 1153, ss. 4-6; 1957, c. 855, ss. 1-4; 1959, c. 491, ss. 5-8; 1961, c. 515, ss. 2, 6, 7; 1965, c. 781; 1967, c. 978, ss. 3-7; 1969, c. 442, ss. 7-14; c. 898; 1971, c. 325, ss. 12-16, 19; c. 326, ss. 3-7; 1973, c. 243, ss. 3-7; c. 244, ss. 1-3; c. 816, s. 4; c. 994, ss. 2, 4; c. 1313, ss. 1, 2; 1975, c. 486, ss. 1, 2; c. 621, ss. 1, 2; 1975, 2nd Sess., c. 983, ss. 126-128; 1977, 2nd Sess., c. 1240; 1979, c. 862, ss. 2, 6, 7; c. 974, s. 1; c. 1063, s. 2; 1979, 2nd Sess., c. 1196, s. 2; cc. 1213, 1240.)

Editor's Note. — The first 1979, 2nd Sess., amendment, effective July 1, 1980, added the last sentence of the first paragraph of subsection (g).

The second 1979, 2nd Sess., amendment, effective July 1, 1980, added subdivision (4) of subsection (e).

The third 1979, 2nd Sess., amendment, effective July 1, 1980, added subsection (x).

As the rest of this section was not changed by the amendment, only subsections (e), (g) and (x) are set out.

Chapter 130.

Public Health.

Article 12.

Sanitary Districts.

Sec.

130-152.2. Additional validation of extension of boundaries of districts.

Sec.

130-154. Further validation of bonds of districts.

Article 2.

Administration of Public Health Law.

§ 130-9. Powers and duties of the Department of Human Resources and Commission for Health Services.

Cross Reference. — As to duty to approve long-term contracts entered into by counties, cities and towns with private persons, firms or corporations for the disposal of solid waste, see § 153A-299.4.

Article 3.

Local Health Departments.

§ 130-17. Powers and duties of local boards; expenditures.

For Issuance of Permit. — A local board of health may not impose a fee pursuant to subsection (e) of this section for the issuance of a permit pursuant to authority delegated by the Department of Human Resources. See opinion of Attorney General to Mr. Thomas R. Dundon, Health Director, Forsyth County, Aug. 13, 1979.

Article 7.

Vital Statistics.

§ 130-46. Death registration.

Cited in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

§ 130-64. Register of deeds to preserve copies of birth and death records.

Cited in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

§ 130-69. Violations of Article; penalty.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 12.

Sanitary Districts.

§ 130-124. Procedure for incorporating district.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

§ 130-152.2. Additional validation of extension of boundaries of districts. — All actions and proceedings prior to April 1, 1979, had and taken by the State Board of Health or any officer or representative thereof, any board of county commissioners and any sanitary district board for the purpose of annexing additional territory to any sanitary district or with respect to any such annexation are hereby in all respects legalized, ratified, approved, validated and confirmed, notwithstanding any lack of power to take such actions or proceedings or any defect or irregularity in any such actions or proceedings and any and all such sanitary districts are hereby declared to be lawfully extended to include such additional territory and as so extended to be in all respects legal and valid sanitary districts. (1959, c. 415, s. 2; 1975, c. 712, s. 1; 1979, 2nd Sess., c. 1079, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "April 1, 1979" for "May 1, 1971" near the beginning of the section.

§ 130-154. Further validation of bonds of districts. — All actions and proceedings prior to April 1, 1979, had and taken and all elections held in any sanitary district in the State or in any district purporting to be a legal sanitary district by virtue of the purported authority and acts of any county board of commissioners or the State Board of Health or any other board, officer or agency for the purpose of authorizing, selling or issuing the bonds of any such sanitary district, and all such bonds at any time issued by or on behalf of any such sanitary district, are hereby in all respects legalized, ratified, approved, validated and confirmed, and all such bonds are hereby declared to be the legal and binding obligations of such sanitary district. (1953, c. 596, s. 3; 1957, c. 1357, s. 1; 1979, 2nd Sess., c. 1079, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "April 1, 1979" for "April 1, 1957" near the beginning of the section.

ARTICLE 13B.

Solid Waste Management.

§ 130-166.16. Definitions.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

ARTICLE 13C.

Ground Absorption Sewage Disposal System Act of 1973.

§ 130-166.22. Short title.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

ARTICLE 13D.

North Carolina Drinking Water Act.

§ 130-166.39. Short title.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

§ 130-166.54. Penalties; remedies; contested cases.

The erroneous reference to § 130-166.52 contained in this section can be construed to correctly cite § 130-166.53. See opinion of Attorney General to Dr. Sarah T. Morrow, Secretary, Department of Human Resources, Dec. 14, 1979.

ARTICLE 18.

Midwives.

Repeal of Article. —
Session Laws 1979, 2nd Sess., c. 1173, s. 2, transferred this Article from the list of statutes repealed effective July 1, 1981, under § 143-34.12, to the list of statutes under § 143-34.13, which makes the repeal now effective July 1, 1983.

ARTICLE 30.

Nursing Home Patients' Bill of Rights.

§ 130-264. Legislative intent.

Editor's Note. —
For article, "The Ombudsman, or Citizens' Defender — The North Carolina Experience," see 10 N.C. Cent. L.J. 227 (1979).

Chapter 131.

Public Hospitals.

Article 7.

McCain Hospital.

Sec.
131-53.1 to 131-55. [Repealed.]
131-57, 131-58. [Repealed.]
131-60. [Repealed.]

Article 8.

Western North Carolina Hospital.

131-61, 131-61.1. [Repealed.]

Sec.
131-72 to 131-74. [Repealed.]

Article 9.

Eastern North Carolina Hospital.

131-76, 131-77. [Repealed.]
131-80, 131-81. [Repealed.]

Article 2.

Hospitals in Counties, Townships, and Towns.

§ 131-9. Trustees to have control, and to make regulations; lease of hospital to nonprofit association or corporation.

Cited in Paine v. Brunswick County Hosp. Auth., 470 F. Supp. 28 (E.D.N.C. 1978).

§ 131-20. All persons subject to hospital regulations.

Cited in Paine v. Brunswick County Hosp. Auth., 470 F. Supp. 28 (E.D.N.C. 1978).

§ 131-22. Regulation of physicians and nurses practicing in hospitals.

Waiver of Procedural Irregularities in Revocation of Privileges. — A doctor's letter to the chairman of the county hospital authority stating that she was formally withdrawing her application for permanent medical staff privileges and a hearing in relation to the loss of those privileges was effective as a waiver of any procedural irregularities that might have existed in connection with the revoking and failing to renew staff privileges. Paine v. Brunswick County Hosp. Auth., 470 F. Supp. 28 (E.D.N.C. 1978).

Article 2A.

The County Hospital Act.

§ 131-28.19. Regulation of physicians and nurses.

Waiver of Procedural Irregularities in Revocation of Privileges. — A doctor's letter to the chairman of the county hospital authority stating that she was formally withdrawing her application for permanent medical staff privileges and a hearing in relation to the loss of those privileges was effective as a waiver of any procedural irregularities that might have existed in connection with the revoking and failing to renew staff privileges. Paine v. Brunswick County Hosp. Auth., 470 F. Supp. 28 (E.D.N.C. 1978).

ARTICLE 7.

McCain Hospital.

§§ 131-53.1 to 131-55: Repealed by Session Laws 1979, c. 838, s. 45, effective July 1, 1980.

Editor's Note. — Session Laws 1979, c. 839, s. 45, as originally enacted, made the repeal conditional upon the termination of the Board of Directors of the North Carolina Specialty Hospitals under the provisions of the "Sunset Law," Session Laws 1977, c. 712. Session Laws 1979, 2nd Sess., c. 1245, amended § 143B-173 so as to terminate the Board of Directors of the North Carolina Specialty Hospitals and also amended Session Laws 1979, c. 838, s. 45, so as to delete the provision making the repeal conditional.

§§ 131-57, 131-58: Repealed by Session Laws 1979, c. 838, s. 45, effective July 1, 1980.

Editor's Note. — Session Laws 1979, c. 839, s. 45, as originally enacted, made the repeal conditional upon the termination of the Board of Directors of the North Carolina Specialty Hospitals under the provisions of the "Sunset Law," Session Laws 1977, c. 712. Session Laws 1979, 2nd Sess., c. 1245, amended § 143B-173 so as to terminate the Board of Directors of the North Carolina Specialty Hospitals and also amended Session Laws 1979, c. 838, s. 45, so as to delete the provision making the repeal conditional.

§ 131-60: Repealed by Session Laws 1979, c. 838, s. 45, effective July 1, 1980.

Editor's Note. — Session Laws 1979, c. 839, s. 45, as originally enacted, made the repeal conditional upon the termination of the Board of Directors of the North Carolina Specialty Hospitals under the provisions of the "Sunset Law," Session Laws 1977, c. 712. Session Laws 1979, 2nd Sess., c. 1245, amended § 143B-173 so as to terminate the Board of Directors of the North Carolina Specialty Hospitals and also amended Session Laws 1979, c. 838, s. 45, so as to delete the provision making the repeal conditional.

ARTICLE 7A.

North Carolina Specialty Hospitals.

§ 131-60.6. Control of certain hospitals transferred to Department of Human Resources; power of secretary to regulate.

Editor's Note. —

The Board of Directors of the North Carolina Specialty Hospitals was terminated by Session Laws 1979, 2nd Sess., c. 1245. The 1979, 2nd Sess., act, amended the enacting clause of Session Laws 1979, c. 836, s. 46, quoted in the 1979 Cumulative Supplement, so as to delete everything preceding the words "effective July 1, 1980."

ARTICLE 8.

Western North Carolina Hospital.

§§ 131-61, 131-61.1: Repealed by Session Laws 1979, c. 838, s. 45, effective July 1, 1980.

Editor's Note. — Session Laws 1979, c. 839, s. 45, as originally enacted, made the repeal conditional upon the termination of the Board of Directors of the North Carolina Specialty Hospitals under the provisions of the "Sunset Law," Session Laws 1977, c. 712. Session Laws 1979, 2nd Sess., c. 1245, amended § 143B-173 so as to terminate the Board of Directors of the North Carolina Specialty Hospitals and also amended Session Laws 1979, c. 838, s. 45, so as to delete the provision making the repeal conditional.

§§ 131-72 to 131-74: Repealed by Session Laws 1979, c. 838, s. 45, effective July 1, 1980.

Editor's Note. — Session Laws 1979, c. 839, s. 45, as originally enacted, made the repeal conditional upon the termination of the Board of Directors of the North Carolina Specialty Hospitals under the provisions of the "Sunset Law," Session Laws 1977, c. 712. Session Laws 1979, 2nd Sess., c. 1245, amended § 143B-173 so as to terminate the Board of Directors of the North Carolina Specialty Hospitals and also amended Session Laws 1979, c. 838, s. 45, so as to delete the provision making the repeal conditional.

Article 9.

Eastern North Carolina Hospital.

§§ 131-76, 131-77: Repealed by Session Laws 1979, c. 838, s. 45, effective July 1, 1980.

Editor's Note. — Session Laws 1979, c. 839, s. 45, as originally enacted, made the repeal conditional upon the termination of the Board of Directors of the North Carolina Specialty Hospitals under the provisions of the "Sunset Law," Session Laws 1977, c. 712. Session Laws 1979, 2nd Sess., c. 1245, amended § 143B-173 so as to terminate the Board of Directors of the North Carolina Specialty Hospitals and also amended Session Laws 1979, c. 838, s. 45, so as to delete the provision making the repeal conditional.

§§ 131-80, 131-81: Repealed by Session Laws 1979, c. 838, s. 45, effective July 1, 1980.

Editor's Note. — Session Laws 1979, c. 839, s. 45, as originally enacted, made the repeal conditional upon the termination of the Board of Directors of the North Carolina Specialty Hospitals under the provisions of the "Sunset Law," Session Laws 1977, c. 712. Session Laws 1979, 2nd Sess., c. 1245, amended § 143B-173 so as to terminate the Board of Directors of the North Carolina Specialty Hospitals and also amended Session Laws 1979, c. 838, s. 45, so as to delete the provision making the repeal conditional.

Article 13A.

Hospital Licensing Act.

§ 131-126.1. Definitions and distinctions.

Cited in American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979).

ARTICLE 18.

Certificate of Need Law.

§ 131-175. Findings of fact.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Chapter 133.

Public Works.

Article 1.

General Provisions.

§ 133-1.1. Certain buildings involving public funds to be designed, etc., by architect or engineer.

Application of Subsection (g). — Subsection (g) of this section, which requires plans and specifications for the construction or repair of certain public buildings to include a "color schedule" for "job-installed finishes", applies to all finished material incorporated into the construction work at the site, such as paint, wall covering, flooring, tile, laminates and paneling. See opinion of Attorney General to Mr. Edward E. Hollowell, Attorney for Wake County Hospital, Inc., Dec. 12, 1979.

Article 2.

Relocation Assistance.

§ 133-6. Declaration of purpose.

Quoted in Henry v. North Carolina Dept. of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979).

§ 133-8. Moving and related expenses.

Relocation Payments in Discretion of Agency Officials. — Subsections (a), (b), and (c) of this section commit the matter of relocation assistance payments absolutely and solely to the discretion to the officials of the agency involved. This section confers no right either to receive such payments or to demand that the amount of payments, if granted, be calculated other than as the agency officials determine. Henry v. North Carolina Dept. of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979).

§ 133-14. Regulations and procedures.

Quoted in Henry v. North Carolina Dept. of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979).

§ 133-17. Administrative payments.

Quoted in Henry v. North Carolina Dept. of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979).

Chapter 134A.

Youth Services.

Article 3.

Commitment and Care.

§ 134A-25. Criminal offense to aid escapes.

Quoted in State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Article 5.

Detention Services.

§ 134A-37. Regional detention services.

Cited in State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Chapter 135.

Retirement System for Teachers and State Employees; Social Security.

Article 1.

Retirement System for Teachers and State Employees.

Sec.
135-5. Benefits.

Article 3.

Other Teacher, Employee Benefits.

135-33. Hospital and medical insurance.

Article 4.

Uniform Judicial Retirement Act of 1973.

Sec.
135-56.1. Creditable service for judges and justices.
135.65. Post-retirement increases in allowances.

Article 1.

Retirement System for Teachers and State Employees.

§ 135-1. Definitions.

Cross Reference. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see § 143-34.1.

§ 135-5. Benefits.

(b6) Service Retirement Allowance of Members Retiring on or after July 1, 1977, but prior to July 1, 1980. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1977, but prior to July 1, 1980, 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-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 ($^1/_4$ 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 service 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, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b7) Service Retirement Allowance of Members Retiring on or after July 1, 1980. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1980, 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 hundredths percent (1.57%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) 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 (1/4 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.

(3) 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 service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2) above.

(4) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(e) Reexamination of Beneficiaries Retired for Disability. — Once each year during the first five years following retirement of a member on a disability retirement allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination, such examination to be made at the place of residence of said beneficiary or other place mutually agreed upon, by a physician or physicians designated by the Board of Trustees. Should any disability beneficiary who has not yet attained the age of 60 years refuse to submit to at least one medical examination in any such year by a physician or physicians designated by the Board of Trustees, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one year all his rights in and to his pension may be revoked by the Board of Trustees.

(1) Should the medical board report and certify to the Board of Trustees that such disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference between his retirement allowance and the average final compensation, and should the Board of Trustees concur in such report, then the amount of his pension shall be reduced to an amount which, together with his annuity and the amount earnable by him, shall equal the amount of his average final compensation. Should his earning capacity be later changed, the amount of his pension may be further modified: Provided, that the new pension shall not exceed the amount of the pension originally granted nor an amount which, when added to the amount earnable by the beneficiary together with his annuity, equals the amount of his average final compensation. A beneficiary restored to active service at a salary less than the average final compensation shall not become a member of the Retirement System.

(2) Should a disability beneficiary under the age of 60 years be restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute

thereafter at the same rate he paid prior to disability; provided that, on and after July 1, 1971, if a disability beneficiary under the age of 62 years is restored to active service at a compensation not less than his average final compensation, 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. Any such prior service certificate on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect, and in addition, upon his subsequent retirement he shall be credited with all his service as a member, but should he be restored to active service on or after the attainment of the age of 50 years his pension upon subsequent retirement shall not exceed the sum of the pension which he was receiving immediately prior to his last restoration and the pension that he would have received on account of his service since his last restoration had he entered service at the time as a new entrant.

(3) Notwithstanding the foregoing, a member retired on a disability retirement allowance who is restored to service and subsequently retires on or after July 1, 1971, shall be entitled to an allowance not less than the allowance described in a below reduced by the amount in b below:

a. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement and his creditable service after he was restored to service.

b. The actuarial equivalent of the retirement benefits he previously received.

(4) As a condition to the receipt of the disability retirement allowance provided for in G.S. 135-5(d), (d1), (d2) and (d3) each member retired on a disability retirement allowance shall, on or before April 15 of each calendar year, provide the Board of Trustees with a statement of his or her income received as compensation for services, including fees, commissions or similar items, and income received from business, for the previous calendar year. Such statement shall be filed on a form as required by the Board of Trustees.

The Director of the State Retirement System shall contact any State or federal agency which can provide information to substantiate the statement required to be submitted by this subdivision and may enter into agreements for the exchange of information.

(g) Election of Optional Allowance. — With the provision that until the first payment on account of any benefit becomes normally due, or his first retirement check has been cashed, any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent of such retirement allowance in a reduced allowance payable throughout life under the provisions of one of the options set forth below. The election of Option 2 or Option 3 or nomination of the person thereunder shall be revoked if such person nominated dies prior to the date the first payment becomes normally due or until the first retirement check has been cashed. Such election may be revoked by the member prior to the date the first payment becomes normally due or until his first retirement check has been cashed. Provided, however, any member having elected Options 2, 3, 5, or 6 and nominated his or her spouse to receive a retirement allowance upon the member's death may, after divorce from his or her spouse, revoke the nomination and elect a new option, effective on the first day of the month in which the new option is elected, providing for a retirement allowance computed to be the actuarial equivalent of the retirement allowance in effect immediately prior to the effective date of the new option.

Option 1. (a) In the Case of a Member Who Retires prior to July 1, 1963. — If he dies before he has received in annuity payments the present value of his annuity as it was at the time of his retirement, the balance shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees.

(b) In the Case of a Member Who Retires on or after July 1, 1963. — If he dies within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less 1/120th thereof for each month for which he has received a retirement allowance payment, shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees; or

Option 2. Upon his death his reduced retirement allowance shall be continued throughout the life of and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement, provided that if the person selected is other than his spouse the reduced retirement allowance payable to the member shall not be less than one half of the retirement allowance without optional modification which would otherwise be payable to him; or

Option 3. Upon his death, one half of his reduced retirement allowance shall be continued throughout the life of, and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement; or

Option 4. Adjustment of Retirement Allowance for Social Security Benefits. — Until the first payment on account of any benefit becomes normally due, any member may elect to convert his benefit otherwise payable on his account after retirement into a retirement allowance of equivalent actuarial value of such amount that with his benefit under Title II of the Federal Social Security Act, he will receive, so far as possible, approximately the same amount per year before and after the earliest age at which he becomes eligible, upon application therefor, to receive a social security benefit. A member who makes an election in accordance with this option shall be deemed to have made a further election of Option 1 above.

Option 5. The member may elect:

(1) To receive a reduced retirement allowance under the conditions of Option 2 or Option 3, as provided for above, with the modification that if both he and the person nominated die within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less 1/120th thereof for each month for which a retirement allowance has been paid, shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees; or

(2) To receive a reduced retirement allowance during his life with provision for some other benefit to be paid after his death in accordance with a plan submitted to and approved by the Board of Trustees.

Option 6. A member may elect either Option 2 or Option 3 with the added provision that in the event the designated beneficiary predeceases the member, the retirement allowance payable to the member after the designated beneficiary's death shall be equal to the retirement allowance which would have been payable had the member not elected the option.

(bb) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1979, which shall become payable on July 1, 1980, as otherwise provided in G.S. 135-5(o), shall be the current maximum four percent (4%) plus an additional three percent (3%) computed on the retirement allowance prior to any increase authorized by paragraph (x4) of this section. Provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(cc) Increases in Benefits to Those Persons Who Were Retired Prior to July 1, 1977. — From and after July 1, 1980, the monthly benefits to or on account of persons who commenced receiving benefits from the system prior to July 1, 1977, shall be increased by a percentage in accordance with the following schedule:

Period in Which Benefits Commenced	Percentage
On or before June 30, 1963	10%
July 1, 1963, to June 30, 1968	7%
July 1, 1968, to June 30, 1977	2%

This increase shall be calculated before monthly retirement allowances, as of July 1, 1980, have been increased for all cost-of-living increases allowed for the same period.

(1979, 2nd Sess., c. 1137, ss. 63, 64, 66; c. 1196, s. 1; c. 1216.)

Editor's Note. —

The first 1979, 2nd Sess., amendment, effective July 1, 1980, added "but prior to July 1, 1980" in the catchline and text of subsection (b6) and added subsection (b7) and added subsections (bb) and (cc).

The second 1979, 2nd Sess., amendment, effective July 1, 1980, added the last sentence of the first paragraph of subsection (g).

The third 1979, 2nd Sess., amendment, effective July 1, 1980, added subdivision (4) of subsection (e).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subsections were not changed by the amendments, only subsections (b6), (b7), (e), (g), (bb) and (cc) are set out.

§ 135-14. Pensions of certain teachers and State employees.

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1137, s. 67, provides:

"Pensions paid to public school teachers and State employees with 20 or more years of service, who separated from service prior to July 1, 1941, and who had attained the age of 65 years on or before August 1, 1959, shall be increased by ten percent (10%)."

ARTICLE 2.

Coverage of Governmental Employees under Title II of the Social Security Act.

§ 135-19. Declaration of policy.

Cross Reference. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see § 143-34.1.

ARTICLE 3.

Other Teacher, Employee Benefits.

§ 135-32. Health benefits division.

Cross Reference. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see § 143-34.1.

§ 135-33. Hospital and medical insurance. — (a) The Board of Trustees of the Retirement System shall formulate, establish and administer for

teachers and State employees, including all employees of the General Assembly except participants in the Legislative Intern Program and pages, a program of hospital and medical care 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. In awarding any contracts pursuant to this section, the Board shall give consideration to the total or overall cost of complete family coverage by teachers and State employees.

(b) Notwithstanding any provisions of this section to the contrary, any member who was vested at the time of retirement, his surviving spouse, and the surviving spouse of a teacher or State employee who is receiving a survivor's alternate benefit under G.S. 135-5(m), may obtain or continue the same hospital and medical care insurance and benefits for himself and/or dependents available to active teachers and State employees until they become ineligible for such insurance or benefits due to reasons other than retirement, provided such member or dependents or surviving spouse agrees to and pays by a deduction from retirement benefits or by other appropriate method an amount not greater than the cost of such benefits for active teachers and State employees, adjusted for any appropriation by the General Assembly for qualified individuals.

(c) The Board of Trustees shall offer any members who were vested at the time of retirement, their spouses or surviving spouses, and the surviving spouses of teachers and State employees who are receiving a survivor's alternate benefit under G.S. 135-5(m), who are eligible for Medicare a plan of supplemental insurance designed to provide them with medical and hospital insurance benefits comparable to the benefits offered active teachers and State employees, if such member or surviving spouse agrees to and pays by a deduction from retirement benefits or other appropriate method the cost of such benefits, adjusted for any appropriation by the General Assembly for qualified individuals.

(d) For the support of the benefits made available to any member vested at the time of retirement, their spouses or surviving spouses, and the surviving spouses of employees who are receiving a survivor's alternate benefit under G.S. 135-5(m) of those associations listed in G.S. 135-27(a), licensing and examining boards under G.S. 135-1.1, the North Carolina Art Society, Inc., and the North Carolina Symphony Society, Inc., each association, organization or board shall pay to the Retirement System the full cost of providing these benefits under this section as determined by the Board of Trustees of the Retirement System. In addition, each association, organization or board shall pay to the Retirement System an amount equal to the cost of the benefits provided under this section to presently retired members of each association, organization or board since such benefits became available at no cost to the retired member. (1971, c. 1009, s. 1; 1973, c. 746; c. 1278, s. 1; 1975, c. 754, s. 1, c. 24; 1977, 2nd Sess., c. 1136, s. 18.1; 1979, c. 972, s. 5; 1979, 2nd Sess., c. 1217.)

Cross Reference. — As to payment of the cost of the insurance programs made available by this section to retired members of certain associations, organizations and boards, see § 143-34.1.

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, designated the first, second, and third sentences as subsection (a), designated the fourth sentence as subsection (b), deleted "And provided further" at the beginning of the fifth sentence and designated the sentence as subsection (c), and added subsection (d).

ARTICLE 4.

Uniform Judicial Retirement Act of 1973.

§ 135-50. Short title and purpose.

Cross Reference. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see § 143-34.1.

§ 135-56.1. Creditable service for judges and justices. — Creditable service for judges and justices of the General Court of Justice shall include, in addition to service as a judge, justice, or district attorney, service as a judge of any lawfully constituted court of this State inferior to the superior court, excluding time served as a justice of the peace, as magistrate or as mayor's court judge. Creditable service shall also include service as clerk of superior court when the service extended for four years or more. Provided, service allowed by this section shall be included in the creditable service of a judge or justice only if such service is purchased prior to retirement at a cost calculated as hereinafter stated less the transfer of any accumulated contributions from either the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System. All purchases of service credits allowed under the provisions of this section shall equal the full cost of the service credits calculated on the basis of the assumption used for purposes of the actuarial valuation of the System's liabilities and shall take into account the additional retirement allowance arising on account of additional service credit commencing at the earliest age at which such member could retire on an unreduced retirement allowance as determined by the System's Board of Trustees upon the advice of the consulting actuary. (1977, c. 1120, s. 1; 1979, 2nd Sess., c. 1227.)

Editor's Note. —
The 1979, 2nd Sess., amendment, rewrote this section.

§ 135-65. Post-retirement increases in allowances.

(c) Increases in benefits paid to members retired prior to July 1, 1979. Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1979, which shall become payable on July 1, 1980, shall be the current maximum four percent (4%) plus an additional six percent (6%) to a total of ten percent (10%) for the year 1980-81 only. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary. (1973, c. 640, s. 1; 1979, c. 838, s. 104; 1979, 2nd Sess., c. 1137, s. 69.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, added subsection (c).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As subsections (a) and (b) were not changed by the amendment, they are not set out.

ARTICLE 4A.

Uniform Solicitorial Retirement Act of 1974.

§ 135-77. Short title and purpose.

Cross Reference. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see § 143-34.1.

ARTICLE 4B.

Uniform Clerks of Superior Court Retirement Act of 1975.

§ 135-84. Short title and purpose.

Cross Reference. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see § 143-34.1.

Chapter 136.

Roads and Highways.

Article 2.

Powers and Duties of Department and Board of Transportation.

Sec.
136-41.1. Appropriation to municipalities; allocation of funds.

Article 2.

Powers and Duties of Department and Board of Transportation.

§ 136-41.1. Appropriation to municipalities: allocation of funds. — (a) There is hereby annually appropriated out of the State Highway Fund a sum equal to the net amount after refunds that was produced during the fiscal year by a one cent (1¢) tax on each gallon of motor fuel as taxed by G.S. 105-434 and 105-435, to be allocated in cash on or before October 1 of each year to the cities and towns of the State in accordance with the following formula:

Seventy-five percent (75%) of said funds shall be distributed among the several eligible municipalities of the State in the percentage proportion that the population of each eligible municipality bears to the total population of all eligible municipalities according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. This annual estimation of population shall include increases in the population within the municipalities caused by annexations accomplished through July 1 of the calendar year in which these funds are distributed. Twenty-five percent (25%) of said fund shall be distributed among the several eligible municipalities of the State in the percentage proportion that the mileage of public streets in each eligible municipality which does not form a part of the highway system bears to the total mileage of the public streets in all eligible municipalities which do not constitute a part of the State highway system.

It shall be the duty of the mayor of each municipality to report to the Department of Transportation such information as it may request for its guidance in determining the eligibility of each municipality to receive funds by virtue of G.S. 136-41.1 and 136-41.2 and in determining the amount of allocation to which each is entitled. Upon failure of any municipality to make such report within the time prescribed by the Department of Transportation, the Department of Transportation may disregard such defaulting unit in making said allotment.

The funds to be allocated under this section shall be paid in cash to the various eligible municipalities on or before October 1 each year after March 15, 1951. Provided that eligible municipalities are authorized within the discretion of their governing bodies to enter into contracts for the purpose of maintenance, repair, construction, reconstruction, widening, or improving streets of such municipalities at any time after January 1 of any calendar year in total amounts not to exceed ninety percent (90%) of the amount received by such municipality during the preceding fiscal year, in anticipation of the receipt of funds under this section during the next fiscal year, to be paid for out of such funds when received.

No allocation to cities and towns shall be made under the provisions of this section from the one cent (1¢) per gallon additional tax on gasoline imposed by Chapter 46 of the Session Laws of 1965, unless and until said additional one cent (1¢) per gallon gasoline tax produces funds which are not needed for or committed by said Chapter 46 of the Session Laws of 1965, to the payment of

the principal of or the interest on the secondary road bonds issued pursuant to the provisions of said Chapter 46 of the Session Laws of 1965. The Department of Transportation is hereby authorized to withhold each year an amount not to exceed one percent (1%) of the total amount appropriated in G.S. 136-41.1 for the purpose of correcting errors in allocations: Provided, that the amount so withheld and not used for correcting errors will be carried over and added to the amount to be allocated for the following year.

The word "street" as used in this section is hereby defined as any public road maintained by a municipality and open to use by the general public, and having an average width of not less than 16 feet. In order to obtain the necessary information to distribute the funds herein allocated, the Department of Transportation may require that each municipality eligible to receive funds under G.S. 136-41.1 and 136-41.2 submit to it a statement, certified by a registered engineer or surveyor of the total number of miles of streets in such municipality. The Department of Transportation may in its discretion require the certification of mileage on a biennial basis.

(b) For purposes of this section and of G.S. 136-41.2 and 136-41.3, urban service districts defined by the governing board of a consolidated city-county in which street services are provided by the consolidated city-county shall be considered eligible municipalities, and the allocations to be made thereby shall be made to the government of the consolidated city-county. (1951, c. 260, s. 2; c. 948, ss. 2, 3; 1953, c. 1127; 1957, c. 65, s. 11; 1963, c. 854, ss. 1, 2; 1969, c. 665, ss. 1, 2; 1971, c. 182, ss. 1-3; 1973, c. 476, s. 193; c. 500, s. 1; c. 507, s. 5; c. 537, s. 6; 1975, c. 513; 1977, c. 464, s. 7.1; 1979, 2nd Sess., c. 1137, s. 50.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "State Budget Officer" for "Secretary of the North Carolina Department of Administration" at the end of the first sentence in the second paragraph.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

Article 3.

State Highway System.

§ 136-63. Change of abandonment of roads.

Quoted in Whitehead Community Club v. Hoppers, 43 N.C. App. 671, 260 S.E.2d 94 (1979).

Article 4.

Neighborhood Roads, Cartways, Church Roads, etc.

§ 136-67. Neighborhood public roads.

Applied in Whitehead Community Club v. Hoppers, 43 N.C. App. 671, 260 S.E.2d 94 (1979).

ARTICLE 9.

Condemnation.

§ 136-104. Vesting of title and right of possession; recording memorandum or supplemental memorandum of action.

Editor's Note. —
For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

§ 136-111. Remedy where no declaration of taking filed; recording memorandum of action.

Editor's Note. —
For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

§ 136-112. Measure of damages.

For discussion of formulas for measuring just compensation in partial taking cases, see Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979).

The burden of proving the existence and the amount of any special or general benefits under this section is on the condemnor. North Carolina Bd. of Transp. v. Rand, 299 N.C. 476, 263 S.E.2d 565 (1980).

Value of Remainder of Land Where, etc. —

In accord with 1st paragraph in 1979 Cum. Supp. See Board of Transp. v. Terminal Whse. Corp., 44 N.C. App. 81, 260 S.E.2d 696 (1979).

Damages Not Resulting from Taking Not Compensable. — Proper application of the measure of damages rule prescribed by subdivision (1) of this section does not make compensable elements of damages to the landowner's remaining property which would not be compensable in the absence of any taking and which do not flow directly from the use to which the land taken is put. Such damages, if any, are shared by other property owners in the vicinity and occur without reference to whether any portion of the landowner's property has been condemned. In short, they do not result from the taking of a portion of the landowner's property. Board of Transp. v. Terminal Whse. Corp., 44 N.C. App. 81, 260 S.E.2d 696 (1979).

Instruction in Partial Taking Case. — If there is a jury trial on the issue of compensation in a partial taking case the trial court is required to instruct the jury only on the before and after value rule set forth in subdivision (1) of this section. Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979).

No Restriction of Real Estate Appraisers' Methods. — This section speaks only to the exclusive measure of damages to be employed by the "commissioners, jury or judge." It in no way attempts to restrict expert real estate appraisers to any particular method of determining the fair market value of property either before or after condemnation. Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979).

The judge is required to instruct the jury to use the standard set out in subdivision (1) of this section — and that standard only — in computing damages. However, expert real estate appraisers need not use the before and after formula in determining damages. Expert real estate appraisers should be given latitude in determining the value of property. Duke Power Co. v. Mom'n' Pops Ham House, Inc., 43 N.C. App. 308, 258 S.E.2d 815 (1979).

Chapter 138.

Salaries, Fees and Allowances.

Sec.

138-5. Per diem and allowances of State boards, etc.
138-6. Travel allowances of State officers and employees.
138-8. Moving expenses of State employees.

§ 138-5. Per diem and allowances of State boards, etc.

(c) Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 29, effective July 1, 1980.

(1979, 2nd Sess., c. 1137, s. 29.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, repealed subsection (c), which provided for subsistence and travel allowances for members of the Advisory Budget Commission. For present provisions as to subsistence and travel allowances of the Advisory Budget Commission, see § 143-4.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subsections were not changed by the amendment, they are not set out.

§ 138-6. Travel allowances of State officers and employees. — (a) Travel on official business by the officers and employees of State departments, institutions and agencies which operate from funds deposited with the State Treasurer shall be reimbursed at the following rates:

(1) For transportation by privately owned automobile, twenty-five cents (25¢) per mile of travel and the actual cost of tolls paid;

(2) For bus, railroad, Pullman, or other conveyance, actual fare;

(3) In lieu of actual expenses incurred for subsistence, payment of thirty-five dollars ($35.00) per day when traveling in-state or forty-five dollars ($45.00) per day when traveling out-of-state. When travel involves less than a full day (24-hour period), a reasonable prorated amount shall be paid in accordance with regulations and criteria which shall be promulgated and published by the Director of the Budget.

(4) For convention registration fees not to exceed thirty dollars ($30.00) per convention.

(1979, 2nd Sess., c. 1137, s. 26.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the mileage in subdivision (a) (1) from 19¢ to 25¢, and increased the amounts in the first sentence of subdivision (a) (3) from $31.00 to $35.00 and from $39.00 to $45.00.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As subsection (b) was not changed by the amendment, it is not set out.

The proration of the daily subsistence allowance as promulgated pursuant to subdivision (a) (3) of this section by the Division of State Budget, for the reimbursement of State employees for expenses incurred for lodging and meals when travel involves less than a twenty-four hour period, is applicable to occupational licensing board members. See opinion of Attorney General to Mr. Henry L. Bridges, State Auditor, Nov. 4, 1979.

§ 138-8. Moving expenses of State employees. — Subject to the rules and regulations promulgated by the Office of State Budget and Management and approved by the Director of the Budget, any department, institution or agency of the State is hereby authorized to pay, from funds available to it, reasonable expenses for transporting the household goods of an employee and members of his household when the transfer of the employee is considered by the Director of the Budget to be in the best interests of the State. (1977, c. 802, s. 15; 1979, 2nd Sess., c. 1137, s. 27.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" near the beginning of the section.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

Travel Expenses of Members of Occupational Licensing Boards. — This section does not authorize the payment of actual travel expenses to members of occupational licensing boards, over and above the amounts provided in the schedule in § 138-6(a) (3) for officers and employees of State departments. See opinion of Attorney General to Mr. Henry L. Bridges, State Auditor, Sept. 14, 1979.

Chapter 140.

State Art Museum; Symphony and Art Societies.

Article 1.

North Carolina Museum of Art.

Sec.

140-1 to 140-5.1. [Recodified.]

Article 1A.

Art Museum Building Commission.

140-5.7 to 140-5.11. [Reserved.]

Article 1B.

North Carolina Museum of Art.

140-5.12. Agency of State; functions.

Sec.

140-5.13. Board of Trustees — establishment; members; selection; quorum; compensation; officers; meetings.

140-5.14. Board of Trustees — powers and duties.

140-5.15. Director of Museum of Art; appointment; dismissal; powers and duties; staff.

140-5.16. Gifts; special fund; exemption from taxation.

140-5.17. State Art Museum Building Commission.

Article 1.

North Carolina Museum of Art.

§§ 140-1 to 140-5.1: Recodified as §§ 140-5.12 to 140-5.17.

Editor's Note. — This Article was rewritten by Session Laws 1979, 2nd Sess., c. 1306, s. 1, effective July 1, 1980, and has been recodified as Article 1B, §§ 140-5.12 to 140-5.17.

Article 1A.

Art Museum Building Commission.

§§ 140-5.7 to 140-5.11: Reserved for future codification purposes.

Article 1B.

North Carolina Museum of Art.

§ 140-5.12. Agency of State; functions. — The North Carolina Museum of Art is an agency of the State of North Carolina within the Department of Cultural Resources. The functions of the North Carolina Museum of Art shall be to acquire, preserve, and exhibit works of art for the education and enjoyment of the people of the State, and to conduct programs of education, research, and publication designed to encourage an interest in and an appreciation of art on the part of the people of the State. (1961, c. 731; 1979, 2nd Sess., c. 1306, s. 1.)

Editor's Note. — This Article is Article 1 of this Chapter as rewritten by Session Laws 1979, 2nd Sess., c. 1306, s. 1, effective July 1, 1980, and recodified. Where appropriate, the historical citations to the former Article have been added to corresponding sections in the Article as rewritten.

§ 140-5.13. Board of Trustees — establishment; members; selection; quorum; compensation; officers; meetings. — (a) It is the duty of the

Department of Cultural Resources to develop policy and to establish and enforce standards for resources, services, and programs involving the arts and the cultural aspects of the lives of the citizens of North Carolina. To attain these objectives, there is hereby established within the Department of Cultural Resources the Board of Trustees of the North Carolina Museum of Art.

(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 eight members;
(2) The North Carolina Art Society, Incorporated, shall elect four members;
(3) The North Carolina Museum of Art Foundation, Incorporated, shall elect four members;
(4) The Board of Trustees of the North Carolina Museum of Art shall elect four members;
(5) The President of the Senate shall appoint one member; and
(6) The Speaker of the House of Representatives shall appoint one member of the House of Representatives.

All regular appointments or elections except those by the President of the Senate or the Speaker of the House 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 President of the Senate and the Speaker of the House of Representatives shall be for the then current legislative term, and no appointee of the President of the Senate or of the Speaker of the House may be appointed to more than two consecutive terms of two years.

(c) Every vacancy 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 members 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) One member shall be appointed by the President of the Senate to serve for the remainder of the then current legislative term.

(7) One member of the House of Representatives shall be appointed by the Speaker of the House of Representatives to serve for the remainder of his legislative term.

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.

(e) Any member of the Board of Trustees may be removed from office by the authority that appointed or elected that member for misfeasance, malfeasance, or nonfeasance in office. In the case of an appointment made by the Governor, removal shall be made in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

(f) A public officer who is appointed or elected to serve on the Board of Trustees shall be deemed to serve thereon as a trustee ex officio and his duties as a trustee shall be deemed additional duties of his primary public office.

(g) The Board of Trustees shall have a chairman, a vice-chairman, and such other officers as the Board deems necessary. The chairman shall be designated by the Governor from among the members of the Board. The vice-chairman shall be elected by and from among the members of the board. The chairman and vice-chairman shall be chosen for terms of two years or for so long as they are members of the Board, whichever is the shorter period. The Director of the North Carolina Museum of Art shall serve as Secretary to the Board of Trustees and shall attend all meetings, except when the Board is considering issues related to the Director's performance of duties.

(h) The Board of Trustees shall meet at least once in each quarter. The Board may hold special meetings at any time and place within the State at the call of the chairman. The chairman may call a special meeting at his discretion, and he shall call a special meeting upon the written request of a majority of the authorized membership of the Board of Trustees.

(i) A majority of the authorized membership of the Board of Trustees shall constitute a quorum for the transaction of business.

(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. Legislative members of the Board of Trustees shall receive from funds available to the Department of Cultural Resources subsistence and travel allowances at the rates authorized by G.S. 120-3.1. 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.

(k) All clerical and administrative services required by the Board of Trustees shall be supplied by the office of the Director of the North Carolina Museum of Art. (1979, 2nd Sess., c. 1306, s. 1.)

§ 140-5.14. Board of Trustees — powers and duties. — The Board of Trustees shall be the governing body of the North Carolina Museum of Art and shall have the following powers and duties:

(1) To adopt bylaws for its own government;

(2) To adopt policies, rules, and regulations for the conduct of the North Carolina Museum of Art;

(3) To prescribe the powers and duties of the Director of the North Carolina Museum of Art, consistent with the provisions of this Article;

(4) To establish such advisory boards and committees as it may deem advisable;

(5) To advise the Secretary of Cultural Resources with respect to inspecting, appraising, obtaining attributions and evaluations of, transporting, exhibiting, lending, storing, and receiving upon consignment or upon loan of statuary, paintings, and other works of art of any and every kind and description that are worthy of acquisition, preservation, and exhibition by the North Carolina Museum of Art;

(6) To advise the Secretary of Cultural Resources on the care, custody, storage, and preservation of all works of art acquired or received upon consignment or loan by the North Carolina Museum of Art;

(7) After consultation with the Secretary of Cultural Resources, on behalf of and in the name of the North Carolina Museum of Art, to acquire by purchase, gift, or will, absolutely or in trust, from individuals, corporations, the federal government, or from any other source, money, works of art, or other property which may be retained, sold, or otherwise used to promote the purposes of the North Carolina Museum of Art as provided in G.S. 140-5.12. The net proceeds of the sale of all property acquired under the provisions of this paragraph shall be deposited in the State Treasury to the credit of the "The North Carolina Museum of Art Special Fund";

(8) After consultation with the Secretary of Cultural Resources, to exchange works of art owned by the North Carolina Museum of Art for other works of art which, in the opinion of the Board, would improve the quality, value, or representative character of the art collection of the Museum;

(9) After consultation with the Secretary of Cultural Resources, to sell any work of art owned by the North Carolina Museum of Art if the Board finds that it is in the best interest of the Museum to do so, unless such sale would be contrary to the terms of acquisition. The net proceeds of each such sale, after deduction of the expenses attributable to that sale, shall be deposited in the State treasury to the credit of "The North Carolina Museum of Art Special Fund," and shall be used only for the purchase of other works of art. No work of art owned by the North Carolina Museum of Art may be pledged or mortgaged;

(10) To make a biennial report to the Governor and the General Assembly on the activities of the Board of Trustees and of the North Carolina Museum of Art;

(11) To adopt, amend, and rescind rules and regulations consistent with the provisions of this Article. All rules and regulations heretofore adopted by the Art Commission shall remain in full force and effect unless and until repealed or superseded by action of the Board. All rules and regulations adopted by the Board shall be enforced by the Department of Cultural Resources;

(12) To determine the sites for expansion of the North Carolina Museum of Art with the approval of the Governor and Council of State and the North Carolina State Capital Planning Commission. (1979, 2nd Sess., c. 1306, s. 1.)

§ 140-5.15. Director of Museum of Art; appointment; dismissal; powers and duties; staff. — (a) The Secretary of Cultural Resources shall appoint the Director of the North Carolina Museum of Art from a list of not fewer than two nominees recommended by the Board of Trustees of the North Carolina Museum of Art.

(b) The Secretary of Cultural Resources may dismiss the Director unless two thirds of the authorized membership of the Board of Trustees shall vote to reverse that action in accordance with the following procedure: Upon dismissal of the Director, the Secretary shall give to the chairman of the Board of Trustees written notice of that action. This notice shall be sent to the chairman of the Board within 10 days after the Secretary makes a final decision on dismissal. The chairman shall promptly communicate the notice of dismissal to all other Board members. Board action to consider reversal of the Secretary's decision shall be taken at a regular or special meeting called pursuant to G.S. 140-5.13(h). Reversal of the Secretary's order of dismissal may be effected only by resolution adopted by an affirmative vote of two thirds of the authorized membership of the Board of Trustees at a meeting held within 30 days after the chairman of the Board receives from the Secretary written notice of dismissal of the Director. All ex officio members of the Board shall be entitled to vote on this question. The failure of two thirds of the authorized membership of the Board of Trustees to vote to reverse the Secretary's order of dismissal within 30 days after the chairman of the Board receives from the Secretary written notice of dismissal of the Director shall be deemed an affirmance of that order by the Board. A decision by the Board of Trustees to affirm or reverse the Secretary's order of dismissal shall be deemed a final decision of the Department of Cultural Resources. An appeal from the final agency decision shall be taken pursuant to Chapter 150A of the General Statutes.

(c) The salary of the Director shall be fixed by the Governor with the approval of the Advisory Budget Commission after receiving the recommendation of the Board of Trustees.

(d) The Director shall have the following powers and duties:

(1) Under the supervision of the Board of Trustees, to direct and administer the North Carolina Museum of Art in accordance with the policies, rules, and regulations adopted by the Board of Trustees;

(2) To employ such persons as are necessary to perform the functions of the North Carolina Museum of Art and are provided for in the budget of the Museum and to promote, demote, and dismiss such persons in accordance with State personnel policies, rules, and regulations. This paragraph shall not apply to associate directors and curators;

(3) To serve as director of collections of the North Carolina Museum of Art;

(4) To serve as Secretary to the Board of Trustees.

(e) The Director, associate directors, and curators shall be exempt from the provisions of the State Personnel Act. The Board of Trustees shall adopt, subject to the approval of the Secretary of Cultural Resources, rules and regulations governing the employment, promotion, demotion, and dismissal of associate directors and curators. (1961, c. 731; 1973, c. 476, s. 38; 1979, 2nd Sess., c. 1306, s. 1.)

§ 140-5.16. Gifts; special fund; exemption from taxation. — (a) All gifts of money to the North Carolina Museum of Art and all interest earned thereon shall be paid into the State treasury and maintained as a fund to be designated "The North Carolina Museum of Art Special Fund."

(b) All gifts made to the North Carolina Museum of Art shall be exempt from every form of taxation including, but not by way of limitation, ad valorem, intangible, gift, inheritance, and income taxation. (1961, c. 731; 1979, 2nd Sess., c. 1306, s. 1.)

§ 140-5.17. State Art Museum Building Commission. — No provision of this Article shall to any extent abrogate or diminish the powers and duties of the State Art Museum Building Commission, provided for in Article 1A of Chapter 140 and in Part 3, Article 2, of Chapter 143B of the General Statutes. (1979, 2nd Sess., c. 1306, s. 1.)

Chapter 143.

State Departments, Institutions, and Commissions.

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143-166. Law-Enforcement Officers' Benefit and Retirement Fund.

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Article 1.

Executive Budget Act.

§ 143-1. Scope and definitions. — This Article shall be known, and may be cited, as "The Executive Budget Act." Whenever the word "Director" is used herein, it shall be construed to mean "Director of the Budget." Whenever the word "Commission" is used herein, it shall be construed to mean "Advisory Budget Commission," if the context shows that it is used with reference to any power or duty belonging to the Office of State Budget and Management and to be performed by it, but it shall mean when used otherwise any State agency, and any other agency, person or commission by whatever name called, that uses or expends or receives any State funds. "State funds" are hereby defined to mean any and all moneys appropriated by the General Assembly of North Carolina, or moneys collected by or for the State, or any agency thereof, pursuant to the authority granted in any of its laws. (1925, c. 89, s. 1; 1929, c. 100, s. 1; 1957, c. 269, s. 2; 1979, 2nd Sess., c. 1137, s. 37.)

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" in the third sentence.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-2. Purposes. — It is the purpose of this Article to vest in the Governor of the State a direct and effective supervision of all agencies, institutions, departments, bureaus, boards, commissions, and every State agency by whatsoever name now or hereafter called, including the same power and supervision over such private corporations and persons and organizations of all kinds that may receive, pursuant to statute, any funds either appropriated by, or collected for, the State of North Carolina, or any of its departments, boards, divisions, agencies, institutions and commissions; for the efficient and economical administration of all agencies, institutions, departments, bureaus, boards, commissions, persons or corporations that receive or use State funds; and for the initiation and preparation of a balanced

budget of any and all revenues and expenditures for each session of the General Assembly.

The Governor shall be ex officio Director of the Budget. The purpose of this Article is to include within the powers of the Office of State Budget and Management all agencies, institutions, departments, bureaus, boards, and commissions of the State of North Carolina under whatever name now or hereafter known, and the change of the name of such agencies hereafter shall not affect or lessen the powers and duties of the Office of State Budget and Management in respect thereto.

The test as to whether an institution, department, agency, board, commission, or corporation or person is included within the purpose and powers and duties of the Director of the Budget shall be whether such agency or person receives for use, or expends, any of the funds of the State of North Carolina, including funds appropriated by the General Assembly and funds arising from the collection of fees, taxes, donations appropriative, or otherwise.

Notwithstanding the general language in this Article the expenditure of funds by or under the supervision and control of the State Auditor and the State Treasurer for their respective departments shall not, except as provided in G.S. 143-25, be subject to the powers of the Director of the Budget or the Office of State Budget and Management, it being intended that the State Auditor and the State Treasurer shall be independent of any fiscal control exercised by the Director of the Budget and shall be subject only to such control as may be exercised by the Advisory Budget Commission. (1925, c. 89, s. 2; 1929, c. 100, s. 2; 1955, c. 578, s. 1; c. 743; 1957, c. 269, ss. 1, 2; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" in three places.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-3.1. Transfer of functions. — Effective July 1, 1955, or as soon thereafter as practical but not later than July 1, 1956, the functions of preaudit of State agency expenditures, issuance of warrants on the State Treasurer for same, and maintenance of records pertaining to these functions shall be transferred from the Auditor's office to the Director of the Budget. All books, papers, reports, files and other records of the Auditor's office pertaining to and used in the performance of these functions shall be transferred to the Office of State Budget and Management, and office machinery and equipment used primarily in the performance of these functions shall be transferred to the Office of State Budget and Management. The Governor, with the advice and consent of the Advisory Budget Commission, is authorized to determine and declare the effective date of the transfer of these functions and to do all things necessary to effect an orderly and efficient transfer; and the Governor, with the advice and consent of the Advisory Budget Commission, is further authorized to transfer to the Office of State Budget and Management the unused portion of such funds as may have been appropriated to the Auditor's office for the 1955-57 biennium for the performance of the functions and duties transferred to the Director of the Budget under the provisions of this section. (1955, c. 578, s. 2; 1957, c. 269, s. 2; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" in three places

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-3.2. Issuance of warrants upon State Treasurer. — Upon the transfer of functions from the Auditor's Office to the Director of the Budget, as provided in G.S. 143-3.1, the Director of the Budget shall have the exclusive responsibility for the issuance of all warrants for the payment of money upon the State Treasurer; and to carry out this responsibility the Director shall designate a State Disbursing Officer whose duties shall be performed as a function of the Office of State Budget and Management. All warrants upon the State Treasurer shall be signed by the State Disbursing Officer, who before issuing same shall determine the legality of payment and the correctness of the accounts; provided that the State Auditor and the State Treasurer shall have the exclusive authority to issue all warrants for the operation of their respective department and such warrants shall be paid by the State Treasurer from the appropriations provided therefor; and provided further, that when considered expedient, due to its size or location, a State agency may upon approval of the Director of the Budget make expenditures through a disbursing account with the State Treasurer. All deposits in such disbursing accounts shall be by the State Disbursing Officer's warrant, and a copy of each voucher making withdrawals from such disbursing accounts, together with such supporting data as may be required by the Director of the Budget, shall be forwarded to the Office of State Budget and Management monthly or otherwise as may be required by the Director of the Budget; provided, however, that a central payroll unit operating under the Office of State Budget and Management may make deposits and withdrawals directly to and from a disbursing account which shall constitute a revolving fund for servicing payrolls passed through such central payroll unit. The State Disbursing Officer is authorized to use a facsimile signature machine in affixing his signature to warrants. The Director of the Budget shall secure insurance and/or a bond in an amount of not less than twenty-five thousand dollars ($25,000) to protect the State of North Carolina against any misuse or unauthorized use of the facsimile signature machine by any person. It is further required that the State Disbursing Officer shall be placed under an official bond in a penal sum to be fixed by the Governor and Advisory Budget Commission at not less than fifty thousand dollars ($50,000). Such official bond shall be a bond with corporate surety and furnished by a company admitted to do business in the State, and the premiums will be paid by the State out of the appropriations to the Office of State Budget and Management. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. (1955, c. 578, s. 2; 1957, c. 269, s. 2; 1961, c. 1194; 1969, c. 844, s. 12; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" in four places.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§§ 143-3.3, 143-3.4: Reserved for future codification purposes.

§ 143-3.5. Coordination of statistics. — It shall be the duty of the Director through the Office of State Budget and Management to coordinate the efforts of governmental agencies in the collection, development, dissemination and analysis of official economic, demographic and social statistics pertinent to State budgeting. The Division shall

(1) Prepare and/or release the official demographic and economic estimates and/or projections for the State;
(2) Conduct special economic and demographic analyses and studies to support statewide budgeting;
(3) Develop and coordinate cooperative arrangements with federal, State and local governmental agencies to facilitate the exchange of data to support State budgeting;
(4) Compile, maintain, and disseminate information about State programs which involve the distribution of State aid funds to local governments including those variables used in their allocation; and,
(5) Develop and maintain in cooperation with other State and local governmental agencies, an information system providing comparative data on resources and expenditures of local governments.

To minimize duplication of effort in collecting or developing new statistical series pertinent to State planning and budgeting, including contractual arrangements, State agencies must submit to the Director of the Budget proposed procedures and funding requirements.

This section shall not apply to the General Assembly, any of its committees and subcommittees, the Legislative Research Commission, the Legislative Services Commission, or any other committee or commission in the legislative branch. (1979, 2nd Sess., c. 1137, s. 41.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1137, s. 79, makes this section effective July 1, 1980.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-4. Advisory Budget Commission. — The Chairman of the Appropriations and the Finance Committees of the House and of the Senate, two other Senators appointed by the President of the Senate, two other Representatives appointed by the Speaker of the House, and four other persons appointed by the Governor shall constitute the Advisory Budget Commission.

The Chairman of the Advisory Budget Commission shall also receive an additional two thousand five hundred dollars ($2,500) payable in quarterly installments, for expenses.

The members of the Advisory Budget Commission shall receive no per diem compensation for their services, but shall receive the same subsistence and travel allowance as are provided for members of the General Assembly for services on interim legislative committees. The Advisory Budget Commission shall be called in conference in January and July of each year, upon 10 days' notice by the Director of the Budget, and at such other times as in the opinion of the Director may be for the public interest.

A vacancy in a seat on the Commission filled by the chairman of a finance or an appropriations committee shall be filled by appointment by the officer who appointed the chairman causing the vacancy. A vacancy in one of the other seats on the Commission shall be filled by appointment by the officer who appointed the person causing the vacancy.

The Advisory Budget Commission alone shall be responsible for recommending to the General Assembly proposed biennial budgets for the requirements of the State Auditor and the State Treasurer, and for such purposes the Advisory Budget Commission shall require the State Auditor and State Treasurer to maintain records and to submit budget requests and periodic reports on their respective departments in the same manner and form as do other State agencies, and may further direct that such requests and reports be filed for safekeeping in the office of the Office of State Budget and Management.

Before the end of each fiscal year or as soon thereafter as practicable, the Advisory Budget Commission shall contract with a competent certified public accountant who is in no way otherwise affiliated with the State or with any agency thereof to conduct a thorough and complete audit of the receipts and expenditures of the State Auditor's office during the immediate fiscal year just ended, and to report to the Advisory Budget Commission on such audit not later than the following October first. A sufficient number of copies of such audit shall be provided so that at least one copy is filed with the Governor's Office, one copy with the Office of State Budget and Management and at least two copies filed with the Secretary of State.

In all matters where action on the part of the Advisory Budget Commission is required by this Article, eight members of the Commission shall constitute a quorum for performing the duties or acts required by the Commission. (1925, c. 89, s. 4; 1929, c. 100, s. 4; 1931, c. 295; 1951, c. 768; 1955, c. 578, s. 3; 1957, c. 269, s. 2; 1973, c. 820, ss. 1-3; 1979, 2nd Sess., c. 1137, ss. 25, 29.1, 37.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, added the second paragraph, rewrote the first sentence of the present third paragraph, which formerly provided that the members of the Commission should receive as full compensation $10.00 per day for each day which they served and their expenses, and substituted "Office of State Budget and Management" for "Department of Administration" in the present fifth and sixth paragraphs.

In rewriting the provisions as to compensation of members of the Commission, the 1979, 2nd Sess., amendatory act referred only to the first sentence of the section, rather than to the first sentence of the second paragraph. However, the context made it plain that the second paragraph was intended, and the amendment has therefore been given effect in the first sentence of the second paragraph of the section as set out above.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-9. Information to be furnished upon request.

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

§ 143-11.1. Photographs to aid in determining needs of institutions requesting permanent improvements. — When the Advisory Budget Commission makes its biennial inspection of the facilities of the State and receives requests from the State institutions in the preparation of the report of the Advisory Budget Commission, the Director of the Budget may secure the services of a qualified photographer to accompany the Advisory Budget Commission on such tour of inspection and to take such photographs as the members of the Advisory Budget Commission may deem advisable in order to assist the Advisory Budget Commission and the members of the General Assembly in obtaining a clear conception of the needs of the various institutions requesting permanent improvements. The Director of the Budget may furnish sufficient copies of such photographs to the General Assembly at the time it is considering requests for appropriations form such institutions to enable each member of the General Assembly to have ready access to such photographs.

For the purpose of securing the service provided in this section, the Director of the Budget is authorized to obtain the services of any regular photographer in the employment of the State and if no such photographer is available the Director of the Budget may secure the services of a professional photographer and the expense of such service shall be borne from the regular funds of the Office of State Budget and Management, and if necessary, additional funds

may be secured from the Contingency and Emergency Fund. (1953, c. 982; 1957, c. 269, ss. 1, 2; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" near the end of the second paragraph.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-19. Help for Director. — The Director is hereby authorized to secure such special help, expert accountants, draftsmen and clerical help as he may deem necessary to carry out his duties under this Article; and shall fix the compensation of all persons employed under this Article; which shall be paid by the State Treasurer upon the warrant of the State Disbursing Officer. A statement in detail of all persons employed, time employed, compensation paid, and itemized statement of all other expenditures made under the terms of this Article, shall be reported to the General Assembly by the Director, and all payments made under this Article shall be charged against and paid out of the emergency contingent fund and/or such appropriations as may be made for the use of the Office of State Budget and Management. (1925, c. 89, s. 20; 1929, c. 100, s. 21; 1957, c. 269, s. 2; 1961, c. 1181, s. 2; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" at the end of the section.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-20. Accounting records and audits. — The Director shall be responsible for keeping a record of the appropriations, allotments, expenditures, and revenues of each State department, institution, board, commission, officer, or other agency in any manner handling State funds. These records shall be kept in summary form, or in as much detail as the Director may deem advisable. Audits of the records of the State Auditor and the State Treasurer for the periods preceding the transfer of preaudit and related functions from the Auditor's office to the Director of the Budget may be accomplished by the Office of State Budget and Management at the direction of the Director of the Budget. (1925, c. 89, s. 22; 1929, c. 100, s. 22; 1955, c. 578, s. 5; 1957, c. 269, s. 2; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" near the end of the last sentence.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-27.1: Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 43, effective July 1, 1980.

§ 143-28. All State agencies under provisions of this Article. — It is the intent and purpose of this Article that every department, institution, bureau, division, board, commission, State agency, person, corporation, or undertaking, by whatsoever name now or hereafter called, that expends money appropriated by the General Assembly or money collected by or for such departments, institutions, bureaus, boards, commissions, persons, corporations, or agencies, under any general law of this State, shall be subject to and under the control

of every provision of this Article. Any power expressed in this Article or necessarily implied from the language hereof or from the nature and character of the duties imposed, in addition to the powers and duties heretofore expressly conferred herein, shall be held and construed to be given hereby to the end that any and all duties herein imposed and made and all purposes herein expressed may be fully performed and completely accomplished, and to that end this Article shall be liberally construed. Provided, that notwithstanding the general language in this Article the expenditure of funds by or under the supervision and control of the State Auditor and the State Treasurer for their respective departments shall not, except as provided in G.S. 143-25, be subject to the powers of the Director of the Budget or the Office of State Budget and Management, it being intended that the State Auditor and the State Treasurer shall be independent of any fiscal control exercised by the Director of the Budget, and shall be subject only to such control as may be exercised by the Advisory Budget Commission. (1925, c. 89, s. 28; 1929, c. 100, s. 29; 1955, c. 578, s. 8; 1957, c. 269, s. 2; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" near the middle of the last sentence.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-28.1. Highway Fund appropriation. — Notwithstanding any other provisions of this Article, the appropriations made from the Highway Fund for highway construction and maintenance are subject to the following provisions.

(1) Cash Flow Funding for Highway Construction and Maintenance. — Highway maintenance and construction funds shall be budgeted, expended and accounted for on a "cash flow" basis. Pursuant to this end, highway maintenance and construction contracts shall be planned and limited so payments due at any time will not exceed the cash available to pay them.

(2) Appropriations are for Payments and Contract Commitments to be Made in the Appropriation Fiscal Year. — The appropriations provided for by the Appropriations Act for highway maintenance and construction are for maximum payments estimated to be made during the appropriation fiscal year and for maximum contracting authority for future years. Highway maintenance and construction contracts shall be scheduled so that the total contract payments and other expenditures charged to projects in the fiscal year for each highway maintenance and construction appropriation item will not exceed the current appropriations provided by the General Assembly and unspent prior appropriations made by the General Assembly for the particular appropriation item.

(3) Payments Subject to Availability of Funds — Retainage Fully Funded — 5% Cash Balance Required. — The annual appropriations for highway maintenance and construction provided for by the Appropriations Act shall be expended only to the extent that sufficient funds are available in the Highway Fund. The Department of Transportation shall fully fund retainage from maintenance and construction contracts in the year in which the work is performed, and in addition shall maintain an available cash balance at the end of each month equal to at least five percent (5%) of the unpaid balance of the total maintenance and construction contract obligations. In the event this cash position is not maintained, no further construction and maintenance contract commitments shall be entered into until the cash balance has been regained.

(4) Anticipation of Revenues. — In awarding State highway construction and maintenance contracts requiring payments beyond a biennium, the Director of the Budget may anticipate revenues as authorized and certified by the General Assembly, to continue contract payments for up to seventy-five percent (75%) of the revenues which are estimated for the first fiscal year of the succeeding biennium and which are not required for other budget items. Up to fifty percent (50%) of the revenues not required for other budget items may be anticipated for the second and subsequent fiscal years' contract payments. After making provisions for federal-aid matching funds, the amounts remaining for State highway construction shall be utilized for the primary, secondary and urban system highways in the same proportionate amounts as are provided in the appropriations for the current fiscal year.

(5) Amounts Obligated — Payments Subject to the Availability of Funds — Termination of Contracts. — Highway maintenance and construction appropriations may be obligated in the amount of allotments made to the Department of Transportation by the Office of State Budget and Management for the estimated payments for maintenance and construction contract work to be performed in the appropriation fiscal year. The allotments shall be multi-year allotments and shall be based on estimated revenues and shall be subject to the maximum contract authority contained in subdivision (2) above. Payment for highway maintenance and construction work performed pursuant to contract in any fiscal year other than the current fiscal year will be subject to appropriations by the General Assembly. Highway maintenance and construction contracts shall contain a schedule of estimated completion progress and any acceleration of this progress shall be subject to the approval of the Department of Transportation provided funds are available. The State reserves the right to terminate or suspend any highway maintenance or construction contract and any highway maintenance or construction contract shall be so terminated or suspended if funds will not be available for payment of the work to be performed during that fiscal year pursuant to the contract. In the event of termination of any contract, the contractor shall be given a written notice of termination at least 60 days before completion of scheduled work for which funds are available. In the event of termination, the contractor shall be paid for the work already performed in accordance with the contract specifications.

(6) Provision Incorporated in Contracts. — The provisions of subdivision (5) of this section shall be incorporated verbatim in all highway construction and maintenance contracts.

(7) Existing Contracts Are Not Affected. — The provisions of this section shall not apply to highway construction and maintenance contracts awarded by the Department of Transportation prior to July 15, 1980. (1979, 2nd Sess., c. 1137, s. 62.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1137, s. 79, makes this section effective July 1, 1980.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-31.1. Study and review of plans and specifications for building, improvement, etc., projects. — It shall be the duty and responsibility of the Director of the Budget to determine whether buildings, repairs, alterations, additions or improvements to physical properties for which appropriations of

State funds are made have been designed for the specific purpose for which such appropriations are made, that such projects have been designed giving proper consideration to economy in first cost, in maintenance cost, in materials and type of construction. Architectural features shall be selected which give proper consideration to economy in design. The Director of the Budget shall have prepared a complete study and review of all plans and specifications for such projects and bids on same will not be received until the results of such study and review have been incorporated in such plans and specifications, and until economic conditions of the construction industry are considered by the Office of State Budget and Management to be favorable to the letting of construction contracts. (1953, c. 1090; 1963, c. 423; 1975, c. 879, s. 46; 1979, 2nd Sess., c. 1137, s. 37.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" near the end of the last sentence.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-34.1. Payrolls submitted to the Director of the Budget; approval of payment of vouchers; payment of required employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security; support of hospital and medical insurance programs for retired members of certain associations, organizations, boards, etc. — All payrolls of all departments, institutions, and agencies of the State government shall, prior to the issuance of vouchers in payment therefor, be submitted to the Director of the Budget, who shall check the same against the appropriations to such departments, institutions and agencies for such purposes, and if found to be within said appropriations, he shall approve the same and return one to the department, institution or agency submitting same and transmit one copy to the State Disbursing Officer, and no voucher in payment of said payroll or any item thereon shall be honored or paid except and to the extent that the same has been approved by the Director of the Budget.

Required employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for employees whose salaries are paid from General Fund or Highway Fund revenues, or from department, office, institutional or agency receipts, or from nonstate funds, shall be paid from the same source as the source of the employees' salaries. In those instances in which an employee's salary is paid in part from the General Fund, or the Highway Fund, and in part from the department, office, institutional or agency receipts, or from nonstate funds, the required salary-related contributions shall be paid from the General Fund, or the Highway Fund, only to the extent of the proportionate part paid from the General Fund, or Highway Fund, in support of the salary of such employee, and the remainder of the employer's contribution requirements shall be paid from the same source which supplies the remainder of such employee's salary. The requirements of this section as to the source of payment are also applicable to payments on behalf of the employee for hospital-medical insurance, longevity payments, salary increments, and legislative salary increases. The Director of the Budget shall approve the method of payment by State departments, offices, institutions and agencies for employer salary-related requirements of this section, and determine the applicability of the section to an employer's salary-related contribution or payment in behalf of an employee.

For the support of the hospital and medical insurance programs made available by G.S. 135-33 to those retired members of the associations and organizations listed in G.S. 135-27(a), the licensing and examining boards

under G.S. 135-1.1, the North Carolina Art Society, Inc., and the North Carolina Symphony Society, Inc., each association or organization shall pay to the Retirement System the full cost of providing these benefits as determined by the Board of Trustees of the Retirement System. (1949, c. 718, s. 5; 1957, c. 269, s. 2; 1961, c. 1181, s. 4; 1979, 2nd Sess., c. 1137, s. 44.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, added the second and third paragraphs.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 143-34.2. Information as to requests for nonstate funds for projects imposing obligation on State; statement of participation in contracts, etc., for nonstate funds; limiting clause required in certain contracts or grants. — All State agencies, funds, or State-supported institutions shall submit to the Office of State Budget and Management, as of the original date thereof, copies of all applications and requests for nonstate funds, (including federal funds), to be used for any purpose to which this section is applicable. This section shall be applicable to all projects and programs which do or may impose upon the State of North Carolina any substantial financial obligation at the time of or subsequent to the acceptance of any funds received upon any such application or request. Every State agency, fund or State-supported institution seeking nonstate funds for any such project or program shall furnish to the Office of State Budget and Management and the Advisory Budget Commission with each such copy of application or request, a statement of the purposes for which any such project or program is desired or advocated, the source and amount of funds to be granted or provided therefor, and a statement of the conditions, if any, upon which such funds are to be provided.

It shall be required of all State agencies, funds, or State-supported institutions, commissions or regional planning and development bodies to submit to the Office of State Budget and Management a statement of participation in any contract, agreement, plan or request for nonstate funds (including federal funds).

Any contract or grant entered into by a State board, commission, agency, department or institution for the operation of a new program by such State board, commission, agency, department or institution or for the enrichment of an ongoing program of such State board, commission, agency, department or institution shall include a limiting clause which specifically states that continuation of the contract or grant program with State appropriations beyond the current State fiscal year is subject to State funds being appropriated by the General Assembly specifically for that program. (1965, c. 1181; 1969, c. 1210; 1977, c. 802, s. 15.25; 1979, 2nd Sess., c. 1137, ss. 37, 45.)

Editor's Note. —

The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "Office of State Budget and Management" for "Department of Administration" in three places, and rewrote the third paragraph, which formerly provided: "Any contract entered into by a State agency, department, or institution for a federal grant shall include a limiting clause which specifically states that continuation of the grant program by the State of North Carolina is subject to State funds being appropriated by the General Assembly for that program."

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

ARTICLE 1.1.

Periodic Review of Certain State Agencies.

§ 143-34.12. Certain General Statutes provisions repealed effective July 1, 1981. — The following statutes are repealed effective July 1, 1981, (except for purposes of the winding-up period, as provided by G.S. 143-34.14):

Chapter 90, Article 1, entitled "Practice of Medicine."
Chapter 90, Article 2, entitled "Dentistry."
Chapter 90, Article 4, entitled "Pharmacy."
Chapter 90, Article 6, entitled "Optometry."
Chapter 90, Article 8, entitled "Chiropractic."
Chapter 90, Article 9, entitled "Nurse Practice Act."
Chapter 90, Article 11, entitled "Veterinarians."
Chapter 90, Article 12A, entitled "Podiatrists."
Chapter 90, Article 13A, entitled "Practice of Funeral Service."
Chapter 90, Article 16, entitled "Dental Hygiene Act."
Chapter 90, Article 17, entitled "Dispensing Opticians."
Chapter 90, Article 18, entitled "Physical Therapy."
Chapter 90, Article 18A, entitled "Practicing Psychologists."
Chapter 90, Article 20, entitled "Nursing Home Administration Act."
Chapter 86, entitled "Barbers."
Chapter 88, entitled "Cosmetic Art."
Chapter 108, Article 3, Part 2, entitled "Licensing of Private Institutions (maternity homes, homes for the aged and infirm, private child-care institutions)."
Chapter 110, Article 3, entitled "Control over Child-Caring Facilities," and Article 7, entitled "Day-Care Facilities."
Chapter 143B, Article 9, Part 4, entitled "Child Day-Care Licensing Commission."
Chapter 122, Article 2E, entitled "Licensing of Local Mental Health Facilities."
G.S. 122-72, entitled "Licensing and Control of Local Mental Institutions and Homes."
Chapter 130, Article 26, entitled "Regulation of Ambulance Services."
Chapter 131, Article 13A, entitled "Hospital Licensing Act."
Chapter 66, Article 9, entitled "Collection of Accounts."
Chapter 66, Article 9B, entitled "Motor Clubs and Associations."
Chapter 143, Article 21, entitled "Water and Air Resources," (except Part 3).
Chapter 143, Article 21A, entitled "Oil Pollution Control."
Chapter 143, Article 21B, entitled "Air Pollution Control."
Chapter 143, Article 38, entitled "Water Resources."
Chapter 143B, Article 7, Part 4, entitled "Environmental Management Commission."
Chapter 131B, entitled "Licensing of Ambulatory Surgical Facilities."
Chapter 84, Article 4, entitled "North Carolina State Bar."
Chapter 85C, entitled "Bail Bondsmen and Runners."
Chapter 90A, Article 2, entitled "Water Treatment Facility Operators."
Chapter 90A, Article 3, entitled "Wastewater Treatment Plant Operators."
Chapter 81A, Article 5, entitled "Public Weighmasters."
Chapter 95, Article 15, entitled "Passenger Tramways."
Chapter 74, Article 7, entitled "The Mining Act of 1971."
Chapter 113A, Article 4, entitled "Sedimentation Pollution Control Act of 1973."

Chapter 143B, Article 7, Part 8, entitled "Sedimentation Control Commission."
Chapter 143B, Article 7, Part 9, entitled "Wastewater Treatment Plant Operators Certification Commission."
G.S. 76-1 through 76-12, relating to a board of commissioners of navigation and pilotage for the Cape Fear River and Bar.
Chapter 76, Article 6, entitled "Morehead City Navigation and Pilotage Commission."
The Article in Chapter 90A concerning sanitarians.
Chapter 143B, Article 9, Part 15, entitled "North Carolina State Commission on Indian Affairs." (1977, c. 712, s. 3; 1977, 2nd Sess., c. 1214, s. 2; 1979, c. 744, ss. 1-4; c. 750, s. 2; 1979, 2nd Sess., c. 1087, s. 3; c. 1097; c. 1173, ss. 1, 2.)

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1087, deleted Chapter 93, "Public Accountants," from the list of repealed statutes.

Session Laws 1979, 2nd Sess., c. 1097, deleted Chapter 78A, Article 5, "Registration of Dealers and Salesmen" (of securities) from the list of repealed statutes.

Session Laws 1979, 2nd Sess., c. 1173, transferred from this section to § 143-34.13, Chapter 90, Article 7, "Osteopathy," Chapter 90, Article 10, "Midwives," and Chapter 130, Article 18, "Midwives."

§ 143-34.13. Certain General Statutes provisions repealed effective July 1, 1983. — The following statutes are repealed effective July 1, 1983, (except for purposes of the winding-up period, as provided by § 143-34.14):

Chapter 90, Article 22, entitled "Licensure Act for Speech and Language Pathologists and Audiologists."
Chapter 89B, entitled "Foresters."
Chapter 85B, entitled "Auctions and Auctioneers."
Chapter 74C, entitled "Private Protective Services Act."
Chapter 89B, entitled "Landscape Contractors."
Chapter 136, Article 2C, entitled "House Movers Licensing Board."
Chapter 93D, entitled "North Carolina State Hearing Aid Dealers and Fitters Board."
Chapter 104E, entitled "North Carolina Radiation Protection Act."
Chapter 106, Article 2, entitled "North Carolina Fertilizer Law of 1947."
Chapter 106, Article 4C, entitled "Structural Pest Control Act."
Chapter 106, Article 5A, entitled "Marketing of Farmers Stock Peanuts."
Chapter 106, Article 12, entitled "Food, Drugs and Cosmetics."
Chapter 106, Article 14, entitled "State Inspection of Slaughterhouses."
Chapter 106, Article 14A, entitled "Licensing and Regulation of Rendering Plants and Rendering Operations."
Chapter 106, Article 15A, entitled "Meat Grading Law."
Chapter 106, Article 17, entitled "Marketing and Branding Farm Products."
Chapter 106, Article 28A, entitled "Regulation of Milk Brought into North Carolina from other States," and Article 28B, entitled "Regulation of Production, Distribution, etc., of Milk and Cream."
Chapter 106, Article 29, entitled "Inspection, Grading, and Testing Milk and Dairy Products."
Chapter 106, Article 31, entitled "North Carolina Seed Law."
Chapter 106, Article 34, Part 10, entitled "Feeding Garbage to Swine."
Chapter 106, Article 35, entitled "Public Livestock Markets."
Chapter 106, Article 35B, entitled "Livestock Dealer Licensing Act."
Chapter 106, Article 44, entitled "Unfair Practices by Handlers of Fruits and Vegetables."

Chapter 106, Article 49, entitled "Poultry; Hatcheries; Chick Dealers."
Chapter 106, Article 51A, entitled "North Carolina Antifreeze Law of 1975."
Chapter 106, Article 53, entitled "Grain Dealers," and Article 54, entitled "Adulteration of Grains."
Chapter 113, Article 7, entitled "North Carolina Game Law of 1935."
Chapter 113, Article 17, entitled "Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department."
Chapter 143, Article 52, Part 3, entitled "Pesticide Dealers and Manufacturers."
Chapter 143, Article 52, Part 4, entitled "Pesticide Applicators and Consultants."
G.S. 58-15, entitled "Authority over all insurance companies; no exemptions from license."
G.S. 58-40, entitled "Agents and others must procure license."
Chapter 58, Article 4, entitled "Insurance Premium Financing."
Chapter 113A, Article 7, entitled "Coastal Area Management."
Chapter 90, Article 7, entitled "Osteopathy."
Chapter 90, Article 10, entitled "Midwives," and Chapter 130, Article 18, entitled "Midwives." (1977, c. 712, s. 4; 1979, c. 744, s. 4; 1979, 2nd Sess., c. 1173, ss. 1, 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1173, transferred to this section from § 143-34.12, Chapter 90, Article 7, entitled "Osteopathy," Chapter 90, Article 10, entitled "Midwives," and Chapter 130, Article 18, entitled "Midwives."

Article 8.

Public Building Contracts.

§ 143-129. Procedure for letting of public contracts; purchases from federal government by State, counties, etc. — No construction or repair work requiring the estimated expenditure of public money in an amount equal to or more than thirty thousand dollars ($30,000) or purchase of apparatus, supplies, materials, or equipment requiring an estimated expenditure of public money in an amount equal to or more than five thousand dollars ($5,000), except in cases of special emergency involving the health and safety of the people or their property, shall be performed, nor shall any contract be awarded therefor, by any board or governing body of the State, or of any institution of the State government, or of any county, city, town, or other subdivision of the State, unless the provisions of this section are complied with. The limitation contained in this paragraph shall not apply to construction or repair work undertaken during the progress of a construction or repair project initially begun pursuant to this section.

Advertisement of the letting of such contracts shall be as follows:

Where the contract is to be let by a board or governing body of the State government, or of a State institution, as distinguished from a board or governing body of a subdivision of the State, proposals shall be invited by advertisement at least one week before the time specified for the opening of said proposals in a newspaper having general circulation in the State of North Carolina. Provided that the advertisements for bidders required by this section shall be published at such a time that at least seven full days shall lapse between the date of publication of notice and the date of the opening of bids.

Where the contract is to be let by a county, city, town or other subdivision of the State, proposals shall be invited by advertisement at least one week

before the time specified for the opening of said proposals in a newspaper having general circulation in such county, city, town or other subdivision.

Such advertisement shall state the time and place where plans and specifications of proposed work or a complete description of the apparatus, supplies, materials or equipment may be had, and the time and place for opening of the proposals, and shall reserve to said board or governing body the right to reject any or all such proposals.

Proposals shall not be rejected for the purpose of evading the provisions of this Article. No board or governing body of the State or subdivision thereof shall assume responsibility for construction or purchase contracts, or guarantee the payments of labor or materials therefor except under provisions of this Article.

All proposals shall be open in public and shall be recorded on the minutes of the board or governing body and the award shall be made to the lowest responsible bidder or bidders, taking into consideration quality, performance and the time specified in the proposals for the performance of the contract. In the event the lowest responsible bids are in excess of the funds available for the project, the responsible board or governing body is authorized to enter into negotiations with the lowest responsible bidder above mentioned, making reasonable changes in the plans and specifications as may be necessary to bring the contract price within the funds available, and may award a contract to such bidder upon recommendation of the Department of Administration in the case of the State government or of a State institution or agency, or upon recommendation of the responsible commission, council or board in the case of a subdivision of the State, if such bidder will agree to perform the work at the negotiated price within the funds available therefor. If a contract cannot be let under the above conditions, the board or governing body is authorized to readvertise, as herein provided, after having made such changes in plans and specifications as may be necessary to bring the cost of the project within the funds available therefor. The procedure above specified may be repeated if necessary in order to secure an acceptable contract within the funds available therefor.

No proposal shall be considered or accepted by said board or governing body unless at the time of its filing the same shall be accompanied by a deposit with said board or governing body of cash, or a cashier's check, or a certified check on some bank or trust company insured by the Federal Deposit Insurance Corporation in an amount equal to not less than five percent (5%) of the proposal. In lieu of making the cash deposit as above provided, such bidder may file a bid bond executed by a corporate surety licensed under the laws of North Carolina to execute such bonds, conditioned that the surety will upon demand forthwith make payment to the obligee upon said bond if the bidder fails to execute the contract in accordance with the bid bond. This deposit shall be retained if the successful bidder fails to execute the contract within 10 days after the award or fails to give satisfactory surety as required herein.

Bids shall be sealed if the invitation to bid so specifies and, in any event, the opening of a bid or the disclosure or exhibition of the contents of any bid by anyone without the permission of the bidder prior to the time set for opening in the invitation to bid shall constitute a general misdemeanor.

All contracts to which this section applies shall be executed in writing, and the board or governing body shall require the person to whom the award of contract is made to furnish bond as required by Article 3 of Chapter 44A; or require a deposit of money, certified check or government securities for the full amount of said contract to secure the faithful performance of the terms of said contract and the payment of all sums due for labor and materials in a manner consistent with Article 3 of Chapter 44A; and no such contract shall be altered except by written agreement of the contractor, the sureties on his bond, and the board or governing body. Such surety bond or deposit required herein shall be

deposited with the board or governing body for which the work is to be performed. When a deposit, other than a surety bond, is made with the board or governing body, said board or governing body assumes all the liabilities, obligations and duties of a surety as provided in Article 3 of Chapter 44A to the extent of said deposit. In the case of contracts for the purchase of apparatus, supplies, materials, or equipment, the board or governing body may waive the requirement for a surety bond or other deposit.

The owning agency or the Department of Administration, in contracts involving a State agency, and the owning agency or the governing board, in contracts involving a political subdivision of the State, may reject the bonds of any surety company against which there is pending any unsettled claim or complaint made by a State agency or the owning agency or governing board of any political subdivision of the State arising out of any contract under which State funds, in contracts with the State, or funds of political subdivisions of the State, in contracts with such political subdivision, were expended, provided such claim or complaint has been pending more than 180 days.

Nothing in this section shall operate so as to require any public agency to enter into a contract which will prevent the use of unemployment relief labor paid for in whole or in part by appropriations or funds furnished by the State or federal government.

Any board or governing body of the State or any institution of the State government or of any county, city, town, or other subdivision of the State may enter into any contract with (i) the United States of America or any agency thereof, or (ii) any other government unit or agency thereof within the United States, for the purchase, lease, or other acquisition of any apparatus, supplies, materials, or equipment without regard to the foregoing provisions of this section or to the provisions of any other section of this Article.

The Secretary of Administration or the governing board of any county, city, town, or other subdivision of the State may designate any officer or employee of the State, county, city, town or subdivision to enter a bid or bids in its behalf at any sale of apparatus, supplies, materials, equipment or other property owned by (i) the United States of America or any agency thereof, or (ii) any other governmental unit or agency thereof within the United States, and may authorize such officer or employee to make any partial or down payment or payment in full that may be required by regulations of the government or agency disposing of such property. (1931, c. 338, s. 1; 1933, c. 50; c. 400, s. 1; 1937, c. 355; 1945, c. 144; 1949, c. 257; 1951, c. 1104, ss. 1, 2; 1953, c. 1268; 1955, c. 1049; 1957, c. 269, s. 3; c. 391; c. 862, ss. 1-4; 1959, c. 392, s. 1; c. 910, s. 1; 1961, c. 1226; 1965, c. 841, s. 2; 1967, c. 860; 1971, c. 847; 1973, c. 1194, s. 2; 1975, c. 879, s. 46; 1977, c. 619, ss. 1, 2; 1979, c. 182, s. 1; 1979, 2nd Sess., c. 1081.)

Local Modification. — Forsyth: 1967, c. 917; 1979, 2nd Sess., c. 1200; Orange County: 1979, 2nd Sess., c. 1167; Pasquotank: 1979, 2nd Sess., c. 1164; City of Winston-Salem: 1979, 2nd Sess., c. 1200.

Editor's Note. —

The 1979, 2nd Sess., amendment, effective retroactively to July 1, 1979, substituted "five thousand dollars ($5,000)" for "two thousand five hundred dollars ($2,500)" near the middle of the first sentence of the first paragraph.

§ 143-135. Limitation of application of Article. — Except for the provisions of G.S. 143-129 requiring bids for the purchase of apparatus, supplies, materials or equipment, this Article shall not apply to construction or repair work undertaken by the State or by subdivisions of the State of North Carolina (i) when the work is performed by duly elected officers or agents using force account qualified labor on the permanent payroll of the agency concerned and (ii) when the total cost of the project, including without limitation all direct

and indirect costs of labor, services, materials, supplies and equipment, does not exceed seventy-five thousand dollars ($75,000). Such force account work shall be subject to the approval of the Director of the Budget and the Advisory Budget Commission in the case of State agencies, of the responsible commission, council, or board in the case of subdivisions of the State. Complete and accurate records of the entire cost of such work, including without limitation, all direct and indirect costs of labor, services, materials, supplies and equipment performed and furnished in the prosecution and completion thereof, shall be maintained by such agency, commission, council or board for inspection by the general public. Construction or repair work undertaken pursuant to this section shall not be divided for the purposes of evading the provisions of this Article. (1933, c. 552, ss. 1, 2; 1949, c. 1137, s. 2; 1951, c. 1104, s. 6; 1967, c. 860; 1975, c. 292, ss. 1, 2; c. 879, s. 46; 1979, 2nd Sess., c. 1248.)

Editor's Note. —
The 1979, 2nd Sess., amendment rewrote this section.

Article 12.

Law-Enforcement Officers' Benefit and Retirement Fund.

§ 143-166. Law-Enforcement Officers' Benefit and Retirement Fund.

(i) The Board of Commissioners herein created shall have power and authority to promulgate rules and regulations and to set up standards under and by which it may determine the eligibility of officers for benefits under this Article, payable to peace officers who may be killed or become seriously incapacitated while in the discharge of their duty; such rules, regulations and standards shall include the amount of the benefits to be paid to the recipient in case of incapacity to perform his duty, as well as the amount to be paid such officer's dependents in case such officer is killed while in the discharge of his duty. The said Board is also authorized to promulgate rules and regulations and set up standards under and by which officers may be eligible for retirement and to determine the amounts to be paid such officers as retirement benefits after it has been determined by the Board that such officers are so eligible.

In order for an officer to be eligible for retirement benefits under this Article, he shall contribute into the fund herein created six percent (6%) of his compensation received for each pay period beginning on or after July 1, 1977. Such rate shall apply uniformly to all members of the Law-Enforcement Officers' Benefit and Retirement Fund, without regard to their coverage under the Social Security Act. The mode of payment to the fund shall be determined by the Board of Commissioners. Provided, that any officer so contributing to the fund herein created, who has become incapacitated in the line of duty, shall not be required to contribute to the fund during the period of his disability. All peace officers as herein defined who are compensated on a fee basis, before they shall be eligible to participate in the retirement fund herein provided for, shall pay into the fund a monthly amount to be determined by the said Board, based upon such officer's average monthly income. Compensation on which the member contributes shall not include any payments for unused sick leave.

The Board of Commissioners shall have the authority to formulate and promulgate rules and regulations under which any county, city, town or other subdivision of government in whose behalf any member performs service as a law-enforcement officer, or any member, may, and is hereby authorized to, elect to pay into the fund for credit to the individual account of such member any one or more of the following:

(1) An amount which, when taken with any additional amount which may be permitted by the Board to be paid on behalf of such member, shall not exceed in any year fifteen percent (15%) of such member's compensation; and

(2) A sum not to exceed three times the value of prior service of such member as determined by the Board of Commissioners;

such amounts so paid shall be accumulated in the individual account of such member at such rate of interest as the Board of Commissioners may from time to time determine and shall, upon retirement of such member be used to provide such additional benefits as the Board of Commissioners shall determine on the basis of the tables and rate of interest last adopted by the Board of Commissioners for this purpose: Provided, however, that the amounts paid under this provision by any county, city, town, or other subdivision of government shall revert to said county, city, town or other subdivision of government upon the death or withdrawal from the fund of a member for whom such amounts were paid. The sums paid by any county, city, town or other subdivision of government as additional payments are hereby declared to be for a public purpose.

It shall be the duty of the State of North Carolina to finance and contribute for the benefit of each member employed by the State as a law-enforcement officer a five percent (5%) contribution in addition to employer contribution provided in paragraph (i) of this Article [section]. Such contribution or financing on the part of the State shall be on a percentage basis and shall be credited to the individual account of such member, and upon the death or withdrawal from the fund of a member such sums credited to that individual member's account shall revert to the general fund or Highway Fund or Wildlife Fund of the State of North Carolina according to the source of the original appropriation. The Board of Commissioners are hereby authorized to formulate and promulgate additional rules and regulations for the administration of the amounts herein authorized to be appropriated. There is hereby appropriated from the general fund of the State for those law-enforcement officers whose salary is paid out of the general fund, and from the Highway Fund of the State for those law-enforcement officers whose salary is paid out of the Highway Fund appropriation in such amount as may be necessary to pay the State's share of the cost of the financing of this provision for the biennium 1949-51. Such appropriation shall be made at the same time and manner as other State appropriations and in the sums and amounts as determined by the Board of Commissioners: Provided, that this provision as to the financing of a member's prior service and the cost of matching contribution on the part of the State of North Carolina shall apply only to those members who are law-enforcement officers of the State of North Carolina and its departments, agencies and commissions and who would be eligible for membership in the Teachers' and State Employees' Retirement System provided by Chapter 135 of the General Statutes of North Carolina but for the fact that said officers are members of the Law-Enforcement Officers' Benefit and Retirement Fund.

(x3) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1979, which shall become payable on July 1, 1980, shall be three percent (3%) computed on the retirement allowance prior to any increase authorized by paragraph (x4) of this section. Provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(x4) From and after July 1, 1980, the total monthly benefits to or on account of persons who commenced receiving benefits from the Retirement Fund prior to July 1, 1977, shall be increased by a percentage thereof. Such percentage shall be determined in accordance with the following schedule:

Period Benefits Commenced	*Percentage*
July 1, 1976, to June 30, 1977	1½%
July 1, 1975, to June 30, 1976	8%
July 1, 1974, to June 30, 1975	15%
Prior to July 1, 1974	23%

This increase shall be calculated before monthly retirement allowances, as of July 1, 1980, have been increased for all cost-of-living increases allowed for the same period.

(y) Any member in service may retire on a basic service retirement allowance who: has attained 50 years of age and has completed 15 or more years of creditable service; or has completed 30 or more years of creditable service; or has attained 55 years of age.

Under such rules and regulations as are otherwise adopted by the Board of Commissioners, a member eligible to retire under this subsection shall receive a basic service retirement allowance equal to one and fifty-seven one hundredths percent (1.57%) of his average final compensation (calculated as the average annual compensation of a member during the four consecutive years of membership service producing the highest such average), multiplied by the number of years of his creditable service, and reduced by one-third of one percent ($^1/_3$ of 1%) for each month by which his date of retirement precedes his 55th birthday, except that no reduction in the basic service retirement allowance shall apply to any member who has 30 or more years of creditable service at the time of his retirement. When the last 12 months of compensation prior to retirement are used in computing average final compensation, the compensation for such 12-month period shall not include any payments for unused sick leave.

On and after July 1, 1980, creditable service on which the retirement allowance is based shall include one month of credit for each 20 days or fraction thereof of sick leave standing to the member's credit upon retirement, as certified by the member's employer, but not to exceed one month's credit for each two years of membership service or fraction thereof earned by the member. Unused sick leave for purposes of this section shall not be deemed to be standing to the credit of the member to the extent the member is compensated for such leave. Creditable service for purposes of determining eligibility for service retirement, disability retirement, early retirement, a vested deferred allowance, or any other benefit allowed under this Article shall not include unused sick leave standing to the credit of the member.

Any member who is less than 55 years of age with five or more years of creditable service and who has been totally and permanently incapacitated for duty, or any member who is less than 55 years of age with one or more years of membership service and who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty at some definite time and place may, upon application of the member or his employer, be retired by the Board of Commissioners on a basic disability retirement allowance as it set forth below. The Board of Commissioners shall not grant a basic disability retirement allowance to any member for whom application for disability retirement is received more than a year after the onset of incapacity for duty or, if the member is in receipt of compensation from his employer on account of such incapacity for duty for more than one year, more than 30 days after the cessation of that compensation.

Under such rules and regulations as are otherwise adopted by the Board of Commissioners, a member eligible for a basic disability retirement allowance shall receive a disability retirement equal to one and fifty-seven one hundredths percent (1.57%) of his average final compensation calculated as the average annual compensation of a member during the four consecutive years

of membership service producing the highest such average, multiplied by the number of years of creditable service which he would have had if he had continued in service until his 55th birthday.

On or after July 1, 1980, should the Board of Commissioners determine that such disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference between the basic disability retirement allowance and the average final compensation, then the portion of his basic disability retirement allowance not provided by the member's contributions shall be reduced to an amount which together with the portion of the basic disability retirement allowance provided by the member's contributions and the amount earnable by him, shall equal the amount of his average final compensation. Should his earning capacity be later changed, the portion of his basic disability retirement allowance not provided by the member's contributions may be further modified: Provided that the new allowance shall not exceed the allowance originally granted nor an amount which, when added to the amount earnable by the member together with the portion of the basic disability retirement allowance provided by the member's own contributions, equals his average final compensation.

The Board of Commissioners shall implement the provisions of this subsection by the adoption of necessary and reasonable rules and regulations.

As a condition to the receipt of the basic disability retirement allowance provided for in this subsection, each disability beneficiary shall, on or before April 15 of each calendar year, provide the Board of Commissioners with a statement of his or her income received as compensation for services, including fees, commissions or similar items and income derived from business for the previous calendar year. Such statement shall be filed on a form as required by the Board of Commissioners.

The Director of the State Retirement Systems shall contact any State or federal agency which can provide information to substantiate the statement required to be submitted by this subsection and may enter into agreements for the exchange of information.

(1979, 2nd Sess., c. 1137, ss. 65, 68, 72; c. 1214; c. 1215, ss. 1, 2; c. 1225, ss. 1-5.)

Editor's Note. —

Session Laws 1979, 2nd Sess., c. 1137, effective July 1, 1980, deleted the former last paragraph of subsection (i), relating to establishment of a uniform annual employer's contribution rate to support the benefit allowances and payment of employer's contributions, added subsections (x3) and (x4) and substituted "one and fifty-seven one hundredths percent (1.57%)" for "one and fifty-five one hundredths percent (1.55%)" near the beginning of the second paragraph and near the middle of the fifth paragraph in subsection (y).

Session Laws 1979, 2nd Sess., c. 1214, effective July 1, 1980, added the last two paragraphs of subsection (y).

Session Laws 1979, 2nd Sess., c. 1215, added the sixth paragraph of subsection (y). Session Laws 1979, 2nd Sess., c. 1215, s. 2, provides: "This act shall become effective on July 1, 1980, for employees retiring on or after July 1, 1980. For employees retiring prior to July 1, 1980, this act shall become effective on July 1, 1981."

Session Laws 1979, 2nd Sess., c. 1225, effective July 1, 1980, in subsection (i), added the last sentence of the second paragraph, deleted subdivision (3) of the third paragraph, which provided for payment of a sum relating to accumulated sick leave, and substituted "in addition to employer contribution provided in paragraph (i) of this Article" for "and a sum not to exceed ten percent (10%) of gross salary that would have been paid to the retiring member, had he been compensated for all accumulated sick leave at the time of retirement, which amount would be in lieu of any other compensation for accumulated sick leave" at the end of the first sentence of the fourth paragraph. The amendment also added the second sentence of the second paragraph of subsection (y), and added the third paragraph of subsection (y).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the rest of the section was not changed by the amendments, only subsections (i), (x3), (x4) and (y) are set out.

ARTICLE 12A.

Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act.

§§ 143-166.8 to 143-166.12: Reserved for future codification purposes.

ARTICLE 12B.

Salary Continuation Plan for Certain State Law-Enforcement Officers.

§ 143-166.13. Persons entitled to benefits under Article. — (a) The following persons who are subject to the Criminal Justice Training and Standards Act are entitled to benefits under this Article:

(1) State Government Security Officers, Department of Administration;
(2) State Correctional Officers, Department of Corrections;
(3) State Probation and Parole Officers, Department of Corrections;
(4) Sworn State Law-Enforcement Officers with the power of arrest, Department of Corrections;
(5) Alcohol Law-Enforcement Agents, Department of Crime Control and Public Safety;
(6) State Highway Patrol Officers, Department of Crime Control and Public Safety;
(7) State Legislative Building Special Police, General Assembly;
(8) Sworn State Law-Enforcement Officers with the power of arrest, Department of Human Resources;
(9) Youth Correctional Officers, Department of Human Resources;
(10) Insurance Investigators, Department of Insurance;
(11) State Bureau of Investigation Officers and Agents, Department of Justice;
(12) Director and Assistant Director, License and Theft Enforcement Section, Division of Motor Vehicles, Department of Transportation;
(13) Members of License and Theft Enforcement Section, Division of Motor Vehicles, Department of Transportation, designated by the Commissioner of Motor Vehicles as either "inspectors" and uniformed weigh station personnel;
(14) Utilities Commission Transportation Inspectors and Special Investigators;
(15) North Carolina Ports Authority Police, Department of Commerce;
(16) Sworn State Law-Enforcement Officers with the power of arrest, Department of Natural Resources and Community Development.

(b) The following persons are entitled to benefits under this Article regardless of whether they are subject to the Criminal Justice Training and Standards Act:

(1) Driver License Examiners injured by accident arising out of and in the course of giving a road test, Division of Motor Vehicles, Department of Transportation. (1979, 2nd Sess., c. 1272, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1272, s. 5, provides: "This act is effective upon ratification and shall apply to persons injured or contracting an occupational disease on or after January 1, 1981."

§ 143-166.14. Payment of salary notwithstanding incapacity; Workers' Compensation Act applicable after two years; duration of payment. — The salary of any of the above listed persons shall be paid as long

as his employment in that position continues, notwithstanding his total or partial incapacity to perform any duties to which he may be lawfully assigned, if that incapacity is the result of an injury by accident or an occupational disease arising out of and in the course of the performance by him of his official duties, except if that incapacity continues for more than two years from its inception, the person shall, during the further continuance of that incapacity, be subject to the provisions of Chapter 97 of the General Statutes pertaining to workers' compensation. Salary paid to a person pursuant to this Article shall cease upon the resumption of his regularly assigned duties, retirement, resignation, or death, whichever first occurs, except that temporary return to duty shall not prohibit payment of salary for a subsequent period of incapacity which can be shown to be directly related to the original injury. (1979, 2nd Sess., c. 1272, s. 1.)

§ 143-166.15. Application of § 97-27; how payments made. — Notwithstanding the provisions of G.S. 143-166.14 of this Article, the persons entitled to benefits shall be subject to the provisions of G.S. 97-27 during the two-year period of payment of full salary. All payments of salary shall be made at the same time and in the same manner as other salaries are paid to other persons in the same department. (1979, 2nd Sess., c. 1272, s. 1.)

§ 143-166.16. Effect on workers' compensation and other benefits; application of § 97-24. — The provisions of G.S. 143-166.14 shall be in lieu of all compensation provided for the first two years of incapacity by G.S. 97-29 and 97-30, but shall be in addition to any other benefits or compensation to which such person shall be entitled under the provisions of the Workers' Compensation Act. The provisions of G.S. 97-24 will commence at the end of the two-year period for which salary is paid pursuant to G.S. 143.166.14. (1979, 2nd Sess., c. 1272, s. 1.)

§ 143-166.17. Period of incapacity not charged against sick leave or other leave. — The period for which the salary of any person is paid pursuant to G.S. 143-166.14 while he is incapacitated as a result of an injury by accident or an occupational disease arising out of and in the course of the performance by him of his official duties, shall not be charged against any sick or other leave to which he shall be entitled under any other provision of law. (1979, 2nd Sess., c. 1272, s. 1.)

§ 143-166.18. Report of incapacity. — Any person designated in G.S. 143-166.13, who, as a result of an injury by accident arising out of and in the course of the performance by him of his official duties, is totally or partially incapacitated to perform any duties to which he may be lawfully assigned, shall report the incapacity as soon as practicable in the manner required by the secretary, or other head of the department to which the agency is assigned by statute, or the commanding officer of the State Highway Patrol in the case of the Highway Patrol. (1979, 2nd Sess., c. 1272, s. 1.)

§ 143-166.19. Determination of cause and extent of incapacity; hearing before Industrial Commission; appeal; effect of refusal to perform duties. — Upon the filing of the report, the secretary or other head of the department, or, in the case of the General Assembly, the Legislative Services Officer, or the commanding officer of the State Highway Patrol in the case of the Highway Patrol, shall determine the cause of the incapacity and to what extent the claimant may be assigned to other than his normal duties. The finding of the secretary, other head of the department, or the commanding

officer of the State Highway Patrol in the case of the Highway Patrol, shall determine the right of the claimant to benefits under this Article. Notice of the finding shall be filed with the North Carolina Industrial Commission. Unless the claimant, within 30 days after he receives notice, files with the North Carolina Industrial Commission, upon the form it shall require, a request for a hearing, the finding of the secretary, other department head, or the commanding officer of the State Highway Patrol in the case of the Highway Patrol, shall be final. Upon the filing of a request, the North Carolina Industrial Commission, shall proceed to hear the matter in accordance with its regularly established procedure for hearing claims filed under the Workers' Compensation Act, and shall report its findings to the secretary, or other head of the department, or the commanding officer of the State Highway Patrol in the case of the Highway Patrol. From the decision of the North Carolina Industrial Commission an appeal shall lie as in other matters heard and determined by such Commission. Any person who shall refuse to perform any duties to which he may properly be assigned as the result of the finding of the secretary, other head of the department, or the commanding officer of the State Highway Patrol in the case of the Highway Patrol, or of the North Carolina Industrial Commission shall be entitled to no benefits pursuant to this Article so long as the refusal shall continue. (1979, 2nd Sess., c. 1272, s. 1.)

Article 21.

Water and Air Resources.

Part 1. Organization and Powers Generally; Control of Pollution.

§ 143-211. Declaration of public policy. — It is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources. Furthermore, it is the intent of the General Assembly, within the context of this Article, to achieve and to maintain for the citizens of the State a total environment of superior quality. Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare. It is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Natural Resources and Community Development as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions. Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources. It is the intent of the General Assembly that the powers and duties of the Environmental Management Commission and the Department of Natural Resources and Community Development be construed so as to enable the Department and the Commission to qualify to administer federally mandated programs of environmental management and to qualify to accept and administer funds

from the federal government for such programs. (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1158, s. 2.)

Editor's Note. —
The 1979, 2nd Sess., amendment added the last sentence.

§ 143-214.1. Water; water quality standards and classifications; duties of Environmental Management Commission.

(d) Criteria for Assignment of Classifications. — In assigning to each identified water the appropriate classifications (with its accompanying standards), the Environmental Management Commission shall consider, and the decision of the Environmental Management Commission when finally adopted and published shall contain its conclusions with respect to the following factors as related to such identified waters:

(1) The size, depth, surface area covered, volume, direction and rate of flow, stream gradient and temperature of the water;

(2) The character of the district bordering said water, including any peculiar suitability such district may have or any dominant economic interest or development which has become established in relation to or by reason of any particular use of such water;

(3) The uses and extent thereof which have been made, are being made, or may in the future be made, of such water for domestic consumption, bathing, fish or wildlife and their culture, industrial consumption, transportation, fire prevention, power generation, scientific or research uses, the disposal of sewage, industrial wastes and other wastes, or any other uses;

(4) In revising existing or adopting new water quality classifications or standards, the Commission shall consider the use and value of State waters for public water supply, propagation of fish and wildlife, recreation, agriculture, industrial and other purposes, use and value for navigation, and shall take into consideration, among other things, an estimate as prepared under section 305(b)(1) of the Federal Water Pollution Control Act amendments of 1972 of the environmental impact, the economic and social costs necessary to achieve the proposed standards, the economic and social benefits of such achievement and an estimate of the date of such achievement;

(5) With regard to the groundwaters, the factors to be considered shall include the natural quality of the water below land surface and the condition of occurrences, recharge, movement and discharge, the vulnerability to pollution from wastewaters and other substances, and the potential for improvement of the quality and quantity of the water.

(1979, c. 633, s. 6; 1979, 2nd Sess., c. 1199.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "shall" for "should" preceding "take into consideration" near the middle, and inserted "amendments of 1972" following "Federal Water Pollution Control Act" near the end, of subdivision (4) of subsection (d).

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 143-215.3. General powers of Environmental Management Commission and Department of Natural Resources and Community Development; auxiliary powers. — (a) In addition to the specific powers prescribed elsewhere in this Article, and for the purpose of carrying out its duties, the Environmental Management Commission shall have the power:

(1) To adopt from time to time and to modify and revoke official regulations interpreting and applying the provisions of Articles 21, 21A and 21B and rules of procedure establishing and amplifying the procedures to be followed in the administration of these Articles, including rules and regulations providing for the charge of a reasonable fee for processing or publicizing applications for permits issued under these Articles and for reviewing, processing and publicizing applications for construction grant awards under the Federal Water Pollution Control Act; provided, however, that there shall be no fee charged to any farmer who submits an application which pertains to his farming operations. Any fees related to construction grants charged by the Commission shall be consistent with federal regulations. Fees for processing permits under these Articles shall not exceed one hundred dollars ($100.00) for any single permit application. No regulations and no rules of procedure shall be effective nor enforceable until published and filed as prescribed by G.S. 143-215.4. Rules or regulations relating to permit or grant application fees shall be subject to a public hearing, prior to adoption, held under procedures established by the Environmental Management Commission.

(2) To direct that such investigation be conducted as it may reasonably deem necessary to carry out its duties as prescribed by this Article, and for this purpose to enter at reasonable times upon any property, public or private, for the purpose of investigating the condition of any waters and the discharge therein of any sewage, industrial waste or other waste or for the purpose of investigating the condition of the air, air pollution, air contaminant sources, emissions or the installation and operation of any air-cleaning devices, and to require written statements or the filing of reports under oath, with respect to pertinent questions relating to the operation of any air-cleaning device, sewer system, disposal system or treatment works: Provided that any records, reports or information obtained under Articles 21, 21A and 21B (i) shall, in the case of effluent or emission data, be related to any applicable effluent or emission limitations, toxic, pretreatment or new source performance standards, and (ii) shall be available to the public except that upon a showing satisfactory to the Environmental Management Commission by any person that records, reports or information or particular part thereof (other than effluent or emission data), to which the Commission has access under these Articles, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Commission shall consider such record, report or information, or particular portion thereof confidential, except that such record or information may be disclosed to employees of the department concerned with carrying out the provisions of these Articles or when relevant in any proceeding under these Articles. The Commission shall provide for adequate notice to the party submitting the information of any decision that such information is not entitled to confidential treatment and of any decision to release information which the submitting party contends is entitled to confidential treatment. No person shall refuse entry or access to any authorized representative of the Commission or Department who requests entry for purposes of inspection, and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties.

(3) To conduct public hearings and to delegate the power to conduct public hearings in accordance with the procedures prescribed by this Article.

(4) To delegate such of the powers of the Environmental Management Commission as the Environmental Management Commission deems necessary to one or more of its members, to the Secretary or any other qualified employee of the Department of Natural Resources and Community Development; provided, that the provisions of any such delegation of power shall be set forth in the official regulations of the Environmental Management Commission; and provided further that the Environmental Management Commission shall not delegate to persons other than its own members and the designated employees of the Department the power to conduct hearings with respect to the classification of waters, the assignment of classifications, air quality standards, air contaminant source classifications, emission control standards, or the issuance of any special order except in the case of an emergency under subsection (a)(12) for the abatement of existing water or air pollution. Any employee of the Department of Natural Resources and Community Development to whom a delegation of power is made to conduct a hearing shall report the hearing with its evidence and record to the Environmental Management Commission.

(5) To institute such actions in the superior court of any county in which a violation of this Article or the rules or regulations of the Environmental Management Commission has occurred, or, in the discretion of the Environmental Management Commission, in the superior court of the county in which any defendant resides, or has his or its principal place of business, as the Environmental Management Commission may deem necessary for the enforcement of any of the provisions of this Article or of any official action of the Environmental Management Commission, including proceedings to enforce subpoenas or for the punishment of contempt of the Environmental Management Commission.

(6) To agree upon or enter into any settlements or compromises of any actions and to prosecute any appeals or other proceedings.

(7) To direct the investigation of any killing of fish and wildlife which, in the opinion of the Environmental Management Commission, is of sufficient magnitude to justify investigation and is known or believed to have resulted from the pollution of the waters or air as defined in this Article, and whenever any person, whether or not he shall have been issued a certificate of approval, permit or other document of approval authorized by this or any other State law, has negligently, or carelessly or unlawfully, or willfully and unlawfully, caused pollution of the waters or air as defined in this Article, in such quantity, concentration or manner that fish or wildlife are killed as the result thereof, the Environmental Management Commission, may recover, in the name of the State, damages from such person. The measure of damages shall be the amount determined by the Department of Natural Resources and Community Development and the North Carolina Wildlife Resources Commission, whichever has jurisdiction over the fish and wildlife destroyed to be the replacement cost thereof plus the cost of all reasonable and necessary investigations made or caused to be made by the State in connection therewith. Upon receipt of the estimate of damages caused, the Department of Natural Resources and Community Development shall notify the persons responsible for the destruction of the fish or wildlife in question and may effect such settlement as the Commission may deem proper and reasonable, and if no settlement is reached within a reasonable time, the Environmental Management Commission shall bring a civil action to recover such damages in the superior court in the county in which the discharge took place. Upon such action being

brought the superior court shall have jurisdiction to hear and determine all issues or questions of law or fact, arising on the pleadings, including issues of liability and the amount of damages. On such hearing, the estimate of the replacement costs of the fish or wildlife destroyed shall be prima facie evidence of the actual replacement costs of such fish or wildlife. In arriving at such estimate, any reasonably accurate method may be used and it shall not be necessary for any agent of the Wildlife Resources Commission or the Department of Natural Resources and Community Development to collect, handle or weigh numerous specimens of dead fish or wildlife.

The State of North Carolina shall be deemed the owner of the fish or wildlife killed and all actions for recovery shall be brought by the Environmental Management Commission on behalf of the State as the owner of the fish or wildlife. The fact that the person or persons alleged to be responsible for the pollution which killed the fish or wildlife holds or has held a certificate of approval, permit or other document of approval authorized by this Article or any other law of the State shall not bar any such action. The proceeds of any recovery, less the cost of investigation, shall be used to replace, insofar as and as promptly as possible, the fish and wildlife killed, or in cases where replacement is not practicable, the proceeds shall be used in whatever manner the responsible agency deems proper for improving the fish and wildlife habitat in question. Any such funds received are hereby appropriated for these designated purposes. Nothing in this paragraph shall be construed in any way to limit or prevent any other action which is now authorized by this Article.

(8) After issuance of an appropriate order, to withhold the granting of any permit or permits pursuant to G.S. 143-215.1 or 143-215.108 for the construction or operation of any new or additional disposal system or systems or air-cleaning device or devices in any area of the State. Such order may be issued only upon determination by the Environmental Management Commission, after public hearing held pursuant to the provisions of G.S. 143-215.4, that the permitting of any new or additional source or sources of water or air pollution will result in a generalized condition of water or air pollution within the area contrary to the public interest, detrimental to the public health, safety, and welfare, and contrary to the policy and intent declared in this Article. The Environmental Management Commission may make reasonable distinctions among the various sources of water and air pollution and may direct that its order shall apply only to those sources which it determines will result in a generalized condition of water or air pollution.

The determination of the Environmental Management Commission shall be supported by detailed findings of fact and conclusions set forth in the order and based upon competent evidence of record. The order shall describe the geographical area of the State affected thereby with particularity and shall prohibit the issuance of permits pending a determination by the Environmental Management Commission that the generalized condition of water or air pollution has ceased.

Notice of hearing shall be given by publication at least once a week for two successive weeks in a newspaper or newspapers having general circulation within the area, the date of the first publication to be at least 20 days prior to the date of hearing; and by registered or certified mail at least 20 days in advance of hearing to the governing body of each county, city, town, metropolitan sewerage district, water and sewer district and any other political subdivision lying, in whole or in part, within the area; to every person within the area whose

permit application is pending; to every affected or interested agency of local, State, and federal government; and to any other person whom the Environmental Management Commission believes to have a direct interest therein.

Any person who is adversely affected by the order of the Environmental Management Commission may seek judicial review of the order pursuant to the provisions of G.S. 143-215.5; and the order shall not be stayed by the appeal.

(9) If an investigation conducted pursuant to this Article reveals a violation of any regulations, standards, or limitations adopted by the Environmental Management Commission pursuant to this Article, or a violation of any terms or conditions of any permit issued pursuant to G.S. 143-215.1 or 143-215.108, or special order or other document issued pursuant to G.S. 143-215.2 or 143-215.109, the Environmental Management Commission may assess the reasonable costs of any investigation, inspection or monitoring survey which revealed the violation against the person responsible therefor. If the violation resulted in an unauthorized discharge to the waters or atmosphere of the State, the Environmental Management Commission may also assess the person responsible for the violation for any actual and necessary costs incurred by the State in removing, correcting or abating any adverse effects upon the water or air resulting from the unauthorized discharge. If the person responsible for the violation refuses or fails within a reasonable time to pay any sums assessed, the Environmental Management Commission may institute a civil action in the superior court of the county in which the violation occurred or, in the Environmental Management Commission's discretion, in the superior court of the county in which such person resides or has his or its principal place of business, to recover such sums.

(10) To require any laboratory facility performing or seeking to perform any tests, analyses, measurements, or monitoring required by this Article or regulations of the Environmental Management Commission implementing the provisions of this Article to be certified by the Environmental Management Commission in accordance with standards established for such facilities in it regulations; and to charge a reasonable fee for certifying any such laboratory facility.

(11) Local Air Pollution Control Programs. —

a. To review and have general oversight and supervision over all existing or proposed local air pollution control programs and to this end shall review and certify such programs as being adequate to meet the requirements of this Article and any applicable standards and rules and regulations pursuant thereto. The Environmental Management Commission shall certify any local program which:

1. Provides by ordinance or local law for requirements compatible with those imposed by the provisions of this Article, and the standards and rules and regulations issued pursuant thereto; provided, however, the Environmental Management Commission upon request of a municipality or other local unit may grant special permission for the governing body of such unit to adopt a particular class of air contaminant regulations which would result in more effective air pollution control than applicable standards, rules, or regulations promulgated by the Environmental Management Commission;

2. Provides for the adequate enforcement of such requirements by appropriate administrative and judicial process;

3. Provides for an adequate administrative organization, staff, financial and other resources necessary to effectively and efficiently carry out its programs; and
4. Is approved by the Environmental Management Commission as adequate to meet the requirements of this Article and any applicable rules and regulations pursuant thereto.

b. No municipality, county, local board or commission or group of municipalities and counties may establish and administer an air pollution control program unless such program meets the requirements of subdivision (11) of subsection (a) of this section and is so certified by the Environmental Management Commission.

c. If the Environmental Management Commission finds that the location, character or extent of particular concentrations of population, air contaminant sources, the geographic, topographic or meteorological considerations, or any combinations thereof, are such as to make impracticable the maintenance of appropriate levels of air quality without an areawide air pollution control program, the Environmental Management Commission may determine the boundaries within which such program is necessary and require such areawide program as the only acceptable alternative to direct State administration.

d. 1. If the Environmental Management Commission has reason to believe that a local air pollution control program certified and in force pursuant to the provisions of this section is inadequate to abate or control air pollution in the jurisdiction to which such program relates, or that such program is being administered in a manner inconsistent with the requirements of this Article, the Environmental Management Commission shall, upon due notice, conduct a hearing on the matter.

2. If, after such hearing the Environmental Management Commission determines that an existing local air pollution control program or one which has been certified by the Environmental Management Commission is inadequate to abate or control air pollution in the municipality, county, or municipalities or counties to which such program relates, or that such program is not accomplishing the purposes of this Article, it shall set forth in its findings the corrective measures necessary for continued certification and shall specify a reasonable period of time, not to exceed one year, in which such measures must be taken if certification is not to be rescinded.

3. If the municipality, county, local board or commission or municipalities or counties fail to take such necessary corrective action within the time specified, the Environmental Management Commission shall rescind any certification as may have been issued for such program and shall administer within such municipality, county, or municipalities or counties all of the regulatory provisions of this Article. Such air pollution control program shall supersede all municipal, county or local laws, regulations, ordinances and requirements in the affected jurisdiction.

4. If the Environmental Management Commission finds that the control of a particular class of air contaminant source because of its complexity or magnitude is beyond the reasonable capability of the local air pollution control authorities or may be more efficiently and economically performed at the State

level, it may assume and retain jurisdiction over that class of air contaminant source. Classification pursuant to this paragraph may be either on the basis of the nature of the sources involved or on the basis of their relationship to the size of the communities in which they are located.

5. Any municipality or county in which the Environmental Management Commission administers its air pollution control program pursuant to paragraph 3 of this subdivision may, with the approval of the Environmental Management Commission, establish or resume a municipal, county, or local air pollution control program which meets the requirements for certification by the Environmental Management Commission.

6. Nothing in this Article shall be construed to supersede or oust the jurisdiction of any local air pollution control program in operation on June 22, 1967; provided that within two years from such date any such program shall meet all requirements of this Article for certification by the Environmental Management Commission as an approved local air pollution control program. Any certification required from the Environmental Management Commission shall be deemed granted unless the Environmental Management Commission takes specific action to the contrary.

7. Any municipality, county, local board or commission or municipalities or counties or designated area of this State for which a local air pollution control program is established or proposed for establishment may make application for, receive, administer and expend federal grant funds for the control of air pollution or the development and administration of programs related to air pollution control; provided that any such application is first submitted to and approved by the Environmental Management Commission. The Environmental Management Commission shall approve any such application if it is consistent with this Article and other applicable requirements of law.

8. Notwithstanding any other provision of this section, if the Environmental Management Commission determines that an air pollution source or combination of sources is operating in violation of the provisions of this Article and that the appropriate local authorities have not acted to abate such violation, the Environmental Management Commission, upon written notice to the appropriate local governing body, may act on behalf of the State to require any person causing or contributing to the pollution to cease immediately the emissions of air pollutants causing or contributing to the violation or may require such other action as it shall deem necessary.

e. Local air pollution control programs authorized. —

1. The governing body of any county, municipality, or group of counties and municipalities within a designated area of the State, as defined in this Article, subject to the approval of the Environmental Management Commission, is hereby authorized to establish, administer, and enforce a local air pollution control program for the county, municipality, or designated area of the State which includes but is not limited to:

I. Development of a comprehensive plan for the control and abatement of new and existing sources of air pollution;

II. Air-quality monitoring to determine existing air quality and to define problem areas, as well as to provide background data to show the effectiveness of a pollution abatement program;

III. An emissions inventory to identify specific sources of air contamination and the contaminants emitted, together with the quantity of material discharged into the outdoor atmosphere;

IV. Adoption, after notice and public hearing, of air quality and emission control standards, or adoption by reference, without public hearing, of any applicable rules, regulations and standards duly adopted by the Environmental Management Commission; and administration of such rules, regulations and standards in accordance with provisions of this subdivision;

V. Provisions for the establishment or approval of time schedules for the control or abatement of existing sources of air pollution and for the review of plans and specifications and issuance of approval documents covering the construction and operation of pollution abatement facilities at existing or new sources;

VI. Provision for adequate administrative staff, including an air pollution control officer and technical personnel, and provision for laboratory and other necessary facilities.

2. Each governing body is authorized to adopt any ordinances, resolutions, rules or regulations which are necessary to establish and maintain an air pollution control program and to prescribe and enforce air quality and emission control standards, a copy of which must be filed with the Department of Natural Resources and Community Development and with the clerk of court of any county affected. Provisions may be made therein for the registration of air contaminant sources; for the requirement of a permit to do or carry out specified activities relating to the control of air pollution, including procedures for application, issuance, denial and revocation; for notification of violators or potential violators about requirements or conditions for compliance; for procedures to grant temporary permits or variances from requirements or standards; for the declaration of an emergency when it is found that a generalized condition of air pollution is causing imminent danger to the health or safety of the public and the issuance of an order to the responsible person or persons to reduce or discontinue immediately the emission of air contaminants; for notice and hearing procedures for persons aggrieved by any action or order of any authorized agent; for the establishment of an advisory council and for other administrative arrangements; and for other matters necessary to establish and maintain an air pollution control program.

3. The penalty for violation of any of the requirements contained in such ordinances, resolutions, rules or regulations shall, upon conviction, be a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days, except that the penalty for violation of an order for the abatement of air pollution issued by the governing body after notice and

hearing shall, upon conviction, be a fine of not more than two hundred fifty dollars ($250.00) or imprisonment for not more than 30 days. Each day in violation shall constitute a separate offense and shall be subject to the foregoing penalties.

4. Each governing body, or its duly authorized agent, may institute a civil action in the superior court, brought in the name of the agency having jurisdiction, for injunctive relief to restrain any violation or immediately threatened violation of such ordinances, orders, rules, or regulations and for such other relief as the court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Article for any violation of same.
5. In addition, each governing body is authorized to expend tax funds, nontax funds, or any other funds available to it to finance an air pollution control program and such expenditures are hereby declared to be for a public purpose and a necessary expense.
6. Any final administrative decision rendered in an air pollution control program of such governing body shall be subject to judicial review as provided by Chapter 150A of the General Statutes, and "administrative agency" or "agency" as used therein shall mean and include for this purpose the governing body of any county or municipality, regional air pollution control governing board, and any agency created by them in connection with an air pollution control program.

f. Administration of county or municipal air pollution control programs. — Subject to the approval of the Environmental Management Commission as provided in this Article, the governing body of any county or municipality may establish, administer, and enforce an air pollution control program by either of the following methods:

1. Establishing a program under the administration of the duly elected governing body of the county or municipality;
2. Appointing an air pollution control board consisting of not less than five nor more than seven members who shall serve for terms of six years each and until their successors are appointed and qualified. Two members shall be appointed for two-year terms, two shall be appointed for four-year terms, and the remaining member or members shall be appointed for six-year terms. Where the term "governing body" is referred to in this section, it shall include the air pollution control board. Such board shall have all the powers and authorities granted to any local air pollution control program. The board shall elect a chairman and shall meet at least quarterly or upon the call of the chairman or any two members of the board;
3. Appointing an air pollution control board as provided in this section, and by appropriate written agreement designating the local health department or other department of county or municipal government as the administrative agent for the air pollution control board; and
4. Designating, by appropriate written agreement, the local board of health and the local health department as the air pollution control board and agency.

g. Creation and administration of regional air pollution control programs. — In addition to any other powers provided by law and subject to the provisions of this section, each governing body of a county or municipality is hereby authorized and empowered to establish by contract, joint resolution, or other agreement with any other governing body of a county or municipality, upon approval by the Environmental Management Commission, an air pollution control region containing any part or all of the geographical area within the jurisdiction of those boards or governing bodies which are parties to such agreement, provided the counties involved in the region are contiguous or lie in a continuous boundary and comprise the total area contained in any region designated by the Environmental Management Commission for an areawide program. The participating parties are authorized to appoint a regional air pollution control board which shall consist of at least five members who shall serve for terms of six years and until their successors are appointed and qualified. Two members shall be appointed for two-year terms, two shall be appointed for four-year terms and the remaining member or members shall be appointed for six-year terms. A participant's representation on the board shall be in relation to its population to the total population of the region based on the latest official United States census with each participant in the region having at least one representative; provided, that where the region is comprised of less than five counties, each participant will be entitled to appoint members in relation to its population to that of the region so as to provide a board of at least five members. Where the term "governing body" is used, it shall include the governing board of a region. The regional board is hereby authorized to exercise any and all of the powers provided in this section. The regional air pollution control board shall elect a chairman and shall meet at least quarterly or upon the call of the chairman or any two members of the board. In lieu of employing its own staff, the regional air pollution control board is authorized, through appropriate written agreement, to designate a local health department as its administrative agent.

(12) To declare an emergency when it finds that a generalized condition of water or air pollution which is causing imminent danger to the health or safety of the public. Regardless of any other provisions of law, if the Department finds that such a condition of water or air pollution exists and that it creates an emergency requiring immediate action to protect the public health and safety or to protect fish and wildlife, the Secretary of the Department with the concurrence of the Governor, shall order persons causing or contributing to the water or air pollution in question to reduce or discontinue immediately the emission of air contaminants or the discharge of wastes. Immediately after the issuance of such order, the chairman of the Environmental Management Commission shall fix a place and time for a hearing before the Environmental Management Commission to be held within 24 hours after issuance of such order, and within 24 hours after the commencement of such hearing, and without adjournment thereof, the Environmental Management Commission shall either affirm, modify or set aside the order of the assistant director.

In the absence of a generalized condition of air or water pollution of the type referred to above, if the Secretary finds that the emissions from one or more air contaminant sources or the discharge of wastes from one or more sources of water pollution is causing imminent

danger to human health and safety or to fish and wildlife, he may with the concurrence of the Governor order the person or persons responsible for the operation or operations in question to immediately reduce or discontinue the emissions of air contaminants or the discharge of wastes or to take such other measures as are, in his judgment, necessary, without regard to any other provisions of this Article. In such event, the requirements for hearing and affirmance, modification or setting aside of such orders set forth in the preceding paragraph of this provision shall apply.

(13) To certify and approve for eligibility any qualified application for State or federal grant funds available for the construction, modification, extension, maintenance, or operation of a disposal system or portion thereof. As a condition of certification and approval of any such application and of the permit issued pursuant to G.S. 143-215.1, the Environmental Management Commission may require that the applicant conform to all applicable requirements of the State or federal laws and programs under which said grant funds are available.

Nothing in this subsection shall be construed to limit any power which the Governor or any other officer may have to declare an emergency and act on the basis of such declaration, if such power is conferred by statute or constitutional provision, or inheres in the office.

(14) To certify and approve, by appropriate delegations and conditions in permits required by G.S. 143-215.1, requests by publicly owned treatment works to implement, administer and enforce a pretreatment program for the control of pollutants which pass through or interfere with treatment processes in such treatment works; and to require such programs to be developed where necessary to comply with the Federal Water Pollution Control Act and the Resource Conservation and Recovery Act, including the addition of conditions and compliance schedules in permits required by G.S. 143-215.1. Pretreatment programs submitted by publicly owned treatment works shall include, at a minimum, the adoption of pretreatment standards, a permit or equally effective system for the control of pollutants contributed to the treatment works, and the ability to effectively enforce compliance with the program.

(c) Relation with the Federal Government. — The Environmental Management Commission as official water and air pollution control agency for the State is delegated to act in local administration of all matters covered by any existing federal statutes and future legislation by Congress relating to water and air quality control. In order for the State of North Carolina to effectively participate in programs administered by federal agencies for the regulation and abatement of water and air pollution, the Department of Natural Resources and Community Development is authorized to accept and administer funds provided by federal agencies for water and air pollution programs and to enter into contracts with federal agencies regarding the use of such funds.

(e) Variances. — Any person subject to the provisions of G.S. 143-215.1 or 143-215.108 may apply to the Environmental Management Commission for a variance from rules, regulations, standards or limitations established pursuant to G.S. 143-214.1, 143-215, or 143-215.107. The Environmental Management Commission may grant such variance, for fixed or indefinite periods after public hearing on due notice, or where it is found that circumstances so require, for a period not to exceed 90 days without prior hearing and notice. Prior to granting a variance hereunder, the Commission shall find that:

(1) The discharge of waste or the emission of air contaminants occurring or proposed to occur do not endanger human health or safety; and

(2) Compliance with the rules, regulations, standards or limitations from which variance is sought cannot be achieved by application of best available technology found to be economically reasonable at the time of application for such variances, and would produce serious hardship without equal or greater benefits to the public, provided that such variances shall be consistent with the provisions of the Federal Water Pollution Control Act as amended or the Federal Clean Air Act as amended; and provided further, that any person who would otherwise be entitled to a variance or modification under the Federal Water Pollution Control Act as amended or the Federal Clean Air Act as amended shall also be entitled to the same variance from or modification in rules, regulations, standards or limitations established pursuant to G.S. 143-214.1, 143-215, and 143-215.107, respectively. (1951, c. 606; 1957, c. 1267, s. 3; 1959, c. 779, s. 8; 1963, c. 1086; 1967, c. 892, s. 1; 1969, c. 538; 1971, c. 1167, ss. 7, 8; 1973, c. 698, ss. 1-7, 9, 17; c. 712, s. 1; c. 1262, ss. 23, 86; c. 1331, s. 3; 1975, c. 583, ss. 5, 6; c. 655, s. 3; 1977, c. 771, s. 4; 1979, c. 633, ss. 6-8; 1979, 2nd Sess., c. 1158, ss. 1, 3, 4.)

Editor's Note. —

The 1979, 2nd Sess., amendment substituted "Environmental Management Commission" for "Department of Natural Resources and Community Development" in the third sentence of the first paragraph of subdivision (a)(7) and in the first sentence of the second paragraph of subdivision (a)(7), and added the second sentence of subdivision (c). The amendment also inserted "as amended" following "Federal Water Pollution Control Act" and following "Federal Clean Air Act" in two places in subdivision (e)(2).

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

Article 21A.

Oil Pollution and Hazardous Substances Control.

Part 1. General Provisions.

§ 143-215.77. Definitions. — As used in this Article, unless the context otherwise requires:

(4) "Discharge" shall mean, but shall not be limited to, any emission, spillage, leakage, pumping, pouring, emptying, or dumping of oil or other hazardous substances into waters, or upon land in such proximity to waters that oil or other hazardous substances is reasonably likely to reach the waters, but shall not include amounts less than quantities which may be harmful to the public health or welfare as determined pursuant to G.S. 143-215.77A; provided, however, that this Article shall not be construed to prohibit the oiling of driveways, roads or streets for reduction of dust or routine maintenance; provided further, that the use of oil or other hazardous substances, oil-based products, or chemicals on the land or waters by any State, county, or municipal government agency in any program of mosquito or other pest control, or their use by any person in accepted agricultural, horticultural, or forestry practices, or in connection with aquatic weed control or structural pest and rodent control, in a manner approved by the State, county, or local agency charged with authority over such uses, shall not constitute a discharge; provided, further, that the use of a pesticide regulated by the North Carolina

Pesticide Board in a manner consistent with the labelling required by the North Carolina Pesticide Law shall not constitute a "discharge" for purposes of this Article. The word "discharge" shall also include any discharge upon land, whether or not in proximity to waters, which is intentional, knowing or willful.

(5a) "Hazardous substance" shall mean any substance, other than oil, which when discharged in any quantity may present an imminent and substantial danger to the public health or welfare, as designated pursuant to G.S. 143-215.77A.

(1979, 2nd Sess., c. 1209, ss. 1, 2.)

Editor's Note. —

The 1979, 2nd Sess., amendment, in subdivision (4), substituted "but shall not include amounts less than quantities which may be harmful to the public health or welfare as determined pursuant to G.S. 143-215.77A" for language which excluded certain discharges in amounts determined by the Environmental Management Commission to be not harmful to the public health or welfare, and rewrote subdivision (5a).

As the rest of the section was not changed by the amendment, only the introductory language and subdivisions (4) and (5a) are set out.

§ 143-215.77A. Designation of hazardous substances and determination of quantities which may be harmful. — (a) Those substances designated as hazardous as of June 1, 1980, by the Administrator of the United States Environmental Protection Agency under 33 U.S.C. 1321(b)(2)(A) are designated as hazardous substances for purposes of this Article.

(b) Such quantities of hazardous substances as may be harmful as determined as of June 1, 1980, by the Administrator of the United States Environmental Protection Agency under 33 U.S.C. 1321(b)(4) are quantities which may be harmful for purposes of this Article.

(c) Changes by Administrator of the United States Environmental Protection Agency in the designation of hazardous substances and the determination of quantities which may be harmful shall be deemed to be made to the designation of hazardous substances and the determination of quantities for purposes of this Article, unless the Commission objects within 120 days of publication of the action in the Federal Register. The Commission may object to a change by the Administrator on the basis that the change is not consistent with the standards for determining hazardous substances or harmful quantities. Upon objection by the Commission to a change, a public hearing must be held pursuant to Article 2 of Chapter 150A of the General Statutes. The change will not be made pending the hearing and a final determination by the Commission. After the hearing, the Commission may reject the change upon a finding that the change is not consistent with the standards for determining hazardous substances or harmful quantities. (1979, 2nd Sess., c. 1209, s. 3.)

Article 21B.

Air Pollution Control.

§ 143-215.107. Air quality standards and classifications.

Cross Reference. — As to motor vehicle emission standards, see § 20-128.2.

ARTICLE 24.

Wildlife Resources Commission.

§ 143-246. Executive Director; appointment, qualifications, duties, oath of office, and bond. — The North Carolina Wildlife Resources Commission as soon as practicable after its organization shall select and appoint a competent person qualified as hereinafter set forth as Executive Director of the North Carolina Wildlife Resources Commission. The Executive Director shall be charged with the supervision of all activities under the jurisdiction of the Commission and shall serve as the chief administrative officer of the said Commission. Subject to the approval of the Commission and the Director of the Budget, he is hereby authorized to employ such clerical and other assistants as may be deemed necessary. The person selected as Executive Director shall have had training and experience in conservation, protection and management of wildlife resources. The salary of such Director shall be fixed by the Governor subject to the approval of the Advisory Budget Commission, and said Director shall be allowed actual expenses incurred while on official duties away from resident headquarters; said salary and expenses to be paid from the Wildlife Resources Fund subject to the provisions of the Executive Budget Act. The term of office of the Executive Director shall be at the pleasure of the Commission. Before entering upon the duties of his office, the Executive Director shall take the oath of office as prescribed for public officials and shall execute and deposit with the State Treasurer a bond in the sum of ten thousand dollars ($10,000), to be approved by the State Treasurer, said bond to be conditioned upon the faithful performance of his duties of office. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. (1947, c. 263, s. 10; 1957, c. 541, s. 17; 1969, c. 844, s. 5; 1979, c. 830, s. 7.)

Editor's Note. — The 1979 amendment, effective July 1, 1980, deleted the former last sentence, which read: "The said Executive Director shall be clothed and vested with all powers, duties, and responsibilities heretofore exercised by the Commission of Game and Inland Fisheries relating to wildlife resources."

ARTICLE 31.

Tort Claims against State Departments and Agencies.

§ 143-291. Industrial Commission constituted a court to hear and determine claims; damages.

Strict Construction. — The Tort Claims Act must be strictly construed. Northwestern Distribs., Inc. v. North Carolina Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203 (1979).

§ 143-297. Affidavit of claimant; docketing; venue; notice of hearing; answer, demurrer or other pleading to affidavit.

The purpose of this section, etc. — In accord with 1st paragraph in original. See Northwestern Distribs., Inc. v. North Carolina Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203 (1979).

§ 143-300.1. Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles. — (a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged mechanical defects or other defects which may affect the safe operation of a public school bus or school transportation service vehicle resulting from an alleged negligent act of maintenance personnel or as a result of any alleged negligent act or omission of the driver of a public school bus or school transportation service vehicle when:

(1) The salary of that driver is paid or authorized to be paid from the State Public School Fund, and the driver is an employee of the county or city administrative unit of which that board is the governing body, or

(2) The driver is an unpaid school bus driver trainee under the supervision of an authorized employee of the Department of Transportation, Division of Motor Vehicles, or an authorized employee of that board or a county or city administrative unit thereof,

and which driver was at the time of the alleged negligent act or omission operating a public school bus or school transportation service vehicle in the course of his employment by or training for that administrative unit or board. The liability of such county or city board of education, the defenses which may be asserted against such claim by such board, the amount of damages which may be awarded to the claimant, and the procedure for filing, hearing and determining such claim, the right of appeal from such determination, the effect of such appeal, and the procedure for taking, hearing and determining such appeal shall be the same in all respects as is provided in this Article with respect to tort claims against the State Board of Education except as hereinafter provided. Any claim filed against any county or city board of education pursuant to this section shall state the name and address of such board, the name of the employee upon whose alleged negligent act or omission the claim is based, and all other information required by G.S. 143-297 in the case of a claim against the State Board of Education. Immediately upon the docketing of a claim, the Industrial Commission shall forward one copy of the plaintiff's affidavit to the superintendent of the schools of the county or city administrative unit against the governing board of which such claim is made, one copy of the plaintiff's affidavit to the State Board of Education and one copy of the plaintiff's affidavit to the office of the Attorney General of North Carolina. All notices with respect to tort claims against any such county or city board of education shall be given to the superintendent of schools of the county or city administrative unit of which such board is a governing board, to the State Board of Education and also to the office of the Attorney General of North Carolina.

(d) The Attorney General may defend any civil action which may be brought against the driver of a public school bus or school transportation service vehicle or school bus maintenance mechanic when such driver or mechanic is paid or authorized to be paid from the State Public School Fund or when the driver is an unpaid school bus driver trainee under the supervision of an authorized employee of the Department of Transportation, Division of Motor Vehicles, or an authorized employee of a county or city board of education or administrative unit thereof. The Attorney General may afford this defense through the use of a member of his staff or, in his discretion, employ private counsel. The Attorney General is authorized to pay any judgment rendered in such civil action not to exceed the limit provided under the Tort Claims Act. The Attorney General may compromise and settle any claim covered by this section to the extent that he finds the same to be valid, up to the limit provided in the Tort Claims Act, provided that the authority granted in this subsection shall be limited to only those claims which would be within the jurisdiction of the Industrial

Commission under the Tort Claims Act. (1955, c. 1283; 1961, c. 1102, ss. 1-3; 1967, c. 1032, s. 1; 1975, c. 589, s. 1; c. 916, ss. 1, 2; 1977, c. 935, s. 1; 1979, 2nd Sess., c. 1332, ss. 1, 2.)

Editor's Note. —
The 1979, 2nd Sess., amendment rewrote subsection (a), and added at the end of the first sentence of subsection (d) the language beginning "or when the driver is an unpaid school bus driver trainee."

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

ARTICLE 36.

Department of Administration.

§ 143-341. Powers and duties of Department. — The Department of Administration has the following powers and duties:

(1) Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 38.

(1979, 2nd Sess., c. 1137, s. 38.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, repealed subdivision (1), providing for powers and duties of the Department relating to the budget.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subdivisions were not changed by the amendment, they are not set out.

§ 143-344. Transfer of functions, property, records, etc. — (a) Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 39.

(1979, 2nd Sess., c. 1137, s. 39.)

Editor's Note. —
The 1979, 2nd Sess., amendment repealed subsection (a), which transferred to the Department of Administration the powers, duties, functions, etc., of the Budget Bureau.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subsections were not changed by the amendment, they are not set out.

ARTICLE 52.

Pesticide Board.

Part 2. Regulation of the Use of Pesticides.

§ 143-442. Registration.

(h) A pesticide may be registered by the Board for experimental use, including use to control wild animal or bird populations, even though the Wildlife Resources Commission may not have concurred in the declaration of the animal or bird populations as pets under the terms of Article 22A of Chapter 113 of the General Statutes.

(1979, c. 830, s. 10.)

Editor's Note. —

The second 1979 amendment, effective July 1, 1980, substituted the language beginning "animal or bird populations" at the end of subsection (h) for "bird or animal populations where the birds or animals in question have not yet been declared unprotected by the Wildlife Resources Commission, notwithstanding the provisions of G.S. Chapter 113, Article 7."

As the rest of the section was not changed by the amendment, only subsection (h) is set out.

Chapter 143A.

State Government Reorganization.

Article 1.

General Provisions.

§ 143A-6. Types of transfers.

Power to Fire within Scope of Subsection (c). — When an agency is transferred to a new department by a "type II transfer," subsection (b) of this section provides that the management functions of the agency, which includes staffing pursuant to subsection (c) of this section, shall be performed not only under the "supervision" but also the "direction" of the head of the principal department. The power to fire clearly falls within the scope of subsection (c) of this section; therefore, the Secretary of Human Resources had the power to fire the superintendent of a State hospital for the mentally disordered before his six-year term expired and it was not required that he be dismissed by the State Board of Mental Health. Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

Effect of Shift of Power to Fire on Employment Contract. — The transfer of the power to dismiss from the State Board of Mental Health to the Department of Human Resources makes no change in either the obligations of the parties or the remedies available to plaintiff superintendent of a State hospital for the mentally disordered in enforcing his agreement. Plaintiff's contract of employment was not with the agency which appointed him but with the State, and the essential terms of that contract — duration, dismissal for cause, and salary — remain unaffected by any shift of the power to fire from one agency of the State to another. Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

Chapter 143B.

Executive Organization Act of 1973.

Article 1.

General Provisions.

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Part 1. General Provisions.

143B-476. Department of Crime Control and Public Safety — head; powers and duties as to emergencies and disasters.

Article 1.

General Provisions.

§ 143B-6. Principal departments. — In addition to the principal departments enumerated in the Executive Organization Act of 1971, all executive and administrative powers, duties, and functions not including those of the General Assembly and its agencies, the General Court of Justice and the administrative agencies created pursuant to Article IV of the Constitution of North Carolina, and higher education previously vested by law in the several State agencies, are vested in the following principal departments:

(1) Department of Cultural Resources
(2) Department of Human Resources
(3) Department of Revenue
(4) Department of Crime Control and Public Safety
(5) Department of Correction
(6) Department of Natural Resources and Community Development
(7) Department of Transportation
(8) Department of Administration
(9) Department of Commerce
(10) Department of Community Colleges. (1973, c. 476, s. 6; c. 620, s. 9; c. 1262, ss. 10, 86; 1975, c. 716, s. 5; c. 879, s. 46; 1977, c. 70, s. 23; c. 198, s. 22; c. 771, s. 4; 1979, 2nd Sess., c. 1130, s. 3.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, added subdivision (10).

§ 143B-13. Appointment, qualifications, terms, and removal of members of commissions.

Applicability of Administrative Procedure Act to Removals. — Subsection (d) of this section does not refer to the Administrative Procedure Act. Absent a specific legislative enactment requiring removal by the Governor to be subject to the Administrative Procedure Act, the act is not applicable to removals by the Governor. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

§ 143B-14. Administrative services to commissions.

(b) Except as otherwise provided in the Executive Organization Act of 1973 or in G.S. 150A-11(4), the powers, duties, and functions of a commission (including but not limited to rule making, regulation, licensing, and promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications) shall not be subject to the approval, review, or control of the head of the department or of the Governor.

(1979, 2nd Sess., c. 1137, s. 41.2.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, inserted "or in G.S. 150A-11(4)" near the beginning of subsection (b).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the other subsections were not changed by the amendment, only subsection (b) is set out.

ARTICLE 2.

Department of Cultural Resources.

Part 2. Art Commission.

§§ 143B-54 to 143B-57: Repealed by Session Laws 1979, 2nd Session, c. 1306, s. 5, effective July 1, 1980.

Cross Reference. — For present provisions as to the administration of the North Carolina Museum of Art, see § 140-5.12 et seq.

Part 3. Art Museum Building Commission.

§ 143B-61.1. Termination of the Art Museum Building Commission. — The Art Museum Building Commission shall continue to exercise its powers and perform its duties until:

(1) The building now under construction, authorized, and to be designated as the North Carolina Museum of Art, is completed and has been dedicated and occupied;

(2) The art collection of the State of North Carolina is suitably exhibited, displayed, or stored therein; and

(3) The State Art Museum Building Commission has submitted its biennial report and any other report required by law, or until the State Art Museum Building Commission has made and submitted its final report to the General Assembly, whichever last occurs.

The Commission shall make a diligent effort to complete construction of the Museum building by the use of State funds already appropriated and gifts of private funds already pledged. Upon completion of the conditions set forth in subdivisions (1) through (3) of this section, Article 1A of Chapter 140 and Part 3 of Article 2 of Chapter 143B of the General Statutes shall no longer be pertinent. (1979, 2nd Sess., c. 1306, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1306, s. 6, makes this section effective July 1, 1980.

Article 3.

Department of Human Resources.

Part 1. General Provisions.

§ 143B-138. Department of Human Resources — functions.

Cited in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

§ 143B-139.3. Department of Human Resources — authority to contract with other entities. — The Department of Human Resources is authorized to contract with any governmental agency, person, association, or corporation for the accomplishment of its duties and responsibilities provided that the expenditure of funds pursuant to such contracts shall be for the purposes for which the funds were appropriated and is not otherwise prohibited by law. (1979, 2nd Sess., c. 1094, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1094, s. 6, provides: "This act is effective upon ratification. All contracts which would be permissible under this act which were entered into on or after April 20, 1979, are hereby validated. The act was ratified June 17, 1980."

The preamble to Session Laws 1979, 2nd Sess., c. 1094 cites as the reason for the enactment Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979), requiring statutory authority for third party contracts.

Part 12. Boards of Directors of Institutions.

§ 143B-173. Boards of directors of institutions — creation, powers and duties. — (a) There are hereby created the following boards of directors of institutions:

(1) Repealed by Session Laws 1979, 2nd Session, c. 1245, s. 1.
(2) The Board of Directors of the North Carolina Orthopedic Hospital;
(3) The Board of Directors of the Lenox Baker Children's Hospital;
(4) The Board of Directors of the Governor Morehead School;
(5) The Board of Directors of the North Carolina Schools for the Deaf; and
(6) The Board of Directors of the Confederate Women's Home

with the power and duty to adopt rules and regulations to be followed in the conduct of their respective institutions.

(1979, 2nd Sess., c. 1245, s. 1.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted subdivision (1) of subsection (a), relating to the Board of Directors of the North Carolina Specialty Hospitals.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 143B-174. Boards of directors of institutions — members; selection; quorum; compensation. — The Board of Directors of the Lenox Baker Children's Hospital of the Department of Human Resources shall consist of nine members appointed by the Governor for terms of six years. The Board of Directors of the North Carolina Orthopedic Hospital of the Department of Human Resources shall consist of nine members appointed by the Governor for terms of six years. The Board of Directors of the Governor Morehead School of the Department of Human Resources shall consist of 11 members appointed by the Governor for terms of six years. The Board of Directors of the North Carolina Schools for the Deaf of the Department of Human Resources shall consist of 11 members appointed by the Governor for terms of four years. The Board of Directors of the Confederate Women's Home of the Department of Human Resources shall consist of seven members appointed by the Governor for terms of two years. The initial members of each of the aforementioned boards of directors shall be the members of the previously existing board of directors for each institution. The members of the various boards of directors shall serve for a period equal to the remainder of their current terms on their respective boards, which are as follows: the Board of Directors of the North Carolina Orthopedic Hospital, two of whose appointments expire April 4, 1973, four of whose appointments expire April 4, 1975, and three of whose appointments expire April 4, 1977; the Board of Directors of the Lenox Baker Children's Hospital, three of whose appointments expire July 10, 1973, three of whose appointments expire July 10, 1975, and three of whose appointments expire July 10, 1977; the Board of Directors of the Governor Morehead School, four of whose appointments expire May 1, 1973, three of whose appointments expire May 1, 1975, and four of whose appointments expire May 1, 1977; the Board of Directors of the North Carolina Schools for the Deaf, all of whose appointments expire July 17, 1973; and the Board of Directors of the Confederate Women's Home, all of whose appointments expire June 30, 1973. At the end of the respective terms of office of the initial members of each board, their successors shall be appointed for terms as hereinabove delineated and until their successors are appointed and qualify. Any appointment to fill a vacancy on the board of directors 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 a board of directors from office for misfeasance, malfeasance or nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of each board of directors shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of a board of directors shall constitute a quorum for the transaction of business.

All clerical and other services required by a board of directors shall be supplied by the Secretary of Human Resources. (1973, c. 476, s. 158; 1977, c. 462, s. 3; 1979, c. 838, s. 44; 1979, 2nd Sess., c. 1245, s. 2.)

Editor's Note. —
The 1979 amendment, effective July 1, 1980, deleted the former first sentence, relating to the Board of Directors of the North Carolina Specialty Hospitals, and deleted provisions as to the Board of Directors of the North Carolina Specialty Hospitals in the present seventh sentence. The amendment was made conditional upon termination of the Board of Directors of the North Carolina Specialty

Hospitals. The Board was terminated by Session Laws 1979, 2nd Sess., c. 1245.

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 one each appointed by the Lieutenant Governor and the Speaker of the House. 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. The Lieutenant Governor and the Speaker of the House shall make their respective appointments on July 1, 1975, for four years. Thereafter, the appointment of their successors shall be for terms of four years.

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.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted "per diem and" preceding "necessary travel and subsistence expenses" near the beginning of the fourth paragraph, and added "and a salary of two hundred dollars ($200.00) per day when hearing cases" at the end of the fourth paragraph.

Article 7.

Department of Natural Resources and Community Development.

Part 4. Environmental Management Commission.

§ 143B-283. Environmental Management Commission — members; selection; removal; compensation; quorum; services. — (a) The Environmental Management Commission shall consist of 13 members appointed by the Governor. The Governor shall select the members so that the membership of the Commission shall consist of:

(1) One who shall be a licensed physician;
(2) One who shall, at the time of appointment, be actively connected with the Commission for Health Services or local board of health or have had experience in water and air pollution control activities;
(3) One who shall, at the time of appointment, be actively connected with or have had experience in agriculture;
(4) One who shall, at the time of appointment, be a registered engineer experienced in the planning or conservation of water or air resources, or planning of water or sewer systems, or having experience in the field of industrial water supply or water and air pollution control, or have had practical experience in water supply and water and air pollution control problems of municipal government;
(5) One who shall, at the time of appointment, be actively connected with or have had experience in the fish and wildlife activities of the State;
(6) One who shall, at the time of appointment, be actively connected with or knowledgeable in the groundwater industry;
(7) Five members interested in water and air pollution control, appointed from the public at large;
(8) One who shall, at the time of appointment, be actively connected with industrical production or have had experience in the field of industrial air and water pollution control; and
(9) One who shall, at the time of appointment, be actively connected with or have had experience in pollution control problems of municipal or county government.

(b) Members so appointed shall serve terms of office of six years. 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. At the expiration of each member's term, the Governor shall replace the member with a new member of like qualifications. The initial members of the Environmental Management Commission shall be those members of the present Board of Water and Air Resources who shall meet the above standards for membership on the Environmental Management Commission and who shall serve on the Environmental Management Commission for a period equal to the remainder of their current terms on the Board of Water and Air Resources, four of whose appointments expire June 30, 1975, five of whose appointments expire June 30, 1977, and four of whose appointments expire June 30, 1979. Any initial appointment to replace a member of the present Board of Water and Air Resources who does not meet the above standards for membership on the Environmental Management Commission shall be for a period equal to the replaced member's unexpired term.

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 Natural Resources and Community Development.

(c) Nine of the members appointed by the Governor under this section shall be persons who do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Chapter. The Governor shall require adequate disclosure of potential conflicts of interest by members. The Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the

eligibility of persons under this section, giving due regard to the requirements of federal legislation, and for this purpose may promulgate rules, regulations or guidelines in conformance with those established by any federal agency interpreting and applying provisions of federal law.

(d) In addition to the members designated by subsection (a), the Environmental Management Commission shall also consist of four members of the General Assembly, appointed as follows:

(1) Two members of the North Carolina House of Representatives to be appointed by the Speaker of the House; and

(2) Two members of the North Carolina Senate to be appointed by the President of the Senate.

The appointed members of the General Assembly shall be initially appointed by July 30, 1980, and shall serve until January 31, 1981. Thereafter, such members shall serve two-year terms, or until their respective successors are appointed. (1973, c. 1262, s. 20; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1158, ss. 5, 6.)

Editor's Note. —

The 1979, 2nd Sess., amendment deleted the former second sentence of subdivision (9) of subsection (a), which related to the promulgation by the Governor of eligibility criteria and rules, regulations or guidelines established by federal agencies, and added subsection (c) and (d).

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.

(d) Whenever the Secretary exercises the authority provided in subsection (c) of this section, he shall be authorized to utilize and allocate all available State resources as are reasonably necessary to cope with the emergency or disaster, including directing of personnel and functions of State agencies or units thereof for the purpose of performing or facilitating the initial response to the disaster or emergency. Following the initial response, the Secretary, in consultation with the heads of the State agencies which have or appear to have the responsibility for dealing with the emergency or disaster, shall designate one or more lead agencies to be responsible for subsequent phases of the response to the emergency or disaster. Pending an opportunity to consult with the heads of such agencies, the Secretary may make interim lead agencies designations.

(e) Every department of State government is required to report to the Secretary, by the fastest means practicable, all natural or man-made disasters or emergencies, including but not limited to wars, insurrections, riots, civil disturbances, or accidents which appear likely to require the utilization of the services of more than one subunit of State government.

(f) The Secretary is authorized to adopt rules and procedures for the implementation of this section.

(g) Nothing contained in this section shall be construed to supersede or modify those powers granted to the Governor or the Council of State to declare and react to a state of disaster as provided in Chapter 166A of the General Statutes, the Constitution or elsewhere. (1977, c. 70, s. 1; 1979, 2nd Sess., c. 1310, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment added subsections (d), (e), (f) and (g).

As the rest of the section was not changed by the amendment, only subsections (d), (e), (f) and (g) are set out.

Chapter 147.

State Officers.

Article 3.

The Governor.

Sec.
147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.
147-33. Compensation and expenses of Lieutenant Governor.

Article 3.

The Governor.

§ 147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office. — The salary of the Governor shall be forty-seven thousand seven hundred dollars ($47,700) per annum, payable monthly. He shall be paid annually the sum of eleven thousand five hundred dollars ($11,500) as an expense allowance in attending to the business for the State and for expenses out of the State and in the State in representing the interest of the State and people, incident to the duties of his office, the said allowance to be paid monthly. In addition to the foregoing allowance, the actual expenses of the Governor while traveling outside the State on business incident to his office shall be paid by the State Treasurer on a warrant issued by the Auditor. Whenever a person who is not a State official or employee is designated by the Governor to represent the Governor's office, such person shall be paid actual travel expenses incurred in the performance of such duty; provided that the payment of such travel expense shall conform to the provisions of the biennial appropriation act in effect at the time the payment is made. (1879, c. 240; Code, s. 3720; 1901, c. 8; Rev., s. 2736; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320; C. S., s. 3858; 1929, c. 276, s. 1; 1947, c. 994; 1953, c. 1, s. 1; 1961, c. 1157; 1963, c. 1178, s. 1; 1965, c. 1091, s. 1; 1971, c. 1083, s. 1; 1973, c. 600; 1977, 2nd Sess., c. 1136, s. 39; c. 1249, s. 5; 1979, 2nd Sess., c. 1137, s. 31.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the expense allowance provided for in the second sentence from $10,000 to $11,500.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 147-33. Compensation and expenses of Lieutenant Governor. — The salary of the Lieutenant Governor shall be the same as for superior court judges as set by the General Assembly in the Budget Appropriation Act. In addition to this salary, the Lieutenant Governor shall be paid an annual expense allowance in the sum of eleven thousand five hundred dollars ($11,500). (1911, c. 103; C. S., s. 3862; 1945, c. 1; 1953, c. 1, s. 1; 1963, c. 1050; 1967, c. 1170, s. 1; 1971, c. 913; 1977, c. 802, s. 42.6; 1977, 2nd Sess., c. 1136, s. 40; 1979, 2nd Sess., c. 1137, s. 32.)

Editor's Note. —
The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the expense allowance from $10,000 to $11,500.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

Chapter 148.

State Prison System.

Article 2.

Prison Regulations.

§ 148-13. Rules and regulations as to grades, allowance of time and privileges for good behavior, etc.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

As to this section as amended by Session Laws 1979, 2nd Sess., c. 1316, see the note catchlined "Amendment Effective March 1, 1981," below.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, ss. 43 to 46, effective March 1, 1981, and applicable to offenses committed on or after that date, amends this section to read as follows:

"§ 148-13. Regulations as to custody grades, privileges, gain time credit, etc. — (a) The Secretary of Correction may issue regulations regarding the grades of custody in which State prisoners are kept, the privileges and restrictions applicable to each custody grade, and the amount of cash, clothing, etc., to be awarded to State prisoners after their discharge or parole.

"(b) With respect to prisoners who are serving prison or jail terms for offenses not subject to Article 81A of Chapter 15A of the General Statutes, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.

"(c) With respect to all prisoners serving prison or jail terms for felonies that occurred on or after the effective date of Article 81A of Chapter 15A of the General Statutes, the Secretary of Correction and local jail administrators must grant credit toward their terms for good behavior as required by G.S. 15A-1340.7. The provisions of this subsection shall not apply to persons convicted of Class A or Class B felonies.

"(d) With respect to prisoners serving prison or jail terms for felonies that occurred on or after the effective date of Article 81A of Chapter 15A, the Secretary of Correction shall issue regulations authorizing gain time credit to be deducted from the terms of such prisoners, in addition to the good behavior credit authorized by G.S. 15A-1340.7. Gain time credit may be granted for meritorious conduct and shall be granted for performance of work inside or outside the prison or jail. Gain time credit earned pursuant to regulations issued under this subsection shall not be subject to forfeiture for misconduct. Gain time shall be administered to qualified prisoners as follows:

"(1) Gained Time II. In addition to the good behavior credit authorized by G.S. 15A-1340.7, prisoners who perform short-term work assignments (requiring a minimum of four hours of actual work per day) shall receive credit for work performed at the rate of two days per month.

"(2) Gained Time II. In addition to the good behavior credit authorized by G.S. 15A-1340.7, prisoners who perform job assignments requiring a minimum of six hours work per day or who perform in part-time work release programs shall receive credit at the rate of four days per month.

"(3) Gained Time III. In addition to the good behavior credit authorized by G.S. 15A-1340.7, prisoners who perform job assignments requiring a minimum of six hours per day with requirements for specialized skills or specialized responsibilities, as well as inmates participating in full-time work release shall receive credit at the rate of six days per month.

"The Secretary of Correction may, in his discretion, grant gain time credit at a rate greater than the rates specified in this subsection for meritorious conduct or emergency work performed, provided, however, that gain time granted for emergency work performed shall not exceed 30 days per month, nor shall gain time granted for meritorious conduct exceed 30 days for each act of meritorious conduct.

"(e) The Secretary's regulations concerning time deductions authorized by this section and his regulations concerning prisoner conduct

issued pursuant to G.S. 15A-1340.7 shall be distributed to and followed by local jail administrators with regard to sentenced jail prisoners."

ARTICLE 3.

Labor of Prisoners.

§ 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.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

An exact time is not an essential element of the offense of escape as set out in subdivision (g)(1) of this section and the 24-hour exception provided in subdivision (g)(2) of this section is a defense which a defendant may raise should the evidence warrant such a defense. Therefore, the trial court did not err in denying a defendant's motion to dismiss at the close of the State's evidence on the grounds the warrant did not set out the exact date and time of the alleged escape and further failed to state the period of time was in excess of the 24-hour time limitation found in subdivision (g)(2) of this section. State v. Womble, 44 N.C. App. 503, 261 S.E.2d 263 (1980).

§ 148-46.1. Inflicting or assisting in infliction of self injury to prisoner resulting in incapacity to perform assigned duties.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, so as to postpone to March 1, 1981, the effective date of the amendment treated under the catchline "Amendment Effective July 1, 1980," in the 1979 Cumulative Supplement.

ARTICLE 3B.

Facilities and Programs for Youthful Offenders.

§ 148-49.10. Purposes of Article.

Retroactive Application. —

State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977), did not alter any established statutory or judicial rule of law so as to constitute judicial ex post facto decision making in violation of due process of law. At most, it simply held that this Article, which arguably gave a sentencing alternative in a first degree murder case, did not have that effect. Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

§ 148-49.14. Sentencing committed youthful offenders.

Remand Where "No Benefit" Finding Not Made. — Where the trial court sentenced a 17 year old defendant to consecutive terms of life imprisonment without making a "no benefit" finding as required by this section, the trial court erred in not making the finding and the case must be remanded for resentencing. State v. Rupard, 299 N.C. 515, 263 S.E.2d 554 (1980).

The trial court, before sentencing a defendant under 21 years of age to imprisonment, must make a finding showing clearly that the court considered the "committed youthful offender" option and determined that the defendant would not benefit from it. Where, on appeal, no such finding appeared in the record before the appellate court, defendant's sentence was vacated and the case remanded for resentencing. State v. Smith, 43 N.C. App. 376, 258 S.E.2d 847 (1979).

§ 148-49.15. Parole of committed youthful offenders.

Cited in State v. Rupard, 299 N.C. 515, 263 S.E.2d 554 (1980).

Article 11.

Inmate Grievance Commission.

§ 148-101. Commission established; appointment and terms of members; chairman; vacancies; compensation.

Editor's Note. — For article, "The Ombudsman, or Citizens' Defender — The North Carolina Experience," see 10 N.C. Cent. L.J. 227 (1979).

Chapter 150A.

Administrative Procedure Act.

Article 2.

Rule Making.

Sec.

150A-11. Special requirements.

Article 5.

Publication of Administrative Rules.

Sec.

150A-63. Publication of rules.

Article 1.

General Provisions.

§ 150A-1. Scope and policy.

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

Cited in James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979); MacDonald v. University of N.C., 299 N.C. 457, 263 S.E.2d 578 (1980).

§ 150A-2. Definitions.

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

Article 2.

Rule Making.

§ 150A-9. Minimum procedural requirements.

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 150A-11. Special requirements. — In addition to other rule-making requirements imposed by law, each agency shall:

(4) With respect to all proposed rules requiring the expenditure or distribution of State funds, submit to the Director of the Budget a summary of the proposed rule or rules and obtain approval of such expenditure or distribution of State funds prior to publishing the notice of public hearing required by G.S. 150A-12(a). (1973, c. 1331, s. 1; 1979, 2nd Sess., c. 1137, s. 41.1.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, added subdivision (4).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (4) are set out.

§ 150A-12. Procedure for adoption of rules.

Cross Reference. —
As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

Quoted in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 150A-13. Emergency rules.

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

ARTICLE 3.

Administrative Hearings.

§ 150A-29. Rules of evidence.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

§ 150A-30. Official notice.

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

§ 150A-36. Final agency decision.

Remand Required Where Findings Insufficient. — Where, on review of an order of a state commission permitting petitioner savings and loan association to open a branch office, trial court determined that the commission's findings were insufficient, i.e., lacking the specificity required by this section, the trial court should never have reached the question of whether reversal under § 150A-51(5) was appropriate. Remand for further findings was essential upon concluding that the findings of record presented an inadequate basis for review. Under no applicable theory of law would it be appropriate for the trial court to reverse the commission and substitute its judgment for the commission's. Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

ARTICLE 4.

Judicial Review.

§ 150A-43. Right to judicial review.

Cited in In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979); North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

§ 150A-45. Manner of seeking review; time for filing petition; waiver.

Applied in MacDonald v. University of N.C., 299 N.C. 457, 263 S.E.2d 578 (1980).

§ 150A-50. Review by court without jury on the record.

Judge Not Subject to Rule 52(a) Requirements. — When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to this section, the judge is not required to make findings of fact and enter a judgment thereon in the same sense as a trial judge pursuant to Rule 52(a) of the Rules of Civil Procedure. In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Cited in Boehm v. North Carolina Bd. of Podiatry Exmrs., 41 N.C. App. 567, 255 S.E.2d 328 (1979); Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

§ 150A-51. Scope of review; power of court in disposing of case.

Application of "Whole Record" Test. — The "whole record" test requires the board's judgment to be affirmed if upon consideration of the whole record as submitted, the facts found by the board are supported by competent, material and substantial evidence, taking into account any contradictory evidence, or evidence from which conflicting inferences could be drawn. Boehm v. North Carolina Bd. of Podiatry Exmrs., 41 N.C. App. 567, 255 S.E.2d 328, cert. denied, 298 N.C. 294, 259 S.E.2d 298 (1979).

The "whole record" test is distinguishable from both de novo review and the "any competent evidence" standard of review. Under the "whole record" test the reviewing court cannot replace the board's judgment between two reasonably conflicting views, even though the court could have reached a different conclusion had the matter been before it de novo. Boehm v. North Carolina Bd. of Podiatry Exmrs., 41 N.C. 567, 255 S.E.2d 328, cert. denied, 298 N.C. 294, 259 S.E.2d 298 (1979).

No court can weigh evidence, etc. — The reviewing court, while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusions of the merits. If, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand. Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

In determining whether reversal or modification of an administrative decision is appropriate under subdivision (5) of this section, the test applied to the evidence must be the "whole record" test. This test does not allow the reviewing court to replace the administrative tribunal's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. Instead, the reviewing court is required to examine all of the competent evidence, pleadings, etc., which comprise the "whole record" to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

Remand Required for Insufficiency of Findings under § 150A-36. — Where, on review of an order of a state commission permitting petitioner savings and loan association to open a branch office, trial court determined that the commission's findings were insufficient, i.e., lacking the specificity required by § 150A-36, the trial court should never have reached the question of whether reversal under subdivision (5) of this section was appropriate. Remand for further findings was essential upon concluding that the findings of record presented an inadequate basis for review. Under no applicable theory of law would it be appropriate for the trial court to reverse the commission and substitute its judgment for the commission's. Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

Insufficiency of an agency's findings does not relieve the trial court of the responsibility for considering all of the competent evidence in the whole record to determine whether substantial evidence is present to support the commission's conclusions. Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

Applied in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979); Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

Cited in In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979); North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

ARTICLE 5.

Publication of Administrative Rules.

§ 150A-58. Short title and definition.

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 150A-59. Filing of rules.

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

§ 150A-63. Publication of rules.

(d) As soon as practicable after February 1, 1976, the Attorney General shall publish, in print, microfiche, or other form, a compilation of all rules in force pursuant to the provisions of this Article. Cumulative supplements shall be published annually, or more frequently in the discretion of the Attorney General. Recompilations shall be made in the discretion of the Attorney General.

(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 one copy 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.

(f) The Attorney General shall make available copies of the compilation, and of all supplements, to other persons at a price determined by him to cover publication and mailing costs. Any money received by the Department of Justice pursuant to this section from the sale of copies of the compilation, and of all supplements, shall be deposited in the State treasury in a special funds account to be held in trust for the Department of Justice to defray the expense of future recompilation, publication, and distribution of the Code. All moneys involved shall be subject to audit by the State Auditor.

(1979, 2nd Sess., c. 1266, ss. 1-3.)

Editor's Note. —

The 1979, 2nd Sess., amendment inserted "in print, microfiche, or other form" in the first sentence of subsection (d), rewrote subsection (e), and added the last two sentences of subsection (f).

As the rest of the section was not changed by the amendment, only subsections (d), (e), and (f) are set out.

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979).

Chapter 152.

Coroners.

§ 152-1. Election; vacancies in office; appointment by clerk in special cases.

Local Modification. — Chowan (officer of coroner abolished): 1979, 2nd Sess., c. 1163.

Chapter 153A.

Counties.

Article 13.

Health and Social Services.

Part 2. Social Service Provisions.

Sec.

153A-258. [Reserved.]

Part 3. Health and Social Services Contracts.

153A-259. Counties authorized to contract with other entities for health and social services.

153A-260. [Reserved.]

Article 15.

Public Enterprises.

Part 4. Long Term Contracts for Disposal of Solid Waste.

153A-299.1. Authority to contract with private firms; contract provisions.

Sec.

153A-299.2. Solid waste defined.

153A-299.3. Power not limited by §§ 153A-136 or 160A-319.

153A-299.4. Approval by Department of Human Resources.

153A-299.5. Approval by board of commissioners or city council.

153A-299.6. Applicability.

Article 23.

Miscellaneous Provisions.

153A-445. Miscellaneous powers found in Chapter 160A.

Article 4.

Form of Government.

Part 3. Organization and Procedures of the Board of Commissioners.

§ 153A-40. Regular and special meetings.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 153A-46. Franchises.

Cross Reference. — As to the approval, under this section, of long-term contracts entered into by boards of county commissioners for the disposal of solid waste, see § 153A-299.5.

Article 6.

Delegation and Exercise of the General Police Power.

§ 153A-136. Regulation of solid wastes.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations notwithstanding the provisions of this section, see § 153A-299.3.

ARTICLE 8.

County Property.

Part 1. Acquisition of Property.

§ 153A-159. Power of eminent domain conferred.

Cited in Centre Dev. Co. v. County of Wilson, 44 N.C. App. 469, 261 S.E.2d 275 (1980).

ARTICLE 12.

Roads and Bridges.

§ 153A-239. Public road defined.

Local Modification. — Brunswick: 1979, 2nd Sess., c. 1319.

§ 153A-240. Naming roads and assigning street numbers in unincorporated areas.

Local Modification. — Brunswick: 1979, 2nd Sess., c. 1319.

§ 153A-241. Closing public roads or easements.

Applied in Whitehead Community Club v. Hoppers, 43 N.C. App. 671, 260 S.E.2d 94 (1979).

ARTICLE 13.

Health and Social Services.

Part 2. Social Service Provisions.

§ 153A-258: Reserved for future codification purposes.

Part 3. Health and Social Services Contracts.

§ 153A-259. Counties authorized to contract with other entities for health and social services. — A county is authorized to contract with any governmental agency, person, association, or corporation for the provision of health or social services provided that the expenditure of funds pursuant to such contracts shall be for the purpose for which the funds were appropriated and is not otherwise prohibited by law. (1979, 2nd Sess., c. 1094, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1094, s. 6, provides: "This act is effective upon ratification. All contracts which would be permissible under this act which were

entered into on or after April 20, 1979, are hereby validated. The act was ratified on June 17, 1980."

The preamble to Session Laws 1979, 2nd Sess., c. 1094, cites as the reason for the enactment Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979), requiring statutory authority for third party contracts.

§ 153A-260: Reserved for future codification purposes.

Article 15.

Public Enterprises.

Part 4. Long Term Contracts for Disposal of Solid Waste.

§ 153A-299.1. Authority to contract with private firms; contract provisions. — The boards of county commissioners on behalf of counties and city councils on behalf of cities and towns are hereby authorized to enter into contracts with any private person, firm or corporation to dispose of by sale or otherwise, solid waste generated within their geographic boundaries or brought into their geographic boundaries. Without intending to limit the provisions which may be included in such contracts, the contracts may specifically include provisions for:

(1) Payment by the county, city or town of a fee or other charge to the private person, firm or corporation to accept and dispose of the solid waste;

(2) Periodic increases or adjustments in the fees or other charges to be paid by the counties, cities or towns to the private person, firm or corporation;

(3) Warranties from the counties, cities or towns with respect to the quantity of the solid waste it will deliver and transfer to the private person, firm or corporation and warranties relating to the content or quality of the solid waste;

(4) Legal and equitable title to the solid waste passing to the private person, firm or corporation upon delivery of the solid waste to the private person, firm or corporation; and

(5) A long term of duration up to a period of 60 years. (1979, 2nd Sess., c. 1135, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1135, s. 7 makes the act effective July 1, 1980.

§ 153A-299.2. Solid waste defined. — As used in this Part, the term "solid waste" shall include but not be limited to trash, debris, garbage, litter, discarded cans or receptacles or any other type of waste or garbage material whatsoever. (1979, 2nd Sess., c. 1135, s. 2.)

§ 153A-299.3. Power not limited by §§ 153A-136 or 160A-319. — Counties, cities and towns may enter into long-term contracts as described in G.S. 153A-299.1 of this Part notwithstanding the provisions of G.S. 153A-136 limiting a franchise granted by a board of county commissioners for the collection and disposal of solid waste to a term of no more than seven years and notwithstanding the provisions of G.S. 160A-319 limiting a franchise granted by a city for the collection and disposal of solid waste to a term of no more than 60 years. (1979, 2nd Sess., c. 1135, s. 3.)

§ 153A-299.4. Approval by Department of Human Resources. — The Department of Human Resources must approve all contracts entered into pursuant to this Part before such contract may become effective. (1979, 2nd Sess., c. 1135, s. 4.)

§ 153A-299.5. Approval by board of commissioners or city council. — Approval of any contract under this Part by the board of county commissioners or city council shall be governed by G.S. 153A-46 as to counties or by G.S. 160A-76 as to cities and towns. (1979, 2nd Sess., c. 1135, s. 5.)

§ 153A-299.6. Applicability. — This Part shall apply only to Beaufort County, Craven County, Edgecombe County, Hyde County, Lenoir County, Martin County, Pamlico County, Pitt County, Washington County, Wilson County, and to any and all incorporated cities and towns situated within the foregoing counties. (1979, 2nd Sess., c. 1135, s. 6.)

Article 18.

Planning and Regulation of Development.

Part 1. General Provisions.

§ 153A-323. Procedure for adopting or amending ordinances under this Article and Chapter 160A, Article 19.

Applied in Lee v. Simpson, 44 N.C. App. 611, 261 S.E.2d 295 (1980).

Part 3. Zoning.

§ 153A-345. Board of adjustment.

Cited in Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979).

Article 23.

Miscellaneous Provisions.

§ 153A-445. Miscellaneous powers found in Chapter 160A. — (a) A county may take action under the following provisions of Chapter 160A:

(1) Chapter 160A, Article 20, Part 1. — Joint Exercise of Powers.
(2) Chapter 160A, Article 20, Part 2. — Regional Councils of Governments.
(3) G.S. 160A-487. — Financial support for rescue squads.
(4) G.S. 160A-488. — Art galleries and museums.
(5) G.S. 160A-492. — Human relations programs.
(6) G.S. 160A-497. — Senior citizens programs.

(1979, 2nd Sess., c. 1094, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment added subdivision (6) of subsection (a).

Session Laws 1979, 2nd Sess., c. 1094, s. 6, provides: "This act is effective upon ratification. All contracts which would be permissible under

this act which were entered into on or after April 20, 1979, are hereby validated." The act was ratified on June 17, 1980.

The preamble to Session Laws 1979, 2nd Sess., c. 1094 cites as the reason for the enactment Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979), requiring statutory authority for third party contracts.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Chapter 157.

Housing Authorities and Projects.

Article 1.

Housing Authorities Law.

Sec.

157-39.1. Area of operation of city, county and regional housing authorities.
157-39.4. Requirements of public hearings.

Article 1.

Housing Authorities Law.

§ 157-39.1. Area of operation of city, county and regional housing authorities. — (a) The boundaries or area of operation of a housing authority created for a city shall include said city and the area within 10 miles from the territorial boundaries of said city, but in no event shall it include the whole or a part of any other city, except as otherwise provided herein. Notwithstanding the previous sentence, a housing authority created for a city may operate and perform any of its lawful functions within any other city that has a common boundary with a city creating an authority when requested to do so by resolution of the governing body of such other city. The area of operation or boundaries of a housing authority created for a county shall include all of the county for which it is created and the area of operation or boundaries of a regional housing authority shall include (except as otherwise provided elsewhere in this Article) all of the counties for which such regional housing authority is created and established: Provided, that a county or regional housing authority shall not undertake any housing project or projects within the boundaries of any city unless a resolution shall have been adopted by the governing body of such city (and also by any housing authority which shall have been theretofore established and authorized to exercise its powers in such city) declaring that there is a need for the county or regional housing authority to exercise its power within such city: Provided, that the jurisdiction of any rural housing authority to which the Secretary of State has heretofore issued a certificate of incorporation shall extend to within a distance of one mile of the town or city limits of any town or city having a population in excess of 500, located in any county now or hereafter constituting a part of the territory of such rural housing authority: Provided, further, that this provision shall not affect the jurisdiction of any city housing authority to which the Secretary of State has heretofore issued a certificate of incorporation.

(b) In any county in which a city housing authority has been established, but where there are portions of the county in which the city is located which are more than 10 miles from the territorial boundaries of the city, the city housing authority is authorized to operate in areas of the county beyond such limit, which are not within another city, upon the adoption of a joint resolution by the city council and the board of county commissioners. Such joint resolution must find that in such additional area, that insanitary or unsafe inhabited dwelling accommodations exist in such area or there is a shortage of safe or sanitary dwelling accommodations in such county available to persons of low income at rentals they can afford. A public hearing on such resolution need be held only by the board of county commissioners.

(c) A joint resolution adopted under subsection (b) of this section may, in lieu of the appointment provisions of G.S. 157-5, provide that the board of

commissioners of the housing authority shall be composed of nine members, with a number (not less than five) to be appointed by the mayor, and the remainder to be appointed by the board of county commissioners. Such housing authority commissioners shall be subject to removal by the appointing person or board under the procedural requirements of G.S. 157-8. (1943, c. 636, s. 5; 1961, c. 200, s. 2; 1979, 2nd Sess., c. 1108, ss. 1, 2.)

Editor's Note. — The 1979, 2nd Sess., amendment designated the former provisions of this section as subsection (a), and added subsections (b) and (c). The amendment also added the second sentence of subsection (a).

§ 157-39.4. Requirements of public hearings. — The board of county commissioners of a county shall not adopt any resolution authorized by G.S. 157-35, 157-39.1, 157-39.2 or 157-39.3 unless a public hearing has first been held which shall conform (except as otherwise provided herein) to the requirements of this Housing Authorities Law for hearings to determine the need for a housing authority of a county: Provided, that such hearings may be held by the board of county commissioners without a petition therefor.

In connection with the issuance of bonds, a regional housing authority may covenant as to limitations on its right to adopt resolutions relating to the increase or decrease of its area of operation. (1943, c. 636, s. 5; 1979, 2nd Sess., c. 1108, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "157-39.1" in the first paragraph.

Chapter 159.

Local Government Finance.

SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

Article 3.

The Local Government Budget and Fiscal Control Act.

Part 1. Budgets.

Sec.

159-17. Ordinance procedures not applicable to budget or project ordinance adoption.

SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

ARTICLE 3.

The Local Government Budget and Fiscal Control Act.

Part 1. Budgets.

§ 159-7. Short title; definitions; local acts superseded.

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 159-17. Ordinance procedures not applicable to budget or project ordinance adoption. — Notwithstanding the provisions of any city charter, general law, or local act:

(1) Any action with respect to the adoption or amendment of the budget ordinance or any project ordinance may be taken at any regular or special meeting of the governing board by a simple majority of those present and voting, a quorum being present;

(2) No action taken with respect to the adoption or amendment of the budget ordinance or any project ordinance need be published or is subject to any other procedural requirement governing the adoption of ordinances or resolutions by the governing board other than the procedures set out in this Article;

(3) The adoption and amendment of the budget ordinance or any project ordinance and the levy of taxes in the budget ordinance are not subject to the provisions of any city charter or local act concerning initiative or referendum.

During the period beginning with the submission of the budget to the governing board and ending with the adoption of the budget ordinance, the governing board may hold any special meetings that may be necessary to complete its work on the budget ordinance. Except for the notice requirements of G.S. 143-318.12, which continue to apply, no provision of law concerning the call of special meetings applies during that period so long as (i) each member of the board has actual notice of each special meeting called for the purpose of considering the budget, and (ii) no business other than consideration of the budget is taken up. This section does not allow the holding of closed meetings or executive sessions by any governing board otherwise prohibited by law from holding such a meeting or session, and may not be construed to do so.

No general law, city charter, or local act enacted or taking effect after July 1, 1973, may be construed to modify, amend, or repeal any portion of this section unless it expressly so provides by specific reference to this section. (1971, c. 780, s. 1; 1973, c. 474, s. 13; 1979, c. 402, ss. 4, 5; c. 655, s. 2.)

Editor's Note. —
This section is set out above to correct an error in the 1979 Cumulative Supplement.

Part 3. Fiscal Control.

§ 159-24. Finance officer.

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

§ 159-25. Duties of finance officer; dual signatures on checks; internal control procedures subject to Commission regulation.

Applied in State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

§ 159-28. Budgetary accounting for appropriations.

Applied in State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

SUBCHAPTER IV. LONG-TERM FINANCING.

ARTICLE 4.

Local Government Bond Act.

Part 1. Operation of Article.

§ 159-43. Short title; legislative intent.

Cross Reference. — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

Part 2. Procedure for Issuing Bonds.

§ 159-54. The bond order.

Cited in Citizens Ass'n for Reasonable Growth v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

§ 159-58. Publication of bond order as adopted.

Cited in Citizens Ass'n for Reasonable Growth v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

§ 159-59. Limitation of action to set aside order.

Applied in Citizens Ass'n for Reasonable Growth v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

§ 159-61. Bond referenda; majority required; notice of referendum; form of ballot; canvass.

Cited in Citizens Ass'n for Reasonable Growth v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

§ 159-62. Limitation on actions contesting validity of bond referenda.

Untimely Claims Extinguished. — This section provides that any claim not prosecuted within 30 days of the date of publication is extinguished. This statute is different from most statutes of limitation since ordinarily a statute of limitation does not extinguish a claim but merely serves as a bar to the prosecution of the claim. Citizens Ass'n for Reasonable Growth v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 342 (1980).

Statute Runs from First Publication. — The statute of limitations of this section begins to run from the date of the first publication required by § 159-61, where the sufficiency of the first notice is not questioned. A city cannot start the statute running anew by publishing the notice a second time. Citizens Ass'n for Reasonable Growth v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

ARTICLE 11.

Enforcement of Chapter.

§ 159-181. Enforcement of Chapter.

Applied in State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

Chapter 160.

Municipal Corporations.

SUBCHAPTER VIII. PARKING AUTHORITIES AND FACILITIES.

Article 38.

Parking Authorities.

Sec.

160-475 to 160-484. [Transferred.]

Sec.

160-490 to 160-492. [Transferred.]

160-494 to 160-496. [Transferred.]

Article 38A.

Public Transportation Authorities.

160-496.1 to 160-496.14. [Transferred.]

SUBCHAPTER VIII. PARKING AUTHORITIES AND FACILITIES.

Article 38.

Parking Authorities.

§§ 160-475 to 160-484: Transferred to §§ 160A-550 to 160A-559 by Session Laws 1979, 2nd Sess., c. 1247, s. 44.

§§ 160-490 to 160-492: Transferred to §§ 160A-560 to 160A-562 by Session Laws 1979, 2nd Sess., c. 1247, s. 44.

§§ 160-494 to 160-496: Transferred to §§ 160A-563 to 160A-565 by Session Laws 1979, 2nd Sess., c. 1247, s. 44.

Article 38A.

Public Transportation Authorities.

§§ 160-496.1 to 160-496.14: Transferred to §§ 160A-575 to 160A-588 by Session Laws 1979, 2nd Sess., c. 1247, s. 45.

Chapter 160A.

Cities and Towns.

Article 5.

Form of Government.

Part 1. General Provisions.

Sec.

160A-64. Compensation of mayor and council.

Part 3. Organization and Procedures of the Council.

160A-68. Organizational meeting of council.
160A-69. Mayor to preside over council.
160A-70. Mayor pro tempore; disability of mayor.
160A-71. Regular and special meetings; recessed and adjourned meetings; procedure.
160A-74. Quorum.
160A-75. Voting.
160A-77. Code of ordinances.
160A-79. Pleading and proving city ordinances.

Part 4. Modification of Form of Government.

160A-102. Amendment by ordinance.
160A-103. Referendum on charter amendments by ordinance.
160A-104. Initiative petitions for charter amendments.

Article 7.

Administrative Offices.

Part 3. Administration of Mayor-Council Cities.

160A-155. Council to provide for administration in mayor-council cities.
160A-158. Mayor and councilmen ineligible to serve or act as heads of departments.

Part 4. Personnel.

160A-162. Compensation.

Article 8.

Delegation and Exercise of the General Police Power.

160A-188. Bird sanctuaries.
160A-193. Abatement of public health nuisances.

Article 9.

Taxation.

160A-209. Property taxes.
160A-210. [Repealed.]

Article 11.

Eminent Domain.

Sec.

160A-248. Board of appraisers.

Article 12.

Sale and Disposition of Property.

160A-267. Private sale.
160A-269. Negotiated offer, advertisement, and upset bids.
160A-272. Lease or rental of property.
160A-272.1. Lease of utility or enterprise property.

Article 13.

Law Enforcement.

160A-282. Auxiliary law-enforcement personnel; workmen's compensation benefits.

Article 16.

Public Enterprises.

Part 1. General Provisions.

160A-312. Authority to operate public enterprises.

Article 17A.

Cemetery Trustees.

160A-349.3. Property vested.
160A-349.7. Presentation of budget; details of budget; appropriation; payment to board.
160A-349.11. Price of lands included in budget.
160A-349.14. Exercise of powers subject to approval.
160A-349.15. Termination.

Article 19.

Planning and Regulation of Development.

Part 1. General Provisions.

160A-361. Planning agency.
160A-364. Procedure for adopting or amending ordinances under Article.

Part 3. Zoning.

160A-388. Board of adjustment.

Part 6. Minimum Housing Standards.

160A-445. Service of complaints and orders.

Part 8. Miscellaneous Powers.

160A-458. Erosion and sedimentation control.

Sec.
160A-458.1. Floodway regulations.
160A-459. [Reserved.]

Article 21.

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Article 25.

Public Transportation Authorities.

160A-575. Title.
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160A-577. Creation; membership.
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ARTICLE 1.

Definitions and Statutory Construction.

§ 160A-2. Effect upon prior laws.

Applied in Guilford County v. Boyan, 42 N.C. App. 627, 257 S.E.2d 463 (1979).

ARTICLE 2.

General Corporate Powers.

§ 160A-11. Corporate powers.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

ARTICLE 3.

Contracts.

§ 160A-16. Contracts to be in writing; exception.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

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.

Notice Provisions Constitutional. — Notice by publication of a public hearing pursuant to this section does not provide inadequate notice to the parties affected by the annexation in violation of their right to due process, since the General Assembly, under Art VII, § 1, of the North Carolina Constitution, may annex land without notice to anyone. Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979).

§ 160A-25. Referendum on question of extension.

A corporation has not been denied equal protection of the laws because corporations have no right to vote as "qualified resident voters" in a referendum on the question of municipal extension held pursuant to this section. Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979).

§ 160A-31. Annexation by petition.

Sections 160A-37(e), 160A-49(e), and this section are in pari materia. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

No Authorization to Annex Part of Area Described. — If the General Assembly had intended to authorize cities proceeding pursuant to a petition for voluntary annexation to annex merely a part of the area described in the petition, it would have so provided as it has explicitly done in §§ 160A-37(e) and 160A-49(e). The absence of such statutory authorization, in light of the explicit provisions for it in the involuntary annexation statutes, is cogent evidence that the General Assembly intended a petition for voluntary annexation to stand or fall as a unity. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Withdrawal from Petition. — Property owners who have signed a voluntary annexation petition have the right to withdraw from the petition at any time up until the governing municipal body has taken action upon the petition by annexing the area described in the petition. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Effect of Withdrawal. — Where six owners of real property located within the area described in a voluntary annexation petition validly withdrew their signatures from the petition before the annexation ordinance was passed, the city governing body was without jurisdiction to take any further action on the petition as submitted, and the entire ordinance purporting to annex all the area described in the petition was void. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Part 2. Annexation by Cities of Less than 5,000.

§ 160A-33. Declaration of policy.

Burden of Showing Noncompliance. — In an annexation proceeding under this Part, the record of the proceedings must show prima facie complete and substantial compliance with the applicable provisions of the statutes, and the burden is upon petitioners requesting review of the annexation proceedings to show by competent evidence failure on the part of the municipality to comply with the statutory requirements as a matter of fact, or irregularity in proceedings which materially prejudice the substantive rights of petitioners. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Contiguity is an essential component of the traditional concept of a municipal corporation, which is envisioned as a governmental unit capable of providing essential governmental services to residents within compact borders on a scale adequate to insure "the protection of health, safety, and welfare in areas being intensively used for residential, commercial, industrial, and government purposes or in areas undergoing such development." Imposition of the contiguity requirement is one means of insuring that the annexation process remains consistent with principles of "sound urban development." Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

Applied in In re Annexation Ordinance, 44 N.C. App. 274, 261 S.E.2d 39 (1979).

§ 160A-35. Prerequisites to annexation; ability to serve; report and plans.

The fact that the metes and bounds description in a resolution of intent to annex failed to close because one small piece of property owned by a person who did not join the petition for review was not included within the resolution of intent, was not fatal to the validity of the annexation ordinance where the resolution of intent and the published notice of public hearing made full reference to a map, filed in the office of the clerk of the city, and available for public inspection of the area proposed to be annexed, and this map and a map published in the newspaper notice of the public hearing showed all the property proposed to be annexed. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Cited in Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-36. Character of area to be annexed.

Territory which is contiguous solely to the "satellite corporate limits" fails to satisfy the requirement of subdivision (b)(1) of this section that the area to be annexed in an involuntary annexation proceeding be contiguous or adjacent to the municipal boundaries of the city which seeks annexation. Territory contiguous solely to "satellite corporate limits" is not eligible for annexation until such "satellite corporate limits" become "a part of the primary corporate limits." This occurs in accord with § 160-58.6 when, through annexation of intervening territory, the boundaries of the satellite area and those of the primary town area touch. Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

If a town wishes to annex involuntarily two unannexed areas on either side of the satellite area, it must t annex the area which abuts directly on both the primary corporate limits and the satellite corporate limits. Only after this intervening territory has been successfully annexed is the area which presently abuts solely on satellite corporate limits eligible for annexation. Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

Application of Subsection (c). — The use and subdivision tests prescribed by subsection (c) of this section yield accurate results only if applied to a land area which encompasses only unannexed territory. This is so because these tests require determination of the percentage of lots being used for "urban purposes" and the percentage of "total acreage" subdivided into lots of five acres or less. Such percentage figures will be skewed and inaccurate if not based on data from all the acreage and lots encompassed by the land area under consideration. Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-37. Procedure for annexation.

Sections 160A-49(e), 160A-31(d), and subsection (e) of this section are in pari materia. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Subsection (e) contains no provision, etc. —

There is no requirement in subsection (e) that a second public hearing be held on the report as amended. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Nor a Provision as to Duration of Public Inspection. — There is no requirement in subsection (e) that the amended report be available for public inspection for any particular amount of time before final action is taken on the annexation proposal. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

The fact that the metes and bounds description in a resolution of intent to annex failed to close because one small piece of property owned by a person who did not join the petition for review was not included within the resolution of intent, was not fatal to the validity of the annexation ordinance where the resolution of intent and the published notice of public hearing made full reference to a map, filed in the office of the clerk of the city, and available for public inspection of the area proposed to be annexed, and this map and a map published in the newspaper notice of the public hearing showed all the property proposed to be annexed. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Applied in Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-38. Appeal.

Scope of Superior Court Review. — The superior court's review, pursuant to this section, of an involuntary annexation proceeding is limited in scope to the following: (1) Did the municipality comply with the statutory procedures? (2) If not, will petitioners "suffer material injury" by reason of the municipality's failure to comply? (3) Does the character of the area specified for annexation meet the requirements of § 160A-36 as applied to petitioners' property? Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Cited in Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-41. Definitions.

Territory which is contiguous solely to "satellite corporate limits" is not a "contiguous area" as that term is defined in subdivision (1). Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

Part 3. Annexation by Cities of 5,000 or More.

§ 160A-45. Declaration of policy.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Applied in In re Annexation Ordinance, 44 N.C. App. 274, 261 S.E.2d 39 (1979).

§ 160A-47. Prerequisites to annexation; ability to serve; report and plans.

Applied in In re Annexation Ordinance, 44 N.C. App. 274, 261 S.E.2d 39 (1979).

§ 160A-48. Character of area to be annexed.

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Two different levels of analysis must be employed in determining whether property sought to be annexed by a municipality meets

the statutory requirements. Initially, the entire area to be annexed viewed as a whole, must meet all of the standards enunciated in subsection (b) of this section. Assuming the area so qualifies, the next inquiry is whether all parts of the area to the annexed meet either the standards of subsection (c) of this section, i.e., property developed for urban purposes, or the standards of subsection (d) of this section, i.e., property not otherwise meeting the developed for urban purposes criteria. In re Annexation Ordinance, 44 N.C. App. 274, 261 S.E.2d 39 (1979).

Tests as to Urban Development, etc. — In accord with original. See In re Annexation Ordinance, 44 N.C. App. 274, 261 S.E.2d 39 (1979).

But the tests of subsection (c) should not be applied to an entire tract sought to be annexed by a city, where the city does not seek to annex undeveloped lands beyond the developed areas peripheral to its present boundaries, but rather seeks to annex undeveloped lands which lie between its boundaries and those substantial areas developed for urban purposes which it also seeks to annex. In re Annexation Ordinance, 44 N.C. App. 274, 261 S.E.2d 39 (1979).

Cited in Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-49. Procedure for annexation.

Sections 160A-37(e), 160A-31(d) and subsection (e) of this section are in pari materia. Conover v. Newton, 297 N.C. 506, 256 S.E.2d 216 (1979).

Applied in In re Annexation Ordinance, 44 N.C. App. 274, 261 S.E.2d 39 (1979).

§ 160A-53. Definitions.

Quoted in Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-56. Counties excepted from Part; Part 1 continued for such counties.

Editor's Note. —
Session Laws 1977, c. 455, s. 2, amended this section by deleting "Halifax" in the first sentence of the first paragraph. The amendment was made subject to a vote of the people of Roanoke Rapids Township, and was defeated.

Part 4. Annexation of Noncontiguous Areas.

§ 160A-58. Definitions.

Satellite corporate limits are not "municipal boundaries" as that term is used in § 160A-36. Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-58.1. Petition for annexation; standards.

Quoted in Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-58.2. Public hearing.

Quoted in Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

§ 160A-58.6. Transition from satellite to primary corporate limits.

If a town wishes to annex involuntarily two unannexed areas on either side of the satellite area, it must first annex the area which abuts directly on both the primary corporate limits and the satellite corporate limits. Only after this intervening territory has been successfully annexed is the area which presently abuts solely on satellite corporate limits eligible for annexation. Only then do the satellite corporate limits become part of the primary corporate limits in accord with this section. Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980).

Article 5.

Form of Government.

Part 1. General Provisions.

§ 160A-64. Compensation of mayor and council. — (a) The council may fix its own compensation and the compensation of the mayor and any other elected officers of the city by adoption of the annual budget ordinance, but the salary of an elected officer other than a member of the council may not be reduced during the then-current term of office unless he agrees thereto. The mayor, councilmen, and other elected officers are entitled to reimbursement for actual expenses incurred in the course of performing their official duties at rates not in excess of those allowed to other city officers and employees, or to a fixed allowance, the amount of which shall be established by the council, for travel and other personal expenses of office; provided, any fixed allowance so established during a term of office shall not be increased during such term of office.

(1979, 2nd Sess., c. 1247, s. 1.)

Editor's Note. — The 1979, 2nd Sess., amendment deleted "publication in and" following "officers of the city by" near the middle of the first sentence of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Part 3. Organization and Procedures of the Council.

§ 160A-68. Organizational meeting of council.

(c) All local acts or provisions of city charters which prescribe a particular meeting day or date for the organizational meeting of a council are hereby repealed. (1971, c. 698, s. 1; 1973, c. 426, s. 13; c. 607; 1979, c. 168; 1979, 2nd Sess., c. 1247, s. 2.)

Editor's Note. —

The 1979, 2nd Sess., amendment added subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 160A-69. Mayor to preside over council. — The mayor shall preside at all council meetings, but shall have the right to vote only when there are equal numbers of votes in the affirmative and in the negative. In a city where the mayor is elected by the council from among its membership, and the city charter makes no provision as to the right of the mayor to vote, he shall have the right to vote as a council member on all matters before the council, but shall have no right to break a tie vote in which he participated. (1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 3.)

Editor's Note. — The 1979, 2nd Sess., amendment added the second sentence.

§ 160A-70. Mayor pro tempore; disability of mayor. — At the organizational meeting, the council shall elect from among its members a mayor pro tempore to serve at the pleasure of the council. A councilman serving as mayor pro tempore shall be entitled to vote on all matters and shall be considered a councilman for all purposes, including the determination of whether a quorum is present. During the absence of the mayor, the council may confer upon the mayor pro tempore any of the powers and duties of the mayor. If the mayor should become physically or mentally incapable of performing the duties of his office, the council may by unanimous vote declare that he is incapacitated and confer any of his powers and duties on the mayor pro tempore. Upon the mayor's declaration that he is no longer incapacitated, and with the concurrence of a majority of the council, the mayor shall resume the exercise of his powers and duties. In the event both the mayor and the mayor pro tempore are absent from a meeting, the council may elect from its members a temporary chairman to preside in such absence. (1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 4.)

Editor's Note. — The 1979, 2nd Sess., amendment added the last sentence.

§ 160A-71. Regular and special meetings; recessed and adjourned meetings; procedure.

(b) (1) The mayor, the mayor pro tempore, or any two members of the council may at any time call a special council meeting by signing a written notice stating the time and place of the meeting and the subjects to be considered. The notice shall be delivered to the mayor and each councilman or left at his usual dwelling place at least six hours before the meeting. Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or have signed a written waiver of notice. In addition to the procedures set out in this subsection or any city charter, a person or persons calling a special meeting of a city council shall comply with the notice requirements of Article 33B of General Statutes Chapter 143.

(2) Special meetings may be held at any time when the mayor and all members of the council are present and consent thereto, or when those not present have signed a written waiver of notice.

(3) During any regular meeting, or any duly called special meeting, the council may call or schedule a special meeting, provided that the motion or resolution calling or scheduling any such special meeting shall specify the time, place and purpose or purposes of such meeting and shall be adopted during an open session.

(b1) Any regular or duly called special meeting may be recessed to reconvene at a time and place certain, or may be adjourned to reconvene at a time and place certain, by the council.

(c) The council may adopt its own rules of procedure, not inconsistent with the city charter, general law, or generally accepted principles of parliamentary procedure. (1917, c. 136, subch. 13, s. 1; C. S., s. 2822; 1971, c. 698, s. 1; 1973, c. 426, s. 14; 1977, 2nd Sess., c. 1191, s. 7; 1979, 2nd Sess., c. 1247, s. 5.)

Editor's Note. —

The 1979, 2nd Sess., amendment redesignated the former first, second, fourth and fifth sentences of subsection (b) as subdivision (1) of subsection (b), designated the former third sentence of subsection (b) as subdivision (2) of subsection (b), and added subdivision (3) of subsection (b). The amendment also added subsection (b1).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 160A-74. Quorum. — A majority of the actual membership of the council plus the mayor, excluding vacant seats, shall constitute a quorum. A member who has withdrawn from a meeting without being excused by majority vote of the remaining members present shall be counted as present for purposes of determining whether or not a quorum is present. (1917, c. 136, subch. 13, s. 1; C. S., s. 2821; 1971, c. 698, s. 1; 1975, c. 664, s. 5; 1979, 2nd Sess., c. 1247, s. 6.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "plus the mayor" near the beginning of the first sentence.

§ 160A-75. Voting. — No member shall be excused from voting except upon matters involving the consideration of his own financial interest or official conduct. In all other cases, a failure to vote by a member who is physically present in the council chamber, or who has withdrawn without being excused by a majority vote of the remaining members present, shall be recorded as an affirmative vote. The question of the compensation and allowances of members of the council is not a matter involving a member's own financial interest or official conduct.

An affirmative vote equal to a majority of all the members of the council not excused from voting on the question in issue (including the mayor's vote in case of an equal division) shall be required to adopt an ordinance, take any action having the effect of an ordinance, authorize or commit the expenditure of public funds, or make, ratify, or authorize any contract on behalf of the city. In addition, no ordinance nor any action having the effect of any ordinance may be finally adopted on the date on which it is introduced except by an affirmative vote equal to or greater than two thirds of all the actual membership of the council, excluding vacant seats (not including the mayor unless he has the right to vote on all questions before the council). (1917, c. 136, subch. 13, s. 1; C. S., s. 2821; 1971, c. 698, s. 1; 1973, c. 426, s. 16; 1979, 2nd Sess., c. 1247, s. 7.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "actual membership of the council, excluding vacant seats" for "members of the council" near the end of the second sentence of the second paragraph.

§ 160A-76. Franchises; technical ordinances.

Cross Reference. — As to approval, under this section, of long-term contracts entered into by city or town councils for the disposal of solid waste, see § 153A-299.5.

§ 160A-77. Code of ordinances.

(b) The council may provide that one or more of the following classes of ordinances shall be codified by appropriate entries upon official map books to be retained permanently in the office of the city clerk or some other city office generally accessible to the public:

(1) Establishing or amending the boundaries of zoning districts;

(2) Designating the location of traffic control devices;

(3) Designating areas or zones where regulations are applied to parking, loading, bus stops, or taxicab stands;

(4) Establishing speed limits;

(4a) Restricting or regulating traffic at certain times on certain streets, or to certain types, weights or sizes of vehicles;

(5) Designating the location of through streets, stop intersections, yield-right-of-way intersections, waiting lanes, one-way streets, or truck traffic routes; and

(6) Establishing regulations upon vehicle turns at designated locations.

(b1) The council may provide that the classes of ordinances described in paragraphs (2) through (6) of subsection (b) above, and ordinances establishing rates for utility or other public enterprise services, or ordinances establishing fees of any nature, shall be codified by entry upon official lists or schedules of the regulations established by such ordinances, or schedules of such rates or fees, to be maintained in the office of the city clerk.

(1979, 2nd Sess., c. 1247, ss. 8, 9.)

Editor's Note. — The 1979, 2nd Sess., amendment added subdivision (4a) of subsection (b), and added subsection (b1). As the rest of the section was not changed by the amendment, only subsections (b) and (b1) are set out.

§ 160A-79. Pleading and proving city ordinances.

(b) Any of the following shall be admitted in evidence in all actions or proceedings before courts or administrative bodies and shall have the same force and effect as would an original ordinance:

(1) A city code adopted and issued in compliance with G.S. 160A-77, containing a statement that the code is published by order of the council.

(2) Copies of any part of an official map book maintained in accordance with G.S. 160A-77 and certified under seal by the city clerk as having been adopted by the council and maintained in accordance with its directions (the clerk's certificate need not be authenticated).

(3) A copy of an ordinance as set out in the minutes, code, or ordinance book of the council, certified under seal by the city clerk as a true copy (the clerk's certificate need not be authenticated).

(4) Copies of any official lists or schedules maintained in accordance with G.S. 160A-77 and certified under seal by the city clerk as having been adopted by the council and maintained in accordance with its directions (the clerk's certificate need not be authenticated).

(1979, 2nd Sess., c. 1247, s. 10.)

Editor's Note. — The 1979, 2nd Sess., amendment added subdivision (4) of subsection (b). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Part 4. Modification of Form of Government.

§ 160A-102. Amendment by ordinance. — By following the procedure set out in this section, the council may amend the city charter by ordinance to implement any of the optional forms set out in G.S. 160A-101. The council shall first adopt a resolution of intent to consider an ordinance amending the charter. The resolution of intent shall describe the proposed charter amendments briefly but completely and with reference to the pertinent provisions of G.S. 160A-101, but it need not contain the precise text of the charter amendments necessary to implement the proposed changes. At the same time that a resolution of intent is adopted, the council shall also call a

public hearing on the proposed charter amendments, the date of the hearing to be not more than 45 days after adoption of the resolution. A notice of the hearing shall be published at least once not less than 10 days prior to the date fixed for the public hearing, and shall contain a summary of the proposed amendments. Following the public hearing, but not earlier than the next regular meeting of the council and not later than 60 days from the date of the hearing, the council may adopt an ordinance amending the charter to implement the amendments proposed in the resolution of intent.

The council may, but shall not be required to unless a referendum petition is received pursuant to G.S. 160A-103, make any ordinance adopted pursuant to this section effective only if approved by a vote of the people, and may by resolution adopted at the same time call a special election for the purpose of submitting the ordinance to a vote. The date fixed for the special election shall be not more than 90 days after adoption of the ordinance.

Within 10 days after an ordinance is adopted under this section, the council shall publish a notice stating that an ordinance amending the charter has been adopted and summarizing its contents and effect. If the ordinance is made effective subject to a vote of the people, the council shall publish a notice of the election in accordance with G.S. 163-287, and need not publish a separate notice of adoption of the ordinance.

The council may not commence proceedings under this section between the time of the filing of a valid initiative petition pursuant to G.S. 160A-104 and the date of any election called pursuant to such petition. (1969, c. 629, s. 2; 1971, c. 698, s. 1; 1973, c. 426, s. 20; 1979, 2nd Sess., c. 1247, s. 11.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "in accordance with G.S. 163-287" for "not less than 30 days before the last day on which voters may register to vote in the special election" near the end of the second sentence of the third paragraph.

§ 160A-103. Referendum on charter amendments by ordinance. — An ordinance adopted under G.S. 160A-102 that is not made effective upon approval by a vote of the people shall be subject to a referendum petition. Upon receipt of a referendum petition bearing the signatures and residence addresses of a number of qualified voters of the city equal to at least 10 percent of the whole number of voters who are registered to vote in city elections according to the most recent figures certified by the State Board of Elections or 5,000, whichever is less, the council shall submit an ordinance adopted under G.S. 160A-102 to a vote of the people. The date of the special election shall be fixed at not more than 120 nor fewer than 60 days after receipt of the petition. A referendum petition shall be addressed to the council and shall identify the ordinance to be submitted to a vote. A referendum petition must be filed with the city clerk not later than 30 days after publication of the notice of adoption of the ordinance. (1969, c. 629, s. 2; 1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, ss. 13, 15.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "and residence addresses" following "bearing the signatures" near the beginning of the second sentence, and substituted "notice of adoption of the ordinance" for "ordinance following its adoption" at the end of the last sentence.

§ 160A-104. Initiative petitions for charter amendments. — The people may initiate a referendum on proposed charter amendments. An initiative petition shall bear the signatures and resident addresses of a number of qualified voters of the city equal to at least ten percent (10%) of the whole number of voters who are registered to vote in city elections according to the most recent figures certified by the State Board of Elections or 5,000,

whichever is less. The petition shall set forth the proposed amendments by describing them briefly but completely and with reference to the pertinent provisions of G.S. 160A-101, but it need not contain the precise text of the charter amendments necessary to implement the proposed changes. The petition may not propose changes in the alternative, or more than one integrated set of charter amendments. Upon receipt of a valid initiative petition, the council shall call a special election on the question of adopting the charter amendments proposed therein, and shall give public notice thereof in accordance with G.S. 163-287. The date of the special election shall be fixed at not more than 120 nor fewer than 60 days after receipt of the petition. If a majority of the votes cast in the special election shall be in favor of the proposed changes, the council shall adopt an ordinance amending the charter to put them into effect. Such an ordinance shall not be subject to a referendum petition. No initiative petition may be filed (i) between the time the council initiates proceedings under G.S. 160A-102 by publishing a notice of hearing on proposed charter amendments and the time proceedings under that section have been carried to a conclusion either through adoption or rejection of a proposed ordinance or lapse of time, nor (ii) within one year and six months following the effective date of an ordinance amending the city charter pursuant to this Article, nor (iii) within one year and six months following the date of any election on charter amendments that were defeated by the voters.

The restrictions imposed by this section on filing initiative petitions shall apply only to petitions concerning the same subject matter. For example, pendency of council action on amendments concerning the method of electing the council shall not preclude an initiative petition on adoption of the council-manager form of government.

Nothing in this section shall be construed to prohibit the submission of more than one proposition for charter amendments on the same ballot so long as no proposition offers a different plan under the same option as another proposition on the same ballot. (1969, c. 629, s. 2; 1971, c. 698, s. 1; 1973, c. 426, s. 21; 1979, 2nd Sess., c. 1247, ss. 12, 14.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "and resident addresses" near the beginning of the second sentence of the first paragraph and substituted "in accordance with G.S. 163-287" for "not less than 30 days before the last day on which voters may register to vote in the special election" at the end of the fifth sentence of the first paragraph.

Article 7.

Administrative Offices.

Part 3. Administration of Mayor-Council Cities.

§ 160A-155. Council to provide for administration in mayor-council cities. — The council shall appoint, suspend, and remove the heads of all city departments, and all other city employees; provided, the council may delegate to any administrative official or department head the power to appoint, suspend, and remove city employees assigned to his department. The head of each department shall see that all laws of the State, the city charter, and the ordinances, resolutions, and regulations of the council concerning his department are faithfully executed within the city. Otherwise, the administration of the city shall be performed as provided by law or direction of the council. (1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 16.)

Editor's Note. — The 1979, 2nd Sess., amendment added the language beginning "and all other city employees; provided" at the end of the first sentence, and deleted "shall appoint, suspend, and remove all city employees assigned to his department, and" following "The head of each department" at the beginning of the second sentence.

§ 160A-158. Mayor and councilmen ineligible to serve or act as heads of departments.—Neither the mayor nor any member of the council shall be eligible for appointment as head of any city department or as acting or interim head of a department; provided, that in cities having a population of less than 5,000 according to the most recent official federal census, the mayor and any member of the council shall be eligible for appointment by the council as department head or other employee, and may receive reasonable compensation for such employment, notwithstanding any other provision of law. (1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 17.)

Editor's Note. — The 1979, 2nd Sess., amendment added the language beginning "provided, that in cities having a population" at the end of the section, and deleted the former second sentence, which read "This section shall not apply to cities having a population of less than 5,000."

Part 4. Personnel.

§ 160A-162. Compensation. — (a) The council shall fix or approve the schedule of pay, expense allowances, and other compensation of all city employees, and may adopt position classification plans; any compensation or pay plan may include provisions for payments to employees on account of sickness or disability. In cities with the council-manager form of government, the manager shall be responsible for preparing position classification and pay plans for submission to the council and, after any such plans have been adopted by the council, shall administer them. In cities with the mayor-council form of government, the council shall appoint a personnel officer (or confer the duties of personnel officer on some city administrative officer); the personnel officer shall then be responsible for administering the pay plan and any position classification plan in accordance with general policies and directives adopted by the council.

(b) The council may purchase life, health, and any other forms of insurance for the benefit of all or any class of city employees and their dependents, and may provide other fringe benefits for city employees. (1923, c. 20; 1949, c. 103; 1969, c. 845; 1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, ss. 18, 19.)

Editor's Note. — The 1979, 2nd Sess., amendment added "any compensation or pay plan may include provisions for payments to employees on account of sickness or disability" at the end of the first sentence of subsection (a), substituted "life, health, and any other forms of insurance" for "life insurance and health insurance" near the beginning of subsection (b), and substituted "and their dependents" for "as a part of their compensation" near the middle of subsection (b).

Article 8.

Delegation and Exercise of the General Police Power.

§ 160A-175. Enforcement of ordinances.

Disposition of Proceeds of Civil Action to Recover Parking Penalties. — In any case in which a person is prosecuted, convicted, and a fine imposed for the violation of a parking ordinance, the fine so imposed must be paid, by directive of North Carolina Const., Art. IX, § 7,

to the county school fund. However, if a city chooses to maintain civil actions to recover the penalties imposed for parking violations, the proceeds of any judgment obtained would belong to the city, and the school fund would have no claim thereon. Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980).

§ 160A-185. Emission of pollutants or contaminants.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

§ 160A-188. Bird sanctuaries. — A city may by ordinance create and establish a bird sanctuary within the city limits. The ordinance may not protect any birds classed as a pest under Article 22A of Chapter 113 of the General Statutes and the Structural Pest Control Act of North Carolina of 1955 or the North Carolina Pesticide Law of 1971. When a bird sanctuary has been established, it shall be unlawful for any person to hunt, kill, trap, or otherwise take any protected birds within the city limits except pursuant to a permit issued by the North Carolina Wildlife Resources Commission under G.S. 113-274(c) (1a) or under any other license or permit of the Wildlife Resources Commission specifically made valid for use in taking birds within city limits. (1951, c. 411, ss. 1, 2; 1971, c. 698, s. 1; 1979, c. 830, s. 3.)

Editor's Note. — The 1979 amendment, effective July 1, 1980, substituted the language beginning "classed as a pest" at the end of the second sentence for "classified as unprotected by the Wildlife Resources Commission or by law," and substituted the language beginning "by the North Carolina Wildlife Resources Commission" at the end of the third sentence for "under G.S. 113-87."

§ 160A-193. Abatement of public health nuisances. — A city shall have authority to summarily remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety. 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 trouble arose, and shall be collected as unpaid taxes. (1917, c. 136, subch. 7, s. 4; C. S., s. 2800; 1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 20.)

Editor's Note. — The 1979, 2nd Sess., amendment added "or public safety" at the end of the first sentence.

Article 9.

Taxation.

§ 160A-209. Property taxes.

(e) With an approving vote of the people, any city may levy property taxes for any purpose for which the city is authorized by its charter or general law to appropriate money. Any property tax levy approved by a vote of the people shall not be counted for purposes of the rate limitation imposed in subsection (d).

The city council may call a referendum on approval of a property tax levy. The referendum may be held at the same time as any other city referendum or city election, but may not be otherwise held (i) on the day of any federal, State, district, or county election already validly called or scheduled by law at

the time the tax referendum is called, or (ii) within the period of time beginning 30 days before and ending 10 days after the day of any other city referendum or city election already validly called or scheduled by law at the time the tax referendum is called. The referendum shall be conducted by the same board of elections that conducts regular city elections. A notice of referendum shall be published in accordance with G.S. 163-287. The notice shall state the date of the referendum, the purpose for which it is being held, and a statement as to the last day for registration for the referendum under the election laws then in effect.

The proposition submitted to the voters shall be substantially in one of the following forms:

(1) Shall the City/Town of . . . . . be authorized to levy annually a property tax at an effective rate not in excess of . . . . . cents on the one hundred dollars ($100.00) value of property subject to taxation for the purpose of . . . . . .?

(2) Shall the City/Town of . . . . . be authorized to levy annually a property tax at a rate not in excess of that which will produce $ . . . . . for the purpose of . . . . . .?

(3) Shall the City/Town of . . . . . be authorized to levy annually a property tax without restriction as to rate or amount for the purpose of . . . . . .?

If a majority of those participating in the referendum approve the proposition, the city council may proceed to levy annually a property tax within the limitations (if any) described in the proposition. Unless otherwise provided in the proposition submitted to the voters, a vote on a property tax levy not to exceed a specified rate per one hundred dollars ($100.00) value of property subject to taxation is a vote on an effective rate per one hundred dollars ($100.00) of appraised value of property before the application of any assessment ratio.

The board of elections shall canvass the referendum and certify the results to the city council. The council shall then certify and declare the result of the referendum and shall publish a statement of the result once, with the following statement appended: "Any action or proceeding challenging the regularity or validity of this tax referendum must be begun within 30 days after (date of publication)." The statement of results shall be filed in the clerk's office and inserted in the minutes of the council.

Any action or proceeding in any court challenging the regularity or validity of a tax referendum must be begun within 30 days after the publication of the results of the referendum. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of or any irregularity in the referendum shall be asserted, nor shall the validity of the referendum be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed herein.

Except for tax referendums on functions not included in subsection (c) of this section, any referendum held before July 1, 1973, on the levy of property taxes is not valid for the purposes of this subsection. Cities in which such referendums have been held may support programs formerly supported by voted property taxes within the general rate limitations set out in subsection (d) at any appropriate level and are not subject to the former voted rate limitation.

(1979, 2nd Sess., c. 1247, s. 21.)

Local Modification. — Town of Carrboro: 1979, 2nd Sess., c. 1139.

Editor's Note. —

The 1979, 2nd Sess., amendment substituted the present fourth sentence for the former fourth and fifth sentences, which provided that notice of the referendum be published twice, and provided for the timing of the notice.

§ 160A-210: Repealed by Session Laws 1979, 2nd Session, c. 1247, s. 22.

ARTICLE 10.

Special Assessments.

§ 160A-233. Enforcement of assessments; interests; foreclosure; limitations.

Attorney's Fee. — Construed together, subsection (c) of this section and § 105-374(i), provide for an award of one reasonable attorney's fee, in the court's discretion, in a foreclosure of an assessment lien by action in nature of action to foreclose a mortgage. Guilford County v. Boyan, 42 N.C. App. 627, 257 S.E.2d 463 (1979).

Limitations of Actions. —

The inherent illogic of the literal meaning of the first sentence of subsection (d), the sentence's context, and the statute's history all show that the legislature did not intend to bar an action for installments of assessments falling due within the 10-year limitation period, even when installments which became due more than 10 years before the institution of the action were sought to be included in the action. Guilford County v. Boyan, 42 N.C. App. 627, 257 S.E.2d 463 (1979).

The second sentence of subsection (d) makes plain that the legislature intended the statute of limitations to run anew from the due date of each individual installment. Guilford County v. Boyan, 42 N.C. App. 627, 257 S.E.2d 463 (1979).

ARTICLE 11.

Eminent Domain.

§ 160A-246. Preliminary condemnation resolution.

Applied in Centre Dev. Co. v. County of Wilson, 44 N.C. App. 469, 261 S.E.2d 275 (1980).

§ 160A-248. Board of appraisers.

(b) If for any reason the first meeting of the board of appraisers cannot be held at the time fixed in the preliminary condemnation resolution or at the site of the property being condemned, the appraisers may fix another time or place and shall serve notice of the change in time or place upon each person upon whom the preliminary condemnation was served. For purposes of appointing an appraiser, the owner shall be deemed to be the holder of an equity of redemption under a mortgage or the grantor under a deed of trust; if there is no mortgage or deed of trust, then the owner shall be deemed to be the life tenant; and in the event there is no life tenant, then the owner shall be deemed to be the holder of legal title to the property.

(1979, 2nd Sess., c. 1247, s. 23.)

Editor's Note. — The 1979, 2nd Sess., amendment rewrote the second sentence of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Cited in Centre Dev. Co. v. County of Wilson, 44 N.C. App. 469, 261 S.E.2d 275 (1980).

§ 160A-255. Appeal to General Court of Justice.

Landowners could not invoke the aid of a court of equity to enjoin a county from condemning their land for a public purpose where plaintiffs have the right of appeal

pursuant to this section and this is an adequate remedy at law. Centre Dev. Co. v. County of Wilson, 44 N.C. App. 469, 261 S.E.2d 275 (1980).

§ 160A-266. Methods of sale; limitation.

Local Modification. — Washington: 1979, 2nd Sess., c. 1120.

Article 12.

Sale and Disposition of Property.

§ 160A-267. Private sale. — When the council proposes to dispose of property by private sale, it shall at a regular council meeting adopt a resolution or order authorizing an appropriate city official to dispose of the property by private sale at a negotiated price. The resolution or order shall identify the property to be sold and may, but need not, specify a minimum price. A notice summarizing the contents of the resolution or order shall be published once after its adoption, and no sale shall be consummated thereunder until 10 days after its publication. (1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 24.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "A notice summarizing the content of the" for "The" at the beginning of the third sentence.

§ 160A-269. Negotiated offer, advertisement, and upset bids. — A city may receive, solicit, or negotiate an offer to purchase property and advertise it for upset bids. When an offer is made and the council proposes to accept it, the council shall require the offeror to deposit five percent (5%) of his bid with the city clerk, and shall publish a notice of the offer. The notice shall contain a general description of the property, the amount and terms of the offer, and a notice that within 10 days any person may raise the bid by not less than ten percent (10%) of the first one thousand dollars ($1,000) and five percent (5%) of the remainder. When a bid is raised, the bidder shall deposit with the city clerk five percent (5%) of the increased bid, and the clerk shall readvertise the offer at the increased bid. This procedure shall be repeated until no further qualifying upset bids are received, at which time the council may accept the offer and sell the property to the highest bidder. The council may at any time reject any and all offers. (1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 25.)

Editor's Note. — The 1979, 2nd Sess., amendment deleted "for cash" at the end of the fifth sentence.

§ 160A-272. Lease or rental of property. — Any property owned by a city may be leased or rented for such terms and upon such conditions as the council may determine, but not for longer than 10 years (except as otherwise provided herein) and only if the council determines that the property will not be needed by the city for the term of the lease. In determining the term of a proposed lease, periods that may be added to the original term by options to renew or extend shall be included. Property may be rented or leased only pursuant to a resolution of the council authorizing the execution of the lease or rental agreement adopted at a regular council meeting upon 10 days' public notice.

Notice shall be given by publication describing the property to be leased or rented, stating the annual rental or lease payments, and announcing the council's intent to authorize the lease or rental at its next regular meeting.

No public notice need be given for resolutions authorizing leases or rentals for terms of one year or less, and the council may delegate to the city manager or some other city administrative officer authority to lease or rent city property for terms of one year or less. Leases for terms of more than 10 years shall be treated as a sale of property and may be executed by following any of the procedures authorized for sale of real property. (1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 26.)

Editor's Note. — The 1979, 2nd Sess., amendment deleted the former second sentence of the first paragraph, which read "Subject to G.S. 160A-321, a city-owned utility or a public service enterprise may be leased for a period of more than 10 years."

§ 160A-272.1. Lease of utility or enterprise property. — Subject to G.S. 160A-321, a city-owned utility or public service enterprise, or part thereof, may be leased. (1979, 2nd Sess., c. 1247, s. 27.)

Article 13.

Law Enforcement.

§ 160A-282. Auxiliary law-enforcement personnel; workmen's compensation benefits. — (a) A city may by ordinance provide for the organization of an auxiliary police department made up of volunteer members.

(b) A city, by enactment of an ordinance, may provide that, while undergoing official training and while performing duties on behalf of the city pursuant to orders or instructions of the chief of police of the city, auxiliary law-enforcement personnel shall be entitled to benefits under the North Carolina Workmen's Compensation Act and to any fringe benefits for which such volunteer personnel qualify.

(c) The board of commissioners of any county may provide that persons who are deputized by the sheriff of the county as special deputy sheriffs or persons who are serving as volunteer law-enforcement officers at the request of the sheriff and under his authority, while undergoing official training and while performing duties on behalf of the county pursuant to orders or instructions of the sheriff, shall be entitled to benefits under the North Carolina Workmen's Compensation Act and to any fringe benefits for which such persons qualify. (1969, c. 206, s. 1; 1971, c. 698, s. 1; 1973, c. 1263, s. 1; 1979, 2nd Sess., c. 1247, s. 28.)

Editor's Note. — The 1979, 2nd Sess., amendment added present subsection (a) and redesignated former subsections (a) and (b) as (b) and (c).

§ 160A-286. Extraterritorial jurisdiction of policemen.

Local Modification: Village of Pinehurst, 1979, 2nd Sess., c. 1168.

ARTICLE 15.

Streets, Traffic and Parking.

§ 160A-296. Establishment and control of streets.

The power provided by subdivision (a)(3) of this section is to be exercised in the discretion of the governing body of the municipality acting in its governmental, rather than its proprietary capacity. Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980).

§ 160A-301. Parking.

Cited in Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980).

§ 160A-304. Regulation of taxis.

Cited in State v. Johnson, 42 N.C. App. 234, 256 S.E.2d 297 (1979).

ARTICLE 16.

Public Enterprises.

Part 1. General Provisions.

§ 160A-312. Authority to operate public enterprises. — A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

A city shall have full authority to protect and regulate any public enterprise system belonging to it by adequate and reasonable rules and regulations.

A city may operate that part of a gas system involving the purchase and/or lease of natural gas fields, natural gas reserves and natural gas supplies and the surveying, drilling or any other activities related to the exploration for natural gas, in a partnership or joint venture arrangement with natural gas utilities and private enterprise. (1971, c. 698, s. 1; 1973, c. 426, s. 51; 1975, c. 821, s. 5; 1979, 2nd Sess., c. 1247, s. 29.)

Editor's Note. —
The 1979, 2nd Sess., amendment substituted "operate, and contract for the operation of" for "and operate" near the beginning of the first sentence of the first paragraph.

Cited in Wall v. City of Durham, 41 N.C. App. 649, 255 S.E.2d 739 (1979).

§ 160A-314. Authority to fix and enforce rates.

Authority Not License to Discriminate. — The statutory authority of a city to fix and enforce rates for public services furnished by it and to classify its customers is not a license to

discriminate among customers of essentially the same character and services. Wall v. City of Durham, 41 N.C. App. 649, 255 S.E.2d 739, cert. denied, 298 N.C. 304, 259 S.E.2d 918 (1979).

§ 160A-315. Billing and collecting agents for certain sewer systems.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

§ 160A-319. Utility franchises.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste notwithstanding the provisions of this section, see § 153A-299.3.

Article 17A.

Cemetery Trustees.

§ 160A-349.3. Property vested. — Upon the creation of such board the title to all property held by the town or city and used for cemetery purposes shall pass to and vest in said board, subject to the same limitations, conditions and restrictions as it was held by the town or city; provided, that the governing body of the town or city may at any time by resolution direct that title to such property shall pass to and vest in the town or city itself, and in such event it shall be the duty of the board and its officers to execute all necessary documents to effect such transfer and vesting. (Pub. Loc. 1923, c. 583, s. 3; 1979, 2nd Sess., c. 1247, s. 30.)

Editor's Note. — The 1979, 2nd Sess., amendment added the proviso.

§ 160A-349.7. Presentation of budget; details of budget; appropriation; payment to board. — Thirty days prior to the adoption of the annual budget by the governing body of the town or city, the said trustees shall present to such governing body a budget for the ensuing year, in which said budget there shall be set out in detail an accurate account of the receipts and expenditures of the board for the previous year, the estimated expense for the ensuing year, the estimated source of income from all sources, other than appropriation by the governing body of the town or city, any balance on hand, and such other information as the said trustees may think proper; and the said governing body of the town or city shall in the annual budget include such appropriation as it deems proper for the care and maintenance of the said cemetery for the ensuing year, which shall be paid over to the board of trustees in monthly installments.

For purposes of the Local Government Budget and Fiscal Control Act (Chapter 159, Subchapter III), the board of trustees of a cemetery is a board of the municipal corporation establishing the board of trustees and is not a public authority as defined by G.S. 159-7. (Pub. Loc. 1923, c. 583, s. 7; 1971, c. 780, s. 37.3; 1973, c. 474, s. 31; 1979, 2nd Sess., c. 1247, s. 31.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "such appropriation as it deems proper" for "a sufficient appropriation" near the end of the first paragraph.

§ 160A-349.11. Price of lands included in budget. — If any lands are acquired by purchase or condemnation for cemetery purposes and the board of trustees shall not have sufficient funds with which to pay for the same, the amount necessary shall be included in their budget request, and the governing body of any town or city may make an appropriation to complete the purchase. (Pub. Loc. 1923, c. 583, s. 11; 1979, 2nd Sess., c. 1247, s. 32.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "request" following "budget", and substituted "may make an appropriation" for "shall make an appropriation necessary" near the end of the section.

§ 160A-349.14. Exercise of powers subject to approval. — The board may not act to acquire or sell land pursuant to G.S. 160A-349.9, G.S. 160A-349.10, or G.S. 160A-349.13 unless such action was approved in advance by the governing body of the town or city. (1979, 2nd Sess., c. 1247, s. 33.)

§ 160A-349.15. Termination. — The governing body of the town or city shall have the authority to terminate the existence of the board at any time. In the event of such termination, all property and assets of the board shall automatically become the property of the town or city and the town or city shall succeed to all rights, obligations and liabilities of the board. Further, in the event of such termination, it shall be the duty of the board and its officers to execute all necessary documents to effect the transfer of property and assets to the town or city. (1979, 2nd Sess., c. 1247, s. 34.)

Article 19.

Planning and Regulation of Development.

Part 1. General Provisions.

§ 160A-361. Planning agency. — Any city may by ordinance create or designate one or more agencies to perform the following duties:

(1) Make studies of the area within its jurisdiction and surrounding areas;
(2) Determine objectives to be sought in the development of the study area;
(3) Prepare and adopt plans for achieving these objectives;
(4) Develop and recommend policies, ordinances, administrative procedures, and other means for carrying out plans in a coordinated and efficient manner;
(5) Advise the council concerning the use and amendment of means for carrying out plans;
(6) Exercise any functions in the administration and enforcement of various means for carrying out plans that the council may direct;
(7) Perform any other related duties that the council may direct.

An agency created or designated pursuant to this section may include, but shall not be limited to, one or more of the following, with such staff as the council may deem appropriate:

(1) A planning board or commission of any size (not less than three members) or composition deemed appropriate, organized in any manner deemed appropriate;

(2) A joint planning board created by two or more local governments pursuant to Article 20, Part 1, of this Chapter. (1919, c. 23, s. 1; C. S., s. 2643; 1945, c. 1040, s. 2; 1955, cc. 489, 1252; 1959, c. 327, s. 2; c. 390; 1971, c. 698, s. 1; 1973, c. 426, s. 57; 1979, 2nd Sess., c. 1247, s. 35.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "but shall not be limited to" following "may include" in the introductory language of the second paragraph.

§ 160A-364. Procedure for adopting or amending ordinances under Article. — Before adopting or amending any ordinance authorized by this Article, the city council shall hold a public hearing on it. A notice of the public hearing shall be given once a week for two successive calendar weeks in a newspaper having general circulation in the area. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing. Such period shall be computed in compliance with G.S. 1-594, and shall not be subject to Rule 6(a) of the Rules of Civil Procedure. (1923, c. 250, s. 4; C.S., s. 2776(u); 1927, c. 90; 1955, c. 1334, s. 1; 1971, c. 698, s. 1; 1973, c. 426, s. 58; 1977, c. 912, s. 5; 1979, 2nd Sess., c. 1247, s. 36.)

Editor's Note. — The 1979, 2nd Sess., amendment, substituted "10 days" for "15 days" in the third sentence.

Part 3. Zoning.

§ 160A-383. Purposes in view.

Applied in A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979); Woodhouse v. Board of Comm'rs, 41 N.C. App. 473, 255 S.E.2d 249, cert. granted, 298 N.C. 305, 259 S.E.2d 918 (1979).

§ 160A-388. Board of adjustment.

(e) The concurring vote of four fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part, or to decide in favor of the applicant any matter upon which it is required to pass under any ordinance, or to grant a variance from the provisions of the ordinance. Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any appeal to the superior court shall be taken within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to the appellant, whichever is later. The decision of the board may be delivered to the appellant either by personal service, or registered mail or certified mail return receipt requested.
(1979, 2nd Sess., c. 1247, s. 37.)

Editor's Note. —
The 1979, 2nd Sess., amendment substituted "Part" for "Article" near the middle of the first sentence of subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Cited in Woodhouse v. Board of Comm'rs, 41 N.C. App. 473, 255 S.E.2d 249 (1979); Woodhouse v. Board of Comm'rs, 299 N.C. 211, 261 S.E.2d 882 (1980); Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520 (1980).

Part 3A. Historic Districts.

§ 160A-395. Exercise of powers under this Part by counties as well as cities; designation of historic districts.

Section Represents Delegation of Power. — This section authorizes any municipal governing body to designate one or more historic districts as a part of its general zoning ordinance. Municipal governing bodies (which term includes governing boards of counties as well) are thereby delegated the legislative power to determine whether or not to designate a historic district or districts. Delegation to municipal corporations of the States' police power to legislate concerning local problems such as zoning is permissible by long standing exception to the general rule of nondelegation of legislative power. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Discretion of Municipal Governing Body. — The statutory authorization of historic district ordinances is a mixture of delegated legislative and administrative power. A municipal governing body has unlimited discretion to determine whether or not to establish a historic district or districts. Once it chooses to do so, however, its discretion insofar as the method and the standard by which a historic district ordinance is to be administered is, by contrast, extremely limited. A historic district ordinance is to be administered by a historic district commission, the composition of which is specified by the General Assembly, in accordance with the standard of "incongruity" set directly by the General Assembly in § 160A-397. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

§ 160A-396. Historic district commission.

Cited in A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

§ 160A-397. Certificate of appropriateness required.

Cited in A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Part 3B. Historic Properties Commissions.

§ 160A-399.6. Certificate of appropriateness required.

Local Modification. — City of Raleigh: 1979, 2nd Sess., c. 1169.

Part 6. Minimum Housing Standards.

§ 160A-445. Service of complaints and orders. — Complaints or orders issued by a public officer pursuant to an ordinance adopted under this Part shall be served upon persons either personally or by registered or certified mail. If the identities of any owners or the whereabouts of persons are unknown and cannot be ascertained by the public officer in the exercise of reasonable diligence, and the public officer makes an affidavit to that effect, then the serving of the complaint or order upon the unknown owners or other persons may be made by publication in a newspaper having general circulation in the city at least once no later than the time at which personal service would be required under the provisions of this Part. When service is made by publication, a notice of the pending proceedings shall be posted in a conspicuous place on the premises thereby affected. (1939, c. 287, s. 5; 1965, c. 1055; 1969, c. 868, ss. 3, 4; 1971, c. 698, s. 1; 1973, c. 426, s. 60; 1977, c. 912, s. 14; 1979, 2nd Sess., c. 1247, s. 38.)

Editor's Note. — The 1979, 2nd Sess., amendment inserted "the identities of any owners or" following "If" at the beginning of the second sentence, and inserted "unknown owners or other" following "serving of the complaint or order upon the" near the middle of the second sentence.

Part 8. Miscellaneous Powers.

§ 160A-458. Erosion and sedimentation control. — Any city may enact and enforce erosion and sedimentation control ordinances as authorized by Article 4 of Chapter 113A of the General Statutes, and in such enactment and enforcement shall comply with all applicable provisions of Article 4. (1979, 2nd Sess., c. 1247, s. 39.)

§ 160A-458.1. Floodway regulations. — Any city may enact and enforce floodway regulation ordinances as authorized by Part 6 of Article 21 of Chapter 143 of the General Statutes, and in such enactment and enforcement shall comply with all applicable provisions of Part 6. (1979, 2nd Sess., c. 1247, s. 39.)

§ 160A-459: Reserved for future codification purposes.

Article 20.

Interlocal Cooperation.

Part 2. Regional Councils of Governments.

§ 160A-470. Creation of regional councils; definition of "unit of local government."

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

§ 160A-475. Specific powers of council.

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note on the expansion of standing in North Carolina taxpayers' actions, see 15 Wake Forest L. Rev. 126 (1979).

Article 21.

Miscellaneous.

§ 160A-485. Waiver of immunity through insurance purchases.

A city, while performing a governmental function in the maintenance of a sewer system within its municipal jurisdiction, may not be held liable for any damage arising out of the governmental activity unless it expressly waives its immunity pursuant to this section. Roach v. City of Lenoir, 44 N.C. App. 608, 261 S.E.2d 299 (1980).

§ 160A-486. Estimates of population. — When a newly incorporated municipality is not included in the most recent federal census of population but otherwise qualifies for distribution of State-collected funds allocated wholly or

partially on the basis of current population estimates, the municipality shall be entitled to participate in the distribution of these funds by reporting all information designated by the Office of State Budget and Management. An estimate of this city's population will be made by the Office of State Budget and Management in accordance with procedures designated by that office. The estimate will be certified to State departments and agencies charged with the responsibility of distributing funds to local governments along with the current population estimates for all other municipalities. (1953, c. 79; 1969, c. 873; 1971, c. 698, s. 1; 1979, 2nd Sess., c. 1137, s. 46.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote this section, which formerly provided for an estimate to be approved by the city council and the board of commissioners of the county or counties in which the city was located.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

§ 160A-487. City and county financial support for rescue squads.

Local Modification. — City of Jacksonville: 1979, 2nd Sess., c. 1113.

§ 160A-488. Museums and arts programs. — (a) Any city or county is authorized to establish and support museums, art galleries, or arts centers, so long as the facility is open to the public.

(b) Any city or county is authorized to establish and support arts programs and facilities. As used in this section, "arts" refers to the performing arts, visual arts, and literary arts and includes dance, drama, music, painting, drawing, sculpture, printmaking, crafts, photography, film, video, architecture, design and literature, when part of a performing, visual or literary arts program.

(c) Any city or county may contract with any other governmental agency, or with any public or nonprofit private association, corporation or organization to establish and support museums, art galleries, arts centers, arts facilities, and arts programs and may appropriate funds to any such governmental agency, or to any such public or nonprofit private association, corporation or organization for the purpose of establishing and supporting such museums, galleries, centers, facilities and programs.

(d) As used in this section, "support" includes, but is not limited to: acquisition, construction, and renovation of buildings, including acquisition of land and other property therefor; purchase of paintings and other works of art; acquisition, lease, or purchase of materials and equipment; compensation of personnel; and all operating and maintenance expenses of the program or facility.

(e) In the event funds appropriated for the purposes of this section are turned over to any agency or organization other than the city or county for expenditure, no such expenditure shall be made until the city or county has approved it, and all such expenditures shall be accounted for by the agency or organization at the end of the fiscal year for which they were appropriated.

(f) For the purposes set forth in this section, a city or county may appropriate funds not otherwise limited as to use by law. (1955, c. 1338; 1961, c. 309; 1965, c. 1019; 1971, c. 698, s. 1; 1975, c. 664, s. 17; 1979, 2nd Sess., c. 1201.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective from and after April 20, 1979, rewrote this section.

§ 160A-490. Photographic reproduction of records. — G.S. 153A-436 shall apply to cities. When a county officer is designated by title in that Article, the designation shall be construed to mean the appropriate city officer, and the city council shall perform powers and duties conferred and imposed on the board of county commissioners. (1955, c. 451; 1971, c. 698, s. 1; 1979, 2nd Sess., c. 1247, s. 41.)

Editor's Note. —
The 1979, 2nd Sess., amendment substituted the present first sentence for the former first sentence, which read "All cities shall be subject to the provisions of Article 2A of Chapter 153 of the General Statutes (G.S. 153-15.1 through 153-15.6)."

§ 160A-497. Senior citizens programs. — Any city or county may undertake programs for the assistance and care of its senior citizens including but not limited to programs for in-home services, food service, counseling, recreation and transportation, and may appropriate funds for such programs. Any city council or county may contract with any other governmental agency, or with any public or private association, corporation or organization in undertaking senior citizens programs, and may appropriate funds to any such governmental agency, or to any such public or private association, corporation or organization for the purpose of carrying out such programs. In the event funds appropriated for the purposes of this section are turned over to any agency or organization other than the city or county for expenditure, no such expenditure shall be made until the city or county, has approved it, and all such expenditures shall be accounted for by the agency or organization at the end of the fiscal year for which they were appropriated. For purposes of this section, the words "senior citizens" shall mean citizens of a city or county who are at least 60 years of age. (1977, c. 187, s. 1; c. 647, ss. 1, 2; 1979, 2nd Sess., c. 1094, ss. 4, 5.)

Editor's Note. —
The 1979, 2nd Sess., amendment substituted "city or county" for "city" in the first, third, and fourth sentences, and substituted "city council or county" for "city council" in the second sentence.

Session Laws 1979, 2nd Sess., c. 1094, s. 6, provides: "This act is effective upon ratification. All contracts which would be permissible under this act which were entered into on or after April 20, 1979, are hereby validated." The act was ratified on June 17, 1980.

Preamble to Session Laws 1979, 2nd Sess., c. 1094 cites as the reason for the enactment Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979), requiring statutory authority for third party contracts.

ARTICLE 22.

Urban Redevelopment Law.

§ 160A-500. Short title.

Editor's Note.—
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 160A-512. Powers of commission.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Applied in Campbell v. First Baptist Church, 298 N.C. 476, 256 S.E.2d 558 (1979).

§ 160A-514. Required procedures for contracts, purchases and sales; powers of commission in carrying out redevelopment project.

Local Modification. — City of Wilmington: 1979, 2nd Sess., c. 1321.

Discretion of Commission. — Each subsection of this section confers upon a redevelopment commission the authority to perform certain acts necessary to carry out the redevelopment project, and the use of the word "may" merely denotes that the commission is not required to do each and every act authorized in this section. However, should a commission elect to exercise the authority conferred upon it by a particular subsection, then the procedural requirements "shall" be followed, under subsection (c) of this section. Thus, the use of the word "may" in subdivision (e)(4) of this section is not mandatory in the sense that it requires a commission to convey to a nonprofit association. Whether there shall be a conveyance is a matter in the discretion of the commission. However, once a commission decides to exercise its authority to so convey, that conveyance must be after a public hearing and "shall be for such consideration as may be agreed upon by the commission and the association or corporation." Campbell v. First Baptist Church, 298 N.C. 476, 259 S.E.2d 558 (1979).

An "exchange" is included within the provisions of subsection (d) of this section unless the commission elects to treat it as a private sale and proceed under the provisions of subsection (e) of this section. Campbell v. First Baptist Church, 298 N.C. 476, 256 S.E.2d 558 (1979).

In light of the specifically outlined exceptions to the general rule, coupled with the specific inclusion of "exchanges" within the proviso of subsection (c) of this section, "exchanges" are within the general rule requiring advertisement and bids. Campbell v. First Baptist Church, 298 N.C. 476, 256 S.E.2d 558 (1979).

Article 23.

Municipal Service Districts.

§ 160A-536. Purposes for which districts may be established.

Cross Reference. — As to authority of counties, cities and towns to enter into long-term contracts with private persons, firms or corporations for the disposal of solid waste, see §§ 153A-299.1 through 153A-299.6.

§§ 160A-545 to 160A-549. Reserved for future codification purposes.

Article 24.

Parking Authorities.

§ 160A-550. Short title. — This Article may be cited as the "Parking Authority Law." (1951, c. 779, s. 1; 1979, 2nd Sess., c. 1247, s. 44.)

Editor's Note. — This article was formerly Article 38 of Chapter 160. It was transferred and renumbered Article 24 of Chapter 160A by Session Laws 1979, c. 1247.

§ 160A-551. Definitions. — As used or referred to in this Article, unless a different meaning clearly appears from the context:

(1) The term "authority" shall mean a public body and a body corporate and politic organized in accordance with this Article for the purposes, with the powers and subject to the restrictions hereinafter set forth;
(2) The term "bonds" shall mean bonds authorized by this Article;
(3) The term "city" shall mean the city that is, or is about to be, included in the territorial boundaries of an authority when created hereunder;

(4) The term "city clerk" shall mean the clerk of the city or the officer thereof charged with the duties customarily imposed on the clerk;
(5) The term "city council" shall mean the legislative body, council, board of commissioners, or other body charged with governing the city;
(6) The term "commissioner" shall mean one of the members of an authority, appointed in accordance with the provisions of this Article;
(7) The term "parking project" shall mean any area or place operated or to be operated by the authority for the parking or storing of motor and other vehicles, open to public use for a fee, and shall without limiting the foregoing, include all real and personal property, driveways, roads, approaches, structures, garages, meters, mechanical equipment, and all appurtenances and facilities either on, above or under the ground which are used or usable in connection with such parking or storing of such vehicles, including on-street parking meters if so provided by the governing authority;
(8) The term "real property" shall mean lands, structures, franchises, and interest in lands, and any and all things usually included within the said term, and includes not only fees simple absolute but also any and all lesser interests, such as easements, rights-of-way, uses, leases, licenses, and all other incorporeal hereditaments and every estate, interest or right, legal or equitable, including terms of years, and liens thereon by way of judgments, mortgages or otherwise, and also claims for damage to real estate. (1951, c. 779, s. 2; 1965, c. 998, s. 1; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-552. Creation of authority. — The city council of any city may, upon its own initiative, and shall, upon petition of 25 or more residents of the city, hold a public hearing on the question whether or not it is necessary for the city to organize an authority under the provisions of this Article. Notice of the time, place and purpose of such hearing shall be given by publication in a newspaper of general circulation in the city, at least once, at least 10 days before such hearing. At such hearing, an opportunity to be heard shall be granted to all residents and taxpayers of the city and all other interested persons. If, after such hearing, the city council shall by resolution determine that it is necessary for the city to organize an authority under the provisions of this Article, the city council shall appoint, as hereinafter provided, five commissioners to act as an authority. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present or cause to be presented to the Secretary of State of North Carolina a written application signed by them, which shall set forth

(1) A statement that the city council has, pursuant to this Article, and after a public hearing held as herein required, determined that it is necessary for the city to organize an authority under the provisions of this Article, and has appointed the signers of such application as commissioners of such an authority;
(2) A statement that the commissioners desire the authority to become a public body and a body corporate and politic under this Article;
(3) The name, address and term of office of each of the commissioners;
(4) The name which is proposed for the corporation; and
(5) The location and the principal office of the proposed corporation.

The application shall be accompanied by a copy, certified by the city clerk, of the resolution or resolutions of the city council making such determination and appointments. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by law to take and certify oaths,

who shall certify upon the application that he personally knows said commissioners and knows them to be the persons appointed as stated in the application, and that each subscribed and swore thereto in the officer's presence. The Secretary of State shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or any other corporation of this State or so nearly similar as to lead to confusion and uncertainty, he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and body corporate and politic under the name proposed in the application; and the Secretary of State shall make and issue a certificate of incorporation pursuant to this Article, under the seal of the State, and shall record the same with the application.

The boundaries of such authority shall be coterminous with those of such city.

In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this Article upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof. (1951, c. 779, s. 3; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-553. Appointment, removal, etc., of commissioners; quorum; chairman; vice-chairman, agents and employees; duration of authority. — An authority shall constist of five commissioners appointed by the city council, and the city council shall designate the first chairman. No commissioner shall be a city official.

The commissioners who are first appointed shall be designated by the city council to serve for terms of one, two, three, four and five years respectively from the date of their appointment. Thereafter, the term of office shall be five years. A commissioner shall hold office until his successor has been appointed by the city council and has qualified. Vacancies shall be filled by the city council for the unexpired term. Three commissioners shall constitute a quorum. A commissioner shall receive no compensation for his services, but he shall be entitled to reimbursement for his actual and necessary expenses incurred in the performance of his official duties.

When the office of the first chairman of the authority becomes vacant, the authority shall select a chairman from among its members. An authority shall select from among its members a vice-chairman, and it may employ a secretary (who shall be executive director), technical experts and such other officers, agents and employees, permanent or temporary, as it may require, and shall determine their qualifications, duties and compensation. An authority may, with the consent of the city council call upon the city attorney or chief law officer of the city for such legal services as it may require, or it may employ its own counsel and legal staff. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper. The city council may remove any member of the authority for inefficiency, neglect of duty or misconduct in office, giving him a copy of the charges against him and an opportunity of being heard in person, or by counsel, in his defense upon not less than 10 days' notice. (1951, c. 779, s. 4; 1979, 2nd Sess., c. 1247, ss. 42, 44.)

Editor's Note. — The 1979, 2nd Sess., amendment deleted the last paragraph, which placed a time limitation on the existence of an authority.

§ 160A-554. Duty of authority and commissioners. — The authority and its commissioners shall be under a statutory duty to comply or cause compliance strictly with all provisions of this Article and, in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed. (1951, c. 779, s. 5; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-555. Interested commissioners or employees. — No commissioner or employee of an authority shall acquire any interest direct or indirect in any parking project or in any property included or planned to be included in any parking project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any parking project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any parking project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office. (1951, c. 779, s. 6; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-556. Purpose and powers of the authority. — An authority incorporated under this Article shall constitute a public body and a body corporate and politic, exercising public powers as an agency or instrumentality of the city with which it is coterminous. The purpose of the authority shall be to relieve traffic congestion of the streets and public places in the city by means of parking facilities, and to that end to acquire, construct, improve, operate and maintain one or more parking projects in the city. To carry out said purpose, the authority shall have power:

(1) To sue and be sued;
(2) To have a seal and alter the same at pleasure;
(3) To acquire, hold and dispose of personal property for its corporate purposes, including the power to purchase prospective or tentative awards in connection with the condemnation of real property;
(4) To acquire by purchase or condemnation, and use real property necessary or convenient. All real property acquired by the authority by condemnation shall be acquired in the manner provided by law for the condemnation of land by the city;
(5) To make bylaws for the management and regulation of its affairs, and subject to agreements with bondholders, for the regulation of parking projects;
(6) To make contracts and leases, and to execute all instruments necessary or convenient;
(7) To construct such buildings, structures and facilities as may be necessary or convenient;
(8) To construct, reconstruct, improve, maintain and operate parking projects;
(9) To accept grants, loans or contributions from the United States, the State of North Carolina, or any agency or instrumentality of either of them, or the city, and to expend the proceeds for any purposes of the authority;
(10) To fix and collect rentals, fees and other charges for the use of parking projects or any of them subject to and in accordance with such agreements with bondholders as may be made as hereinafter provided;
(11) To do all things necessary or convenient to carry out the purpose of the authority and the powers expressly given to it by this Article;

(12) To issue revenue bonds under the Local Government Revenue Bond Act. (1951, c. 779, s. 7; 1965, c. 998, s. 2; 1971, c. 780, s. 18; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-557. Conveyance of property by the city to the authority; acquisition of property by the city or by the authority. — (a) The city may convey, with or without consideration, to the authority real and personal property owned by the city for use by the authority as a parking project or projects or a part thereof. In case of real property so conveyed, the instrument of conveyance shall contain a provision for reversion of the property to the city upon the termination of the corporate existence of the authority or upon the termination of the use of the property for the corporate purpose of the authority. Such conveyance of property by the city to the authority may be made without regard to the provisions of other laws regulating sales of property by the city or requiring previous advertisement of sales of property by the city.

(b) The city may acquire by purchase or condemnation real property in the name of the city for the authority or for the widening of existing roads, streets, parkways, avenues or highways or for new roads, streets, parkways, avenues or highways to any of the parking projects, or partly for such purposes and partly for other city purposes, by purchase or condemnation in the manner provided by law for the acquisition of real property by the city. The city may close such streets, roads, parkways, avenues, or highways as may be necessary or convenient.

(c) Contracts may be entered into between the city and the authority providing for the property to be conveyed by the city to the authority, the additional property to be acquired by the city and so conveyed, the streets, roads, parkways, avenues and highways to be closed by the city, and the amounts, terms and conditions of payment to be made by the authority. Such contracts may contain covenants by the city as to the road, street, parkway, avenue and highway improvements to be made by the city, including provisions for the installation of parking meters in designated streets of the city and for the removal of such parking meters in the event that such parking meters are not found to be necessary or convenient. Any such contract may pledge all or any part of the revenues of on-street parking meters to the authority for a period of not to exceed the period during which bonds of the authority shall be outstanding; provided, that the total amount of such revenues which may be paid pursuant to such a pledge shall not exceed the total of the principal of and interest on such bonds which become due and payable during such period. Such contracts may also contain provisions limiting or prohibiting the construction and operation by the city or any agency thereof in designated areas of public parking facilities and parking meters whether or not a fee or charge is made therefor. Any such contracts between the city and the authority may be pledged by the authority to secure its bonds and may not be modified thereafter except as provided by the terms of the contracts or by the terms of the pledge. The city council may authorize such contracts on behalf of the city and no other authorization on the part of the city for such contracts shall be necessary.

(d) The authority may itself acquire real property for a parking project at the cost and expense of the authority by purchase or condemnation pursuant to the laws relating to the condemnation of land by the city.

(e) In case the authority shall acquire any real property which it shall determine is no longer required for a parking project, then, if such real property was acquired at the cost and expense of the city, the authority shall have power to convey it without consideration to the city, or, if such real property was acquired at the cost and expense of the authority, then the authority shall have

power to sell, lease or otherwise dispose of said real property and shall retain and have the power to use the proceeds of sale, rentals or other moneys derived from the disposition thereof for its purposes. (1951, c. 779, s. 8; 1965, c. 998, s. 3; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-558. Contracts. — The authority shall let contracts in the manner provided by law for contracts of the city. (1951, c. 779, s. 9; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-559. Moneys of the authority. — All moneys of the authority shall be paid to the treasurer of the city as agent of the authority, who shall designate depositories and who shall not commingle such moneys with any other moneys. Such moneys shall be deposited in a separate bank account or accounts. The moneys in such accounts shall be paid out on checks of the treasurer on written requisition of the chairman of the authority or of such other person or persons as the authority may authorize to make such requisitions. All deposits of such moneys shall be secured in the manner provided by law for securing deposits of moneys of the city. The city accountant of the city and his legally authorized representatives are authorized and empowered from time to time to examine the accounts and books of the authority, including its receipts, disbursements, contracts, leases, sinking funds, investments and any other records and papers relating to its financial standing. The authority shall cause an annual audit of its accounts to be made by a certified public accountant or firm of certified public accountants, and shall cause a copy of the report of each such audit to be filed with the city clerk, who shall present the same to the city council. The authority shall have power, notwithstanding the provisions of this section to contract with the holders of any of its bonds as to the custody, collection, securing, investment and payment of any moneys of the authority or any moneys held in trust or otherwise for the payment of bonds or in any way to secure bonds, and to carry out any such contract notwithstanding that such contract may be inconsistent with the previous provisions of this section. Moneys held in trust or otherwise for the payment of bonds or in any way to secure bonds and deposits of such moneys may be secured in the same manner as moneys of the authority, and all banks and trust companies are authorized to give such security for such deposits. (1951, c. 779, s. 10; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-560. Bonds legal investments for public officers and fiduciaries. — The bonds are hereby made securities in which all public officers and bodies of this State and all municipalities and municipal subdivisions, all insurance companies and associations and other persons carrying on an insurance business, all banks, bankers, trust companies, savings banks and savings associations, including savings and loan associations, investment companies and other persons carrying on a banking business and all other persons whatsoever, except as hereinafter provided, who are now or may hereafter be authorized to invest in bonds or other obligations of the State, may properly and legally invest funds including capital in their control or belonging to them; provided that, notwithstanding the provisions of any other general or special law to the contrary, such bonds shall not be eligible for the investment of funds, including capital, trusts, estates or guardianships under the control of individual administrators, guardians, executors, trustees and other individual fiduciaries. The bonds are also hereby made securities which may be deposited with and may be received by all public officers and bodies of this State and all municipalities and municipal subdivisions for any purpose for which the deposit of bonds or other obligations of this State is now or may hereafter be authorized. (1951, c. 779, s. 15; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-561. Exemptions from taxation. — It is hereby found, determined and declared that the creation of the authority and the carrying out of its corporate purposes is in all respects for the benefit of the people of the State of North Carolina, for the improvement of their health, welfare and prosperity, and for the promotion of their traffic, and is a public purpose, and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this Article, and the State of North Carolina covenants with the holders of the bonds that the authority shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of the project or any tolls, revenues or other income received by the authority and that the bonds of the authority and the income therefrom shall at all times be exempt from taxation, except for transfer and estate taxes. (1951, c. 779, s. 16; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-562. Tax contract by the State. — The State of North Carolina covenants with the purchasers and with all subsequent holders and transferees of bonds issued by the authority pursuant to this article, in consideration of the acceptance of and payment for the bonds, that the bonds of the authority issued pursuant to this article and the income therefrom, and all moneys, funds and revenues pledged to pay or secure the payment of such bonds, shall at all times be free from taxation except for transfer and estate taxes. (1951, c. 779, s. 17; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-563. Actions against the authority. – In every action against the authority for damages, for injuries to real or personal property, or for the destruction thereof, or for personal injuries or death, the complaint shall contain an allegation that at least 30 days have elapsed since the demand, claim or claims upon which such action is founded were presented to a member of the authority, or to its secretary, or to its chief executive officer and that the authority has neglected or refused to make an adjustment or payment thereof for 30 days after such presentment. (1951, c. 779, s. 19; 1979, 2nd Sess., c. 1247, s. 44.)

§ 160A-564. Termination of authority. — The city council shall have the authority to terminate the existence of the authority at any time. In the event of such termination, all property and assets of the authority shall automatically become the property of the city and the city shall succeed to all rights, obligations and liabilities of the authority. (1951, c. 779, s. 20; 1979, 2nd Sess., c. 1247, ss. 43, 44.)

Editor's Note. — The 1979, 2nd Sess., amendment rewrote this section.

§ 160A-565. Inconsistent provisions in other acts superseded. — Insofar as the provisions of this Article are inconsistent with the provisions of any other act, general or special, the provisions of this Article shall be controlling. This Article shall not repeal or modify any other act providing a different method of financing parking projects in cities, the powers conferred hereby being intended to be in addition to and not in substitution for the powers conferred by other acts. (1951, c. 779, s. 22; 1979, 2nd Sess., c. 1247, s. 44.)

§§ 160A-566 to 160A-574: Reserved for future codification purposes.

ARTICLE 25.

Public Transportation Authorities.

§ 160A-575. Title. — This Article shall be known and may be cited as the "North Carolina Public Transportation Authorities Act." (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

Editor's Note. — This article was formerly Article 38A of Chapter 160. It was recodified as Article 25 of Chapter 160A by Session Laws 1979, c. 1247.

§ 160A-576. Definitions. — As used in this Article, unless the context otherwise requires:

(1) "Authority" means a body corporate and politic organized in accordance with the provisions of this Article for the purposes, with the powers and subject to the restrictions hereinafter set forth.

(2) "Governing body" means the board, commission, council or other body, by whatever name it may be known, in which the general legislative powers of the municipality are vested.

(3) "Municipality" means any county, city, or town of this State, and any other political subdivision, public corporation, authority, or district in this State, which is or may be authorized by law to acquire, establish, construct, enlarge, improve, maintain, own, and operate public transportation systems.

(4) "Municipality's chief administrative official" means the county manager, city manager, town manager, or other person, by whatever title he shall be known, in whom the responsibility for the municipality's administrative duties is vested.

(5) "Public transportation" means transportation of passengers whether or not for hire by any means of conveyance, including but not limited to a street railway, elevated railway or guideway, subway, motor vehicle or motor bus, either publicly or privately owned and operated, holding itself out to the general public for the transportation of persons within the territorial jurisdiction of the authority, including charter service.

(6) "Public transportation system" means, without limitation, a combination of real and personal property, structures, improvements, buildings, equipment, vehicle parking or other facilities, and rights-of-way, or any combination thereof, used or useful for the purposes of public transportation. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-577. Creation; membership. — A municipality may, by resolution or ordinance, create a transportation authority, hereinafter sometimes referred to as the "authority." It shall be a body corporate and politic. It shall consist of up to 11 members as determined by the governing body of the municipality.

Members of the authority shall reside within the territorial jurisdiction of the authority as hereinafter set out. They shall be appointed by the governing body of the municipality. The terms of the members shall be fixed by the governing body. Appointments to fill vacancies occurring during the regular terms shall be made by the governing body. The appointments of all members shall run until their successors are appointed and qualified.

The members of the authority shall elect a chairman and vice-chairman from the membership of the authority. They shall also elect a secretary who may, or may not, be a member of the authority.

A majority of the members shall constitute a quorum for the transaction of business and an affirmative vote of the majority of the members present at a meeting of the authority shall be required to constitute action of the authority. Members of the authority shall receive such compensation, if any, as may be fixed by the governing body of the municipality. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-578. Purpose of the authority. — The purpose of the authority shall be to provide for a safe, adequate and convenient public transportation system for the municipality creating the authority and for its immediate environs, through the granting of franchises, ownership and leasing of terminals, buses and other transportation facilities and equipment, and otherwise through the exercise of the powers and duties conferred upon it. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-579. General powers of the authority. — The general powers of the authority shall include any or all of the following:

(1) To sue and be sued;

(2) To have a seal;

(3) To make rules and regulations, not inconsistent with this Chapter, for its organization and internal management;

(4) To employ persons deemed necessary to carry out the management functions and duties assigned to them by the authority and to fix their compensation, within the limit of available funds;

(5) With the approval of the municipality's chief administrative official, to use officers, employees, agents and facilities of the municipality for such purposes and upon such terms as may be mutually agreeable;

(6) To retain and employ counsel, auditors, engineers and private consultant on an annual salary, contract basis, or otherwise for rendering professional or technical services and advice;

(7) To acquire, maintain and operate such lands, buildings, structures, facilities, and equipment as may be necessary or convenient for the operations of the authority and for the operation of a public transportation system;

(8) To make or enter into contracts, agreements, deeds, leases, conveyances or other instruments, including contracts and agreements with the United States and the State of North Carolina;

(9) To surrender to the municipality any property no longer required by the authority;

(10) To make plans, surveys and studies of public transportation facilities within the territorial jurisdiction of the authority and to prepare and make recommendations in regard thereto;

(11) To enter into and perform contracts with public transportation companies with respect to the operation of public passenger transportation;

(12) To issue certificates of public convenience and necessity; and to grant franchises and enter into franchise agreements and in all respects to regulate the operation of buses, taxicabs and other methods of public passenger transportation which originate and terminate within the territorial jurisdiction of the authority as fully as the municipality is now or hereafter empowered to do within the territorial jurisdiction of the municipality;

(13) To operate public transportation systems and to enter into and perform contracts to operate public transportation services and facilities and to own or lease property, facilities and equipment necessary or convenient therefor, and to rent, lease or otherwise sell the right to do so to any person, public or private; further, to the extent authorized by resolution or ordinance of the municipality to obtain grants, loans and assistance from the United States, the State, any public body, or any private source whatsoever;

(14) To enter into and perform contracts and agreements with other public transportation authorities pursuant to the provisions of G.S. 160A-460 through 160A-464 of Part 1 of Article 20 of Chapter 160A of the General Statutes; in addition, to enter into and perform contracts with other units of local government when specifically authorized by the governing body, pursuant to the provisions of G.S. 160A-460 through 160A-464 of Part 1 of Article 20 of Chapter 160A of the General Statutes;

(15) To do all things necessary or convenient to carry out its purpose and to exercise the powers granted to the authority. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-580. Authority of Utilities Commission not affected. — Except as otherwise provided herein, nothing in this Article shall be construed to limit or otherwise affect the power or authority of the North Carolina Utilities Commission or the right of appeal to the North Carolina Utilities Commission as provided by law. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-581. Territorial jurisdiction. — The jurisdiction of the authority shall extend to all local public passenger transportation operating within the municipality. Said jurisdiction shall also extend up to 30 miles outside of the corporate limits of the municipality where the municipality is a town or city, and up to five miles outside of the boundaries of the municipality where the municipality is a county or up to five miles outside of the combined boundaries of a group of counties. The authority shall not have jurisdiction over public transportation subject to the jurisdiction of and regulated by the I.C.C., nor shall it have jurisdiction over intrastate public transportation classified as common carriers of passengers by the North Carolina Utilities Commission. A public transportation authority shall not extend service into a political subdivision without the consent of the governing body of that political subdivision. A majority vote of the governing body shall constitute consent. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-582. Fiscal accountability. — The authority shall be fiscally accountable to the municipality, and the municipality's governing body shall have authority to examine all records and accounts of the authority at any time. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-583. Funds. — The establishment and operation of a transportation authority as herein authorized are governmental functions and constitute a public purpose, and the municipality is hereby authorized to appropriate funds to support the establishment and operation of the transit authority. The municipality may also dedicate, sell, convey, donate or lease any of its interest in any property to the authority. Further, the authority is hereby authorized to establish such license and regulatory fees and charges as it may deem appropriate, subject to the approval of the governing body of the municipality. If the governing body finds that the funds otherwise available are insufficient, it may call a special election without a petition and submit to the qualified

voters of the municipality the question of whether or not a special tax shall be levied and/or bonds issued, specifying the maximum amount thereof, for the purpose of acquiring lands, buildings, equipment and facilities and for the operations of the transit authority. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-584. Effect on existing franchises and operations. — In the event a transportation authority is established under the authority of this Article, any existing franchises granted by the municipality shall continue in full force and effect until legally terminated; further, all ordinances and resolutions of the municipality regulating bus operations and taxicabs shall continue in full force and effect until superseded by regulations of the transportation authority. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-585. Termination. — The governing body of the municipality shall have the authority to terminate the existence of the authority at any time. In the event of such termination, all property and assets of the authority shall automatically become the property of the municipality and the municipality succeed to all rights, obligations and liabilities of the authority. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-586. Controlling provisions. — Insofar as the provisions of this Article are not consistent with the provisions of any other law, public or private, the provisions of this Article shall be controlling. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

160A-587. Consolidation of public transportation authority and parking authority. — The municipality may, by resolution or ordinance, vest in a single body corporate and politic both the powers of a public transportation authority in accordance with the provisions of this Article and the powers of a parking authority in accordance with the provisions of Article 38 of Chapter 160 of the General Statutes. Notwithstanding the membership provisions of G.S. 160A-553, the members of a consolidated body created pursuant to this section shall be selected according to the provisions of G.S. 160A-577. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

§ 160A-588. Joint provision of services. — Two or more municipalities may cooperate in the exercise of any power granted by this Article according to the procedures and provisions of G.S. 160A-460 through 160A-464 of Part 1 of Article 20 of Chapter 160A of the General Statutes. Additional municipalities may join an existing transportation authority upon making satisfactory arrangements pursuant to the provisions of G.S. 160A-460 through 160A-464 of Part 1 of Article 20 of Chapter 160A of the General Statutes. (1977, c. 465; 1979, 2nd Sess., c. 1247, s. 45.)

Chapter 162.

Sheriff.

Article 4.

County Prisoners.

Sec.
162-46. [Repealed.]

Article 4.

County Prisoners.

§ 162-42. Counties and towns may hire out certain prisoners.

Local Modification. — Chowan, Perquimans, Randolph and Pasquotank: 1979, 2nd Sess., c. 1309.

§ 162-46: Repealed by Session Laws 1979, c. 760, s. 4, effective March 1, 1981.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of the repeal to March 1, 1981.

Chapter 163.

Elections and Election Laws.

SUBCHAPTER III. QUALIFYING TO VOTE.

Article 7.
Registration of Voters.

Sec.
163-66. Custody of registration records and pollbooks; access; obtaining copies.

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

Article 14.
Voting Machines.

Sec.
163-162.1. Temporary authority regarding voting for President.

SUBCHAPTER III. QUALIFYING TO VOTE.

ARTICLE 7.

Registration of Voters.

§ 163-65. Registration books and records.

Stated in Hurow v. Miller, 45 N.C. App. 58, 262 S.E.2d 287 (1980).

§ 163-66. Custody of registration records and pollbooks; access; obtaining copies. — In all counties the registration records, books, registration certificates, indexes, and other records of registration and voting shall be and remain in the possession of the county board of elections. The county board of elections shall keep these books in a safe and secure place where they may not be tampered with, stolen, or destroyed. If possible, the board shall keep them in a fireproof vault. The board may exercise supervision and control of these records through its properly designated officers and employees. It shall be the duty of the county board of elections, on application of any candidate, or the county chairman of any political party, or any other person, to furnish a list of the persons registered to vote in the county or in any precinct or precincts therein. No registrar shall furnish lists of registered voters or permit the registration records of his precinct to be copied. The county board of elections shall furnish such lists and, upon request, it may furnish selective lists according to party affiliation, sex, race, date of registration, or any other reasonable category. In all instances, however, the county board of elections shall require persons to whom any list is furnished to make full reimbursement for the expense incurred in preparing it. Notwithstanding the above, however, the chairman of each political party, as defined in G.S. 163-96, shall be entitled biennially, upon request, to one free list of all registered voters in his county showing the name, address, sex, political affiliation and precinct of each registered voter; provided, that in counties having voter records maintained on electronic data processing equipment, such lists shall not be furnished biennially but instead on the following schedule: once in each odd-numbered year, once during the first six calendar months of each even-numbered year, and once during the last six months of each even-numbered year. The free list furnished the chairman of each political party shall group the registered voters by precinct and shall be furnished as soon as practical but no later than 30 days after said request. (1901, c. 89, s. 83; Rev., s. 4382; C. S., s. 6016; 1931, c. 80; 1939, c. 263, s. $3^1/_2$; 1949, c. 916,

ss. 6, 7; 1953, c. 843; 1955, c. 800; 1959, c. 883; 1963, c. 303, s. 1; 1967, c. 775, s. 1; 1973, c. 793, s. 22; 1975, c. 12; 1979, 2nd Sess., c. 1242.)

Editor's Note. — The 1979, 2nd Sess., amendment, effective July 1, 1980, added the proviso at the end of the next-to-last sentence.

§ 163-67. Full-time registration; application to register.

Stated in Hurow v. Miller, 45 N.C. App. 58, 262 S.E.2d 287 (1980).

§ 163-69. Permanent registration.

Stated in Hurow v. Miller, 45 N.C. App. 58, 262 S.E.2d 287 (1980).

Article 8.

Challenges.

§ 163-85. Challenge procedures other than on day of primary or election.

Action for Malicious Prosecution. — Actions for malicious prosecution based on administrative proceedings have been limited to instances where there is a type of confinement, or interference with the right to earn a livelihood. Therefore an action for malicious prosecution would not lie where defendants challenged plaintiff's right to vote under subsection (a) of this section. Hurow v. Miller, 45 N.C. App. 58, 262 S.E.2d 287 (1980).

§ 163-89. Procedures for challenging absentee ballots.

Stated in Hurow v. Miller, 45 N.C. App. 58, 262 S.E.2d 287 (1980).

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

Article 14.

Voting Machines.

§ 163-162.1. Temporary authority regarding voting for President. — The Executive Secretary-Director of the State Board of Elections is hereby authorized to permit any county using voting machines or systems, where limitations render impossible the placing of the entire ballot thereon, to prescribe temporary rules to such counties, upon written request, for the use of paper ballots for the office of President of the United States in precincts where voting machines are used for voting on all other offices in the November 4, 1980 general election. In the alternative, permission may be granted to use paper ballots for the office of soil conservation district board of supervisors. (1979, 2nd Sess., c. 1325, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1325, s. 2, provides: "This act is effective upon ratification and shall cease to be in effect on and after January 1, 1981." The act was ratified on June 25, 1980.

SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS.

ARTICLE 22.

Corrupt Practices and Other Offenses against the Elective Franchise.

§ 163-270. Using funds of insurance companies for political purposes.

Quoted in State v. Charlotte Liberty Mut. Ins. Co., 298 N.C. 270, 258 S.E.2d 343 (1979).

§ 163-271. Intimidation of voters by officers made misdemeanor.

Editor's Note. — For comment on political patronage and the Fourth Circuit's test of dischargeability, see 15 Wake Forest L. Rev. 655 (1979).

§ 163-275. Certain acts declared felonies.

Amendment Effective March 1, 1981. — Session Laws 1979, 2nd Sess., c. 1316, ss. 27, 28, effective March 1, 1981, and applicable to offenses committed on or after that date, will amend the introductory paragraph and subdivision (14) of this section to read as follows:

"**§ 163-275. Certain acts declared felonies.** — Any person who shall, in connection with any primary, general or special election held in this State, do any of the acts or things declared in this section to be unlawful, shall be guilty of a Class H felony. It shall be unlawful:

"(14) Any officer authorized by G.S. 163-80 to register voters and any other individual who knowingly and willfully receives, completes, or signs an application to register from any voter contrary to the provisions of G.S. 163-72 shall be guilty of a Class H felony."

§ 163-278. Duty of investigating and prosecuting violations of this Article.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

ARTICLE 22A.

Regulating Contributions and Expenditures in Political Campaigns.

§ 163-278.6. Definitions.

Editor's Note. —
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 163-278.19. Violations by corporations, business entities, labor unions, professional associations and insurance companies.

Editor's Note. —

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Quoted in State v. Charlotte Liberty Mut. Ins. Co., 298 N.C. 270, 258 S.E.2d 343 (1979).

Chapter 164.

Concerning the General Statutes of North Carolina.

Article 3.

Commission Code Recodification.

Sec.
164-33. Report of Commission to General Assembly.
Sec.
164-34. Printing of recodified statutes; distribution of new code; termination of Commission.

ARTICLE 3.

Commission Code Recodification.

§ 164-33. Report of Commission to General Assembly. — The Commission is authorized and directed to report and recommend to the General Assembly such legislation as it finds in making up the recodification as may be necessary or advisable to:

(1) Eliminate, modify or repeal obsolete laws;

(2) Clarify ambiguous laws; or

(3) Resolve conflicts in or between laws.

The report and recommendations of the Commission concerning these matters shall be prepared, printed and bound and presented to the 1983 Session of the General Assembly with the legislative edition of the recodification required to be submitted as hereafter provided. (1979, c. 1075, s. 9; 1979, 2nd Sess., c. 1181.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "1983 Session" for "1981 Session" in the last sentence.

§ 164-34. Printing of recodified statutes; distribution of new code; termination of Commission. — As soon as the work of recodification is completed, the Commission shall cause to be printed and published a sufficient number of copies of such recodification as a legislative edition, to be used for examination, consideration and action by the members of the General Assembly of 1983. Such legislative edition shall set forth all the general public laws of North Carolina, together with any supplemental or implementing legislation recommended by the Commission as essential to make a complete and clear statement of said laws, in such form and with such arrangement, numbering system, tables of contents, indices and editorial aids as said Commission shall determine.

As soon as the report of the Commission and legislative edition have been printed, one copy thereof shall be placed in the hands of each of the Justices of the Supreme Court, each judge of the Court of Appeals, each judge of the superior court, the Governor, the head of each principal department of the State government, the members of the General Statutes Commission, and, immediately upon their election, or as soon thereafter as possible, the members of the General Assembly of the Regular Session of 1983.

The Commission shall go out of existence upon the submission of its report and the legislative edition as herein provided. (1979, c. 1075, s. 10; 1979, 2nd Sess., c. 1181.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "a sufficient number of copies" for "no fewer than 600 copies" near the middle of the first sentence of the first paragraph, substituted "Commission" for "division" in two places in the second sentence of the first paragraph, and substituted "Session of 1983" for "Session of 1981" at the end of the second paragraph.

Chapter 166A.

North Carolina Emergency Management Act.

Sec.

166A-1. Short title.
166A-4. Definitions.
166A-5. State emergency management.
166A-6. State of disaster.
166A-7. County and municipal emergency management.
166A-9. Accept services, gifts, grants and loans.
166A-10. Establishment of mutual aid agreements.
166A-12. Nondiscrimination in emergency management.
166A-13. Emergency management personnel.
166A-14. Immunity and exemption.

§ 166A-1. Short title. — This Chapter may be cited as "North Carolina Emergency Management Act of 1977." (1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "Emergency Management" for "Civil Preparedness."

§ 166A-4. Definitions. — The following words and phrases as used in this Chapter shall have the following meanings:

(1) "Emergency Management." — Those measures taken by the populace and governments at federal, State, and local levels to minimize the adverse effect of any type disaster, which include the never-ending preparedness cycle of prevention, mitigation, warning, movement, shelter, emergency assistance and recovery.

(2) "Emergency Management Agency." — A State or local governmental agency charged with coordination of all emergency management activities for its jurisdiction.

(3) "Disaster." — An occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made accidental, military or paramilitary cause.

(4) "Political Subdivision." — Counties and incorporated cities, towns and villages. (1951, c. 1016, s. 2; 1953, c. 1099, s. 1; 1955, c. 387, s. 1; 1975, c. 734, ss. 4-6, 14; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "Emergency Management" for "Civil Preparedness" in the catchlines to subdivisions (1) and (2) and substituted "emergency management" for "civil preparedness" in subdivision (2).

§ 166A-5. State emergency management. — The State emergency management program includes all aspects of preparations for, response to and recovery from war or peacetime disasters.

(1) Governor. — The Governor shall have general direction and control of the State emergency management program and shall be responsible for carrying out the provisions of this Chapter.

a. The Governor is authorized and empowered:

1. To make, amend or rescind the necessary orders, rules and regulations within the limits of the authority conferred upon him herein, with due consideration of the policies of the federal government.

2. To delegate any authority vested in him under this Chapter and to provide for the subdelegation of any such authority.

3. To cooperate and coordinate with the President and the heads of the departments and agencies of the federal government, and with other appropriate federal officers and agencies, and with the officers and agencies of other states and local units of government in matters pertaining to the emergency management of the State and nation.
4. To enter into agreements with the American National Red Cross, Salvation Army, Mennonite Disaster Service and other disaster relief organizations.
5. To make, amend, or rescind mutual aid agreements in accordance with G.S. 166A-10.
6. To utilize the services, equipment, supplies and facilities of existing departments, offices and agencies of the State and of the political subdivisions thereof. The officers and personnel of all such departments, offices and agencies are required to cooperate with and extend such services and facilities to the Governor upon request. This authority shall extend to a state of disaster, imminent threat of disaster or emergency management planning and training purposes.
7. To agree, when required to obtain federal assistance in debris removal, that the State will indemnify the federal government against any claim arising from the removal.
8. To sell, lend, lease, give, transfer or deliver materials or perform services for disaster purposes on such terms and conditions as may be prescribed by any existing law, and to account to the State Treasurer for any funds received for such property.

b. In the threat of or event of a disaster, or when requested by the governing body of any political subdivision in the State, the Governor may assume operational control over all or any part of the emergency management functions within this State.

(2) Secretary of Crime Control and Public Safety. — The Secretary of Crime Control and Public Safety shall be responsible to the Governor for State emergency management activities and shall have:

a. The power, as delegated by the Governor, to activate the State and local plans applicable to the areas in question and he shall be empowered to authorize and direct the deployment and use of any personnel and forces to which the plan or plans apply, and the use or distribution of any supplies, equipment, materials and facilities available pursuant to this Chapter or any other provision of law.
b. Additional authority, duties, and responsibilities as may be prescribed by the Governor, and he may subdelegate his authority to the appropriate member of his department.

(3) Functions of State Civil Preparedness. — The functions of the State emergency management program include:

a. Coordination of the activities of all agencies for emergency management within the State, including planning, organizing, staffing, equipping, training, testing, and the activation of emergency management programs.
b. Preparation and maintenance of State plans for man-made or natural disasters. The State plans or any parts thereof may be incorporated into department regulations and into executive orders of the Governor.
c. Promulgation of standards and requirements for local plans and programs, determination of eligibility for State financial assistance provided for in G.S. 166A-7 and provision of technical assistance to local governments.

d. Development and presentation of training programs and public information programs to insure the furnishing of adequately trained personnel and an informed public in time of need.

e. Making of such studies and surveys of the resources in this State as may be necessary to ascertain the capabilities of the State for emergency management, maintaining data on these resources, and planning for the most efficient use thereof.

f. Coordination of the use of any private facilities, services, and property.

g. Preparation for issuance by the Governor of executive orders, proclamations, and regulations as necessary or appropriate; and

h. Cooperation and maintenance of liaison with the other states, federal government and any public or private agency or entity in achieving any purpose of this Chapter and in implementing programs for emergency, disaster or war prevention, preparation, response, and recovery.

i. Making recommendations, as appropriate, for zoning, building and other land-use controls, and safety measures for securing mobile homes or other nonpermanent or semipermanent works designed to protect against or mitigate the effects of a disaster.

j. Coordination of the use of existing means of communications and supplementing communications resources and integrating them into a comprehensive State or State-federal telecommunications or other communications system or network. (1951, c. 1016, ss. 3, 9; 1953, c. 1099, s. 3; 1955, c. 387, ss. 2, 3, 5; 1957, c. 950, s. 5; 1975, c. 734, ss. 9, 10, 14, 16; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment, substituted "emergency management" for "civil preparedness" throughout the section.

§ 166A-6. State of disaster. —

(c) In addition, during a state of disaster, with the concurrence of the Council of State, the Governor has the following powers:

(1) To direct and compel the evacuation of all or part of the population from any stricken or threatened area within the State, to prescribe routes, modes of transportation, and destinations in connection with evacuation; and to control ingress and egress of a disaster area, the movement of persons within the area, and the occupancy of premises therein;

(2) To establish a system of economic controls over all resources, materials and services to include food, clothing, shelter, fuel, rents and wages, including the administration and enforcement of any rationing, price freezing or similar federal order or regulation;

(3) To regulate and control the flow of vehicular and pedestrian traffic, the congregation of persons in public places or buildings, lights and noises of all kinds and the maintenance, extension and operation of public utility and transportation services and facilities;

(4) To waive a provision of any regulation or ordinance of a State agency or a local governmental unit which restricts the immediate relief of human suffering;

(5) To use contingency and emergency funds as necessary and appropriate to provide relief and assistance from the effects of a disaster, and to reallocate such other funds as may reasonably be available within the appropriations of the various departments when the severity and

magnitude of such disaster so requires and the contingency and emergency funds are insufficient or inappropriate;

(6) To perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population;

(7) To appoint or remove an executive head of any State agency or institution the executive head of which is regularly selected by a State board or commission.

a. Such an acting executive head will serve during:

1. The physical or mental incapacity of the regular office holder, as determined by the Governor after such inquiry as the Governor deems appropriate;
2. The continued absence of the regular holder of the office; or
3. A vacancy in the office pending selection of a new executive head.

b. An acting executive head of a State agency or institution appointed in accordance with this subdivision may perform any act and exercise any power which a regularly selected holder of such office could lawfully perform and exercise.

c. All powers granted to an acting executive head of a State agency or institution under this section shall expire immediately:

1. Upon the termination of the incapacity as determined by the Governor of the officer in whose stead he acts;
2. Upon the return of the officer in whose stead he acts; or
3. Upon the selection and qualification of a person to serve for the unexpired term, or the selection of an acting executive head of the agency or institution by the board or commission authorized to make such selection, and his qualification.

(8) To procure, by purchase, condemnation, seizure or by other means to construct, lease, transport, store, maintain, renovate or distribute materials and facilities for emergency management without regard to the limitation of any existing law. (1951, c. 1016, s. 4; 1955, c. 387, s. 4; 1959, c. 284, s. 2; c. 337, s. 4; 1975, c. 734, ss. 11, 14; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "emergency management" for "civil preparedness" in subdivision (8) of subsection (c). As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 166A-7. County and municipal emergency management. — (a) The governing body of each county is responsible for emergency management, as defined in G.S. 166A-4, within the geographical limits of such county. All emergency management efforts within the county will be coordinated by the county, including activities of the municipalities within the county.

(1) The governing body of each county is hereby authorized to establish and maintain an emergency management agency for the purposes contained in G.S. 166A-2.

(2) The governing body of each county which establishes an emergency management agency pursuant to this authorization will appoint a coordinator who will have a direct responsibility for the organization, administration and operation of the county program and will be subject to the direction and guidance of such governing body.

(3) In the event any county fails to establish an emergency management agency, and the Governor, in his discretion, determines that a need exists for such an emergency management agency, then the Governor

is hereby empowered to establish an emergency management agency within said county.

(b) All incorporated municipalities are authorized to establish and maintain emergency management agencies subject to coordination by the county. Joint agencies composed of a county and one or more municipalities within its borders may be formed.

(c) Each county and incorporated municipality in this State is authorized to make appropriations for the purposes of this Chapter and to fund them by levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues, whose use is not otherwise restricted by law.

(d) In carrying out the provisions of this Chapter each political subdivision is authorized:

(1) To appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil preparedness purposes and to provide for the health and safety of persons and property, including emergency assistance, consistent with this Chapter;

(2) To direct and coordinate the development of emergency management plans and programs in accordance with the policies and standards set by the State;

(3) To assign and make available all available resources for emergency management purposes for service within or outside of the physical limits of the subdivision; and

(4) To delegate powers in a local state of emergency under G.S. 166A-8 to an appropriate official.

(e) Each county which establishes an emergency management agency pursuant to State standards and which meets requirements for local plans and programs may be eligible to receive State financial assistance. Such financial assistance for the maintenance and operation of a county emergency management program will not exceed one thousand dollars ($1,000) for any fiscal year and is subject to an appropriation being made for this purpose. Eligibility of each county will be determined annually by the State. (1951, c. 1016, s. 6; 1953, c. 1099, s. 4; 1957, c. 950, s. 2; 1959, c. 337, s. 5; 1973, c. 620, s. 9; 1975, c. 734, ss. 12, 14, 16; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "emergency management" for "civil preparedness" throughout the section.

§ 166A-9. Accept services, gifts, grants and loans. — Whenever the federal government or any agency or officer thereof or of any person, firm or corporation shall offer to the State, or through the State to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant or loan, for the purposes of emergency management, the State acting through the Governor, or such political subdivision, acting with the consent of the Governor and through its governing body, may accept such offer. Upon such acceptance the Governor of the State or governing body of such political subdivision may authorize any officer of the State or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials or funds on behalf of the State or of such political subdivision, and subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer. (1951, c. 1016, s. 8; 1973, c. 803, s. 45; 1975, c. 19, s. 72; c. 734, ss. 13, 14; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "emergency management" for "civil preparedness" near the middle of the first sentence.

§ 166A-10. Establishment of mutual aid agreements.

(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 civil preparedness 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.

(1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "emergency management" for "civil preparedness" near the end of the first sentence of subsection (b) and near the end of subsection (c).

As subsections (a) and (d) were not changed by the amendment, they are not set out.

§ 166A-12. Nondiscrimination in emergency management. — State and local governmental bodies and other organizations and personnel who carry out emergency management functions under the provisions of this Chapter are required to do so in an equitable and impartial manner. Such State and local governmental bodies, organizations and personnel shall not discriminate on the grounds of race, color, religion, nationality, sex, age or economic status in the distribution of supplies, the processing of applications and other relief and assistance activities. (1975, c. 734, s. 3; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "emergency management" for "civil preparedness" in the first sentence.

§ 166A-13. Emergency management personnel. — (a) No person shall be employed or associated in any capacity in any emergency management agency established under this Chapter if that person:

(1) Advocates or has advocated a change by force or violence in the constitutional form of the Government of the United States or in this State;

(2) Advocates or has advocated the overthrow of any government in the United States by force or violence;

(3) Has been convicted of any subversive act against the United States;

(4) Is under indictment or information charging any subversive act against the United States; or

(5) Has ever been a member of the Communist Party.

Each person who is appointed to serve in any emergency management agency shall, before entering upon his duties, take a written oath before a person authorized to administer oaths in this State, which oath shall be substantially as follows:

"I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of North Carolina, against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter. And I do further swear (or affirm) that I do not advocate, nor am I, nor have I ever knowingly been, a member of any political party or organization that advocates the overthrow

of the Government of the United States or of this State by force or violence; and that during such time as I am a member of the State Emergency Management Agency I will not advocate nor become a member of any political party or organization that advocates the overthrow of the Government of the United States or of this State by force or violence, so help me God."

(b) No position created by or pursuant to this Chapter shall be deemed an office within the meaning of Article 6, Section 9 of the Constitution of North Carolina. (1951, c. 1016, s. 10; 1975, c. 734, ss. 14, 16; 1977, c. 848, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "emergency management" for "civil preparedness" in the introductory language in the first paragraph of subsection (a) and in the introductory language in the second paragraph of subsection (a), and substituted "Emergency Management" for "Civil Preparedness" in the second sentence of the oath in subsection (a).

§ 166A-14. Immunity and exemption. — (a) All functions hereunder and all other activities relating to emergency management are hereby declared to be governmental functions. Neither the State nor any political subdivision thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker complying with or reasonably attempting to comply with this Chapter or any order, rule or regulation promulgated pursuant to the provisions of this Chapter or pursuant to any ordinance relating to any emergency management measures enacted by any political subdivision of the State, shall be liable for the death of or injury to persons, or for damage to property as a result of any such activity.

(b) The rights of any person to receive benefits to which he would otherwise be entitled under this Chapter or under the Workers' Compensation Law or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of Congress shall not be affected by performance of emergency management functions.

(c) Any requirement for a license to practice any professional, mechanical or other skill shall not apply to any authorized emergency management worker who shall, in the course of performing his duties as such, practice such professional, mechanical or other skill during a state of disaster.

(d) As used in this section, the term "emergency management worker" shall include any full or part-time paid, volunteer or auxiliary employee of this State or other states, territories, possessions or the District of Columbia, of the federal government or any neighboring country or of any political subdivision thereof or of any agency or organization performing emergency management services at any place in this State, subject to the order or control of or pursuant to a request of the State government or any political subdivision thereof.

(e) Any emergency management worker, as defined in this section, performing emergency management services at any place in this State pursuant to agreements, compacts or arrangements for mutual aid and assistance to which the State or a political subdivision thereof is a party, shall possess the same powers, duties, immunities and privileges he would ordinarily possess if performing his duties in the State, or political subdivision thereof in which normally employed or rendering services. (1957, c. 950, s. 4; 1975, c. 734, s. 14; 1977, c. 848, s. 2; 1979, c. 714, s. 2; 1979, 2nd Sess., c. 1310, s. 2.)

Editor's Note. — The 1979, 2nd Sess., amendment substituted "emergency management" for "civil preparedness" throughout the section.

Chapter 168.

Handicapped Persons.

Article 1.

Rights.

§ 168-1. Purpose and definition.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in this section. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in this section; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

Person with Normal Vision Despite Eye Disease. — Where plaintiff has indicated in his pleadings that he has an eye disease but that his vision is functioning normally with glasses, plaintiff is not visually disabled within the meaning of this section, and thus is not a "handicapped person" who is granted a right of employment by § 168-6. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

People Irritated by Tobacco Smoke. — It is manifestly clear that the legislature did not intend to include within the meaning of "handicapped persons" those people with "any pulmonary problem" however minor, or all people who are harmed or irritated by tobacco smoke. GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979).

§ 168-2. Right of access to and use of public places.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-3, 168-6, 168-8, 168-9, 168-10, and this section utilize the broadly defined term "handicapped person" which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-3. Right to use of public conveyances, accommodations, etc.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped,"

which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-6, 168-8, 168-9, 168-10, and this section utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-4. May be accompanied by guide dog.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-5, 168-7, and this section. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-5. Traffic and other rights of persons using certain canes.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-7, and this section. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-6. Right to employment.

Plaintiff Must Establish Status as "Handicapped Person". — In order to state a cause of action for violation of the right to employment granted in this section, plaintiff must establish that he is a "handicapped person" to whom such rights are granted. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those

sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-8, 168-9, 168-10, and this section utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

Person with Normal Vision Despite Eye Disease. — Where plaintiff has indicated in his pleadings that he has an eye disease but that his vision is functioning normally with glasses, plaintiff is not visually disabled within the meaning of § 168-1, and thus is not a "handicapped person" who is granted a right of employment by this section. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-7. Guide dogs.

Application of Term "Visually Handicapped". — The restrictive definition of "Visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and this section. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-8. Right to habilitation and rehabilitation services.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-9. Right to housing.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term

"handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168-10. Eliminate discrimination in treatment of handicapped and disabled.

Application of Term "Visually Handicapped". — The restrictive definition of "visually handicapped" in § 111-11 should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, is used solely in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term, i.e., §§ 168-4, 168-5 and 168-7. On the other hand, those sections of the statute which address problems common to all handicapped citizens i.e., §§ 168-2, 168-3, 168-6, 168-8, 168-9, and 168-10, utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities." Thus, when the statute is read contextually, it is clear that the General Assembly did not intend the narrow definition "visually handicapped" in § 111-11 to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in § 111-11 would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

Constitution of North Carolina

ARTICLE I

DECLARATION OF RIGHTS

Section 1. *The equality and rights of persons.*

Cited in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Sec. 6. *Separation of powers.*

Legislature May Delegate Limited, etc. — The principle that the General Assembly may not delegate its power to any other department or body, is not absolute. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Quoted in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979).

Sec. 8. *Representation and taxation.*

Cited in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 11. *Property qualifications.*

Quoted in Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979).

Sec. 12. *Right of assembly and petition.*

Cited in City of Winston-Salem v. Chauffers Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

Sec. 13. *Religious liberty.*

Secular Neutrality Mandated. — Construed together, this section and Art. I, § 19 of this State's Constitution and the First Amendment may be said to coalesce into a singular guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state. The legislature oversteps the bounds of this separation when it enacts a regulatory scheme which, whether in purpose, substantive effect, or administrative procedure, tends to "control or interfere" with religious affairs, or to "discriminate" along religious lines, or to constitute a law "respecting" the establishment of religion. Stated simply, the constitutional mandate is one of secular neutrality toward

religion. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Sec. 14. *Freedom of speech and press.*

Cited in Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Sec. 16. *Ex post facto laws.*

Section Applies to Legislative, Not Judicial Action. — There is no violation of the ex post facto clause in the Constitution of this State when a decision is applied retroactively because the clause applies to legislative and not judicial action. A party has no vested right in a decision of this State's Supreme Court. State v. Rivens, 299 N.C. 385, 261 S.E.2d 867 (1980).

Sec. 18. *Courts shall be open.*

Applied in Petrou v. Hale, 43 N.C. App. 655, 260 S.E.2d 130 (1979).

Cited in State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979).

Sec. 19. *Law of the land; equal protection of the laws.*

I. GENERAL CONSIDERATION.

What Constitutes "Law of the Land".— In accord with 3rd paragraph in original. See A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

The "law of the land" requires notice and opportunity to be heard. Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

Means Chosen to Implement Object within Police Power. —

Although the object of particular legislation may well be within the scope of the police power, the legislation may yet deprive individuals of due process of law if the means chosen to implement the legislative objective are unreasonable. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

The legislature may make classifications, etc. —

In accord with 1979 Cum. Supp. See A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Equal Protection Extends to Persons, Not Rights. — The argument that the amended § 50-6 violates equal protection by preserving a dependent spouse's right to alimony without at the same time preserving all other property rights incident to continuation of the marital status is beside the mark. The equal protection clauses of the State and federal Constitutions prohibit the denial of the equal protection of the laws to persons, not to rights. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Applied in North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Quoted in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

V. ILLUSTRATIVE CASES.

Preservation of Historical Structures. — The police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State's legacy of historically significant structures. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Sec. 20. *General warrants.*

Fourteenth Amendment Search and Seizure Requirements Compared. — Though the language in this section, providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal Constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979).

Applied in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

Cited in Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

Sec. 22. *Modes of prosecution.*

Applied in State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979).

Stated in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

Sec. 23. *Rights of accused.*

I. GENERAL CONSIDERATION.

Applied in State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

V. SELF-INCRIMINATION.

Scope of Protection. —

The protection afforded by the privilege against self-incrimination does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

Privilege Protects against Only Real Dangers. — It is well established that the privilege against self-incrimination protects against real dangers, not remote and speculative possibilities, and a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

Guaranty Extends to Any Proceedings, etc. —

The constitutional privilege against self-incrimination applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

Privilege Extends to Pleading Stage of Civil Action. — A defendant may plead his privilege against self-incrimination in a civil action where the plaintiff asks for punitive damages, and the privilege applies to protect a party from self-incrimination at the pleadings stage of an action. Therefore, in an action to recover compensatory and punitive damages for alienation of affections and criminal conversation where defendant refused to answer the allegations of plaintiff's complaint claiming his constitutional privilege against self-incrimination, the trial court erred in deeming the allegations as admitted pursuant to Rule 8(d). Byrd v. Hodges, 44 N.C. App. 509, 261 S.E.2d 269 (1980).

Sec. 25. *Right of jury trial in civil cases.*

Right Premised on Existence of Genuine Issues. — The constitutional right to trial by jury is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury. Therefore the right to jury trial is not an impediment to directing a verdict for that party with the burden of proof where the credibility of the movant's evidence is manifest as a matter of law. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Cited in Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979).

Sec. 28. *Imprisonment for debt.*

A party's activities in adding "payment in full" language to a check after it had been cashed by another party, and then attempting to use the check to defeat the other party's claim, constituted fraud within the intent of § 1-410(4) and within this section, the North Carolina constitutional exception permitting imprisonment in case of fraud. Koury v. Meyer, 44 N.C. App. 392, 261 S.E.2d 217 (1980).

Sec. 32. *Exclusive emoluments.*

Cited in Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 34. *Perpetuities and monopolies.*

Cited in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

ARTICLE II

LEGISLATIVE

Section 1. *Legislative power.*

Modern Legislatures May Delegate, etc. —

From this section and from Art. I, § 6, of the State Constitution, derives the principle that the General Assembly may not delegate its power to any other department or body. This principle, however, is not absolute. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Quoted in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 24. *Limitations on local, private, and special legislation.*

Editor's Note. —

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Cited in Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979).

ARTICLE III

EXECUTIVE

Sec. 4. *Oath of office for Governor.*

Cited in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

Sec. 5. *Duties of Governor.*

Quoted in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

ARTICLE IV

JUDICIAL

Section 1. *Judicial power.*

Quoted in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Sec. 12. *Jurisdiction of the General Court of Justice.*

I. GENERAL CONSIDERATION.

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

ARTICLE V

FINANCE

Sec. 2. *State and local taxation.*

I. POWER OF TAXATION GENERALLY; CLASSIFICATION.

A. General Consideration.

Editor's Note. —
For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

Cited in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 5. *Acts levying taxes to state objects.*

Cited in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

ARTICLE VII

LOCAL GOVERNMENT

Section 1. *General Assembly to provide for local government.*

Editor's Note. —
For note on the expansion of standing in North Carolina taxpayers' actions, see 15 Wake Forest L. Rev. 126 (1979).

Notice of Annexation. — Notice by publication of a public hearing pursuant to § 160A-24 does not provide inadequate notice to the parties affected by the annexation in violation of their right to due process, since the General Assembly, under this section, of the North Carolina Constitution, may annex land without notice to anyone. Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979).

ARTICLE IX

EDUCATION

Sec. 7. *County school fund.*

Effect of City's Civil Action to Recover Penalties. — In any case in which a person is prosecuted, convicted, and a fine imposed for the violation of a parking ordinance, the fine so imposed must be paid, by directive of this section, to the county school fund. However, if a city chooses to maintain civil actions to recover the penalties imposed for parking violations, the proceeds of any judgment obtained would belong to the city, and the school fund would have no claim thereon. Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980).

Section 15A-544(h) permitting the remission of the amounts adjudged forfeited on criminal appearance bonds does not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used in the public schools. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, cert. denied, 298 N.C. 302, 259 S.E.2d 303 (1979).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

Section 1. *Personal property exemptions.*

Editor's Note. —
For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

Sec. 2. *Homestead exemptions.*

Editor's Note. —
For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

Appendix I. Rules of Practice in the General Court of Justice

(2A) NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ARTICLE I. APPLICABILITY OF RULES

Rule 1

Scope of Rules: Trial Tribunal Defined

Quoted in State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979).

Rule 2

Suspension of Rules

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3

Appeal in Civil Cases—How and When Taken

The provisions of § 1-279, etc. — The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of both § 1-279 and this Rule and Rule 26 are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979).

Section 1-279 and this rule require, etc. — Where the appeal is taken more than ten days after the "entry" of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in this rule and in § 1-279, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

An appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

However, where defendants' Rule 12(b)(6) defense was converted and merged automatically into their Rule 56 motion, plaintiff's failure to mention specifically in her notice of appeal that portion of the trial court's order sustaining defendant's defense under Rule 12(b)(6) did not deprive the Court of Appeals of jurisdiction to hear plaintiff's appeal. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

Rule 9

The Record on Appeal—Function, Composition, and Form

Applied in State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979).

Quoted in Wright v. Asheville Pool & Gunite Co., 44 N.C. App. 80, 259 S.E.2d 797 (1979).

Stated in Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980).

Cited in State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850 (1980).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

Question Must Be Presented on Appeal. — A defendant may properly present on appeal the questions in section (a) of this Rule without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under § 15-173 without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

The trial court's findings of fact are deemed to be supported by competent evidence and are conclusive on appeal where defendant does not bring forth in the record any of the testimony or evidence in the case. Bethea v. Bethea, 43 N.C. App. 372, 258 S.E.2d 796 (1979).

Purpose of Section (d). — Section (d) of this rule introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based. Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980).

Applied in State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); North Carolina Nat'l Bank v. Goode, 298 N.C. 485, 259 S.E.2d 288 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); State v. Smith, 43 N.C. App. 727, 259 S.E.2d 805 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); Patrick v. Mitchell, 44 N.C. App. 357, 260 S.E.2d 809 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207 (1980); Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520 (1980).

Cited in State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Jones v. Morris, 42 N.C. App. 10, 255 S.E.2d 619 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979).

Rule 11

Settling the Record on Appeal; Certification

The action of the trial judge in settling the record is final and will not be reviewed on appeal. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Court of Appeals Determines Question of Compliance. — Upon appeal, the opinion of Court of Appeals, not the clerk of the superior court, determines whether service of the

proposed record was properly made within the required time, whether the record on appeal was properly settled, and whether the record is certified by the clerk of the superior court within ten days after settlement as required by this rule. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

Opposing Counsel of Record under § 122-58.24. — Under § 122-58.24, the staff attorney of the Attorney General who represents the State at a commitment hearing is the opposing counsel of record within the meaning of Rule 26 and should be served with the proposed record on appeal as required by Rule 11 where the respondent appeals from an order of commitment. And if the State is not the petitioner in the involuntary commitment proceeding, the proposed record on appeal should be served on opposing counsel of record for the petitioner by the respondent appellant. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of section (e) of this rule, or to comply with the mandate of Rule 12(a), works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Failure to Comply Restored Jurisdiction to Trial Court. — Where defendant properly gave notice of appeal on September 1, 1978, but between that date and November 28, 1978, when judgment was entered, a period of 88 days, he took no steps to perfect that appeal, i.e., contrary to the mandate of section (a) of this rule defendant neither tendered a proposed record on appeal within 30 days, nor did he seek any extension of time to settle such a record as permitted by Rule 27(c), defendant's failure to perfect his appeal constituted an abandonment which reinvested the trial court with jurisdiction to render further order in the cause. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Applied in State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980).

Rule 12

Filing the Record; Docketing the Appeal: Copies of Record

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of Rule 11(e), or to comply with the mandate of section (a) of this rule, works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Applied in State v. Crouch, 41 N.C. App. 612, 255 S.E.2d 192 (1979); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979).

Rule 13

Filing and Service of Briefs

Cited in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

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

Applied in Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).

Rule 16

Scope of Review of Decisions of Court of Appeals

Applied in Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980).

Cited in Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

ARTICLE V. EXTRAORDINARY WRITS

Rule 21

Certiorari

Applied in State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979).

Cited in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980); Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980).

Rule 22

Mandamus and Prohibition

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Rule 23

Supersedeas

Quoted in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

ARTICLE VI. GENERAL PROVISIONS

Rule 25

Dismissal for Failure to Comply with Rules

Applied in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Cited in Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Rule 26

Filing and Service

Requirements Jurisdictional. — The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of § 1-279, Rule 3 and this rule are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979).

When Papers Must Be Served. — This rule is interpreted as requiring that the papers referred to therein be served on all other parties to the appeal on the day of or before the day of

filing; therefore, service of notice of appeal on plaintiff's counsel was timely where service was made by depositing the notice in the mail on the same day, though several hours later, that notice was filed with the clerk of court. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979).

Service on Appointed Special Advocate for State. — Where, at a mental health hearing session, the State was represented by an appointed special advocate, which special advocate was present at the hearing, had knowledge of the evidence offered, and was qualified to determine for the State if the proposed record on appeal was accurate, he alone was the "attorney of record" within the meaning of this rule, and the proposed record on appeal should be served on him as special advocate rather than the Attorney General. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

Rule 27

Computation and Extension of Time

Applied in State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Rule 28

Briefs; Function and Content

Questions raised by assignments, etc. — On appeal, where defendant brings forward in his brief fewer arguments than there are assignments of error, the remaining assignments of error are deemed abandoned. State v. Ledford, 41 N.C. App. 213, 254 S.E.2d 780 (1979).

Failure to Relate Cases to Assignment of Error. — Where plaintiff, in his brief, has listed several cases but has made no attempt to relate the cases cited to his one assignment of error or to any argument advanced in support thereof, his brief is clearly not in accordance with this rule. Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, cert. denied, 298 N.C. 294, 259 S.E.2d 910 (1979).

Applied in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Cited in State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979).

Rule 30

Oral Argument

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980).

Rule 35

Costs

Applied in City of Wilmington v. Camera's Eye, Inc., 43 N.C. App. 558, 259 S.E.2d 589 (1979).

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule
2. Calendaring of Civil Cases.

2. Calendaring of Civil Cases.

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge. The Administrative Office of the Courts shall be available to provide assistance to judges in developing a case management program.

The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record.

In districts with Trial Court Administrators, the responsibility for carrying out the case management plan may be delegated to the Trial Court Administrator.

The case management plan must contain a provision that attorneys may request that cases may be placed on the calendar.

(b) The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

(c) Except in districts served by a Trial Court Administrator, a ready calendar shall be maintained by the Clerk of Court for the District and Superior Courts. Five months after a complaint is filed, the Clerk shall place that case on a ready calendar, unless the time is extended by written order of the Senior Resident Judge or the Chief District Judge for their respective jurisdictions. In districts with Trial Court Administrators, a case tracking system shall be maintained.

(d) During the first full week in January and first full week following the 4th of July or such other weeks as the Senior Resident Judge shall designate that are agreeable to the Chief Justice, the Senior Resident Judge of each district shall be assigned to his home district for administrative purposes. During such administrative terms, the Senior Resident Judge shall be responsible for reviewing all cases on the ready calendar, or all cases designated by the Trial Court Administrator, of each county in the judicial district. The Senior Resident Judge shall take appropriate actions to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion. The Chief District Court Judge shall undertake periodically such an administrative review of the District Court Civil Docket.

(e) When an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(f) Requests for a peremptory setting for cases involving persons who must travel long distances or numerous expert witnesses or other extraordinary reasons for such a request must be made to the Senior Resident Judge or Chief

District Judge. In districts with Trial Court Administrators, requests should be made to the Trial Court Administrator. A peremptory setting shall be granted only for good and compelling reasons. A Senior Resident Judge or Chief District Judge may set a case peremptorily on his own motion.

(g) When a case on a published calendar (tentative or final) is settled, all attorneys of record must notify the Trial Court Administrator (Clerk of Court in those counties with no Trial Court Administrator) with twenty-four (24) hours of the settlement and advise who will prepare and present judgment, *and when.*

Editor's Note. — This rule was rewritten by amendment adopted June 3, 1980, effective July 1, 1980.

6. Motions in Civil Actions.

Where there is an awareness by the trial judge of the grounds, the motion is adequately stated for the purposes of this rule.

McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Appendix II. Rules of Practice in United States District Courts

United States District Court for the Middle District of North Carolina

Table of Rules

V. United States Magistrates

RULE

50. [Rescinded.]

50.1. Jurisdiction; Authority; Special Designation.
- (a) Designation to Hear Pretrial Matters, Conduct Hearings and Submit Findings and Recommendations; Special Designations.
- (b) Assignment of Additional Duties; Authority.
- (c) Assignment of Duties and Reference of Cases to Magistrates.

50.2. Civil Trials.
- (a) Consent to Exercise of Civil Jurisdiction.
- (b) Withdrawal of Consent.
- (c) Reference Discretionary.

50.3. Civil Appeals.
- (a) Nondispositive Pretrial Matters.
- (b) Dispositive Pretrial Motions and Prisoner Cases.
- (c) Trials; Consent.
- (d) Stay Pending Appeal.

50.4. Payment of Fixed Sum in Lieu of Appearance.
- (a) Forfeiture of Collateral.
- (b) Mandatory Appearances.

50.5. Recording Proceedings.
- (a) Court Reporters; Requests; Agreements of Parties.

V. United States Magistrates

Rule 50.

[Rescinded]

Editor's Note. — This rule was adopted by order dated December 2, 1970, and rescinded by order dated February 14, 1980. For present rules covering the same subject matter, see Rules 50.1 to 50.5.

Rule 50.1.*

JURISDICTION; AUTHORITY; SPECIAL DESIGNATION

(a) Designation to Hear Pretrial Matters, Conduct Hearings and Submit Findings and Recommendations; Special Designations.

(1) Full time magistrates are authorized and designated to exercise the powers and authority and to perform the duties enumerated in 28 U.S.C. § 636 (b)(1) and (2).

(2) Unless otherwise limited in their orders of appointment, full time magistrates serving this court are specially designated to:

* Magistrates Rules will become a separate part of the Local Rules when revision is complete and be redesignated Part IV, Rule 401 — *et seq.*

(A) Exercise civil jurisdiction to conduct any or all proceedings in jury or nonjury cases and order the entry of judgment in any case referred to them for that purpose, pursuant to 28 U.S.C. § 636 (c), and

(B) Exercise jurisdiction to try persons accused of, and sentence persons convinced of, misdemeanors committed within this judicial district, pursuant to 18 U.S.C. § 3401.

(b) Assignment of Additional Duties; Authority.

Pursuant to 28 U.S.C. § 636 (b)(3), full time magistrates are authorized to perform addditional functions and duties, including the following, when assigned to do so in manner provided in section (c):

(1) Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings;

(2) Conduct calendar and status calls of civil and criminal calendars, and determine motions to expedite or postpone the trial of cases;

(3) Conduct arraignments in cases not triable by the magistrate to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or nolo contendere and ordering a presentence report in appropriate cases;

(4) Conduct voir dire and select petit juries for the court;

(5) Accept petit jury verdicts in civil cases in the absence of a judge;

(6) Conduct preliminary proceedings relating to the potential revocation of probation;

(7) Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings;

(8) Order the exoneration or forfeiture of bonds;

(9) Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484 (d);

(10) Conduct examinations of judgment debtors, in accordance with Rule 69 of the Federal Rules of Civil Procedure;

(11) Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act;

(12) Conduct such hearings as are necessary or appropriate, and submit to a judge proposed findings of fact and recommendations for disposition of applications for judgment by default pursuant to Rule 55 (b) of the Federal Rules of Civil Procedure, or motions to set aside judgments by default pursuant to Rule 55 (c) of the Federal Rules of Civil Procedure, in accordance with the procedure set out in Rule 50.3 (b).

(13) Consider an application by a complainant pursuant to 42 U.S.C. § 2000e-5(f)(1), and in such circumstances as may be deemed just, appoint an attorney for such complainant, and authorize the commencement of an action without payment of fees, costs, or giving security therefor;

(14) Issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States government;

(15) Conduct extradition proceedings, in accordance with 18 U.S.C § 3184;

(16) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. § 1782;

(17) Require compliance with Local Rule 17(c) with regard to *pro se* petitions under 42 U.S.C. § 1983; and

(18) Perform any additional duty which is not inconsistent with the Constitution and laws of the United States.

Comment. — 28 U.S.C. § 636 (a) confers upon United States Magistrates "... (1) all the powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts; (2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of Title 18, and take acknowledgments, affidavits, and depositions; and (3) the power to conduct trials under section 3401, Title 18, United States Code, in conformity with and subject to the limitations of that section."

(c) Assignment of Duties and Reference of Cases to Magistrates.

Duties and cases may be assigned or referred to United States Magistrates:

(1) By a court order entered in the action;

(2) By the clerk in compliance with:

(i) A standing order, or

(ii) The instructions or directions of a judge.

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.2.

CIVIL TRIALS

(a) Consent to Exercise of Civil Jurisdiction.

(1) The consent of a party to the exercise of civil jurisdiction authorized in 28 U.S.C. § 636 (c)(1) may be communicated to the clerk by letter, or by a form available in the clerk's office, signed by the party or his attorney.

(2) A consent may not be limited to trial by a particular magistrate or contain any other condition. A conditional consent is ineffective.

(3) To protect voluntariness the consent of a party will be placed in the public court file only when the Court has ordered the case referred to a magistrate.

(4) Parties intervening by permission after reference are deemed to have consented.

(b) Withdrawal of Consent.

After a case has been referred, the consent of the parties to the exercise of a magistrate's jurisdiction may not be withdrawn without the approval of the court.

(c) Reference Discretionary.

Reference of a case to a magistrate after the consent of all parties is within the discretion of the Court.

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.3.

CIVIL APPEALS

(a) Nondispositive Pretrial Matters.

(1) When a United States Magistrate issues a final order pursuant to 28 U.S.C. § 636 (a) or (b)(1)(A), any party has the right to appeal to a United States District Judge as provided herein unless:

(A) the statute or rule granting authority to the United States Magistrate to issue such order specifically provides a different procedure for review; or

(B) review of the order may ultimately be obtained in a trial of the action or in another proceeding.

(2) Appeal is taken by written notice filed with the Clerk within 10 days after entry of the order appealed from, and served upon the other parties.

(3) The notice of appeal must specify the order or part thereof appealed from and state the basis for asserting that it is clearly erroneous or contrary to law.

(4) No response or briefs are required unless ordered by the judge.

(b) Dispositive Pretrial Motions and Prisoner Cases.

(1) When a party objects to a magistrate's proposed findings and recommendations in the manner provided in 28 U.S.C § 636 (b)(1)(C), he must:

(A) File the objection with the clerk;

(B) Specify those portions of the proposed findings and recommendations to which objection is made; and

(C) File with the Clerk a transcript of the specific portions of any evidentiary proceeding to which objection is made.

(2) No additional hearing will be held unless ordered by the judge.

(3) No response or briefs are required unless ordered by the judge.

(c) Trials; Consent.

(1) A consent to appeal on the record to a judge of the district court, pursuant to 28 U.S.C. § 636 (c)(4):

(A) May be communicated to the Clerk by letter, or by a form available in the Clerk's Office, signed by a party or his attorney.

(B) May not be conditional or limited to a particular judge.

(2) After all parties have consented to an appeal to a judge no party may withdraw consent without approval of a judge.

(3) A party intervening by permission after all original parties have consented to appeal to a district judge is deemed to have consented.

(4) The Federal Rules of Appellate Procedure apply to appeals on the record by consent from a magistrate to a district judge, except that:

(A) Consent to appeal on the record to a judge of this court must be in writing signed by the parties and filed with the clerk.

(B) A judge may waive the filing of briefs and a transcript and order any other exception which will make the appeal expeditious and inexpensive without substantial prejudice to the rights of any party.

(d) Stay Pending Appeal.

Application for a stay of a magistrate's order pending any appeal must first be made to the magistrate.

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.4.

PAYMENT OF FIXED SUM IN LIEU OF APPEARANCE

(a) Forfeiture of Collateral.

(1) The payment of a sum fixed by court order may be accepted in suitable misdemeanor cases, in lieu of appearance, terminating the proceedings.

(2) The Court will by separate order identify the misdemeanors, fix the sum which may be paid in lieu of appearance, and may provide for increasing the penalties upon the failure of defendants to respond to a citation or notice.

(3) The Court's order is a public document available upon request in the office of the Clerk of Court.

(b) Mandatory Appearances.

(1) Payment of a fixed sum in lieu of appearance is not permitted:

(A) When the offense is aggravated and the defendant is cited or given notice to appear before a magistrate, or

(B) There are multiple offenses arising out of the same facts or sequence of events.

Comment: See the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates and proposed Revised Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates.

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.5.

RECORDING PROCEEDINGS

(a) Court Reporters; Requests; Agreements of Parties.

(1) Requests that proceedings be taken down by a court reporter must be in writing filed with the Clerk not less than 5 business days before the date set for the proceedings or as soon as practicable if a proceeding is to be held with less than 5 days' notice to the parties.

(2) Agreements by the parties that the proceedings be recorded by means other than by a court reporter, or that no record of the proceedings be made must be in writing filed with the Clerk or announced in open court at the beginning of the proceedings.

Comment: Absent a request or an agreement by the parties, the magistrate will determine the method of recording the proceedings as provided by 28 U.S.C. § 636 (c)(7).

Editor's Note. — This rule was adopted by order dated February 14, 1980.

The United States District Court for the Eastern District of North Carolina

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United States District Court
Eastern District of North Carolina
Chambers of the Chief Judge

In the Matter of Rules of Practice for the Eastern District of North Carolina	Order Pursuant to 28 U.S.C. §2071, §83 F.R. Civ. P., and §57 F.R. Crim. P.

Pursuant to Section 2071 of Title 28, United States Code, Rule 83, Federal Rules of Civil Procedure and Rule 57, Federal Rules of Criminal Procedure, the following are promulgated as the Rules of Practice for handling matters in the United States District Court for the Eastern District of North Carolina, effective October 1, 1980.

This 25th day of July, 1980.

/s/ F. T. Dupree, Jr.
Chief District Court Judge

/s/ John D. Larkins, Jr.
Senior District Court Judge

/s/ W. Earl Britt
District Court Judge

PREFACE

The Rules of Practice here promulgated are the product of a project begun by Senior District Court Judge John D. Larkins, Jr., during his last year as Chief Judge of this court. Many persons, lay and professional, have contributed to their content. It is hoped that they will prove to be as successful in application as were the rules they replace.

The rules replaced by these rules were promulgated by Chief District Court Judge Algernon L. Butler, Jr., in 1961. Those who have used Judge Butler's rules are aware of how effectively they served to facilitate the business of the court. They were well-reasoned, practical rules that simplified and made easier the administration of justice.

As Judge Butler recognized in 1961, "rules of court must inevitably change if they are to keep pace with our social, economic and political development." It was with this in mind that Judge Larkins appointed a special committee chaired by Hon. Charles B. Winberry, Jr., of Rocky Mount to study and recommend new rules for handling matters in the Eastern District of North Carolina. That committee, with helpful contributions from the United States' Attorney and his staff, the Clerk and his staff, lay-persons affiliated with the court and the bar at large, spent almost two years preparing that which follows. The Court is grateful for the time and effort expended by them in their undertaking.

It is intended that these rules serve to expedite the business of the court and to conserve time and resources. Where there is uncertainty they shall be so interpreted and applied.

Mindful that the passage of time will require changes, the Court will welcome suggestions from those using the rules and from time to time will publish amendments.

/s/ F. T. DUPREE, JR.
Chief District Judge

Raleigh, North Carolina
July 25, 1980

Local Rules of Practice and Procedure of the United States District Court for the Eastern District of North Carolina

Effective August 1, 1980

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I. General Rules

Rule 1.00 Scope and Citation of Local Rules

These local rules of practice shall govern the conduct of the United States District Court for the Eastern District of North Carolina except when the conduct of this court is governed by federal statutes and rules. A judge, for good cause and in his discretion, may alter these rules in any particular case. These rules shall be cited: "Local Rule ————, EDNC".

Rule 2.00 Attorneys.

2.01: *Roll of Attorneys.* The bar of this court consists of those heretofore admitted and those hereafter admitted as prescribed by this Local Rule 2.00.

2.02: *Eligibility.* A member in good standing of the bar of the Supreme Court of North Carolina, who resides in the State of North Carolina and who maintains an office in the State of North Carolina, is eligible for admission to the bar of this court.

2.03: *Procedure for Admission.* Before being presented to the court for taking the required oath, an applicant for admission shall certify in a written application that such applicant:

(a) Is a member in good standing of the bar of the Supreme Court of North Carolina, a resident of North Carolina, and maintains an office in North Carolina; and,

(b) Has studied the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, and the Local Rules of this court.

In addition to these certifications, the written application shall contain the certification of two attorneys who are members in good standing of the bar of this court that the applicant is of good moral character and professional reputation and meets the requirements for admission. An applicant may be admitted to practice in this court by a judge or magistrate upon oral motion by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

> I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Following the administration of the oath, the application shall be signed by the judge or magistrate and the applicant shall file the application, accompanied by a fee of $15.00, with the clerk. The clerk shall then issue the applicant a certificate of admission to the bar of this court. Upon the filing of a properly certified and executed application accompanied by the admission fee of $15.00, the clerk may accept for filing papers signed by the applicant. However, no applicant shall make an appearance on behalf of a client until the applicant has taken the oath.

2.04: *Representation by Local Counsel Who Must Sign All Pleadings.* Litigants in civil and criminal actions and parties in bankruptcy proceedings, except governmental agencies and parties appearing *pro se,* must be represented by at least 1 member of the bar of this court, who shall sign each pleading, motion, discovery procedure or other document filed in this court.

2.05: *Appearances by Attorneys Not Admitted in the District.* Any person who is a member in good standing of the bar of a United States District Court and the bar of the highest court of any state or the District of Columbia shall be permitted to appear in a particular matter in association with a member of the bar of this court. The appearance of such a person in a particular matter shall confer jurisdiction upon this court for any alleged misconduct of that person or for any other purpose arising in the course of or in the preparation of such matter.

2.06: *Pleadings, Service, and Attendance by Local Counsel in Cases Where Out-of-State Attorney Appears.* Pleadings and other documents filed in a case where an attorney appears who is not admitted to the bar of this court shall contain the individual name, firm name, address, and phone number of both the attorney making special appearance under this Local Rule and the associated local counsel. In such a case, the service of all pleadings and notices as are required shall be sufficient if served only upon the associated local counsel. Unless excused by the court, the associated local counsel shall be

present at all pre-trial conferences, hearings and trials and may attend discovery proceedings.

2.07: *Withdrawal of Appearance.* No attorney whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record, except with leave of the court.

2.08: *Courtroom Decorum.* Counsel shall conduct themselves with dignity and propriety. Counsel shall rise when addressing the court, and all statements to the court, shall be made from counsel table or from behind the lectern facing the court. Counsel shall not approach the bench unless requested to do so by the court or unless permission is granted upon the request of counsel.

2.09: *Questioning of Witnesses.* Only one attorney for each party may question a particular witness unless the court allows otherwise. Counsel shall remain seated while questioning witnesses.

2.10: *Professional Standards.* The ethical standard governing the practice of law in this court is the Code of Professional Responsibility of the North Carolina State Bar, Incorporated now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court. Counsel are directed to advise the Clerk of this Court within 10 days of disciplinary action taken against them resulting in suspension or disbarment. The disciplinary procedures of this court shall be on file with the clerk and furnished to counsel upon request.

Rule 3.00 Court Schedule and Conduct of Business.

3.01: *Headquarters of the Clerk.* The headquarters of the clerk of the court shall be in Raleigh.

3.02: *Divisions of the District.* There shall be six divisions of this court. Headquarters of each division and the counties comprising the divisions are as follows:

NAME OF DIVISION	*HEADQUARTERS*	*COUNTIES*	
Elizabeth City Division	Elizabeth City	Bertie	Hertford
		Camden	Pasquotank
		Chowan	Perquimans
		Currituck	Tyrrell
		Dare	Washington
		Gates	
Fayetteville Division	Fayetteville	Cumberland	Sampson
		Robeson	
New Bern Division	New Bern	Beaufort	Lenoir
		Carteret	Martin
		Craven	Onslow
		Hyde	Pamlico
		Jones	Pitt
Raleigh Division	Raleigh	Franklin	Vance
		Granville	Wake
		Harnett	Warren
		Johnston	
Wilmington Division	Wilmington	Bladen	Duplin
		Brunswick	New Hanover
		Columbus	Pender
Wilson Division	Wilson	Edgecombe	Northampton
		Greene	Wayne
		Halifax	Wilson
		Nash	

3.03: *Assignment of Cases to a Division.*

(a) *Civil Actions.* The clerk shall assign all civil actions to a division when the action is filed or removed. If one or more plaintiffs are residents of this District, the clerk shall assign the case to the division in which the first named such plaintiff resides. If no plaintiff resides in the District and one or more defendants reside in the District, the clerk shall assign the action to the division in which the first named such defendant resides. In the event no party resides in the District but the claim is alleged to have arisen in the District or to involve real property in the District, the clerk shall assign the action to the division in which such claim is alleged to have arisen or in which the real property is situate. In all other instances, a case shall be assigned to a division in the discretion of the clerk.

(b) *Criminal Actions.* The clerk shall assign all criminal indictments to a division when an indictment is filed or transferred. If the indictment alleges the crime occurred within the District, the clerk shall assign the action to the division in which the crime is alleged to have occurred. In cases where it is not alleged that the crime occurred in the District or in cases in which it is unclear in which division the alleged crime occurred, the clerk shall assign the indictment to the division in which the first named defendant, who resides within this District, resides. In all other instances, an indictment shall be assigned to a division in the discretion of the clerk.

(c) *Residence of Corporation.* For the purposes of this local rule, a corporate plaintiff shall be deemed to reside in the state in which it was incorporated and in the district and division in which it has its principal office; and, a corporate defendant shall be deemed to reside in the division in which the corporation is alleged to (1) be incorporated and have its principal office, or (2) be licensed to do business or (3) be doing business.

(d) *United States as Plaintiff.* For the purposes of this local rule, in cases where the United States, its agencies or officers acting in an official capacity, is the plaintiff it shall be deemed that such plaintiff does not reside in this district.

3.04: *Court in Continuous Session.* The court shall be in continuous session in all divisions of the District on all business days throughout the year. All matters of either a criminal or civil nature not reached at the regular sessions of court are deemed to be in an open status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties.

3.05: *Place and Time of Holding Court.* Regular or special sessions of court, motion days, pre-trial conferences and other court business will be conducted at a place designated by the court. On the opening day of a session, court shall begin at 10:00 a.m.; on all other days, unless the presiding judge shall otherwise direct, court shall begin at 9:30 a.m.

3.06: *Correspondence.* Correspondence addressed to the court shall indicate that copies have been transmitted to all other parties and failure to transmit the same to all other parties may result in sanctions by the court. Such correspondence shall not become a part of the record in the case.

3.07: *Forms of Pleadings, Motions and Documents.* All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall:

(a) be on standard legal size paper;
(b) state the court and division in which the action is pending;
(c) bear, except for initial filings, the case number assigned by the clerk;
(d) contain the caption of the case;
(e) if applicable, state the title of the pleading, motion, discovery procedure or document and the federal statute or rule number under which the party is proceeding;
(f) contain the individual name, firm name, address and telephone number of all attorneys who appear for the filing party, including an

attorney making a special appearance pursuant to Local Rule 2.05;
(g) bear the date when signed by counsel;
(h) be signed by counsel as required by Local Rule 2.04; and
(i) have each page numbered successively.

The following forms are examples to be followed:

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

NO: _____

(Civil)

JAMES T. SMITH,
Plaintiff
vs.
AARON T. JONES, et al,
Defendants

OFFER OF JUDGMENT
Rule 68, F.R. Civ. P.

OR

(Criminal)

UNITED STATES OF AMERICA
vs.
AARON T. JONES,
Defendant

MOTION TO TRANSFER PROCEEDING
Rule 21(a), F.R. Crim. P.

(Closing)

This ——— day of January, 1980

(signature)

OF COUNSEL:

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3.08: *Filing and Service of Papers.* Unless otherwise specifically provided for, the original of all pleadings and other papers required to be filed or served shall be filed with the clerk in the office of the clerk in Raleigh, Fayetteville, New Bern or Wilmington regardless of the division to which the case is assigned. When the law requires a proceeding to be heard and determined by a district court of three judges, pleadings and other documents shall be filed in triplicate. In all cases, whenever a pleading (subsequent to the complaint) or other paper is required to be filed with the clerk or with the court, a copy thereof shall be served upon opposing parties as provided in Rule 5(b), F.R. Civ. P.

Rule 4.00 Motion Practice.

4.01: *General Requirements.* All motions shall be concise and shall state precisely the relief requested. Motions shall conform to the general motions requirements, standards and practices set forth in the applicable Federal Rules of Procedure and in Local Rule 3.07. Time for the filing of pre-trial motions in criminal cases is governed by the provisions of Local Rule 44.00.

4.02: *Motions Relating to Discovery and Inspection.* No motions to compel discovery will be considered by the Court unless the motion sets forth, by item, the specific question, interrogatory, etc. objected to, along with the grounds supporting or in opposition to the objection. A discovery motion in a criminal action (Rule 16, F.R. Crim. P.) shall state that a request for discovery and inspection was made and denied.

4.03: *Supporting Memoranda.* Except for motions which the clerk may grant as specified in Local Rule 9.00, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Rule 5.01. Where appropriate, motions shall be accompanied by affidavits or other supporting documents.

4.04: *Responses to Motions.* Any party may file a written response to any motion. The response may be a memorandum in the manner prescribed by Local Rule 5.01 and may be accompanied by affidavits and other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum in the manner prescribed by Local Rule 5.01 and, when appropriate, by affidavits and other supporting documents. Responses and accompanying documents shall be filed within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable Federal Rules of Procedure. In the event no response is filed, the court may proceed to rule on the motion.

4.05: *Replies.* Replies to responses are discouraged. However, a party desiring to reply to matters raised initially in a response to a motion or in accompanying supporting documents shall file the reply within 10 days after service of the response, unless otherwise ordered by the court.

4.06: *Affidavits.* Ordinarily, affidavits will be made by the parties and other witnesses and not by counsel for the parties. However, affidavits may be made by counsel for a party if the sworn facts are known to counsel or counsel can swear to them upon information and belief, and

(a) the facts relate solely to an uncontested matter; or

(b) the facts relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the facts; or

(c) the facts relate solely to the nature and value of the legal services rendered for the party by such counsel or counsel's law firm; or

(d) the refusal to accept the affidavit would work a substantial hardship on the party and the court finds that its acceptance of the affidavit would not be such as to require that counsel or counsel's law firm be disqualified from continuing to appear for the party.

4.07: *Hearings on Motions.* Hearings on dispositive motions may be ordered by the court, in its discretion, upon the request for counsel. Unless ordered by the court, motions shall be determined without hearing.

4.08: *Frivolous or Delaying Motions.* Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion.

Rule 5.00 Supporting Memoranda.

5.01: *Form and Content.* A memorandum shall be in the form prescribed by Local Rule 3.07 and shall contain:

(a) a concise summary of the nature of the case;

(b) a concise statement of the facts that pertain to the matter before the court for ruling;

(c) the argument (brevity is expected) relating to the matter before the court for ruling with appropriate citations in accordance with Local Rules 5.02, 5.03 and 5.04;

(d) copies of any cases cited as required by Local Rules 5.03 and 5.04; and

(e) where the supporting memorandum opposes a Motion for Summary Judgment a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

5.02: *Citation of Published Decisions.* Published decisions cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations:

(1) State Court Citation: *Rawls* v. *Smith,* 238 N.C. 162, 77 S.E. 2d 701 (1953).

(2) District Court Citation: *Smith* v. *Jones,* 141 F. Supp. 248 (E.D.N.C. 1956).

(3) Court of Appeals Citation: *Smith* v. *Jones,* 237 F. 2d 597 (4th Cir. 1956).

(4) United States Supreme Court Citation: *Smith* v. *Jones,* 325 U.S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554 (1956). If a petition for certiorari or an appeal was filed in the United States Supreme Court, the disposition of the case in that court should always be shown with parallel citations. For example: *Carson* v. *Warlick,* 238 F. 2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664 (1957).

5.03: *Citation of Decisions Not Appearing in Certain Published Reports.* Decisions published outside the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g. CCH Tax Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.

5.04: *Citation of Unpublished Decisions.* Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit Court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows: *United States* v. *William Norman,* No. 74-50-CR(or CIV)-5 (E.D.N.C. January 7, 1975) and *United States* v. *Norman,* No. 74-2398 (4th Cir. June 27, 1975).

Rule 6.00 Jurors.

6.01: *Jury Lists.* When the jury for a session of the court is drawn, the clerk shall furnish a copy of the list to members of the bar of this court upon their request therefor. The list shall set out the name, address, occupation and employer of each juror and, where available, the name, address, occupation and employer of the spouse of each juror. The jurors and their families shall not be contacted, either directly or indirectly, in an effort to secure information concerning the background of any member of the jury panel. When the jurors are seated in the jury box, a chart or list shall be furnished by the clerk to the parties or their counsel, showing the name and seating assignment of each juror.

6.02: *Examination of Jurors.* The court shall conduct the examination of prospective jurors. Counsel shall file prior to trial a list of any *voir dire* questions counsel desires the court to ask the jury other than routine questions such as (1) the occupations and addresses of jurors and their spouses, (2) the identity and relation of jurors, the parties, counsel and witnesses and (3) the knowledge of the jurors concerning the case.

6.03: *Contact with Trial Jurors.* Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall individually or through an investigator or any person acting for such attorney an party litigant ask questions of or make comments to a member of that jury or the members of the family of such a juror that are calculated merely to harass or embarrass such a juror or a member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.

Rule 7.00 Release of Information to News Media.

7.01: *Court Personnel.* All court personnel, including but not limited to, the Marshal and deputy marshal and office personnel, the clerk and deputy clerks and officer personnel, probation officers and office personnel, bailiffs, court reporters, and the judges' and magistrates' office personnel, are prohibited from disclosing to any person, where it can reasonably be expected to be disseminated by means of public communication, without authorization of the court, information relating to any pending matter, civil or criminal, that has not been filed as a part of the public records of the court. This proscription applies to the divulgence of any information concerning arguments and hearings held in chambers or otherwise outside the presence of the jury or the public.

7.02: *Copies of Public Records.* The members of the news media and others may obtain copies of all public records from the clerk upon payment of copying fees.

7.03: *Criminal Matters.* In addition to the provisions of this Local Rule 7.00, the provisions of Local Rule 45.00 shall apply to all criminal matters.

Rule 8.00 Photographing and Reproducing Court Proceedings.

The taking of photographs in the courtroom, court offices or in the corridors immediately adjacent thereto, during judicial proceedings or during any recess of the court, and the transmitting or sound-recording of such proceedings for broadcasting by radio or television shall not be permitted. Proceedings designated and conducted as ceremonies, such as naturalization proceedings, the administration of oaths of office to officers of the court, presentation of portraits and other ceremonial occasions, may be photographed in or broadcast from the courtroom, with the permission and under the supervision of the court.

Rule 9.00 Powers and Duties of the Clerk.

9.01: *Approval of Security.* The clerk or deputy clerk is authorized to approve all recognizances, stipulations, bonds, guaranties, or undertakings, in the penal sum prescribed by statute or order of the court, whether the security be property, or personal or corporate surety.

9.02: *Seizure of Person or Property.* All acts and duties pertaining to the seizure of person or property as provided by the law of the State of North Carolina authorized to be done by a judge or the clerk of the state court may be done in like cases by a judge of this court or the clerk of this court, respectively.

9.03: *Orders and Judgments.* The clerk or a deputy clerk is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown.

(a) Consent orders for the substitution of attorneys.

(b) Orders enlarging time periods in civil actions authorized to be entered by the court by Rule 6(b), F.R. Civ. P.

(c) Orders extending for a reasonable amount of time the period within which an act must be performed under the local rules of this court.

(d) Consent orders dismissing an action, except in bankruptcy proceedings and in cases to which Rule 23(c) F.R. Civ. P. and Rule 66, F.R. Civ. P. apply.

(e) Orders canceling liability on bonds.

(f) Orders changing the time of opening and adjourning court in the absence of the judge.

(g) Judgments by default as provided for in Rule 55(a) and 55(b)(1), F.R. Civ. P.

(h) Orders authorizing service of process by a person other than a United States Marshal pursuant to Rule 4(c), F.R. Civ. P.

(i) Certification of law students and supervising attorney pursuant to Local Rule 13.00.

(j) Any other motion, rule or order which may be granted of course or without notice.

(k) Pursuant to the provisions of 28 U.S.C. § 956, the clerk or a deputy clerk, when there is need to serve a complaint and attachment upon a vessel, or any other process incident to admiralty and maritime claims, either *in rem* or *in personam,* are empowered to grant and enter an order authorizing any sheriff or any deputy sheriff, or other suitable person, to serve all such process.

9.04: *Handling of Exhibits.* The clerk shall be the custodian of all exhibits admitted into evidence. Upon 10 days' notice by mail to counsel for all parties, the clerk may, within 30 days after the entry of final judgment, destroy or otherwise dispose of the exhibits.

9.05: *Deposit of Registry Funds in Interest-Bearing Accounts.* Whenever an order of court directs the clerk to place registry funds into interest-bearing accounts, counsel are directed to confer with the clerk, within 5 days after receipt of the order, concerning the manner and place of investment. If counsel and the clerk do not agree, the clerk shall seek further direction from the court. No officer or employee of this court shall incur any liability for failure to invest or for improper investment unless counsel have complied with their obligations under this local rule.

9.06: *Central Violations Bureau.* The clerk shall establish a Central Violations Bureau which shall be under the jurisdiction of the clerk and staffed by designated employees of the clerk. The bureau is authorized to perform all functions assigned to the Central Violations Bureau by Section XV, Disposition of Federal Petty Offenses by Mail, Volume IX-A, Guide to Judiciary Policies and Procedures. The Central Violations Bureau shall maintain a public listing of the petty offenses for which collateral may be posted in lieu of appearance and the amount of collateral required for each offense.

9.07: *Court Libraries.* The clerk shall maintain for the court and the general use of members of the bar of this court the court libraries in the District. Books shall not be removed from the library without the consent of the person responsible for the maintenance of the particular library, and shall not be removed from the courthouse under any circumstances. A violation of this rule shall be punishable as for contempt of court.

9.08: *Jurisdictional Agreements with Other Courts.* The clerk shall maintain all jurisdictional agreements entered into by the Chief District Judge of this court and the Chief District Judge of any other United States District Court and a copy of each such agreement and copies of such agreements shall be furnished to counsel upon request.

Rule 10.00 Sureties.

10.01: *Security.* Except as otherwise provided by law, every recognizance, stipulation, bond, guaranty, or undertaking shall be with security that consists

of either (1) cash or negotiable governments bonds, or (2) one or more sureties, as provided by law or the applicable Federal Rules of Procedure. A judge may enter pertinent orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this District.

10.02: *Use of Real Property as Security.* Whenever a surety seeks to justify assets by demonstrating ownership of real property, a judge or magistrate shall determine by satisfactory evidence that the property is of sufficient unencumbered value to protect the interests of the adverse party.

10.03: *Prohibited Sureties.* Members of the bar, administrative officers and employees of this court, and the Marshal and deputies and assistants thereto shall not act as surety in any matter, criminal or civil, pending in this court.

Rule 11.00 Civil Rights Actions By Prisoners, 42 U.S.C. § 1983.

All complaints on behalf of state prisoners seeking relief under 42 U.S.C. § 1983 and federal prisoners challenging conditions of confinement shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. An original and one copy of the complaint for the court and one copy of the complaint for each defendant named in the action shall be filed.

Rule 12.00 Habeas Courts Actions (28 U.S.C. § 2254) And 28 U.S.C. § 2255 Motions.

All petitions on behalf of prisoners seeking relief under 28 U.S.C. § 2255 shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. Such proceedings shall be governed by the rules promulgated by the United States Supreme Court.

Rule 13.00 Student Practice Rule.

13.01: *Compliance with Rule.* Students may participate as counsel in civil and criminal cases in this court subject to their compliance with all of the requirements of this Local Rule 13.00.

13.02: *Eligibility.* An eligible student must

(a) be duly enrolled in a law school;

(b) have completed at least 3 semesters of legal studies;

(c) have knowledge of the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, the Code of Professional Responsibility, and the Local Rules of this court;

(d) be supervised by a supervising attorney as defined in Local Rule 13.03;

(e) be certified by the Dean of the Law School where the student is enrolled, or the Dean's designee, as being of good character, sufficient legal ability, and adequately trained to fulfill the responsibilities of a legal intern to both the client and the court;

(f) be certified by the court to practice pursuant to this Local Rule 13.00; and,

(g) decline personal compensation for his or her legal services from a client or any other source.

13.03: *Supervising Attorney.* A supervisor must:

(a) either (1) have faculty or adjunct faculty status at a law school at which a portion of the supervisor's duties includes supervision of students in a clinical program; or (2) be a member of the bar of this court for at least 2 years, who in the determination of the court, is competent to carry out the role of supervising attorney;

(b) be admitted to practice in this court;
(c) be certified by the court as a student supervisor;
(d) be present with the student at all times in court, and at other proceedings in which testimony is taken;
(e) co-sign all pleadings or other documents filed with the court;
(f) assume full personal and professional responsibility for a student's guidance and any work undertaken and for the quality of the student's work, and to be available for consultation with represented clients;
(g) assist and counsel the student in activities mentioned in Local Rule 13.05, and review such activities with the student, all to the extent required for proper practical training of the student and the protection of the client; and
(h) supplement oral or written work of the student as necessary to insure proper representation of the client.
13.04: *Certification of Student and Supervisor.*
(a) *Student.* The court's certification of a student to practice under this Local Rule 13.00 shall be filed with the clerk and shall remain in effect for 18 months or until the student graduates from law school, whichever is earlier. Certification to appear generally or in a particular case may be withdrawn by the court at any time, in the discretion of the court, and without any showing of cause.
(b) *Supervising Attorney.* Certification of the supervising attorney shall be filed with the clerk, and shall remain in effect indefinitely unless withdrawn by the court, in its discretion, and without any showing of cause.
13.05: *Activities.* A certified student may under the personal supervision of his or her supervisor:
(a) represent any client including federal, state or local governmental bodies, if the client on whose behalf the certified student is appearing has consented in writing to that appearance and the supervising lawyer has given written approval of that appearance;
(b) represent a client in any criminal, civil or administrative matter; however, the court retains the authority to limit a student's participation in any individual case;
(c) in connection with matters in this court, engage in other activities on behalf of the client in all ways that a licensed attorney may, under the general supervision of the supervising lawyer; however, a student shall make no binding commitments on behalf of a client absent prior client and supervisor approval, and in any matters, including depositions, in which testimony is taken the student must be accompanied by the supervising lawyer. Documents or papers which are filed shall be read, approved, and co-signed by the supervising lawyer. The court retains the authority to establish exceptions to such activities; and,
(d) prior to oral participation by a certified student in a hearing or trial, the supervising attorney shall provide the court with a written statement of the scope of participation anticipated on the part of the certified student.

Rule 14.00 Naturalization.

Petitions for naturalization will be considered and acted upon, and appropriate ceremonies conducted in connection therewith, on Wednesday of the first week of any regular session of Court at which naturalization hearings are set, beginning at 2:00 o'clock P.M., unless otherwise ordered by the court. The court may at other times, in its discretion, for good cause shown, and upon reasonable prior notice by the applicant to the Immigration and Naturalization Service, consider and act upon petitions for naturalization by members of the armed services, seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Rule 15.00 Sanctions.

If counsel or any party fail to comply in good faith with any local rule of this court, the court in its discretion may impose sanctions.

Rules 16.00 to 19.00: Reserved for Future Purposes.

II. Civil Rules

Rule 20.00 Minors and Incompetents as Parties.

20.01: *Representation.* Representation of minor and incompetent parties in a civil action shall be in accordance with Rule 17(c). F.R. Civ. P. Appointments of guardians *ad litem* by any state court shall satisfy the requirements of the Federal Rules of Civil Procedure unless the court finds that the interests of the parties so represented are not being adequately protected.

20.02: *Settlement or Dismissal of Actions.* No civil action to which a minor or incompetent person is a party shall be compromised, settled, discontinued, or dismissed without an Order of Approval entered by the court. It shall be the responsibility of counsel for the minor or incompetent parties to prepare a proposed Order of Approval for submission to the court. The Order of Approval shall bear the written consent of (1) counsel for all the parties to the action, (2) the legal representative of minor or incompetent parties, and (3), in the case of minors, at least one of the natural parents or persons standing *in loco parentis.* Unless otherwise ordered by the court, the Order of Approval shall contain statements as to the following:

(a) that all parties are properly represented and are properly before the court; that no questions exist as to misjoinder or nonjoinder of parties; and that the court has jurisdiction over the subject matter and the parties;

(b) if the minor or incompetent parties are plaintiffs, a summary of contentions sufficient to show that the complaint states a claim upon which relief can be granted; if the minor or incompetent parties are defendants, a statement of contentions sufficient to show that no affirmative defenses could clearly be raised in bar of recovery;

(c) a summary of services rendered by counsel for the minor or incompetent parties, along with an opinion as to the fairness and reasonableness of the settlement, if any; and

(d) in cases involving claims for personal injuries asserted by minor or incompetent parties, an estimate of actual and foreseeable medical, hospital and related expenses and a statement by an examining physician setting forth the nature and extent of the plaintiff's injuries, extent of recovery and prognosis.

20.03: *Approval of Counsel Fees and Payment of Judgments.* In its Order of Approval, the court shall approve or fix the amount of the fee to be paid to counsel for the minor or incompetent parties and make appropriate provision for the payment thereof. The Order of Approval shall also provide the manner in which judgments, if any, are to be paid and may make specific provisions for the payment of medical, hospital and similar expenses when allowed by applicable law.

Rule 21.00 Consent of Parties to Civil Trial Jurisdiction of Magistrates (28 U.S.C. § 636(c)).

(a) A plaintiff, desiring to consent to the civil trial jurisdiction of certified magistrates, shall file an executed consent not later than 20 days after the

service by a defendant of the first answer or motion, whichever occurs first, following the institution of the action.

(b) A defendant, desiring to consent to the civil trial jurisdiction of certified magistrates, shall file an executed consent not later than 20 days after the filing of such defendant's first answer or motion, whichever occurs first, following the institution of the action.

(c) An additional party, joined in an action in which all parties have previously consented to magistrate jurisdiction, who desires to consent to the civil trial jurisdiction of certified magistrates, shall, within 10 days from the filing of the order allowing joinder, file such consent. If such additional party fails to so consent, the magistrate cannot exercise trial jurisdiction.

(d) The form of the consent shall be in the manner prescribed by Local Rule 3.07, state the name of the consenting party, contain a statement that such party consents to invoke the civil trial jurisdiction of certified magistrates as provided by 28 USC § 636(c) and be dated and signed by counsel for the consenting party. The consent may be filed separately or it may be attached to any pleading or motion provided that such consent shall not be set out in such pleading or motion nor referred to therein. The clerk shall prepare a consent form which the clerk shall attach to all complaints and to orders joining additional parties prior to service.

(e) The clerk shall retain, in a private file to be maintained for this purpose, all executed consents. If all parties return such executed consents, they shall be placed in the record of the case and the civil trial jurisdiction of certified magistrates as provided by 28 USC § 636(c) shall be deemed to have been invoked.

(f) Appeals from the judgment of a magistrate shall be to the United States Court of Appeals for this circuit unless the parties stipulate at the time of consent that an appeal may be taken to a judge of this court. Such an appeal shall lie to the Chief Judge of this court or such other judge as may be designated by the Chief Judge of this court.

Rule 22.00 Assertion of Rule 12(b), F.R. Civ. P. Defenses.

Defenses asserted in a responsive pleading pursuant to Rule 12(b), F.R. Civ. P. shall be supported by a memorandum which must be served prior to the discovery conference prescribed by Rule 26(f), F.R. Civ. P. The memorandum shall be in the form prescribed by Local Rule 5.01.

Rule 23.00 Discovery Conference, Rule 26(f) F.R. Civ. P.

A discovery conference may be held in every civil action at the earliest practicable date following the close of the pleadings in accordance with Rule 26(f), F.R. Civ. P. The conference shall be informal in nature and for the purpose of setting a preliminary plan and schedule for discovery, pre-trial conferences and trial. Subject to the provisions of Local Rule 2.06, counsel for all parties shall participate in the discovery conference.

Rule 24.00 Civil Discovery.

24.01: *Conducting Discovery.* In all civil actions, the parties shall schedule and conduct discovery in accordance with the order entered following the discovery conference, Rule 26(f), F.R. Civ. P. All discovery motions and requests shall be propounded so as to allow the respondent sufficient time to

answer prior to the time when discovery is scheduled to be completed. To shorten discovery time, it is expected that discovery procedures will proceed concurrently. After the time for completing discovery has expired, further discovery may proceed only by order of the court and may, in no event, interfere with the conduct of either the final pre-trial conference or the trial.

24.02: *Numbering Discovery Procedures.* Each time a particular discovery procedure is used, it shall be sequentially numbered (e.g., "First Set", "Second Set", "First Request", "Second Request", etc.) so that it will be distinguishable from a prior procedure.

24.03: *Form of Interrogatories, Responses and Objections.* All interrogatories shall be filed and served on opposing counsel. Three copies shall be served on counsel for the respondent. There shall be sufficient space following each question in which the respondent shall state the response. If the space provided is not sufficient, additional pages shall be attached. An objection to an interrogatory shall be made by stating the objection and the reason therefor in the space provided for the response. Before filing the interrogatories containing the responses and objections, if any, the responding party shall attach thereto a cover sheet containing a statement (1) that each response separately and fully answers each interrogatory, except those to which objections are made, and (2) the capacity, if any, in which such respondent is acting, which statement shall be signed and verified by the respondent. Where there are objections, there shall be attached to the interrogatories a second sheet, signed by counsel making such objection, stating the number of each such interrogatory and incorporating by reference the reason stated for each objection.

24.04: *Depositions for Use at Trial.* Depositions *de bene esse* shall not be regarded as being within the rules applicable to discovery.

Rule 25.00 Final Civil Pre-Trial Conference.

25.01: *Scheduling and Notice.* A final pre-trial conference shall be scheduled in every civil action after the time for discovery has expired. The clerk shall give at least 30 days' notice of such conference.

25.02: *Preparation by Counsel for Final Pre-Trial Conference.* At least 10 days prior to the final pre-trial conference, trial counsel for each of the parties shall confer and prepare a proposed final pre-trial order. It shall be the duty of counsel for the plaintiff to arrange for this conference. In the absence of an agreement to the contrary, the conference of attorneys shall be held in the office of the attorney nearest the headquarters of the division to which the action has been assigned.

25.03: *Form of Proposed Final Pre-Trial Order.* The proposed final pre-trial order shall contain the following:

(a) *Contentions.* A concise statement of the contentions of each party concerning the disputed issues of law and fact and of the relief sought by each party.

(b) *Stipulations on Legal and Factual Issues.* Stipulations covering all relevant and material facts, including admissions, and legal issues which are not in dispute.

(c) *List of Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, that will be used to illustrate the testimony of a witness. The exhibits shall be numbered (P1. Ex. 1, et seq.; D. Ex. 1, et seq.). These numbers shall remain the same throughout all further proceedings. Exhibit stickers may be obtained from the clerk. Copies of all exhibits listed in the proposed final pre-trial order shall be made available to opposing counsel at the time of the final pre-trial conference of attorneys. Any exhibits that cannot readily be reproduced shall be

identified and arrangements shall be made to afford opposing counsel an opportunity to examine those exhibits in advance of the final pre-trial conference.

(d) *Stipulations on Exhibits.* Stipulations concerning the authenticity and the admissibility into evidence of each exhibit listed. Additionally, counsel shall list those exhibits about which they have been unable to enter into stipulations and their respective contentions and objections as to the authenticity and admissibility of each such exhibit.

(e) *Designation of Pleadings and Discovery Materials.* The designation of all portions of pleadings and discovery materials including depositions, interrogatories and requests for admissions that each party may offer at trial and a brief statement of what counsel proposes to establish by each designation.

(f) *List of Witnesses and Parties.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by the testimony of each witness; and, a list of the names and addresses of all parties and representatives of parties who will be in attendance at the trial.

(g) *Pending Motions.* A list of all pending motions.

(h) *Burden of Proof.* A statement as to which party has the burden of proof as to each issue and any dispute concerning the same.

(i) *Pre-Trial Rulings.* A list of any motion *in limine* or questions of evidence, including the authenticity and the admissibility of exhibits, or other matters that might expedite the disposition of the case at trial.

25.04: *Conduct of the Final Pre-Trial Conference.* At the final pre-trial conference, the court shall:

(a) Rule on or make provisions for ruling on all pending motions, questions of evidence including matters concerning the authenticity and admissibility into evidence of any exhibit and other matters that might expedite the disposition of the case. If, in light of pre-trial stipulations, it appears that some or all of the contested issues are amenable to adjudication by summary judgment or partial summary judgment, the court shall order the matter to be set for determination and shall fix a schedule for the submission of memoranda and other documents in support of the parties' respective positions; and

(b) Consider the proposed final pre-trial order and make such amendments and modifications as may be appropriate. The court shall order the preparation of a final pre-trial order incorporating the proposal of the parties and any appropriate amendments and modifications.

25.05: *Final Pre-Trial Order.* The final pre-trial order shall be filed with the clerk and copies mailed to counsel or the parties.

Rule 26.00 Attorney Preparations for Civil Trial.

26.01: *Compliance with Rule.* At least 10 days prior to first day of the session at which a civil action is set for trial, trial counsel for all parties shall comply with each of the provisions of this Local Rule 26.00.

26.02: *Newly Discovered Exhibits and Stipulations.* In the event a party desires to offer newly discovered exhibits, (including a map or diagram to be used to illustrate the testimony of a witness) counsel may move to so amend the pre-trial order and counsel for all parties shall, where possible, enter into stipulations as to the authenticity and admissibility of such exhibits. Such motions and stipulations shall be filed with the Clerk. Copies of such exhibits shall be made available to opposing counsel prior to trial provided that any exhibit that cannot readily be reproduced shall be identified and arrangements shall be made to afford opposing counsel an opportunity to examine such exhibits prior to trial.

26.03: *Discovery Materials to Be Used at Trial.* Counsel may reduce to narrative form interrogatories and answers expected to be read into evidence. Additionally counsel may reduce to narrative form the formal parts of all deposition testimony expected to be read into evidence (e.g., identification of the witness and relationship of the witness to the case, qualifications of an expert, etc.), and shall designate those portions of a deposition which counsel desires to read verbatim to the court or jury. Copies thereof shall be filed with the clerk. If there are objections to portions thereof, counsel shall within 5 days file with the court such objections setting forth the reasons for each such objection.

26.04: *Trial Memorandum.* Counsel shall file with the clerk a concise memorandum of authorities on all anticipated evidentiary questions, including depositions, and on all contested issues of law.

26.05: *List of Witnesses and Parties.* Counsel shall file with the clerk a list of the names and addresses of all witnesses, parties and representatives of parties who may be present at the trial and the capacity in which they will be present. The list shall indicate those persons for whom subpoenas have been issued. Counsel may not release a person from a subpoena without notice to opposing counsel and leave of court. A party objecting to the release of a person shall bear all costs incident to such person which arise subsequent to the request for release.

26.06: *Jury Cases.* In all jury cases, counsel shall file with the clerk:

(a) a list of any *voir dire* questions as required by Local Rule 6.02;

(b) requests for jury instructions with citations to supporting authorities; and

(c) proposed issues to be submitted to the jury.

26.07: *Non-Jury Cases.* In all non-jury cases, counsel shall file with the clerk:

(a) proposed findings of fact and conclusions of law; and

(b) a brief statement of the nature and extent of the relief sought.

26.08: *Late Developments in the Case.* Counsel shall immediately inform the court, opposing counsel and counsel in the next succeeding two cases on the calendar of any settlement or of any developments of an emergency nature which may necessitate a motion for continuance.

Rule 27.00 Civil Trials.

27.01: *Opening Statements.* At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) shall, without argument and in such reasonable time as the court allows, state to the court and the jury the following:

(a) the substance of the claim, counterclaim, crossclaim or defense; and,

(b) what counsel contends the evidence will show.

Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

27.02: *Witnesses.* The court may, in its discretion and in the interests of justice, permit a party to call and examine a witness not listed in the final pre-trial order.

27.03: *Closing Argument.* The court will set the times for closing argument after consultation with the parties. Unless otherwise ordered by the court, the party with the burden of proof shall open and close the argument. The opening argument may not be waived.

27.04: *Taking Verdicts and Polling the Jury.* The court may take the verdict of the jury in open court in the absence of any party or counsel. Unless the contrary affirmatively appears of record, it will be presumed that the parties

were present, or by their voluntary absence, waived their presence. The jury will not be polled unless a party requests a poll at the time the verdict is taken *or unless a poll is ordered by the court.*

Rule 28.00 Civil Contempt.

28.01: *Rights of Contemnor.* In all cases of civil contempt, the contemnor shall have due notice of the contempt charges, opportunity to reply to the charges and notice of the date and place of hearing in open court from which the public shall not be excluded.

28.02: *Summary Contempt Proceedings.* In contempt proceedings where the court may act summarily, the contemnor shall have the right to defend against the charges and to offer evidence in the form of affidavits. The movant shall have the right to offer the similar evidence.

28.03: *Plenary Contempt Proceedings.* In contempt proceedings where the court may not act summarily, the presentation of evidence is governed by Rule 1101 of the Federal Rules of Evidence. In no case of civil contempt, however, shall the parties be entitled to trial by jury, but rather the district judge before whom the matter is tried shall find the facts and enter a judgment or order in accordance with the provisions of the Federal Rules of Civil Procedure applicable to non-jury cases.

Rules 29.00 to 39.00: Reserved for Future Purposes.

III. Criminal Rules

Rule 40.00 Prompt Disposition of Criminal Cases.

The Plan for Achieving Prompt Disposition of Criminal Cases adopted by the Judges of this District is incorporated in these Local Rules by reference thereto as Appendix A.

Rule 41.00 Waiver of Appearance in Misdemeanor Cases, Rule 43(c)(2), F.R. Crim. P.

A defendant in misdemeanor cases may execute a written waiver of appearance which contains the following statements:

(a) the designation of counsel to appear in behalf of the defendant and the granting to such counsel of full authority to enter on behalf of the defendant a plea of guilty, not guilty, or nolo contendere to the offense charged, or to a lesser offense or offenses in lieu thereof;

(b) a consent to trial by the magistrate; and, a waiver of: (1) the right to be tried and sentenced by a district judge, (2) the right to a jury trial, (3) the right to testify in person, and (4) the right to face his or her accusers;

(c) an agreement to be bound by the decisions of the court as in any other case of adjudication and the entry of judgment subject to the right of appeal as in any other case; and,

(d) the circumstances which justify the approval of the written waiver of appearance by the court.

The waiver of appearance must (1) be in writing, (2) be signed by the defendant and his or her counsel, (3) be consented to by the United States Attorney or an Assistant United States Attorney and (4) be approved by the court.

Rule 42.00 Arraignment.

Ordinarily arraignments shall be conducted by magistrates under the provisions of Rule 19(B)(4), F.R. Crim. P. Although it is desirable for the United States Attorney to be present at arraignment, the presence of the United States Attorney at arraignment is not mandatory, and in the absence of the United States Attorney the magistrate shall conduct the arraignment in accordance with Rule 10, F.R. Crim. P. When a judge conducts the arraignment, the United States Attorney or an Assistant United States Attorney shall be present.

Rule 43.00 Criminal Pre-Trial Discovery and Inspection.

43.01: *Criminal Pre-Trial Conference.* Within 10 days after arraignment the United States Attorney shall arrange a pre-trial conference with counsel for the defendant. The pre-trial conference shall be held not later than 20 days after arraignment.

At the pre-trial conference and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

(a) to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(b) to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(c) to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(d) to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which is the property of the defendant and which are within the possession, custody or control of the government;

(e) to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record; and

(f) to inspect, copy or photograph any exculpatory evidence.

Thereafter and upon the request of the government, counsel for the defendant shall:

(a) permit the United States Attorney to inspect and copy or photograph any document or other physical object intended to be introduced as an exhibit of the defendant at the trial;

(b) permit the United States Attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular cases, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to the testimony of such witness; and

(c) disclose the substance of any alibi or similar defense intended to be presented by the defendant.

43.02: *Further Discovery or Inspection.* In the event that either party thereafter moves to compel compliance with Local Rule 43.01 or for additional discovery or inspection, such motion shall be filed within 5 days of the pre-trial conference held pursuant to Local Rule 43.01 or such later date as may be set by the court for the filing of pre-trial motions. The motion shall contain:

(a) the statement that the prescribed conference was held;
(b) the date of said conference;
(c) the names of all counsel participating in the conference; and
(d) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion and the reasons given for the same.

43.03: *Duty of Disclosure:* Any duty of disclosure and discovery set forth in Local Rule 43.00 is a continuing one and the United States Attorney and counsel for the defendant shall produce voluntarily any additional relevant information gained by either of them.

Rule 44.00 Time Period for Filing Pre-Trial Motions in Criminal Cases.

All pre-trial motions, including but not limited to motions to suppress and motions under Rules 7, 12, 14, 16, and 41, F.R. Crim. P., shall be filed no later than 10 days after the pre-trial conference.

Rule 45.00 Publicity in Criminal Matters.

45.01: *Statements by One Participating in or Associated with an Investigation.* An attorney participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
(a) information contained in a public record;
(b) that the investigation is in progress;
(c) the general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim;
(d) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto; and
(e) a warning to the public of any dangers.

45.02: *Statements after Filing Complaint, Information, or Indictment, Issuance of Warrant or Arrest.* An attorney or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication that relates to:
(a) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused;
(b) the possibility of a plea of guilty to the offense charged or to a lesser offense;
(c) the existence or contents of any confession, admission, or statement given by the accused or the refusal or failure of the accused to make a statement;
(d) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests;
(e) the identity, testimony, or credibility of a prospective witness; or
(f) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

45.03: *Statements That Can Be Made.* This rule does not preclude an attorney during such period from announcing:
(a) the name, age, residence, occupation, and family status of the accused;
(b) if the accused has not been apprehended, any information necessary to aid in apprehension of the accused or to warn the public of any dangers the accused may present;

(c) a request for assistance in obtaining evidence;
(d) the identity of the victim of the crime;
(e) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;
(f) the identity of investigating and arresting officers or agencies and the length of the investigation;
(g) at the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement;
(h) the nature, substance, or text of the charge;
(i) quotations from or references to public records of the court in the case;
(j) the scheduling or result of any step in the judicial proceedings; or
(k) that the accused denies the charges made against him.

45.04: *Statements during Jury Selection or Trial.* During the selection of a jury or the trial of a criminal matter, an attorney or a law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that the attorney may quote from or refer without comment to public records of the court in the case.

45.05: *Statements after Trial, Disposition without Trial, or Sentencing:* After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, an attorney or a law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the sentence.

45.06: *Statements of Staff and Employees.* An attorney shall exercise reasonable care to prevent employees and associates from making an extra-judicial statement that the attorney would be prohibited from making under this Local Rule 45.00 and Local Rule 7.00.

Rule 46.00 Petition for Disclosure of Presentence or Probation Records.

No confidential records of this court maintained by the probation office, including presentence and probation supervision records, shall be sought by any applicant except by written petition to this court establishing with particularity the need for specific information in the records. Whenever a probation officer is served with a subpoena or other judicial process seeking the production or disclosure of pre-sentence and probation records and reports, the probation officer shall petition the Chief Judge of this court in writing for instructions with respect to responding to such process. In no event shall production or disclosure be made except pursuant to an order by a judge.

Rule 47.00 Time of Issuance of Subpoenas in Criminal Cases.

Subpoenas for witnesses in criminal cases shall be delivered to the Marshal or other person qualified to make service at least 7 days prior to the Monday of the week in which the case is set for trial. The failure of the Marshal or other qualified person to serve a subpoena not delivered within this time period shall not constitute sufficient cause for a continuance.

Rules 48.00 to 59.00: Reserved for Future Purposes.

IV. Magistrates

Rule 60.00 Standards of Performance.

In performing duties for the court, a magistrate shall conform to all applicable provisions of federal statutes and rules, to the Local Rules and procedures of this court, and to the requirements specified in any order of reference from a judge.

Rule 61.00 Assignment of Matters to Magistrates.

61.01: *Criminal Cases.*

(a) *Misdemeanor Cases.* Upon the filing of an information, complaint or violation notice, or the return of an indictment, all misdemeanor cases shall be assigned by the clerk to a magistrate, who shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

(b) *Felony Cases.* Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk to a magistrate for the conduct of an arraignment and such pretrial conferences as are necessary, and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Local Rule 62.04.

61.02: *Civil Cases.* Upon filing, all civil cases shall be assigned by the clerk to a magistrate for the conduct of such discovery and pretrial conferences as are necessary and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Local Rule 62.03. Where designated by a judge, the magistrate may conduct additional pretrial conferences and hear the motions and perform the duties set forth in Local Rules 62.04, 62.05 and 62.06. Where the parties consent to trial and disposition of a case by a certified magistrate under Local Rule 21.00, such case shall, with the approval of the judge to whom it was assigned at the time of filing, be reassigned to a certified magistrate for the conduct of all further proceedings and the entry of judgment.

61.03: *General.* Nothing in these rules shall preclude a judge from reserving any proceeding for conduct by a judge, rather than a magistrate. The judge, moreover, may by order modify the method of assigning proceedings to a magistrate as changing conditions may warrant.

Rule 62.00 Authority of Magistrates.

62.01: *Duties under 28 U.S.C. § 636(a).* A magistrate is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may:

(a) exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;

(b) administrator [administer] oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions; and

(c) conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

62.02: *Disposition of Misdemeanor Cases — 18 U.S.C. § 3401.*

A magistrate may:

(a) try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;

(b) direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and

(c) conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

62.03: *Determination of Non-Dispositive Pretrial Matters — 28 U.S.C. § 636(b)(1)(A).* A magistrate may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in Local Rule 62.04.

62.04: *Recommendations Regarding Case-Dispositive Motions — 28 U.S.C. § 636(b)(1)(B).*

(a) A magistrate may submit to a judge a report containing proposed findings of fact and recommendations for disposition by the judge of the following pretrial motions in civil and criminal cases:
1. Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;
2. Motions for judgment on the pleadings;
3. Motions for summary judgment;
4. Motions to dismiss or permit the maintenance of a class action;
5. Motions to dismiss for failure to state a claim upon which relief may be granted;
6. Motions to involuntarily dismiss an action;
7. Motions for review of default judgments;
8. Motions to dismiss or quash an indictment or information made by a defendant; and
9. Motions to suppress evidence in a criminal case.

(b) A magistrate may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this Local Rule 62.04.

62.05: *Prisoner Cases under 28 U.S.C. § 2254 and § 2255.* A magistrate may perform any or all of the duties imposed upon a judge by the rules governing proceedings in the United States district courts under 28 U.S.C. § 2254 and § 2255. In so doing, a magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for disposition of the petition by the judge. Any order disposing of the petition shall only be made by a judge.

62.06: *Prisoner Cases under 42 U.S.C. § 1983.* A magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

62.07: *Special Master References.* A magistrate may be designated by a judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Rule 53, F.R. Civ. P. Upon the consent of the parties, a magistrate may be designated by a judge to serve as a special master in any civil case, notwithstanding the limitations of Rule 53(b), F.R. Civ. P.

62.08: *Conduct of Trial and Disposition of Civil Cases upon Consent of the Parties — 28 U.S.C. § 636(c).* Subject to the provisions of Local Rule 21.00, a certified magistrate may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or nonjury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings, a magistrate may hear and determine any and all pretrial and posttrial motions, including case-dispositive motions.

62.09: *Other Duties.* A magistrate is also authorized to:

(a) exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the judges;

(b) conduct discovery conferences, pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings in civil and criminal cases;
(c) conduct arraignments in criminal cases not triable by the magistrate and take not guilty pleas in such cases;
(d) receive grand jury returns in accordance with Rule 6(f), F.R. Crim. P.;
(e) accept waivers of indictment, pursuant to Rule 7(b), F.R. Crim. P.;
(f) conduct voir dire and select petit juries for the court;
(g) accept petit jury verdicts in civil cases in the absence of a judge;
(h) conduct necessary proceedings leading to the potential revocation of probation;
(i) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;
(j) order the exoneration or forfeiture of bonds;
(k) conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);
(l) conduct examinations of judgment debtors in accordance with Rule 69, F.R. Crim. P.;
(m) conduct proceedings for initial commitment of narcotics addicts under Title III of the Narcotic Addict Rehabilitation Act;
(n) perform the functions specified in 18 U.S.C. § 4107, § 4108 and § 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein; and
(o) perform any additional duty as is not inconsistent with the Constitution and laws of the United States.

Rule 63.00 Review and Appeal.

63.01: *Appeal of Non-Dispositive Matters — 28 U.S.C. § 636(b)(1)(A).* Any party may appeal from a magistrate's order determining a motion or matter under Local Rule 62.03 within 10 days after issuance of the magistrate's order, unless a different time is prescribed by the magistrate or a judge. Such party shall file with the clerk, and serve on the magistrate and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A judge shall consider the appeal and shall set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The judge may also reconsider *sua sponte* any matter determined by a magistrate under this rule.

63.02: *Review of Case-Dispositive Motions and Prisoner Litigation — 28 U.S.C. § 636(b)(1)(B).* Any party may object to a magistrate's proposed findings, recommendations or report under Local Rules 62.04, 62.05 or 62.06, within 10 days after being served with a copy thereof. Such party shall file with the clerk, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the

magistrate, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

63.03: *Special Master Reports — 28 U.S.C. § 636(b)(2).* Any party may seek review of, or action on, a special master report filed by a magistrate in accordance with the provisions of Rule 53(e), F.R. Civ. P.

63.04: *Appeal from Judgments in Misdemeanor Cases — 18 U.S.C. § 3402.* A defendant may appeal a judgment of conviction by a magistrate in a misdemeanor case by filing a notice of appeal and paying a $5.00 filing fee within 10 days after entry of the judgment, and by serving a copy of the notice upon the United States Attorney. The scope of appeal shall be the same as on an appeal from a judgment of the district court to the court of appeals.

63.05: *Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties — 28 U.S.C. § 636(c).*

(a) *Appeal to the Court of Appeals.* Upon the entry of judgment in any civil case disposed of by a magistrate on consent of the parties under authority 28 U.S.C. § 636(c) and Local Rule 62.08, an aggrieved party shall appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of this court.

(b) *Appeal to a District Judge.*

1. *Notice of Appeal.* In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in civil case disposed of by a magistrate to a judge, rather than directly to the Court of Appeals. In such case the appeal shall be taken by filing a notice of appeal with and paying a $5.00 filing fee to the clerk within 30 days after entry of the magistrate's judgment but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate or a judge may extend the time for filing the notice of appeal for an additional 20 days. A request for such extension, however, shall be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.
2. *Service of the Notice of Appeal.* The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his or her last known address.
3. *Record on Appeal.* The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).
4. *Memoranda.* The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the

extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his or her memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

5. *Disposition of the Appeal by a Judge.* The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witnesses.

63.06: *Appeals from Other Orders of a Magistrate.* Appeals from any other decisions and orders of a magistrate not provided for in this Local Rule 63.00 should be taken as provided by governing statute, rule, or decisional law.

Rules 64.00 to 79.00: Reserved for Future Purposes.

V. Admiralty and Maritime Claims

Rule 80.00 Title and Scope.

These rules apply to admiralty and maritime claims within the meaning and contemplation of Rule 9(h), F.R. Civ. P. and remedies within Supplemental Rule A of the Supplemental Rules for Certain Admiralty and Maritime Claims, F.R. Civ. P. unless inconsistent therewith.

Rule 81.00 Return of Process.

(a) All process shall be issued by the clerk without order, except suits prosecuted in forma pauperis sought to be filed without prepayment of fees or costs or without security.

(b) Unless otherwise ordered by the court, all process from this court within the scope of Supplemental Rules C and D, F.R. Civ. P. shall be returnable (1) by claim within 10 days after execution of the process and by motion or answer within 20 days following claim, or (2) both claim and motion or answer within 30 days following execution of the process.

(c) Unless otherwise ordered by the court, Rule 9(h), F.R. Civ. P. process from this court in personam shall be by civil summons returnable 20 days after service of the process except process within the contemplation of Supplemental Rule B, F.R. Civ. P. which shall be in a conformity therewith.

(d) Whenever a vessel is to be served, the party seeking service shall inform the Marshal of the registry of the vessel to be served, provided, however, failure to so inform the Marshal shall not be cause for the Marshal to refuse to serve the said vessel or in any way invalidate service of said vessel.

Rule 82.00 Publication.

(a) Publication required by Supplemental Rule C(4), F.R. Civ. P. shall be made once, without further court order, in any one of the following newspapers:

Elizabeth City Division:

Virginian Pilot, Norfolk, Virginia

The News and Observer, Raleigh, North Carolina

Wilmington Division:

Wilmington Morning Star, Wilmington, North Carolina

The News and Observer, Raleigh, North Carolina

All Other Divisions:

The News and Observer, Raleigh, North Carolina

(b) If the property arrested is not released within 10 days after execution of process, publication hereunder shall, unless otherwise ordered, be caused by the plaintiff or intervenor to be made within 17 days after execution of process.

(c) Such notice shall be substantially as follows, except and unless otherwise provided in actions for the enforcement of forfeitures for violation of any federal statute:

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Caption of Case

NOTICE: The United States Marshal, Eastern District of North Carolina, has arrested the [(Vessel and appurtenances) (property)] in the above causes, civil and maritime for [nature of claim, i.e. contract, salvage, damage, collision, foreclosure of preferred mortgage, etc.] amounting to [$ (and nature of unliquidated items)]. Process returnable on [month, day and year, i.e. 30 days following execution of process as measured by Rule 6(a), F.R. Civ. P.] at the (name of courthouse), (city), (state), and any person claiming any interest therein must appear no later than that date and file written claims, answer or other defense, in person, or by attorney, or default and condemnation will be ordered.

DATED at [city of publication], (state), [month, day and year of publication].

[Name]

[Address]

[Attorney(s) for (Plaintiff) (Intervenor)]

(d) Plaintiff or intervenor will cause to be furnished to the Marshal, at the time process issues in Supplemental Rules B, C and D, F.R. Civ. P. actions, a prepared statement of attachment and garnishment or arrest with blanks for completion of date thereof and for signature below the name and title of such Marshal, together with self addressed envelope to plaintiff or plaintiff's attorney with sufficient postage affixed. The Marshal will promptly cause same to be completed and mailed after execution of process.

(e) Plaintiff shall effect publication required by Supplemental Rule F(4), F.R. Civ. P. without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina
The News and Observer, Raleigh, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(f) Whenever publication is required by Supplemental Rules C(4) and F(4), F.R. Civ. P. plaintiff or intervenor shall cause to be filed with the clerk, not later than the return date, sworn proof of publication by or on behalf of the publisher or the editor in charge of legal notices of the newspaper in which published, together with a copy of the proof of publication, or publication or reproduction thereof.

Rule 83.00 Publication of Notice of Sale.

Notice of sale of property in suits in rem and quasi in rem, except in suits on behalf of the United States where other notice is prescribed by statute, shall be caused by the Marshal to be published in any one of the newspapers set forth in Local Rule 82.00(a) and published at least twice, the first publication to be at least 1 calendar week prior to date of sale and the second publication to be at least 3 calendar days prior to date of sale, unless otherwise ordered by the court.

Rule 84.00 Stipulations for Costs and Security.

(a) In actions where there is sought, in whole or in part, a remedy listed in Supplemental Rule A of the Supplemental Rules For Certain Admiralty and Maritime Claims, F.R. Civ. P., no initial pleading seeking such remedy, or claim pursuant to supplemental Rule F(5), F.R. Civ. P. shall be filed unless the party offering the same shall first file a stipulation for costs in the sum of $250.00, or in case 2 or more vessels are jointly or severally proceeded against, a sum equal to $250.00 per vessel, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. In all other admiralty and maritime actions, no initial complaint, whether original or interlocutory, shall be filed by any party, unless the party offering the same shall first file a stipulation for costs in the sum of $100.00, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. All stipulations shall be with at least 1 surety resident in this district. Any incorporated surety company duly authorized to do business in this district may be accepted as such surety. In the place of the stipulation for costs with surety, a party may deposit the necessary amount in the registry of the court accompanied by a statement conditioned as above, referring to such deposited amount.

(b) Seamen suing as provided in 28 U.S.C. § 1916 shall not be required to file a stipulation for costs in the first instance. The court may however, order a stipulation to be given at any time.

(c) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater, better or lesser security; and any such order may be enforced by attachment or otherwise.

(d) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater or better costs security; and any such order may be enforced by attachment or otherwise. The court may enter such order on its own motion, with or without notice.

(e) In all actions in rem brought by seamen in their own names and for their own benefit for wages, salvage, or the enforcement of laws for their health or safety without prepaying costs or fees or furnishing security therefor, pursuant to 28 U.S.C. § 1916, the Marshal may at any time after service of process, attachment, or seizure of a vessel, petition any judge or magistrate of this court to require the posting of security for any or all reasonable expenses which have been or may be incurred while the vessel is in the custody of the Marshal. Upon filing such petition for the posting of security, a hearing date shall promptly be set by the court and the Marshal shall give notice of the time and place of such hearing by serving a copy of the notice of hearing together with a copy of the petition upon counsel of record for the parties or upon the parties, and by posting a copy of same on the vessel.

Rule 85.00 Form of Stipulations.

Except in cases instituted by the United States by information, or complaint of information upon seizures for any breach of the revenue, navigation, or other laws of the United States, stipulations or bonds in admiralty and maritime actions need not be under seal and may be executed by the agent or counsel of the stipulator or obligor. Stipulations for costs with corporate surety need not be signed or executed by the party, but may be signed by its agent or counsel, and shall be sufficient in any event if executed only by the surety approved by the court.

Rule 86.00 Pleadings and Parties.

(a) Every complaint filed as a Rule 9(h), F.R. Civ. P. action shall set forth "In Admiralty" following the designation of the court, in addition to the statement, if any, contained in the body of the complaint pursuant to such rule.

(b) In actions under Supplemental Rules B, C or D, F.R. Civ. P. the business telephone number and address of the plaintiff's counsel or the plaintiff, if plaintiff appears *pro se,* shall be included.

(c) Every complaint in Supplemental Rules B and C, F.R. Civ. P. actions shall state the amount of the debt, damages, or salvage for which the action is brought, and shall include in addition thereto the amount of any claim for unliquidated items claims, including attorneys fees.

(d) In cases of salvage, the complaint shall also state to the extent known or estimate the value of the hull, cargo, freight and other property salved, the amount claimed, the names of the principal salvors, and that the suit is instituted in their behalf and in behalf of all other persons interested or associated with them. There shall also be attached to the complaint a list of all known salvors and all persons believed entitled to share in the salvage, and also any agreement of consortship available and known to exist among them or any of them, including a copy of any such agreement.

Rule 87.00 Verification of Pleadings and Answers to Interrogatories.

Every complaint and claim in Supplemental Rules B, C and D, F.R. Civ. P. actions shall be verified on oath or solemn affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a complaint, claim or answers to interrogatories may be made

by an agent, attorney-in-fact or attorney of record, who shall state briefly the sources of his or her knowledge, information and belief, declare that the document affirmed is true to the best of his or her knowledge, information and belief, state the reason why verification is not made by the party or a corporate officer, and that he or she is authorized so to act. Any such verification will be deemed to have been made by the party to whom a document might apply as if verified personally. Any interested party may move the court, with or without a request for stay, for the personal oath of a party or all parties, or that of a corporate officer. If required by the court, such verification shall be procured by commission or as otherwise ordered.

Rule 88.00 Intervention.

(a) Whenever a vessel or other property is seized, attached or arrested in a proceeding and said property is in the hands of the Marshal, anyone having a claim against the vessel or property is required to present the same by intervening complaint filed in the case and not by way of original complaint, unless otherwise ordered by the court. Upon the filing of each such intervening complaint, the clerk [or, counsel who files same] shall forthwith deliver a conformed copy thereof to the Marhsal who shall thereupon post such copy on the vessel or property, but the Marshal need not rearrest or reattach the vessel or property. Counsel for intervening parties are required to ascertain the names and addresses of other counsel of record in the proceedings at the time of the filing of an intervening complaint and forthwith to serve a copy of the intervening complaint, including any exhibits attached to the original thereof, upon such other counsel and shall thereafter file a certificate with the clerk setting forth the names and addresses of counsel served, method of service and the date thereof.

(b) Subject to other rules of this court, any party is permitted to intervene without the filing of a motion or petition to intervene in any proceeding filed pursuant to Rule 9(h), F.R. Civ. P. where a vessel or other property has been arrested or attached and is in the hands of the Marshal, except that no party is permitted to intervene in any such proceeding without first obtaining leave of court if intervention is sought within 15 days prior to the date for which a sale of the vessel or property has been set by the court. If intervention is sought within said 15 day period by any party, that party is required to file a motion or petition to intervene and to serve copies thereof along with any exhibits or documents relied upon in support of such intervenors' claims and request for intervention, upon all counsel of record. In such circumstances the court may allow intervention upon such terms and conditions which it considers equitable to the interests of all parties involved.

(c) Following an initial attachment, arrest or seizure, any party intervening in a proceeding alleging a claim against the property is required to deposit funds for the safekeeping of the property with the Marshal upon the filing of such intervening claim or complaint. Unless the court otherwise orders for good cause shown, the deposit is to be in an amount determined by the Marshal.

Rule 89.00 Appraisement and Appraisers and Other Matters.

(a) Order for appraisement of property under arrest or attachment, or of plaintiff's interest in the vessel and pending freight under Supplemental Rule F(7), F.R. Civ. P. shall issue only upon motion and notice pursuant to Rule 7(b), F.R. Civ. P. or upon consent of the attorneys for the respective parties. Before executing their trust, appraisers shall be sworn or affirmed to faithful discharge thereof before the clerk or a deputy clerk. The appraisement shall be returned to the clerk and the clerk shall give notice of the return to the parties

or their attorneys. Any party, on notice, may appeal the appraisement instanter to the court. After return of the appraisement, the court, on notice and hearing, shall determine the value of the property under arrest or attachment or the value of plaintiff's interest in the vessel and pending freight. For their services, appraisers shall be paid fees, as ordered by the court, by the party at whose instance the appraisal was ordered. Appraiser's fees shall thereafter be taxed as the court orders.

(b) All other maritime procedures and remedies such as motions for appointment of substitute custodians and like matters are left to be handled by an originating motion pursuant to Rule 7(b), F.R. Civ. P., on such notice as the exigencies of the circumstances may require.

Rule 90.00 Release of Seizures — Custodial Cost — General Bonds.

(a) Property seized by the Marshall may be released as follows:

(1) By the Marshal upon the receipt of security by the Marshal, accompanied by the endorsed express authorization for release signed by the party or counsel for the party as provided by Supplemental Rule E(5)(c), F.R. Civ. P. if all costs and charges of the court and its officers shall have first been paid. Monies received as part of any cash stipulation shall be delivered by the Marshal to the clerk for deposit in the registry of the court.

(2) In an action entirely for a sum certain, by paying into the court the amount alleged in the complaint to be due, with interest at 6 percent per annum thereon from the date claimed to be due to a date 24 months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, claim of the property shall be filed.

(3) In actions other than possessory, petitory, and partition, by filing, in addition to a claim of the property, an approved stipulation for the amount of the appraised or agreed value of the property seized, with interest (unless otherwise ordered by the court), conditioned to abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree rendered by this court or by any appellate court, with interest.

(4) In possessory, petitory, and partition actions, only upon the order of the court, and on such security and terms as ordered.

(5) Upon the dismissal or discontinuance of the action or upon the written consent of the attorney for the party on whose behalf the property is detained, if all costs and charges of the court and its officers shall have first been paid.

(b) The Marshal shall not deliver any property so released until costs and charges of the Marshal shall first have been paid.

(c) In any general bond as provided for by Supplemental Rule E(5)(b) F.R. Civ. P. the vessel will be identified by name, nationality, dimensions, official number or registration number, hailing port and port of documentation, to the extent applicable. The owner of such vessel shall also file complete designated United States address for communications to the owner or designated agent, which shall be by mail. Execution of process against the vessel so stayed under Supplemental Rule E(5)(b), F.R. Civ. P. shall be endorsed to the Marshal as stayed pursuant to that rule. Such process shall be served by the Marshal together with a copy of the complaint on the master or other person in whose charge or custody the vessel is found and the Marshal shall make his or her return thereof. If no master or other person in charge of custody is found aboard the vessel, the Marshal shall so make his or her return accordingly, and the clerk shall advise by mail the owner or designated agent, at the address furnished pursuant to this rule, of the nature of the action, any amount claimed, the plaintiff, the name and address of plaintiff's attorney, the case number, and the return day 30 days from the date of the Marshal's attempt. The clerk will maintain a current list of vessels subject to a general bond and

file said bonds alphabetically by name of vessel and endorsed as provided by Supplemental Rule E(5)(b), F.R. Civ. P.

Rule 91.00 Taxation as Costs.

If costs shall be awarded to either or any party, then the reasonable premium or expense paid on all bonds or stipulations or other security by the party in whose favor such costs are allowed shall be taxed as a part of the costs of the case. In addition thereto, if costs shall be awarded to either or any party, then the reasonable expenses paid by a party incidental to or arising out of the attachment or arrest of any property in the proceedings or while said property is "in custodia legis" shall be taxed as a part of the costs of the case.

Rule 92.00 Stay of Execution or of Release of Property After Judgment or Dismissal.

No execution of judgment shall issue nor shall seized property be released pursuant to judgment or order of dismissal, until 10 days after its entry. Upon the filing of a motion for new trial or notice of appeal or motion to set aside default within said 10 day period, a further stay shall exist for a period not to exceed 30 days from the entry of judgment or dismissal to permit the entry of an order fixing the amount of a supersedeas bond and the filing of same.

Rule 93.00 Possessory Actions — Short Day Return.

In all possessory actions upon special order of the court, process may be made returnable upon a short day. The answer shall be filed within such time as may be specifically ordered by the court, and a day of hearing then fixed, unless otherwise ordered. The hearing of possessory suits shall be given preference.

Rule 94.00 Claims After Sale, How Limited.

Claims upon the proceeds of sale of property under a final decree, except for seamen's wages, shall not be admitted in behalf of lienors who file their claims after the sale, to the prejudice of lienors who filed their claims before the sale, but shall be limited to remnants and surplus, unless for cause shown it shall be otherwise ordered.

Rules 95.00 to 99.00: Reserved for Future Purposes.

Appendix A

Plan for Achieving Prompt Disposition of Criminal Cases for the Eastern District of North Carolina — Statement of Time Limits and Procedures

Preamble

As required by the Speedy Trial Act of 1974 and the Speedy Trial Act Amendments Act of 1979, the judges of the United States District Court for the Eastern District of North Carolina adopt the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings.

II. Time Limits Adopted by the Court

Preamble

As required by the Speedy Trial Act of 1974 and the Speedy Trial Act Amendments Act of 1979, the judges of the United States District Court for the Eastern District of North Carolina adopt the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings.

1. **Applicability.**

(a) *Offenses.* The time limits set forth herein are applicable to all criminal offenses triable in this court,* including cases triable by United States magistrates, except for petty offenses as defined in 18 U.S.C. § 1(3). Except as specifically provided, they are not applicable to proceedings under the Federal Juvenile Delinquency Act. [§ 3172]

(b) *Persons.* The time limits are applicable to persons accused who have not been indicted or informed against as well as those who have, and the word "defendant" includes such persons unless the context indicates otherwise.

2. **Priorities in Scheduling Criminal Cases.**

Preference shall be given to criminal proceedings as far as practicable as required by Rule 50(a) of the Federal Rules of Criminal Procedure. The trial of defendants in custody solely because they are awaiting trial and of high-risk defendants as defined in section 5 should be given preference over other criminal cases. [§ 3164(a)]

3. **Time within Which an Indictment or Information Must Be Filed.**

(a) *Time Limits.* If an individual is arrested or served with a summons and the complaint charges an offense to be prosecuted in this district, any indictment or information subsequently filed in connection with such charge shall be filed within 30 days of arrest or service. [§ 3161(b)]

* (b) *Grand Jury Not in Session.* If the defendant is charged with a felony to be prosecuted in this district, and no grand jury in the district has been in session during the 30-day period prescribed in subsection (a), such period shall be extended an additional 30 days. [§ 3161(b)]

(c) *Measurement of Time Periods.* If a person has not been arrested or served with a summons on a Federal charge, an arrest will be deemed to have been made at such time as the person (i) is held in custody solely for the purpose of responding to a Federal charge; (ii) is delivered to the custody of a Federal official in connection with a Federal charge; or (iii) appears before a judicial officer in connection with a Federal charge.

(d) *Related Procedures.*

(1) At the time of the earliest appearance before a judicial officer of a person who has been arrested for an offense not charged in an indictment or information, the judicial officer shall establish for the record the date on which the arrest took place.

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* 18 U.S.C. § 3172 defines offense as "any Federal criminal offense which is in violation of any Act of Congress . . ." The district courts with jurisdiction over offenses created by other legislatures will wish to consider the extent to which Speedy Trial Act standards should be applied to trials for such offenses.

* This subsection should be excluded in districts in which there is no likelihood of its coming into play.

(2) In the absence of a showing to the contrary, a summons shall be considered to have been served on the date of service shown on the return thereof.

4. Time within Which Trial Must Commence.

(a) *Time Limits.* The trial of a defendant shall commence not later than 70 days after the last to occur of the following dates:

(1) The date on which an indictment or information is filed in this district;

(2) The date on which a sealed indictment or information is unsealed; or

(3) The date of the defendant's first appearance before a judicial officer of this district.

[§ 3161(c)(1)]

(b) *Retrial; Trial after Reinstatement of an Indictment or Information.* The retrial of a defendant shall commence within 70 days from the date the order occasioning the retrial becomes final, as shall the trial of a defendant, upon an indictment or information dismissed by a trial court and reinstated following an appeal. If the retrial or trial follows an appeal or collateral attack, the court may extend the period if unavailability of witnesses or other factors resulting from passage of time make trial within 70 days impractical. The extended period shall not exceed 180 days. [§§ 3161(d)(2), (e)]

(c) *Withdrawal of Plea.* If a defendant enters a plea of guilty or nolo contendere to any or all charges in an indictment or information and is subsequently permitted to withdraw it, the time limit shall be determined for all counts as if the indictment or information were filed on the day the order permitting withdrawal of the plea became final. [§ 3161(i)]

(d) *Superseding Charges.* If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense or with an offense required to be joined with that offense, the time limit applicable to the subsequent charge will be determined as follows:

(1) If the original indictment or information was dismissed on motion of the defendant before the filing of the subsequent charge, the time limit shall be determined without regard to the existence of the original charge. [§ 3161(d)(1)]

(2) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information. [§ 3161(h)(6)]

(3) If the original indictment or information was dismissed on motion of the United States attorney before the filing of the subsequent charge, the trial shall commence within the time limit for commencement of trial on the original indictment or information, but the period during which the defendant was not under charges shall be excluded from the computations. Such period is the period between the dismissal of the original indictment or information and the date the time would have commenced to run on the subsequent charge had there been no previous charge.* [§ 3161(h)(6)]

If the subsequent charge is contained in a complaint, the formal time limit within which an indictment or information must be obtained on the charge

* Under the rule of this paragraph, if an indictment was dismissed on motion of the prosecutor on May 1, with 20 days remaining within which trial must be commenced, and the defendant was arrested on a new complaint on June 1, the time remaining for trial would be 20 days from June 1: the time limit would be based on the original indictment, but the period from the dismissal to the new arrest would not count. Although the 30-day arrest-to-indictment time limit would apply to the new arrest as a formal matter,the short deadline for trial would necessitate earlier grand jury action.

shall be determined without regard to the existence of the original indictment or information, but earlier action may in fact be required if the time limit for commencement of trial is to be satisfied.

(e) *Measurement of Time Periods.* For the purpose of this section:

(1) If a defendant signs a written consent to be tried before a magistrate and no indictment or information charging the offense has been filed, the time limit shall run from the date of such consent.

(2) In the event of a transfer to this district under Rule 20 of the Federal Rules of Criminal Procedure, the indictment or information shall be deemed filed in this district when the papers in the proceeding or certified copies thereof are received by the clerk.

(3) A trial in a jury case shall be deemed to commence at the beginning of voir dire.

(4) A trial in a non-jury case shall be deemed to commence on the day the case is called, provided that some step in the trial procedure immediately follows.

(f) *Related Procedures.*

(1) At the time of the defendant's earliest appearance before a judicial officer of this district, the officer will take appropriate steps to assure that the defendant is represented by counsel and shall appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure.

(2) The court shall have sole responsibility for setting cases for trial after consultation with counsel. At the time of arraignment or as soon thereafter as is practicable, each case will be set for trial on a day certain or listed for trial on a weekly or other short-term calendar. [§ 3161(a)]

(3) Individual calendars shall be managed so that it will be reasonably anticipated that every criminal case set for trial will be reached during the week of original setting. A conflict in schedules of Assistant United States Attorneys or defense counsel will be ground for a continuance or delayed setting only if approved by the court and called to the court's attention at the earliest practicable time.

(4) In the event that a complaint, indictment, or information is filed against a defendant charged in a pending indictment or information or in an indictment or information dismissed on motion of the United States Attorney, the trial on the new charge shall commence within the time limit for commencement of trial on the original indictment or information unless the court finds that the new charge is not for the same offense charged in the original indictment or information or an offense required to be joined therewith.

(5) At the time of the filing of a complaint, indictment, or information described in paragraph (4), the United States Attorney shall give written notice to the court of that circumstance and of his position with respect to the computation of the time limits.

(6) All pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

5. **Defendants in Custody and High-Risk Defendants.***

(a) *Time Limits.* Notwithstanding any longer time periods that may be permitted under sections 3 and 4, the following time limits will also be applicable to defendants in custody and high-risk defendants as herein defined:

(1) The trial of a defendant held in custody solely for the purpose of a trial

* If a defendant's presence has been obtained through the filing of a detainer with state authorities, the Interstate Agreement on Detainers, 18 U.S.C., Appendix, may require that trial commence before the deadline established by the Speedy Trial Act. See U.S. v. Mauro, 436 U.S. 340, 356-57 n.24 (1978).

on a Federal charge shall commence within 90 days following the beginning of continuous custody.

(2) The trial of a high-risk defendant shall commence within 90 days of the designation as high-risk.

[§ 3164(b)]

(b) *Definition of "High-Risk Defendant."* A high-risk defendant is one reasonably designated by the United States Attorney as posing a danger to himself or any other person or to the community.

(c) *Measurement of Time Periods.* For the purposes of this section:

(1) A defendant is deemed to be in detention awaiting trial when he is arrested on a Federal charge or otherwise held for the purpose of responding to a Federal charge. Detention is deemed to be solely because the defendant is awaiting trial unless the person exercising custodial authority has an independent basis (not including a detainer) for continuing to hold the defendant.

(2) If a case is transferred pursuant to Rule 20 of the Federal Rules of Criminal Procedure and the defendant subsequently rejects disposition under Rule 20 or the court declines to accept the plea, a new period of continuous detention awaiting trial will begin at that time.

(3) A trial shall be deemed to commence as provided in sections 4(e)(3) and 4(e)(4).

(d) *Related Procedures.*

(1) If a defendant is being held in custody solely for the purpose of awaiting trial, the United States Attorney shall advise the court at the earliest practicable time of the date of the beginning of such custody.

(2) The United States Attorney shall advise the court at the earliest practicable time (usually at the hearing with respect to bail) if the defendant is considered by him to be high risk.

(3) If the court finds that the filing of a "high-risk" designation as a public record may result in prejudice to the defendant, it may order the designation sealed for such period as is necessary to protect the defendant's right to a fair trial, but not beyond the time that the court's judgment in the case becomes final. During the time the designation is under seal, it shall be made known to the defendant and his counsel but shall not be made known to other persons without the permission of the court.

6. Exclusion of Time from Computations.

(a) *Applicability.* In computing any time limit under section 3, 4, or 5, the periods of delay set forth in 18 U.S.C. § 3161(h) shall be excluded. Such periods of delay shall not be excluded in computing the minimum period for commencement of trial under section 7.

(b) *Records of Excludable Time.* The clerk of the court shall enter on the docket, in the form prescribed by the Administrative Office of the United States Courts, information with respect to excludable periods of time for each criminal defendant. With respect to proceedings prior to the filing of an indictment or information, excludable time shall be reported to the clerk by the United States Attorney.

(c) *Stipulations.*

(1) The attorney for the government and the attorney for the defendant may at any time enter into stipulations with respect to the accuracy of the docket entries recording excludable time.

(2) To the extent that the amount of time stipulated by the parties does not exceed the amount recorded on the docket for any excludable period of delay, the stipulation shall be conclusive as between the parties

unless it has no basis in fact or law. It shall similarly be conclusive as to a codefendant for the limited purpose of determining, under 18 U.S.C. § 3161(h)(7), whether time has run against the defendant entering into the stipulation.

(3) To the extent that the amount of time stipulated exceeds the amount recorded on the docket, the stipulation shall have no effect unless approved by the court.

(d) *Pre-Indictment Procedures.*

(1) In the event that the United States Attorney anticipates that an indictment or information will not be filed within the time limit set forth in section 3, he may file a written motion with the court for a determination of excludable time. In the event that the United States Attorney seeks a continuance under 18 U.S.C. § 3161(h)(8), he shall file a written motion with the court requesting such a continuance.

(2) The motion of the United States Attorney shall state (i) the period of time proposed for exclusion, and (ii) the basis of the proposed exclusion. If the motion is for a continuance under 18 U.S.C. § 3161(h)(8), it shall also state whether or not the defendant is being held in custody on the basis of the complaint. In appropriate circumstances, the motion may include a request that some or all of the supporting material be considered *ex parte* and *in camera.*

(3) The court may grant a continuance under 18 U.S.C. § 3161(h)(8) for either a specific period of time or a period to be determined by reference to an event (such as recovery from illness) not within the control of the government. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

(e) *Post-Indictment Procedures.*

(1) At each appearance of counsel before the court, counsel shall examine the clerk's records of excludable time for completeness and accuracy and shall bring to the court's immediate attention any claim that the clerk's record is in any way incorrect.

(2) In the event that the court continues a trial beyond the time limit set forth in section 4 or 5, the court shall determine whether the limit may be recomputed by excluding time pursuant to 18 U.S.C. § 3161(h).

(3) If it is determined that a continuance is justified, the court shall set forth its findings in the record, either orally or in writing. If the continuance is granted under 18 U.S.C. § 3161(h)(8), the court shall also set forth its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

7. Minimum Period for Defense Preparation

Unless the defendant consents in writing to the contrary, the trial shall not commence earlier than 30 days from the date on which the indictment or information is filed or, if later, from the date on which counsel first enters an appearance or on which the defendant expressly waives counsel and elects to proceed pro se. In circumstances in which the 70-day time limit for commencing

trial on a charge in an indictment or information is determined by reference to an earlier indictment or information pursuant to section 4(d), the 30-day minimum period shall also be determined by reference to the earlier indictment or information. When prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea, a new 30-day minimum period will not begin to run. The court will in all cases schedule trials so as to permit defense counsel adequate preparation time in the light of all the circumstances. [§ 3161(c)(2)]

8. **Time within Which Defendant Should Be Sentenced.**

* (a) *Time Limit.* A defendant shall ordinarily be sentenced within [45] days of the date of his conviction or plea of guilty or nolo contendere.

(b) *Related Procedures.* If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

9. **Juvenile Proceedings.**

(a) *Time Within Which Trial Must Commence.* An alleged delinquent who is in detention pending trial shall be brought to trial within 30 days of the date on which such detention was begun, as provided in 18 U.S.C. § 5036.

(b) *Time of Dispositional Hearing.* If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than 20 court days after trial, unless the court has ordered further study of the juvenile in accordance with 18 U.S.C. § 5037(c).

10. **Sanctions.**

(a) *Dismissal or Release from Custody.* Failure to comply with the requirements of Title I of the Speedy Trial Act may entitle the defendant to dismissal of the charges against him or to release from pretrial custody. Nothing in this plan shall be construed to require that a case be dismissed or a defendant released from custody in circumstances in which such action would not be required by 18 U.S.C. §§ 3162 and 3164.*

(b) *High-Risk Defendants.* A high-risk defendant whose trial has not commenced within the time limit set forth in 18 U.S.C. § 3164(b) shall, if the failure to commence trial was through no fault of the attorney for the government, have his release conditions automatically reviewed. A high-risk defendant who is found by the court to have intentionally delayed the trial of this case shall be subject to an order of the court modifying his nonfinancial conditions of release under chapter 207 of Title 18, U.S.C., to ensure that he shall appear at trial as required. [§ 3164(c)]

(c) *Discipline of Attorneys.* In a case in which counsel (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial, (2) files a motion solely for the purpose of delay which he knows is frivolous and without merit, (3) makes a statement for the purpose of obtaining a continuance which he knowns to be false and which is

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* The Speedy Trial Act does not establish time limits governing the period between conviction and sentencing, but the district courts may wish to do so. The time limit set forth in brackets in this section is a suggested limit, and not a maximum permissible limit.

* Dismissal may also be required in some cases under the Interstate Agreement on Detainers, 18 U.S.C., Appendix.

material to the granting of the continuance, or (4) otherwise willfully fails to proceed to trial without justification consistent with 18 U.S.C. § 3161, the court may punish such counsel as provided in 18 U.S.C. §§ 3162(b) and (c).

(d) *Alleged Juvenile Delinquents.* An alleged delinquent in custody whose trial has not commenced within the time limit set forth in 18 U.S.C. § 5026 shall be entitled to dismissal of his case pursuant to that section unless the Attorney General shows that the delay was consented to or caused by the juvenile or his counsel, or would be in the interest of justice in the particular case.

11. **Persons Serving Terms of Imprisonment.**

If the United States Attorney knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly seek to obtain the presence of the prisoner for trial, or cause a detainer to be filed, in accordance with the provisions of 18 U.S.C. § 3161(j).

12. **Effective Dates.**

(a) The amendments to the Speedy Trial Act made by Public Law 96-43 became effective August 2, 1979. To the extent that this revision of the district's plan does more than merely reflect the amendments, the revised plan shall take effect upon approval of the reviewing panel designated in accordance with 18 U.S.C. § 3165(c). However, the dismissal sanction and the sanctions against attorneys authorized by 18 U.S.C. § 3162 and reflected in sections 10(a) and (c) of this plan shall apply only to defendants whose cases are commenced by arrest or summons on or after July 1, 1980,* and to indictments and informations filed on or after that date.

(b) If a defendant was arrested or served with a summons before July 1, 1979, the time within which an information or indictment must be filed shall be determined under the plan that was in effect at the time of such arrest or service.

(c) If a defendant was arraigned before August 2, 1979, the time within which the trial must commence shall be determined under the plan that was in effect at the time of such arraignment.

(d) If a defendant was in custody on August 2, 1979, solely because he was awaiting trial, the 90-day period under section 5 shall be computed from that date.

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* This date should be advanced if sanctions are to be implemented earlier pusuant to 18 U.S.C. § 3174(c).

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

Editor's Note. — For note on an attorney's right to compensation when discharged without cause from a contingent fee contract, see 15 Wake Forest L. Rev. 677 (1979).

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

Editor's Note. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

Appendix IX. Rules Governing Admission to Practice of Law

(Effective February 1, 1976.)

North Carolina Administrative Code

TITLE 21

OCCUPATIONAL LICENSING BOARDS

CHAPTER 30

BOARD OF LAW EXAMINERS

SECTION .0600. MORAL CHARACTER

.0601 Burden of Proof

Constitutional Challenge Held Moot. — Action seeking injunctive relief and declaration that bar rules regarding moral character were unconstitutional held moot following plaintiffs' admission to bar. See Nestler v. Board of Law Exmrs., 611 F.2d 1380 (4th Cir. 1980).

Appendix X. North Carolina Supreme Court Library Rules

Hours and Use of Library

Rule

3. Hours.
5. Use after Hours.

Services

11. Copy Service, Fees, and Certification.

Rule

Borrowing and Removing Material

13. Who May Borrow Material.

Appendix I

Official Register, State of North Carolina

Hours and Use of Library

3. Hours. — Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from nine o'clock in the morning until five o'clock in the afternoon and on Saturday, except during July and August, from nine o'clock in the morning until twelve o'clock noon.

Editor's Note. — The amendment promulgated July 24, 1980, inserted "except during July and August" near the end of this rule and made certain minor changes in wording throughout.

5. Use after Hours. — Only the following persons may enter the Library or use the material or facilities of the Library when the Library is not open for public use as provided for by Rule 3:

(a) Members and employees of the Supreme Court and the Court of Appeals.

(b) Members of the North Carolina State Bar, Inc., upon presentation of a valid State Bar membership card, may use the Library between the hours of five o'clock in the afternoon and twelve o'clock midnight, Monday through Friday.

(c) [Deleted.]

Editor's Note. —

The amendment promulgated July 24, 1980, rewrote subsection (b), which formerly read "Members of the North Carolina State Bar, Inc., who have offices in the Justice Building," and deleted subsection (c), relating to issuance, use and revocation of Library use permits.

Services

11. Copy Service, Fees, and Certification. — The Library shall operate a copy service by means of which it shall furnish requested copies of all or portions of any Library material that legally may be copied, such copies to be furnished subject to the following terms and conditions:

(f) Patrons may make their own photocopies for ten cents ($.10) per page.

Editor's Note. — The amendment promulgated July 24, 1980, added subsection (f).

As the rest of this rule was not changed by the amendment, only introductory language and subsection (f) are set out.

Borrowing and Removing Material

13. Who May Borrow Material. — The following persons only may borrow and remove material from the Library:

(f) The Secretary-Treasurer of the North Carolina State Bar, Inc.

Editor's Note. — The amendment promulgated July 24, 1980, rewrote subsection (f), which formerly read "the Secretary of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum, as long as his or her office is in the Justice Building."

As the rest of this rule was not changed by the amendment, only introductory language subsection (f) are set out.

Appendix I

OFFICIAL REGISTER STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The District Attorneys and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Division of Archives and History.

(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.

(9) The Chairman of the Judicial Standards Commission.

(10) The Secretary-Treasurer of the North Carolina State Bar, Inc.

Editor's Note. —

Appendix I was rewritten by amendment promulgated July 24, 1980.

Appendix XI. Comparative Tables

(4) TABLE OF LAWS CODIFIED SUBSEQUENT TO 1919

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1137	43	143-27.1 Repealed

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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

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I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1980 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.

RUFFUS L. EDMISTEN

Attorney General of North Carolina

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