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HE GENERAL STATUTES OF NORTH CAROLINA

1976 INTERIM SUPPLEMENT

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

UNDER THE DIRECTION OF
W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

To Be Used With the 1975 Cumulative Supplement

THE MICHIE COMPANY

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Preface

This 1976 Interim Supplement to the General Statutes of North Carolina contains the general and permanent laws enacted at the Second 1975 Session of the General Assembly, which was held in 1976, annotations from cases decided since the preparation of the 1975 Cumulative Supplement and available in advance sheets on June 2, 1976, and references to opinions of the Attorney General. In addition, this Supplement contains: certain general and permanent provisions of the 1975 General Appropriations Bill, Session Laws 1975, Chapter 875, that were not codified in the 1975 Cumulative Supplement; certain sections and parts of sections added or amended by 1975 acts with postponed effective dates, which were set out only in notes in the 1975 Cumulative Supplement; constitutional amendments adopted at the election held March 23, 1976; 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 1975 Cumulative Supplement or the replacement volumes.

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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1975 Second Session of the General Assembly affecting Chapters 1 through 168 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 288 (p. 122)-289 (p. 619). North Carolina Court of Appeals Reports volumes 26 (p. 536)-29 (p. 186). Federal Reporter 2nd Series volumes 518 (p. 33)-530. Federal Supplement volumes 396 (p. 257)-408 (p. 968). Federal Rules Decisions volumes 67 (p. 194)-69 (p. 608). United States Reports volumes 419 (p. 985)-423 (p. 160). Supreme Court Reporter volume 96 (pp. 1-1690).

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North Carolina Court of Appeals Reports volumes 26 (p. 580) 23 (p. 185).

Federal Emorter and Series volumes 518 (p. 83) 530.

Federal Supplement volumes 136 (p. 257) 408 (p. 968).

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United States Reports volumes 418 (p. 985) 435 (p. 160).

Supreme Court Reporter volume 96 (pp. 1-1520).

The General Statutes of North Carolina 1976 Interim Supplement

Chapter 1.

Civil Procedure.

SUBCHAPTER II. LIMITATIONS.

Article 3.

Limitations, General Provisions.

Sec.

1-15. Statute runs from accrual of action.

1-17. Disabilities.

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

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

(b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance of or failure to perform professional services, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action. (C. C. P., s. 17; Code, s. 138; Rev., s. 360; C. S., s. 405; 1967, c. 954, s. 3; 1971, c. 1157, s. 1; 1975, 2nd Sess., c. 977, ss. 1, 2.)

Editor's Note. -

The 1975, 2nd Sess., amendment, effective Jan. 1, 1977, inserted "or one for malpractice arising out of the performance of or failure to perform professional services" near the beginning of subsection (b) and added subsection (c).

Session Laws 1975, 2nd Sess., c. 977, s. 7,

contains a severability clause. Session Laws 1977, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

As subsection (a) was not changed by the

amendment, it is not set out.

Applied in Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

§ 1-17. Disabilities. — (a) A person entitled to commence an action who is at the time the cause of action accrued either

(1) Within the age of 18 years; or

(2) Insane;

may bring his action within the time herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

three years next after the removal of the disability, and at no time thereafter. For those persons under a disability on January 1, 1976, as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled

from January 1, 1976.

(b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c): Provided, that if said time limitations expire before such minor attains the full age of 19 years, the action may be brought before said minor attains the full age of 19 years. (C. C. P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C. S., s. 407; 1971, c. 1231, s. 1; 1975, c. 252, ss. 1, 3; 1975, 2nd Sess., c. 977, s. 3.)

Editor's Note. -

The 1975, 2nd Sess., amendment effective Jan. 1, 1977, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1975, 2nd Sess., c. 977, s. 7, contains a severability clause. Session Laws

1977, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

Once the period of limitation begins to run, the subsequent accession of a minor to a right of action cannot toll its running. Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

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

One of the purposes of this section is to prevent defendants from having the benefit of the lapse of time — the statute of limitations — while they remain beyond the limits of the State and allow their debts to remain unpaid, it not being the policy of the State to drive its citizens to seek their legal remedies abroad. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

When a nonresident defendant is amenable to process there is no need for a tolling statute. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

The application of a tolling statute such as this section when defendant has at all times been subject to the service of process under § 1-75.4-(5) by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

That there is little need to give effect to a

tolling statute when a nonresident is amenable to service that will confer personal jurisdiction does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

ARTICLE 4.

Limitations, Real Property.

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

I. GENERAL NOTE ON ADVERSE POSSESSION.

B. Character of Possession.

Continuity and Duration. -

Whereas the occupation and use by the

adverse claimant must be continuous, it need not be unceasing. Helton v. Cook, 27 N.C. App. 565, 219 S.E.2d 505 (1975).

§ 1-40. Twenty years adverse possession.

Character of Possession. -

In order to establish title by adverse possession there must be actual possession with an intent to hold solely for the possessor to the exclusion of others. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

The claimant must exercise acts of dominion over the land in making the ordinary use and taking the ordinary profits of which the land is susceptible, with such acts being so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

The possession must be within known and visible lines. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

There must be an actual possession of the real property claimed; the possession must be hostile to the true owner; the claimant's possession

must be exclusive; the possession must be open and notorious; the possession must be continuous and uninterrupted for the statutory period; and the possession must be with an intent to claim title to the land occupied. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible. The test is involved in the question whether the acts of ownership were such as to subject the claimants continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass quare clausam fregit for damages. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

Absence Due to Imprisonment. — See Helton v. Cook, 27 N.C. App. 565, 219 S.E.2d 505 (1975).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-47. Ten years.

IV. SUBDIVISION (2) SEALED INSTRUMENTS.

Counterclaim under Truth-in-Lending Act.

— In an action to recover under an installment sales contract, subdivision (2) of this section cannot be utilized to allow a counterclaim under the Federal Truth-in-Lending Act, 15 U.S.C.

1601, after the one-year limitation on actions under 15 U.S.C. 1640(e) has expired, since it is inconsistent with the new amendment to the federal act, 15 U.S.C. 1681. Ken-Lu Enterprises, Inc. v. Neal, 29 N.C. App. 78, 223 S.E.2d 831 (1976).

§ 1-50. Six years.

I. IN GENERAL.

Stated in State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

§ 1-52. Three years.

I. IN GENERAL.

Title VII Litigation. — While a State statute of limitations may have some relation to the degree of relief afforded in Title VII litigation, the crucial time limitation for the original filing of the Title VII claim is determined by Title VII itself. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1976).

On the issue of whether the Title VII action is barred by State statutes of limitations, courts have ruled in favor of the tolling when Equal Employment Opportunities Commission charges are filed. Pittman v. Anaconda Wire & Cable Co.,

408 F. Supp. 286 (E.D.N.C. 1976).

The federal courts entertaining § 1981 claims have adopted the most closely analogous State statute of limitations. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1976).

When the statute, etc. -

Once the period of limitation begins to run

nothing stops it. Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

Applied in Howard v. Hamilton, 28 N.C. App. 670, 222 S.E.2d 913 (1976); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975).

Cited in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

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

When Statute Begins to Run. -

The courts of this State have consistently held that the statute of limitations for claims for injury or damage from a defective product begins to run from the date of the sale and delivery of the product (not the date of the ultimate failure of the product or the injury). Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

§ 1-53. Two years.

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

Although a cause of action was available to plaintiff under § 109-34 with its attendant six-year statute of limitations, plaintiff chose to bring an action for wrongful death allegedly caused by the negligence of the defendant officers in not providing medical attention for plaintiff's jailed intestate, and the two-year

statute of limitations provided for in subsection (4) of this section was applicable; therefore, plaintiff is entitled to his day in court on his wrongful death action where plaintiff's intestate was imprisoned on September 13, 1971, and died on the next day, and the action was commenced on September 12, 1973. State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

I. REAL PARTIES IN INTEREST.

A. In General.

Cited in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.1. Legislative intent.

The provisions of this Article are to be construed liberally in favor of finding personal jurisdiction, as long as such a finding is consistent with due process. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

A prima facie presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in a matter. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

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

The application of a tolling statute such as § 1-21 when defendant has at all times been subject to the service of process under subdivision (5) of the present section by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

There is no need for a tolling statute when a nonresident defendant is amenable to process. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

That there is little need to give effect to a tolling statute when a nonresident is amenable to service that will confer personal jurisdiction does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

Where plaintiff-wife and defendant-husband resided in this State and lived together as husband and wife in this State for almost two years, and the plaintiff's claim for alimony arose out of the act of abandonment within the State by the defendant, the action comes within this section in all respects. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

The acts of residing with a wife in the State, an abandonment of the wife in the State and fleeing the State following willful misconduct meets the "minimum contacts" test and gives the court personal jurisdiction over the defendant. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

The long-arm manner of personal service

under § 1A-1, Rule 4(j)(9)b may be made in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in the present section. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

The term "injury to the person or property" as used in subdivision (3) of this section should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

An action for alimony on the ground of abandonment is a claim of "injury to person or property" under subdivision (3) of this section. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

The words "domicile" and "inhabitant" mean substantially the same thing. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

One is an inhabitant of or domiciled in a given place if he resides there actually and permanently. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Minimum Contacts Standards Followed. — In order for jurisdiction to be exercised, the defendant must be found to have certain minimum contacts with the State of the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

Evidence Insufficient to Establish, etc. —

For the courts of this State to exercise in personam jurisdiction over defendant, where the only contact ever had with the State was that on two occasions defendant entered into contracts in Washington, D.C., with a resident of North Carolina for delivery and receipt in Washington, D.C., would violate defendant's constitutional rights to due process. William R. Andrews Associates v. Sodibar Sys. of D.C., Inc., 28 N.C. App. 663, 222 S.E.2d 922 (1976).

The mere solicitation of business is not sufficient contact on which to base jurisdiction over a nonresident defendant. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C.

The burden is on the plaintiffs to prove the existence of jurisdiction, but that burden can be met by a prima facie showing that jurisdiction is conferred by a statute such as this one. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

Applied in Van Buren v. Glasco, 27 N.C. App. 1. 217 S.E.2d 579 (1975).

§ 1-75.11. Judgment nonappearing against defendant, proof of iurisdiction.

Default judgment by the clerk is provided for by Rule 55(b)(1), is subject to the jurisdictional proofs required by this section and is still controlled by § 1-209(4), which empowers the clerk to enter all judgments by default and default and inquiry as are authorized by Rule 55. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

SUBCHAPTER IV. VENUE. ARTICLE 7.

Venue.

§ 1-77. Where cause of action arose.

This section does not apply to actions against the State, Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Any consideration of subdivision (2) involves two questions. -

In accord with 1st paragraph in original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When Cause of Action Accrues. — A cause of action may be said to accrue, within the

meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Where Cause of Action Arose. -

The cause of action arises in the county where the acts or omissions constituting the basis of the action occurred. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

§ 1-82. Venue in all other cases.

This section governs suits against the State on contracts generally since there is no venue statute specifically applicable to the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

§ 1-83. Change of venue.

I. IN GENERAL.

Cited in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

SUBCHAPTER VI. PLEADINGS.

ARTICLE 17.

Pleadings, General Provisions.

§ 1-148. Verification before what officer.

Insufficient Basis to Impeach Verification.
— See Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

Trial.

§ 1-180. Judge to explain law, but give no opinion on facts.

I. IN GENERAL.

Applied in State v. Maddox, 27 N.C. App. 58, 217 S.E.2d 765 (1975); State v. Tomlim, 27 N.C. App. 68, 217 S.E.2d 755 (1975); State v. Moore, 27 N.C. App. 284, 218 S.E.2d 499 (1975); State v. Caldwell, 27 N.C. App. 323, 219 S.E.2d 235 (1975); State v. Abrams, 27 N.C. App. 627, 219 S.E.2d 823 (1975); State v. Sligh, 27 N.C. App. 668, 219 S.E.2d 801 (1975); State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975); State v. McNeil, 28 N.C. App. 125, 220 S.E.2d 401 (1975); State v. Buchanan, 28 N.C. App. 163, 220 S.E.2d 207 (1975); State v. Johnson, 28 N.C. App. 166, 220 S.E.2d 632 (1975); Board of Transp. v. Harvey, 28 N.C. App. 327, 220 S.E.2d 815 (1976); State v. Wright, 28 N.C. App. 481, 221 S.E.2d 745 (1976); State v. Hunt, 28 N.C. App. 486, 221 S.E.2d 720 (1976).

Cited in State v. Walker, 28 N.C. App. 389, 221 S.E.2d 387 (1976).

II. OPINION OF JUDGE.

A. General Consideration.

Credibility of Witnesses, etc. -

The credibility of witnesses, the weight and sufficiency of testimony, are matters peculiarly within the province of the jury to consider and pass upon. Williford v. Jackson, 29 N.C. App. 128, 223 S.E.2d 528 (1976).

It is for the jury and not for the judge to say how the testimony of a witness is affected by other testimony. Williford v. Jackson, 29 N.C.

App. 128, 223 S.E.2d 528 (1976).

Where the jury has heard nothing with respect to a trial judge's comments and opinions, then this section is simply inapplicable.

State v. Rhodes, 28 N.C. App. 432, 221 S.E.2d 730 (1976).

B. What Constitutes an Opinion.

Questioning Witness. -

In accord with 5th paragraph in 1975 Cum. Supp. See State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Test for Determining Prejudice. -

When an objectionable opinion statement purportedly has been made and possibly violates this section, that remark, standing by itself, may not necessarily constitute reversible error. To establish reversible error, courts must consider the remark in the light of the circumstances under which it was made. State v. Rhodes, 28 N.C. App. 432, 221 S.E.2d 730 (1976).

Showing that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred is insufficient to show prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

C. Illustrative Cases.

- 1. Remarks Held Not Erroneous.
- a. Remarks concerning a Party to the Trial.

Trial judge's admonition to defense counsel to refer to his client as defendant, or by his full name rather than by his first name, was made in order to preserve the trial judge's conception of dignity and decorum in the courtroom, and did not constitute an opinion or partiality toward

either defendant or the State. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

b. Remarks concerning Witnesses.

Judge's cautionary remark to a witness to prevent his implicating defendant in other crimes was appropriate and in no way amounted to an expression of opinion on the evidence. State v. Roberts, 28 N.C. App. 194, 220 S.E.2d 627 (1975).

c. Remarks concerning Weight and Credibility of Testimony.

Use of Word "His" to Refer to All Witnesses. — In a prosecution for kidnapping, where the trial judge charged the jury to scrutinize the testimony of interested witnesses, and the trial judge used the personal pronoun "his" to refer to the testimony of such witnesses, the charge does not constitute an expression of opinion upon the credibility of defendant in violation of this section since the admonition to scrutinize included not only the defendant but also the testimony "of any witness" whether male or female. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

d. Miscellaneous Remarks.

Reference to Deceased as Common-Law Husband. — In a prosecution for first-degree murder, the trial judge's characterization of deceased as the common-law husband of the defendant in his charge to the jury was harmless error. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

In a prosecution for kidnapping, use of the word "rape" by the judge in a charge to the jury did not indicate an expression on the judge's part that such fact had been established where, in addition to the full and adequate curative instruction regarding the use of the word "rape," the jury was instructed elsewhere in the charge that "what the evidence does actually show is a question of fact for the jury's determination." Therefore, the charge when considered as a whole is free from prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

Instructions Must Be Sufficiently

New trial must result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Charge Must Be Considered, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, cert. denied, 288 N.C. 733, 220 S.E.2d 352 (1975).

In accord with 4th paragraph in 1975 Cum. Supp. See State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, cert. denied, 288 N.C. 733, 220 S.E.2d 352 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

Isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

On appeal, a charge to a jury must be read and considered in its entirety. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by this section. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Inconsistent or Contradictory Instruc-

It must be assumed on appeal of two conflicting instructions to the jury that the jury was influenced by that portion of the charge which is incorrect. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Erroneous Instruction Not Cured, etc. -

Where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part, particularly when the incorrect portion of the charge is the application of the law to the facts. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

When the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Requests for Instructions, etc. -

It is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction, otherwise they are deemed to have been waived and will not be considered on appeal. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

The law requires that any alleged inaccuracies in the trial court's charge to the jury be called to the attention of the court before the jury retires in order to give the trial judge an opportunity to correct any alleged inaccuracy in his review of the evidence and statement of the

contentions of the parties. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

A party desiring further elaboration must aptly tender requests for further instructions. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

Exception Must Be Specific. -

An alleged error in the charge of the court to the jury must be specified, both as to alleged error in the charge actually given and as to an alleged failure to give an instruction required by the law. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Errors Should Be Pointed Out, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

In order for inaccuracies in the recitation of facts or contentions in jury instructions to be considered on appeal, they must be called to the attention of the trial judge in time for him to correct them at trial. Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

Any misstatements of counsel's contentions made by the trial judge to the jury must be brought to the trial judge's attention before the jury retires for deliberation so that he has an opportunity for correction. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

B. Explanation Required.

1. In General.

Explanation of Subordinate Features, etc.— In accord with 6th paragraph in 1975 Cum. Supp. See State v. Williams, 289 N.C. 439, 222 S.E.2d 242 (1976).

In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor have been considered subordinate features of the case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

2. Statement of Evidence.

In General. -

When instructions which are not based upon a state of facts presented by some reasonable view of the evidence are prejudicial to the accused, he is entitled to a new trial. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

It is sufficient for the trial judge to fairly summarize the evidence for the purpose of explaining the law applicable thereto. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976). A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

In reviewing the evidence, the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Slight inaccuracies in the statement, etc. -

Objections to minor discrepancies in the trial judge's statement of the evidence to the jury are deemed to be waived and will not be considered on appeal unless called to the attention of the court in time to afford opportunity for correction. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Recapitulation Unnecessary. —

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

The requirement of this section that the judge state the evidence is met by presentation of the principal features of the evidence relied on by the prosecution and the defense. A "verbatim recital of the evidence" is not required. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

The trial judge is not required to recapitulate the testimony of a witness in the exact words used by the witness. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

Failure to include instructions as to the purposes for which evidence was received is not ground for exception unless counsel has requested such an instruction. State v. Collins, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

Contentions of Parties. -

A judge is not required to state the contentions of the parties in his charge to the jury. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Instruction on Weight of Evidence. — That testimony is admissible does not require the judge, without a request therefor, to instruct the jury as to the weight to be given the evidence. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

3. Explanation of Law.

In General. -

This section requires that the trial judge clarify and explain the law arising on the evidence. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

It is the duty of the trial judge, not defendant's expert medical witness, to explain the law and define legal terms such as "intent."

State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975)

Informing Jurors as to Punishment. — In the absence of some compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt, and is therefore no concern of the jurors. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

In noncapital cases where the jury requests information as to punishment, the trial judge should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

C. Illustrative Cases.

Alibi. -

The trial judge is not required to instruct on legal effect of an alibi unless defendant specifically requests such instruction. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Mere denial that defendant was at the scene of the crime does not require a charge on the legal effect of an alibi, but rather, the general charge that the jury should acquit the defendant unless it is satisfied beyond a reasonable doubt that the defendant committed the crime is sufficient. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Self-Defense. -

When the State or defendant produces evidence that defendant acted in self-defense in a prosecution for first-degree murder, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, an instruction on self-defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the

murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Degrees of Crime. -

In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

Trial judge's charge to the jury in a prosecution for first-degree murder placing the burden on defendant to rebut the presumption of malice so as to reduce the charge from second-degree murder to manslaughter was not error where all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation, and the jury returned a verdict of murder in the first degree never reaching the questions raised as to instructions relating to second-degree murder and manslaughter. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

The trial court's instruction in a murder, etc. —

In a prosecution for first-degree murder, trial judge did not err in charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instruction for Jury to Deliberate Further. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where one juror, after the verdict was first returned and the jury was being polled, stated that at that time he had some doubt about defendant's mental capacity, the trial judge's instruction to the jury to deliberate further was not error, since the juror's statement was not a vote of guilty, but indicated only that the verdict was not unanimous. State v. Sellers, 29 N.C. App. 22, 222 S.E.2d 750 (1976).

Charge on "Serious Injury". — In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's

instruction to the jury that a serious injury is any physical injury that causes great pain and suffering was not error since it imposed a greater degree of injury than necessary. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720 (1976).

In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery, where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complies with the requirements of this section. State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

In a prosecution for first-degree murder, a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

"Delivery" under § 90-87. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under § 90-87. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

Vehicle Speed Misstated. — Where a witness testified that defendant's vehicle was traveling at a speed of 65 or 70 when it collided with plaintiff's vehicle, the fact that the judge also mentioned the speeds 45 to 60 miles per hour in his charges to the jury in the absence of testimony as to these speeds could not have prejudiced defendant. Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

An erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Flight from Scene of Crime. — Trial judge did not err in failing to instruct, without request, on the weight to be given evidence of flight from the scene of a crime since flight is not an element of the State's case nor is its absence a defense, but is rather a circumstance to be considered by the jury in determining a general mens rea in a criminal case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Difference between First Second-Degree Murder. - Trial judge did not err in instructing the jury that second-degree murder differs from first-degree murder in that a specific intent to kill is not an element of second-degree murder. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

§ 1-181. Requests for special instructions.

Request Imposes Duty on Court. - A request for special instructions, aptly made, tendered in writing before argument and signed by counsel, has been held to impose a duty on the court to give the instructions in substance where relevant to the case. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Words of Common Usage. — It is not error for the court to fail to define and explain words of common usage and meaning to the general public. State v. Thomas, 28 N.C. App. 495, 221

S.E.2d 749 (1976).

This section applies equally to essential elements of the crime charged as well as to other legal terms contained in the charge. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

This section does not apply where defendant fails to request specific instructions but the charge as given was clear and unambiguous. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Applied in State v. Scales, 28 N.C. App. 509, 221 S.E.2d 898 (1976).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

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

A consent judgment is the contract between the parties entered upon records with approval and sanction of the court. Redevelopment Comm'n v. Hannaford, 29 N.C. App. 1, 222 S.E.2d 752 (1976).

A consent judgment is construed as any other contract. Redevelopment Comm'n v. Hannaford, 29 N.C. App. 1, 222 S.E.2d 752 (1976).

Default judgment by the clerk is provided

for by Rule 55(b) (1), is subject to the jurisdictional proofs required by § 1-75.11 and is still controlled by subdivision (4) of the present section, which empowers the clerk to enter all judgments by default and default and inquiry as are authorized by Rule 55. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

ARTICLE 26.

Declaratory Judgments.

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

In General. -

The Declaratory Judgment Act may be utilized to alleviate uncertainty and clarify litigation. Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75 (1976).

Construction of Insurance Contracts. — The Declaratory Judgment Act, not applicable to claims under the Workmen's Compensation Act,

is applicable to construction of insurance contracts and in determining the extent of coverage when there is controversy as to whether workmen's compensation or the insurance covers. Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75 (1976).

Cited in Houck v. Stephens, 26 N.C. App. 608, 216 S.E.2d 490 (1975).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-269. Certiorari, recordari, and supersedeas.

II. CERTIORARI.

B. General Consideration.

Stated in Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

§ 1-271. Who may appeal.

And Only the "Aggrieved" May Appeal. — In accord with 1st paragraph in original. See Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975).

In accord with 3rd paragraph in original. See Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975).

Appeal can be taken only by the aggrieved

real party in interest. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

"Party Aggrieved" Defined. -

In accord with 4th paragraph in original. See State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

In accord with 5th paragraph in original. See

State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

One may be aggrieved within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

An administrative agency cannot be a person aggrieved by its own order, but it may be an aggrieved party to secure judicial review of a decision of an administrative agency. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

§ 1-272. Appeal from clerk to judge.

Under a strict construction of this section and § 1-273 as they affect § 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of \$7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

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

Under a strict construction of this section and § 1-272 as they affect § 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of \$ 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

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

Quoted in In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

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

II. APPEAL IN GENERAL.

A. General Consideration.

Reason for This Section. — See Pruitt Williams, 288 N.C. 368, 218 S.E.2d 348 (1975)

Applied in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975); Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

Cited in Sink v. Easter, 288 N.C. 183, 217

S.E.2d 532 (1975).

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

Interlocutory Orders. -

This section serves as a roadblock to appeals from interlocutory orders which do not deprive the appellant of a substantial right. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

C. What Supreme Court Will Consider.

When Appeal from Interlocutory, etc. -Appeal from an interlocutory order may be considered by appellate courts if a substantial right of the appellant would be affected adversely by continuing the effectiveness of the injunction pending trial on the merits. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

III. APPEAL AS TO PAR-TICULAR SUBJECTS.

G. Appeals as to Miscellaneous Subjects.

Joinder and restraining orders are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

The addition of parties where they are not necessary is a matter within the trial court's

discretion, and the judge's order refusing to join additional parties is not ordinarily reviewable. Henredon Furn. Indus., Inc. v. Southern Ry., 27 N.C. App. 331, 219 S.E.2d 238 (1975).

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

Applied in State v. Harold, 27 N.C. App. 588, 219 S.E.2d 528 (1975); Clark v. Wallace, 27 N.C. App. 589, 219 S.E.2d 501 (1975).

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

Stated in Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

SUBCHAPTER X. EXECUTION.

ARTICLE 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.3. Application of Article to sale ordered by clerk; by judge; authority to fix procedural details.

Refusal to File Order of Confirmation. — The clerk is not authorized under this section or any other statute to refuse to file and maintain in her records a valid order of confirmation. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.14. Public sale; judge's approval of clerk's order of sale.

The court in exercising its sound discretion may reject the bid at any time before confirmation. In re Green, 27 N.C. App. 555, 219

S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

§ 1-339.25. Public sale; upset bid on real property; compliance bond.

After the time provided by this section for the placing of an upset bid has expired and after the order of confirmation has been signed by the clerk and approved by a superior court judge, the clerk has no authority to accept an upset bid, and in the absence of findings of fraud, mistake or collusion, a superior court judge has no authority to set aside the order of confirmation and to order a resale of the property. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

§ 1-339.28. Public sale: confirmation of sale.

Before confirmation, the prospective purchaser has no vested interest in the property. His bid is but an offer subject to the approval of the court. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Upon confirmation the sale becomes final and the vested interest of the purchaser is not lightly to be put aside. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

After confirmation of a judicial sale, the purchaser becomes the equitable owner of the property, and the sale may then be set aside only for mistake, fraud or collusion. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

The court in exercising its sound discretion may reject the bid at any time before confirmation. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

ARTICLE 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.

The execution sale authorized by § 105-375 is analogous to an execution sale conducted under the authority of this section. Henderson

County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Part 2. Procedure for Sale.

§ 1-339.54. Notice to judgment debtor of sale of real property.

Effect of Noncompliance. —
Notice requirement for execution sales is directory only, and failure to comply with the notice requirement prior to an execution sale does not render the sale invalid or void with

respect to an innocent purchaser who lacks knowledge of the irregularity. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

ARTICLE 31.

Supplemental Proceedings.

§ 1-363. Receiver appointed.

Verified pleadings essentially operate as affidavits under this section and should be construed accordingly. Doxol Gas of Angier, Inc.

v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.3. Grounds for attachment.

Applied in Northside Properties, Inc. v. Ko-Ko **Mart**, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

§ 1-440.5. By whom order issued; when and where; filing of bond and affidavit.

Issuance of attachment by clerk, etc. -The issuance of the attachment order by the clerk is consistent with due process since the clerk is a judicial officer and not a mere administrative functionary. Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Part 2. Procedure to Secure Attachment.

§ 1-440.11. Affidavit for attachment: amendment.

I. IN GENERAL.

Applied in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

Applied in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

§ 1-440.39. Discharge of attachment upon giving bond.

Applied in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

ARTICLE 37.

Injunction.

§ 1-485. When preliminary injunction issued.

III. GROUNDS OF RELIEF.

C. Application of Section.

When Temporary Injunction Granted. -

In accord with original. See Waff Bros. v. Bank of N.C., N.A., 289 N.C. 198, 221 S.E.2d 273 (1976).

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.

court erred in ordering a temporary restraining order vacated prior to a hearing of the matter

In determining on appeal whether the lower on the merits, the Supreme Court is not bound by the findings of fact, or lack of such findings, by the lower court, but may review the evidence and make its own findings of fact. Waff Bros. v. Bank of N.C., N.A., 289 N.C. 198, 221 S.E.2d 273 (1976).

Matters to Be Considered Upon Final Hearing. — Upon the final hearing on the merits of a complaint seeking a temporary restraining order, neither the Supreme Court's findings of fact upon appeal of an order vacating a temporary restraining order nor the findings or

conclusions of the Court of Appeals, or of the trial judge at the hearing upon the order to show cause why the restraining order should not be continued, are to be considered by the superior court. Waff Bros. v. Bank of N.C., N.A., 289 N.C. 198, 221 S.E.2d 273 (1976).

Cited in Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-502. In what cases appointed.

Discretion of Court. -

The granting or refusing an order for the appointment of a receiver is not a mere matter of discretion in the judge, and either party dissatisfied with his ruling may have it reviewed.

Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

Applied in Stegall Milling Co. v. Hettiger, 27 N.C. App. 76, 217 S.E.2d 767 (1975).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 43.

Nuisance and Other Wrongs.

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

Cited in Brandenburg Land Co. v. White, 26 N.C. App. 548, 216 S.E.2d 912 (1975).

ARTICLE 43C.

Actions Pertaining to Cities.

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

Notice Sufficient. — Notice of a claim filed with a responsible official of a city, such as the city manager or the city attorney, or other

designee of the council, is sufficient. Miller v. City of Charlotte, 288 N.C. 475, 219 S.E.2d 62 (1975).

Chapter 1A.

Rules of Civil Procedure.

Sec.

1A-1. Rules of Civil Procedure.

Article 3.

Pleadings and Motions.

Rule

8. General rules of pleadings.

§ 1A-1. Rules of Civil Procedure.

ARTICLE 2.

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

Rule 3. Commencement of action.

A civil action is no longer commenced only by issuance of summons but by filing a complaint with the court. McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976). Cited in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Rule 4. Process.

Fifteen-year-old boy as "person of suitable age and discretion" within section (j)(1)a of this rule. See Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975).

Dwelling House or Usual Place of Abode. — It is unrealistic to interpret section (j)(1)a of this rule so that the person to be served only has one dwelling house or usual place of abode at which process may be left. Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975).

Showing Required under Section (j)(9). — Section (j)(9)c of this rule does not require a showing both that the whereabouts of the party to be served cannot with due diligence be ascertained and that there has been a diligent but unsuccessful attempt to serve him under one of the preceding subparagraphs of subsection (9) under which a sumons would necessarily have been issued. McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976).

Issuance of a summons is not essential to validity of service of process by publication made pursuant to section (j)(9)c upon a party to a civil action whose address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained. McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976).

The long-arm manner of personal service under section (j)(9)b may be made in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in § 1-75.4. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Applied in William R. Andrews Associates v. Sodibar Sys. of D.C., Inc., 28 N.C. App. 663, 222 S.E.2d 922 (1976).

Cited in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

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

Where motion for alimony did not specify a date for a hearing, but was served, by depositing it in the mail, properly addressed to defendant's attorney, at least five days before

an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Rule 6. Time.

A Party Entitled to Notice, etc. -

In accord with 1975 Cum. Supp. See Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975); Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975).

And ordinarily does this, etc. -

In accord with 1975 Cum. Supp. See Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975).

Defendant does not have an absolute right to the notice requirement of this rule. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Where motion for alimony did not specify a date for a hearing, but was served, by depositing it in the mail, properly addressed to defendant's attorney, at least five days before an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Applied in Fitch v. Fitch, 26 N.C. App. 570, 216

S.E.2d 734 (1975).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed: form of motions.

The word "application" as used in section (b)(1) of this rule and in subsections (b) and (d) of § 50-16.8 has reference to the same kind of procedure. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

"Counterclaim Denominated as Such". This rule, in providing that a reply must be filed "to a counterclaim denominated as such,"

implies there will be counterclaims not so denominated. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

Rule 8. General rules of pleadings.

(a) Claims for relief. — A pleading which sets forth a claim for relief, whether

an original claim, counterclaim, crossclaim, or third-party claim, shall contain
(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing

that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. Provided, however, in all professional malpractice actions, including actions against health care providers, wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000): Provided that at any time after service of claim for relief, any party may make request of claimant for written statement of the amount of monetary relief sought, and claimant shall, within 10 days after service of such request, serve said statement upon the requesting party, provided that said statement shall not be filed with the court until the action has been called for trial or until entry of default is requested. Provided, any statement of "the amount of monetary relief sought" which is served

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on an opposing party may be amended in the manner and at the time provided by G.S. 1A-1, Rule 15. (1975, 2nd Sess., c. 977, s. 5.)

Editor's Note. -

The 1975, 2nd Sess., amendment, effective July 1, 1976, added the three provisos to

subdivision (2) of section (a).

Session Laws 1975, 2nd Sess., c. 977, s. 7, contains a severability clause. Session Laws 1977, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

As the rest of the rule was not changed by the

amendment, only section (a) is set out.

Vague and conclusory pleading is not encouraged or commended. Smith v. State, 289

N.C. 303, 222 S.E.2d 412 (1976).

Provisions relating to procedure for divorce are liberally construed to insure the consideration of divorce cases on their merits. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Rule 9. Pleading special matters.

Cited in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Rule 10. Form of pleadings.

Pleading Treated as Counterclaim. — Defendant's failure to allege affirmatively facts within his pleading does not preclude the pleading from being treated as a counterclaim where the answer begins, "the defendant . . . alleges and says:" and then admits the allegations of the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Usury is an affirmative defense and must be pleaded. Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975).

When not raised by the pleading the issue of usury may still be tried if raised by the express or implied consent of the parties at trial. Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975).

Answer Treated as Counterclaim. — In a suit for absolute divorce where defendant admits the allegations of the complaint and prays for an absolute divorce on the same grounds, the fact that defendant's pleading is labelled an "answer" does not preclude its being treated also as a counterclaim. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

To require defendant who solemnly admits the truth of the allegations of the complaint upon which he then bases his prayer for relief to repeat them in his own pleading as a prerequisite to treating his pleading as a counterclaim seeking affirmative relief would be a triumph of form over substance. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Rule 11. Signing and verification of pleadings.

Insufficient Basis to Impeach Verification.
— See Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976).

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

Pleadings are to be liberally construed. Benton v. W.H. Weaver Constr. Co., 28 N.C.

App. 91, 220 S.E.2d 417 (1975).

Ordinarily no appeal lies from a denial of a

motion to dismiss. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Trial court is required to make findings of fact and conclusions of law on a motion to dismiss only when required by statute or requested by a party. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Allegations Treated as True. — For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976).

A suit against the State for breach of contract may not be dismissed under section (b) of this rule on the ground of sovereign immunity, where the State, through its authorized officers or agencies, has entered into a valid contract and thereby consented to be sued for damages on the contract in the event it breaches the contract. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Motion for Judgment on Pleadings Treated as Summary Judgment Motion.—A motion for judgment on the pleadings is inappropriate where the complaint is not fatally defective and matters outside the pleadings are presented to and considered by the court; under such circumstances the motion for judgment on the pleadings must be treated as a motion for summary judgment. Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975).

Sufficiency of Complaint. —
Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement. Benton v. W.H. Weaver Constr. Co., 28 N.C. App. 91, 220 S.E.2d 417 (1975).

The court's concern in analyzing a complaint

in terms of a motion under section (b)(6) of this rule is not whether the complaint states a claim upon which relief can be granted on the alleged theory of breach of contract, but rather whether the complaint when liberally construed states a claim for plaintiff in the case against defendant upon which relief can be granted on any theory. Benton v. W.H. Weaver Constr. Co., 28 N.C. App. 91, 220 S.E.2d 417 (1975).

Judgment on the pleadings, etc. -

The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. Cline v. Seagle, 27 N.C.

App. 200, 218 S.E.2d 480 (1975).

Applied in Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp., 27 N.C. App. 403, 219 S.E.2d 242 (1975); Grissom v. North Carolina Dep't of Revenue, 28 N.C. App. 277, 220 S.E.2d 872 (1976); Gibson v. Campbell, 28 N.C. App. 653, 222 S.E.2d 449 (1976); William R. Andrews Associates v. Sodibar Sys. of D.C., Inc., 28 N.C. App. 663, 222 S.E.2d 922 (1976); Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

Cited in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975); North Carolina Nat'l Bank v. Wallens, 26 N.C. App. 580, 217 S.E.2d 12 (1975); Newton v. Standard Fire Ins. Co., 27 N.C. App. 168, 218 S.E.2d 231 (1975); Mozingo v. North Carolina Nat'l Bank, 27 N.C. App. 196, 218 S.E.2d 506 (1975); Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975).

Rule 13. Counterclaim and crossclaim.

Answer Treated as Counterclaim. — In a suit for absolute divorce where defendant admits the allegations of the complaint and prays for an absolute divorce on the same grounds, the fact that defendant's pleading is labelled an

"answer" does not preclude its being treated also as a counterclaim. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Rule 15. Amended and supplemental pleadings.

The rules achieve their purpose, etc. -

The Rules of Civil Procedure achieve their purpose of assuring a speedy trial by providing for and encouraging liberal amendments to the pleadings under this rule. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

The pleadings are regarded as amended,

When not raised by the pleading the issue of usury may still be tried if raised by the express or implied consent of the parties at trial. Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975).

Rule Applies to Motions. — The philosophy of this rule should apply not only to pleadings

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but also to motions where there is no material prejudice to the opposing party. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

Notice of Motion to Add Defendant. — If an order allowing amendment and adding a party defendant is void for lack of notice to the original defendant, it is void for all purposes. Pask v.

Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975). Applied in Johnson v. Northwestern Bank, 27 N.C. App. 240, 218 S.E.2d 722 (1975); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Cited in McCarley v. McCarley, 289 N.C. 109,

221 S.E.2d 490 (1976).

ARTICLE 4.

Parties.

Rule 21. Procedure upon misjoinder and nonjoinder.

Notice to Bring in Additional Party. — Long prior to the adoption of this rule, North Carolina has held that existing parties to a lawsuit are entitled to notice of a motion to bring in additional parties. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

If an order allowing amendment and adding a party defendant is void for lack of notice to the

original defendant, it is void for all purposes. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

The original defendant is entitled to notice of a motion to bring in a new party defendant. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

Applied in Peterson v. Johnson, 28 N.C. App. 527, 221 S.E.2d 920 (1976).

Rule 30. Depositions upon oral examination.

Applied in Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

Cited in Willis v. Duke Power Co., 26 N.C. App. 598, 216 S.E.2d 732 (1975).

Rule 33. Interrogatories to parties.

Cited in Willis v. Duke Power Co., 26 N.C. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 App. 598, 216 S.E.2d 732 (1975); Reavis v. (1975).

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

Cited in Willis v. Duke Power Co., 26 N.C. App. 598, 216 S.E.2d 732 (1975).

Rule 36. Requests for admission; effect of admission.

Applied in Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975).

Cited in Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

Oral Request. — Where the parties did not demand a jury trial in the manner provided by this rule, but all parties did orally request trial by jury, and the clerk noted the request in her order transferring the cause to the civil issue docket of the superior court, the purpose of this

rule was accomplished. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Applied in Whitaker v. Earnhardt, 26 N.C. App. 736, 217 S.E.2d 125 (1975).

Rule 39. Trial by jury or by the court.

Applied in Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Rule 40. Assignment of cases for trial; continuances.

Continuances are addressed, etc. -

A motion for continuance is addressed to the sound discretion of the trial judge. State v. Courson, 27 N.C. App. 268, 218 S.E.2d 416, cert. denied, 288 N.C. 732, 220 S.E.2d 352 (1975).

Granting a motion for a continuance is within the discretion of the trial court. State v. Edwards, 27 N.C. App. 369, 219 S.E.2d 249 (1975).

This rule makes no attempt to enumerate the myriad circumstances which might be urged as grounds for a continuance, but leaves it to the judge to determine, in each case, whether "good cause" for a continuance has been shown. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976)

A motion to continue is addressed to the sound discretion of the trial judge, who should determine it as the rights of the parties require under the circumstances. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Discretion of the trial judge in ruling on a motion for a continuance is not unlimited, and must not be exercised absolutely, arbitrarily or capriciously, but only in accordance with fixed legal principles. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Since motions for continuance are generally addressed to the sound discretion of the trial court, a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

And ruling thereon is, etc. -

In accord with 1975 Cum. Supp. See State v. Courson, 27 N.C. App. 268, 218 S.E.2d 416, cert. denied, 288 N.C. 732, 220 S.E.2d 352 (1975). State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975); State v. Edwards, 27 N.C. App. 369, 219 S.E.2d 249 (1975).

Continuances are not favored. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Withdrawal of Attorney. — Respondents were prima facie entitled to a continuance where respondents' affidavit and statements in open court that their attorney had withdrawn from the case on the day of the trial without warning were uncontroverted by the record. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

An attorney's withdrawal on the eve of the trial of a civil case is not ipso facto grounds for a continuance. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

The decision whether to grant a continuance

because the moving party's attorney has withdrawn from the case on the day of trial rests in the trial judge's discretion, to be exercised after he has determined from the facts and circumstances of the particular case whether immediate trial or continuance will best serve the ends of justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Factors to Be Considered. — The chief consideration to be weighed in passing upon the application for a continuance is whether the grant or denial of a continuance will be in furtherance of substantial justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

In passing on a motion for continuance the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

In reaching its conclusion on a motion for a continuance the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

In ruling on a motion for a continuance the trial court may take into consideration facts within its judicial knowledge. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

The motion for a continuance should be granted where nothing in the record controverts a sufficient showing made by the moving party. Shankle v. Shankle, 289 N.C. 473, 223 S.E. 2d 380 (1976).

Party seeking continuance has burden of showing sufficient grounds for it. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Rule 41. Dismissal of actions.

Motion for Nonsuit Replaced, etc. -

In a civil action tried without a jury, the former motion for nonsuit has been replaced by the motion for dismissal. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Motion to dismiss differs from the former motion for judgment as for nonsuit in that the lodging of a motion to dismiss under section (b) of this rule permits the trial judge to weigh the evidence, find facts against plaintiff and sustain defendant's motion at the conclusion of plaintiff's evidence even though plaintiff mould have repelled the motion for nonsuit under the former practice. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Common-Law Rule Changed. -

This rule had the effect of changing former practice only to the extent that the plaintiff desiring to take a voluntary nonsuit, now a voluntary dismissal, must now act before he rests his case, whereas under former practice he could do so at any time before the verdict. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Effect of 1969 amendment of, etc. -

Case cited under this catchline in 1975 Cumulative Supplement was affirmed in part and reversed in part in 289 N.C. 109, 221 S.E.2d 490 (1976).

Subsection (a)(1), as first enacted, etc. — Case cited under this catchline in 1975 Cumulative Supplement was affirmed in part and reversed in part in 289 N.C. 109, 221 S.E.2d 490 (1976).

Plaintiff May Not Dismiss, etc. —

Case cited under this catchline in 1975 Cumulative Supplement was affirmed in part and reversed in part in 289 N.C. 109, 221 S.E.2d 490 (1976).

Function of Judge on Motion, etc. -

The trial judge's evaluation of the evidence pursuant to a motion to dismiss is to be made free of any limitations as to the inferences which a court must indulge in favor of plaintiff's evidence on a motion for a directed verdict. Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

Except in the clearest cases, it is the better practice in the case of a motion to dismiss for the trial judge to decline to render judgment until all the evidence is in. Whitaker v. Earnhardt, 289

N.C. 260, 221 S.E.2d 316 (1976).

Upon defendant's demand for affirmative relief defendant's right to have his claim adjudicated in the case "has supervened," and plaintiff thereby loses the right to withdraw (without defendant's consent) allegations upon which defendant's claim is based. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Where the complaint in a suit for an absolute divorce alleged facts entitling either or both of the parties to the marriage to an absolute divorce, defendant's answer admitting these allegations together with his prayer for an absolute divorce on the same grounds was, in

effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Applied in Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740 (1975); Roger Staley, Inc. v. Waco Realty Co., 27 N.C. App. 541, 219 S.E.2d 654 (1975); Baltzley v. Wiseman, 28 N.C. App. 678,

222 S.E.2d 733 (1976).

Rule 43. Evidence.

Applied in Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

Rule 45. Subpoena.

Applied in State v. Neely, 26 N.C. App. 707, 217 S.E.2d 94 (1975).

Rule 49. Verdicts.

Before a verdict is complete it must be accepted by the court. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

The trial judge may vacate the answer to a particular issue when to do so does not affect or alter the import of the answers to the other issues. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

Waiver of Right to Submit Issue. -

The right to have an issue of fact determined by the jury is waived unless a party demands its submission before the jury retires. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Where the jury's findings are indefinite or inconsistent, the presiding judge may give additional instructions and direct the jury to retire again and bring in a proper verdict, but he may not tell them what their verdict shall be. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

In an action to recover on a written contract of guaranty where the trial judge noted inconsistency in the jury's answers to the third and fourth issues, which related only to the

Cited in Marriott Fin. Servs., Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975); Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975); Hall v. GMC, 27 N.C. App. 202, 218 S.E.2d 721 (1975).

amount of damages, it was within the court's sound discretion to either resubmit all issues or resubmit only on issues as to damages. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

It is the duty of the presiding judge, before accepting a verdict, to scrutinize its form and substance to prevent insufficient or inconsistent findings from becoming a record of the court. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

Finding in Accord with the Judgment Entered. — Where an alleged usage of trade was not in writing, the question of its existence was not submitted to the jury as an issue of fact, and plaintiff made no demand for its submission before the jury retired, and since the trial judge himself made no finding on the issue, he was "deemed to have made a finding in accord with the judgment entered." Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

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

Discretion of Trial Court. — A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

Motion for judgment n.o.v. is inappropriate when addressed to the trier of fact, since it must be preceded by a motion for a directed verdict, which is improper in nonjury trials. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Discrepancies and contradictions in the evidence, etc. —

Contradictions or discrepancies in the evidence on a motion for a directed verdict even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

Directed verdicts are appropriate only, etc. —

A motion for a directed verdict is appropriate in cases tried by jury. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Trial Judge Must Consider, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975).

When a defendant moves for a directed verdict pursuant to section (a) of this rule, the trial judge must take plaintiff's evidence to be true, consider all the evidence in the light most favorable to plaintiff and give him the benefit of every reasonable inference which may be legitimately drawn therefrom. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

Directed Verdict When Plaintiff's Evidence,

Directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

Appropriate Motion for Directed Verdict Is

Prerequisite, etc. -

Motion for judgment n.o.v. must be preceded by a motion for a directed verdict. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

No Review Unless Abuse Shown. — The trial court's ruling on a motion to set aside the verdict as being contrary to the weight of the evidence will not be reviewed in the absence of a showing of abuse. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

Applied in Hoffman v. Clement Bros. Co., 27 N.C. App. 548, 219 S.E.2d 638 (1975); Foster v. Shearin, 28 N.C. App. 51, 220 S.E.2d 179 (1975); Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976); Bynum v. North Carolina Blue Cross & Blue Shield, Inc., 28 N.C. App. 515, 222 S.E.2d 263 (1976); Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

Cited in Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); Helton v. Cook, 27 N.C. App.

565, 219 S.E.2d 505 (1975).

Rule 51. Instructions to jury.

This rule requires, etc. -

In accord with 1975 Cum. Supp. See Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975).

Thus, section (a) of this rule, etc. —

In accord with 2nd paragraph in 1975 Cum. Supp. See Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975).

Judge Must Declare and Explain, etc. -

When charging the jury in a civil action the trial judge shall declare and explain the law arising on the evidence. He must relate and apply the law to variant factual situations presented by some reasonable view of the evidence. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

By alleging the existence of a pertinent city ordinance, introducing it in evidence and presenting testimony tending to show its violation by defendants, plaintiffs made the ordinance a substantial feature of the case, thereby imposing on the trial judge a positive duty to give appropriate jury instructions with respect to the ordinance. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Facts Not Supported by Evidence. — An instruction relating to a factual situation not properly supported by the evidence is erroneous. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Emphasizing Evidence of One Side. — The trial judge in an armed robbery case erred in emphasizing the State's evidence and

minimizing defendant's evidence where he gave a complete recitation of the testimony of the State's witnesses but referred to the testimony of defendant and his six witnesses only by stating that defendant contended he was elsewhere at the time of the robbery. State v. Foster, 27 N.C. App. 409, 219 S.E.2d 265 (1975).

Remarks Discrediting Counsel. — Remarks by the trial judge whose effect was to threaten to find defendants' counsel in contempt of court tended to discredit defendants' counsel, and hence their cause, in the eyes of the jury in violation of section (a) of this rule. Board of Transp. v. Wilder, 28 N.C. App. 105, 220 S.E.2d 183 (1975).

Use of Exact Words Formulated by Litigant.

— A litigant is not entitled to have the trial judge instruct the jury in the exact words formulated by the litigant, it being sufficient if the pertinent and applicable instructions requested are given substantially in the charge. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

Rule 52. Findings by the court.

The Judge Who Tries, etc. -

In accord with 2nd paragraph in original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

There are two kinds of facts, etc. -

In accord with original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

Ultimate facts are the final facts, etc. — In accord with original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

Evidentiary facts are those, etc. -

In accord with original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

The trial judge is required to find, etc. — In accord with 1st paragraph in original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

Separate Conclusions, etc. -

In accord with 4th paragraph in original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

Failure to Except. -

Failure to except to the findings of the trial judge does not necessarily preclude appellate review on the question of whether the evidence supported the findings of fact, but appellant must assign error so as to outline his objections on appeal. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Difference between this rule, etc. -

Section (c) of this rule is nearly identical to the federal Rule 52(b) and the court may therefore turn to the federal courts' interpretation of that

Failure of trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Instructions on elements of damages are not proper if the evidence does not reveal a basis for such an award. Spears v. Service Distrib. Co., 27 N.C. App. 646, 219 S.E.2d 817 (1975).

Applied in Swaney v. Shaw, 27 N.C. App. 631, 219 S.E.2d 803 (1975); Lee v. Kellenberger, 28 N.C. App. 56, 220 S.E.2d 140 (1975); Berube v. Mobile Homes Sales & Serv., 28 N.C. App. 160, 220 S.E.2d 636 (1975).

rule for guidance. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Findings of Fact and Conclusions of Law, etc. —

Where the judge tries a case without a jury, it is his duty to find the facts specially and state separately his conclusions of law and thereby resolve all controversies between the parties raised by the pleadings and the evidence. Heating & Air Conditioning Associates v. Myerly, 29 N.C. App. 85, 223 S.E.2d 545 (1976).

Judge's Findings of Fact, etc. -

The trial court's findings of fact are conclusive if they are supported by competent evidence, even though there may be evidence to the contrary. Heating & Air Conditioning Associates v. Myerly, 29 N.C. App. 85, 223 S.E.2d 545 (1976).

When the trial judge sits as the trier of facts, his judgment will not be disturbed on the theory that the evidence did not support his findings of fact if there be any evidence to support the judgment. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

But Sufficiency of Evidence, etc. -

Notice of appeal and exception to the entry of a judgment after denial of motions for dismissal and judgment presents the face of the record for review including the question of whether the facts found support the judgment and whether the judgment is regular in form. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Motion to Dismiss. — The trial court is required to make findings of fact and

conclusions of law on a motion of dismiss only when required by statute or requested by a party. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment.

Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Applied in Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975); Whitaker v. Earnhardt, 26 N.C. App. 736, 217 S.E.2d 125 (1975); Traber v. Crawford, 28 N.C. App. 694, 222 S.E.2d 713 (1976).

Rule 53. Referees.

Right to Jury Trial. -

Defendants did not waive their right to jury trial on the issue of determining the location of the true boundary line between the lands of the parties by failing to make exceptions to specified findings of fact by the referee where exceptions which defendant did make were sufficient to give plaintiff notice and to present the issue in dispute to the court. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

One of the purposes of this rule is to minimize fragmentary appeals. Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

Definition of Final Judgment. -

In accord with 2nd paragraph in 1975 Cum. Supp. See Newton v. Standard Fire Ins. Co., 27 N.C. App. 168, 218 S.E.2d 231 (1975).

Definition of Interlocutory Order. —

In accord with 2nd paragraph in 1975 Cum. Supp. See Newton v. Standard Fire Ins. Co., 27 N.C. App. 168, 218 S.E.2d 231 (1975).

An appeal is subject to dismissal when the judgment from which the appeal is taken purportedly "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" and the trial court does not find there was "no just reason for delay." Equitable Leasing Corp. v. Kingsmen Prods., Inc., 27 N.C. App. 661, 220 S.E.2d 95 (1975).

Attempted appeal from an order dismissing fewer than all of plaintiffs' claims is premature where the trial court did not find that there is no just reason for delay. Mozingo v. North Carolina Nat'l Bank, 27 N.C. App. 196, 218

S.E.2d 506 (1975).

The joinder and restraining orders are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is

not immediately perfected. Guy v. Guy, 27 N.C.

App. 343, 219 S.E.2d 291 (1975).

Summary judgment dismissing the action as to two defendants adjudicated the rights and liabilities of fewer than all the parties contained no determination by the trial judge that there was no just reason for delay, and therefore was not a final judgment and not appealable. Beach & Adams Bldrs., Inc. v. Felton, 27 N.C. App. 334, 219 S.E. 2d 287 (1975).

The provision "shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes," not included in the federal rules, may give a court, by certiorari or otherwise, limited power to allow appellant review of an interlocutory order under this rule, but in view of all of the provisions of the rule, including the right of the trial court to revise the order or judgment at any time before final adjudication, this provision should be strictly construed; and discretionary authority thereunder, if any, should be exercised sparingly in extraordinary circumstances to avoid a harsh result. Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

Applied in Oestreicher v. American Nat'l Stores, Inc., 27 N.C. App. 330, 219 S.E.2d 303 (1975); Hall v. Hall, 28 N.C. App. 217, 220 S.E.2d 158 (1975); North Carolina Nat'l Bank v.

Gillespie, 28 N.C. App. 237, 220 S.E.2d 862 (1976); Beck v. Beck, 28 N.C. App. 488, 221 S.E.2d 763 (1976).

Cited in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Rule 55. Default.

An entry is only an, etc. -

In accord with 1975 Cum. Supp. See Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975).

This rule does not provide for judgments by "default and inquiry" per se and in any event the rule authorizes the clerk to enter only those judgments which would have been designated formerly as "default final." Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

The entry of default and entry of default judgment by the clerk may be simultaneous and can be contained in the same document. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

What Constitutes Appearance. — Negotiations between parties after institution of an action may constitute an appearance. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

A party may appear without pleading. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

Section (b)(1) Subject to \$\$ 1-75.11 and 1-209(4). — Default judgment by the clerk is provided for by section (b)(1) of this rule, is subject to the jurisdictional proofs required by \$ 1-75.11 and is still controlled by \$ 1-209(4) which empowers the clerk to enter all judgments by default final and default and inquiry as are authorized by this rule. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

Cited in Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Rule 56. Summary judgment.

Rule 56 and its federal counterpart, etc. — In accord with 1st paragraph in 1975 Cum. Supp. See Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

In accord with 3rd paragraph in 1975 Cum. Supp. See Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Summary judgment is a drastic remedy.— In accord with 1975 Cum. Supp. See Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Rule Must Be Used Cautiously. — Summary judgment is a drastic remedy, one to be approached with caution. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Summary judgments should be looked upon, etc. —

The court should never resolve an issue of fact, but summary judgments should be looked upon with favor where no genuine issue of material fact is presented. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The purpose of the summary judgment, etc. —

The rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

The purpose of this rule is to prevent unnecessary trials when there are no genuine issues of fact and to identify and separate such issues if they are present. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The rule is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

The purpose of this rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleadings as means to delay the recovery of just demands. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The obvious purpose of summary judgment is to save time and expense in cases where there is no "genuine issue" as to any material fact. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

The purpose of the rule is not to resolve, etc. —

This rule does not authorize the court to decide an issue of fact. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

Court's Function On Motion, etc. -

In accord with 1st paragraph in 1975 Cum. Supp. See Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

In ruling on a motion for summary judgment the trial judge does not make findings of fact, which are decisions upon conflicting evidence, but he may properly list the uncontroverted material facts which are the basis of his conclusions of law and judgment. Rodgerson v. Davis, 27 N.C. App. 173, 218 S.E.2d 471, cert. denied, 288 N.C. 731, 220 S.E.2d 351 (1975).

Function of trial judge is to examine the materials, determine what facts are established and conclude whether there is a genuine issue as to any material fact and if a party is entitled to judgment as a matter of law. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Directed Verdict Test Applies, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

Functionally the motion for summary judgment and the motion for a directed verdict are closely akin to each other. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

If it is clear that a verdict would be directed for the movant on the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Where a motion for summary judgment is supported by proof which would require a directed verdict in his favor at trial, movant is entitled to summary judgment unless the opposing party comes forward to show a triable issue of material fact. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

Test Is Whether There Is Genuine Issue, etc. —

There is no requirement in this rule that the summary judgment, to be valid, must contain the ritual statement that there is no genuine issue as to any material fact. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

Under this rule summary judgment is proper where there exists no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Bogle v. Duke Power Co., 27 N.C. App. 318, 219 S.E.2d (1975).

The critical question for determination by the trial court in considering a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, establish a genuine issue as to any material fact. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

The opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Question for Court, etc. -

Once the movant establishes that there is no genuine issue of material fact the movant must further prove that he is entitled to judgment as a matter of law. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

Motion Granted Only Where, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

Case cited to last paragraph under this catchline in 1975 Cum. Supp. was reversed on other grounds in 288 N.C. 375, 218 S.E.2d 379 (1975).

The motion for summary judgment should not be granted unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Motion for summary judgment must be denied if the opposing party submits affidavits or other supporting material which casts doubts upon the existence of a material fact or upon the credibility of a material witness, or if such doubts are raised by movant's own evidentiary material. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A question of fact which is immaterial, etc. —

In accord with 1975 Cum. Supp. See Johnson v. Northwestern Bank, 27 N.C. App. 240, 218 S.E.2d 722 (1975).

The burden is on the moving party, etc.—
In accord with 1st paragraph in 1975 Cum.
Supp. See Dendy v. Watkins, 288 N.C. 447, 219
S.E.2d 214 (1975).

In accord with 2nd paragraph in 1975 Cum. Supp. See Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

Cases cited to last paragraph under this catchline in 1975 Cum. Supp. was reversed on other grounds in 288 N.C. 375, 218 S.E.2d 379 (1975).

As movant, defendant has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized, and those of the opposing party are on the whole indulgently treated." Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

The burden is on the party moving for summary judgment to show that there is no genuine issue of material fact regardless of who will have the burden of proof on the issue concerned at the trial. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

Every party moving for summary judgment has the burden of proving that it is entitled to judgment in its favor. Olney Paint Co. v. Zalewski, 29 N.C. App. 149, 223 S.E.2d 573

(1976).

For summary judgment to be appropriate for the party with the burden of persuasion he must still succeed on the strength of his own evidence even though his affidavits and supporting material are not challenged as provided by sections (e) and (f) of this rule. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. Kidd v. Early, 289 N.C. 343, 222

S.E.2d 392 (1976).

And Court Must View, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

In accord with 4th paragraph in 1975 Cum. Supp. See Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

The papers of the party moving for summary judgment are carefully scrutinized and all inferences are resolved against him. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Granting of summary judgment, etc. Motion for summary judgment should ordinarily be denied even though the opposing party makes no response, if (1) the movant's supporting evidence is self-contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge or because he has testified as to matters of opinion involving a substantial margin for honest error, (2) there are significant gaps in the movant's evidence or it is circumstantial and reasonably allows inferences inconsistent with the existence of an essential element, or (3) although all the evidentiary or historical facts are established, reasonable minds may still differ over their application to some principle such as the prudent man standard for negligence cases. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Even Unopposed Evidence, etc. -

The trial court is not required to assign credibility to a party's affidavits merely because they are uncontradicted. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Movant's uncontradicted and unimpeached proofs in support of his motion for summary judgment do not import veracity merely because they are uncontradicted by the opposing party. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Statements in Affidavits May Not Suffice, etc. —

If the movant's affidavits seem inherently incredible, if the circumstances themselves are suspect or if the need for cross-examination appears, the court is free to deny the summary judgment motion. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

If there is any question as to the credibility, etc. —

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Shearin v. National Indem. Co., 27 N.C. App. 88, 218 S.E.2d 207 (1975).

Party Opposing Properly Supported Motion, etc. —

Case cited to last paragraph under this catchline in 1975 Cum. Supp. was reversed on other grounds in 288 N.C. 375, 218 S.E.2d 379 (1975).

But Must Set Forth, etc. —

If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial and he cannot rest upon the very allegations of his complaint. Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

Evidence which may be considered, etc. -

When the motion for summary judgment comes on to be heard, the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials; and the court may also consider facts which are subject to judicial notice and any presumptions that would be available at trial. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Party opposing motion for summary judgment does not have to establish that he would prevail on the issue involved, but merely that the issue exists. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

Section (c) and Rule 52. — Under section (c) the trial judge does not sit as fact finder as is true under Rule 52. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Failure to Respond Not Fatal. — Not every failure of the opposing party to respond to a

motion for summary judgment will require the entry of summary judgment. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Where plaintiff's interest necessarily raises a question of the credibility of their testimony in support of their motion for summary judgment, and their testimony cannot, under any circumstances, be accorded credibility as a matter of law, summary judgment would be inappropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Facts Peculiarly Within Knowledge of Party. — Courts are slow to grant summary judgment when a movant presents his own affidavit concerning facts which are peculiarly within his knowledge. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Compliance with Rule. — Issues of fact with regard to a motion for summary judgment must be raised in the manner prescribed by this rule. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The summary judgment rule was not intended to deprive a party of a jury trial. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Motion Granted on Basis of Party's Own Affidavits. — Summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction and failed to utilize section (f) of this rule; and (3) when summary judgment is otherwise appropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Validity of the judgment does not depend upon the form in which the determination is made, whether express or implied, but upon the correctness of the determination. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

Genuine Issue Shown. -

On the question of whether a genuine issue of fact exists on a motion for summary judgment, where the record indicates that the defendant used reasonable means to call to the attention of the plaintiff the limitation of liability clause upon which it relied, and no controversy as to the facts with reference to this question appears upon the record, there was no error in the treatment of the limitation of liability clause as part of the contract between the parties. Gas House, Inc. v. Southern Bell Tel. & Tel. Co., 289 N.C. 175, 221 S.E.2d 499 (1976).

Genuine Issue Not Shown. -

There was no genuine issue as to any material

fact in an action under an airplane insurance policy, where defendant insurance company effectively cancelled the policy under the terms of the contract by notice to the plaintiff insured when plaintiff failed to make premium payments on time, where defendant had not waived the right of cancellation by past acceptance of late payments which conformed to the conditions of cancellation, and where tender or refund of the unearned portion of the premium payments was not a condition precedent to cancellation. Klein v. Avemco Ins. Co., 289 N.C. 63, 220 S.E.2d 595 (1975).

Summary Judgment Was Proper. — Nothing in the Constitution nor in the Supreme Court's decisions precludes summary judgment in favor of a party with the burden of persuasion when the opposing party has failed to respond to the motion in the manner required by sections (e) or (f) of this rule and no genuine issue as to any material fact arises out of movant's own evidence or the situation itself challenges credibility. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

In an action for specific performance of an option contract for sale of land, where plaintiff's affidavits and materials in support of their motion for summary judgment, if true, established that, upon tender of the deed, they were ready, willing and able to pay defendants cash for the property, there were only latent doubts as to the credibility of the affidavits, the affidavits of a disinterested bank president strongly corroborated plaintiffs' affidavits and financial statements, and defendants neither produced any contradictory affidavits, pointed to any specific grounds for impeachment, nor utilized section (f) of this rule, summary judgment against defendants decreeing specific performance was appropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Applied in Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp., 27 N.C. App. 403, 219 S.E.2d 242 (1975); Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); North Carolina Nat'l Bank v. Gillespie, 28 N.C. App. 237, 220 S.E.2d 862 (1976); United States Steel Corp. v. Lassiter, 28 N.C. App. 406, 221 S.E.2d 92 (1976); Pritchett v. Thompson, 28 N.C. App. 458, 221 S.E.2d 757 (1976); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976); Currituck Grain Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976); Gibson v. Campbell, 28 N.C. App. 653, 222 S.E.2d 449 (1976).

Cited in Overton v. Boyce, 26 N.C. App. 680, 217 S.E.2d 704 (1975); Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976).

Rule 57. Declaratory judgments.

Applied in Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75 (1976).

Rule 58. Entry of judgment.

Objectives of Rule. -

The objectives of this rule are to make the moment of entry of judgment easily identifiable and to give fair notice to all parties. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976).

Evidence of Mailing. — The clerk's notation on the judgment of the time of the mailing is prima facie evidence of the mailing and time of the mailing. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976).

Under this rule there are three requirements necessary for the entry of judgments which are not rendered in open court. First, an order for the entry of judgment must be given to the clerk by the judge. Second, the judgment must be

filed. Third, the clerk must mail notice to all parties, and entry of judgment is deemed to have been made at the time of the mailing of the notice. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976).

This rule has no application to a confession of judgment. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976).

Applied in Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

Rule 59. New trials; amendment of judgments.

Court Not Empowered, etc. -

In accord with original. See Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

A motion to set aside the verdict, etc. -

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court and refusal to grant the motion is not reviewable in the absence of abuse of discretion. State v. Gleason, 27 N.C. App. 587, 219 S.E.2d 350 (1975).

The general rule that an appeal takes a case

out of the jurisdiction of the trial court was not changed by this rule or Rule 60. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

The trial judge has discretionary power,

A motion for new trial on the grounds of inadequate damages is addressed to the discretion of the trial judge. Gwaltney v. Keaton, 29 N.C. App. 91, 223 S.E.2d 506 (1976).

Applied in Board of Transp. v. Harvey, 28 N.C. App. 327, 220 S.E.2d 815 (1976).

Rule 60. Relief from judgment or order.

I. IN GENERAL.

Federal Rule Nearly Identical. —

Section (b) of this rule is nearly identical to federal Rule 60(b). Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Authority of Courts to Correct Error, etc. — In accord with 1975 Cum. Supp. See Vandooren v. Vandooren, 27 N.C. App. 279, 218 S.E.2d 715 (1975).

Excusable Neglect, etc. -

In accord with 1st paragraph in original. See U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

It is the duty of the judge presiding at the hearing on the motion to make findings of fact and upon those facts to determine as a matter of law whether there is a showing of excusable neglect and of a meritorious defense. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

Even in situations when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless the defendant has a meritorious defense. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

Meritorious Defense, etc. -

At the hearing on the motion to set aside a judgment it is not necessary that a meritorious defense be proved, but only that a prima facie defense exists. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

Consent Judgment. -

A consent judgment cannot be changed without the consent of the parties or set aside except upon proper allegation and proof that consent was not in fact given or that, it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment. Blankenship v. Price, 27 N.C. App. 20, 217 S.E.2d 709 (1975).

No Application to Interlocutory Judgments. — Section (b) of this rule has no application to interlocutory judgments, orders or proceedings of the trial court. It only applies, by its express terms, to final judgments. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Court May Act Otherwise than "on Motion". — Although this rule says that the court is to act "on motion," it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

The results of a new physical examination was not "newly discovered evidence" which would allow reopening a judgment and granting a new trial under section (b). Grupen v. Thomasville Furn. Indus., 28 N.C. App. 119, 220 S.E.2d 201 (1975).

The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by this rule or Rule 59. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Legal Error Cannot Be Set Aside. — Section (a) does not authorize the trial court to set aside a previous ruling where the basis is a legal error. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

The trial court has inherent power to amend judgments by correcting clerical errors or supplying defects so as to make the record speak the truth. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

The correction of clerical errors is not limited to the term of court, but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

No Power to Correct Judicial Errors. — The power to correct clerical errors after the lapse

of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

The power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756

Section (b) has been described as 2 grand reservoir of equitable power to do justice in a particular case. Jim Walter Homes, Inc. v. Peartree, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

Applied in Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976).

Cited in Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976).

III. APPLICATION OF THE PRINCIPLES.

B. Neglect of Counsel.

Where Negligence, etc. -

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Where the trial court expressly found that defendant was diligent in communicating with his attorneys and providing them with information necessary to prepare answer, and that the neglect of the attorneys in failing to file answer within apt time was both excusable and was not to be imputed to defendant, these findings, coupled with the court's finding that defendant has a meritorious defense, fully support the order setting aside a judgment of default for excusable neglect. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

IV. PLEADING AND PRACTICE.

Questions Reviewable on Appeal. -

The trial judge's findings of fact are conclusive on appeal when supported by competent evidence, but, the conclusions of law made by the judge upon the facts found are reviewable on appeal. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

Discretion of Judge Not Reviewable on Appeal — Abuse of Discretionary Power. —

A motion for relief under section (b) of this

rule is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Effect of Pending Appeal. — Although section (a) of this rule specifically permits the trial court to correct clerical mistakes before the

appeal is docketed in the appellate court, and thereafter while the appeal is pending with leave of the appellate court, section (b) is silent on the question. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Rule 62. Stay of proceedings to enforce a judgment.

The granting or refusing an order for the appointment of a receiver is not a mere matter of discretion in the judge, and either party dissatisfied with his ruling may have it reviewed.

Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

Quoted in Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

Purpose of a preliminary injunction, etc. — Purpose of an interlocutory injunction is to preserve the status quo of the subject matter involved until a trial can be had on the merits. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

The decision of the trial judge to grant,

To issue or to refuse to issue an interlocutory injunction is usually a matter of discretion to be exercised by the trial court. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Burden is on plaintiffs, etc. -

In accord with 1975 Cum. Supp. See Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Grounds for Temporary Injunction. -

In accord with 2nd paragraph in 1975 Cum. Supp. See Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

There is no statute that requires, etc. — Case cited under this catchline in 1975 Cum.

Supp. was affirmed in 288 N.C. 368, 218 S.E.2d 348 (1975).

Necessity for Detailed Order. -

Reference to some other document within a temporary restraining order is not sufficient to provide a description of the act or acts enjoined or restrained. Gibson v. Cline, 28 N.C. App. 657, 222 S.E.2d 478 (1976).

Scope of Review of Injunctive Orders. —

In accord with 2nd paragraph in 1975 Cum. Supp. See Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

The issuing court, after weighing the equities, and the advantages and disadvantages to the parties, determines in its sound discretion whether an interlocutory injunction should be granted or refused. The court cannot go further and determine the final rights of the parties, which must be reserved for the final trial of the action. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Rule 68.1. Confession of judgment.

They are in derogation of common right, etc. —

A statute authorizing confession of judgment is in derogation of the common law and is to be strictly construed. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976).

Confession Is Consent Judgment.

In accord with 1975 Cum. Supp. See

Yarborough v. Yarborough, 27 N.C. App. 100, 218 S.E.2d 411 (1975).

Written Authorization Required. — There can be no entry of a confession of judgment, under this rule, without a written authorization for entry by the defendant, and defendant is therefore deemed to have notice since without a written statement by defendant authorizing its

§ 1A-1, Rule 70 GENERAL STATUTES OF NORTH CAROLINA § 1A-1, Rule 70

entry there can be no confession of judgment. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976).

Express or Implied Consent. — In order that a confession of judgment may be binding on the

plaintiff, it is essential that he, either expressly or impliedly, assent thereto. Yarborough v. Yarborough, 27 N.C. App. 100, 218 S.E.2d 411 (1975).

Rule 70. Judgment for specific acts; vesting title.

Cited in Taylor v. Johnston, 27 N.C. App. 186, 218 S.E.2d 500 (1975).

Chapter 1B. Contribution.

ARTICLE 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.

Legislative Intent. -

It is the intent of draftsmen of uniform acts that as much as possible they be given uniform interpretation among those states where they are in force. Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975).

Cited in Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976).

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

Applied in Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975).

Chapter 5.

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

I. GENERAL CONSIDERATION.

Cited in White v. White, 289 N.C. 592, 223 S.E.2d 377 (1976).

II. SUBDIVISION (1).

Subdivision (1) of this section is not unconstitutional in that it is not vague and a denial of due process. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976).

Due process safeguards must be extended to persons cited for direct contempt of court in cases where final adjudication and sentencing for the contemptuous conduct is delayed until after trial. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976).

Notice and Hearing but Not Trial Required.

— Before an attorney is finally adjudicated in

contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full scale trial is appropriate. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976).

Due Process Requirements Met. — Due process requirements of notice and opportunity to be heard on a contempt charge were adequately met where petitioner received actual notice, including the time and place, that he would be cited for contempt, and a written transcript provided formal notice of the specific actions for which petitioner was being cited. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976).

§ 5-5. Summary punishment for direct contempt.

Constitutionality. —
This section is not unconstitutional on its face

and does not violate due process of law. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976).

§ 5-8. Acts punishable as for contempt.

Purge Order Not Appealable until Punishment Imposed. — Until some punishment is imposed, order providing that defendant could purge itself of contempt by supplying certain documents is not final and

does not affect a substantial right so as to render it directly appealable. Willis v. Duke Power Co., 26 N.C. App. 598, 216 S.E.2d 732 (1975).

Applied in Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975).

§ 5-9. Trial of proceedings in contempt.

Applied in Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975).

Chapter 7A.

Judicial Department.

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

Article 7.

Organization.

Sec. 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.

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 Sec.

additional seats of court, by counties.

Article 16.

Magistrates.

7A-172. Minimum and maximum salaries.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPART-MENT.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

7A-304. Costs in criminal actions. 7A-305. Costs in civil actions.

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

ARTICLE 5.

Jurisdiction.

§ 7A-25. Original jurisdiction of the Supreme Court.

Section Unconstitutional. — Even if the General Assembly did not intend to repeal this section by ratification of the 1971 revision of N.C. Const., Art. IV, this section is unconstitutional. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

This section was rendered null and void when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. Smith v. State, 289 N.C. 303, 212 S.E.2d 412 (1976).

Legislative Intent to Repeal. — It was the intent of the General Assembly that upon the

ratification of the 1971 revision of N.C. Const., Art. IV, this section be repealed, since the jurisdiction which this section purports to give to the Supreme Court exceeded that granted to it in revised Article IV of the State Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

No Execution to Enforce Judgment Available from Supreme Court. — In the event a plaintiff is successful in establishing a claim for breach of contract against the State, he cannot obtain execution from the Supreme Court to enforce the judgment. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

§ 7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.

Objections and Exceptions Necessary to Preserve Legal Questions on Appeal. — Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

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

Applied in State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975); Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

Cited in State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975); State v. Carter, 289 N.C.

35, 220 S.E.2d 313 (1975); State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976); State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976); State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976); State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

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

Applied in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); State v. McCotter, 288 N.C. 227, 217 S.E.2d 525 (1975); Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975); State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819 (1976).

Cited in State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); Watson Seafood & Poultry Co. v.

George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975); Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976); Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976); Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976); Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976); Tennessee-Carolina Transp., Inc. v. Strick Corp., 289 N.C. 587, 223 S.E.2d 346 (1976).

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

Applied in Pritchett v. Clapp, 288 N.C. 329, 218 S.E.2d 406 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

Stated in In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Cited in State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); Tennessee-Carolina Transp., Inc. v. Strick Corp., 289 N.C. 587, 223 S.E.2d 346 (1976).

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

ARTICLE 7.

Organization.

§ 7A-41. Superior court divisions and districts; judges; assistant district attorneys. — The counties of the State are organized into four judicial divisions and 30 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	1	5
	4	Duplin, Jones, Onslow, Sampson	raler resident	5
	5	New Hanover, Pender	1081 281 181	5
	6	Bertie, Halifax, Hertford, Northampton	i moissi	3
	7	Edgecombe, Nash, Wilson	2	4
	8	Greene, Lenoir, Wayne	on Indian so	4
	9	Franklin, Granville, Person, Vance, Warren	1 diame	3
Second	10	Wake	3	11
	11	Harnett, Johnston, Lee	70 miles	4
	12	Cumberland, Hoke	2	8
	13	Bladen, Brunswick, Columbus	1	2
	14	Durham	2	4
	15	Alamance, Chatham, Orange	1 1 1 1 1 1 6	5
	16	Robeson, Scotland	i	3
Third	17	Caswell, Rockingham, Stokes, Surry	i	4
	18	Guilford	3	9
	19	Cabarrus, Montgomery, Ran- dolph, Rowan	2	5
	20	Anson, Moore, Richmond, Stanly, Union	1	5
	21	Forsyth	2	7
	22	Alexander, Davidson, Davie, Iredell	1	4
	23	Alleghany, Ashe, Wilkes, Yadkin	alary and exp	1

						f Full-Time
Judicial Division	Judicial District	Counties		Resident udges		. District attorneys
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	our segu	274	1
	25	Burke, Caldwell, Catawba	2			5
	26	Mecklenburg	4			14
	27	Cleveland, Gaston, Lincoln	3	Distr for	ict 27 Prose	ecutorial -A and 3 cutorial
	00	D 1	0	Dis	trict :	27-B
	28	Buncombe	2			4
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1			3
	30	Cherokee, Ćlay, Graham, Haywood, Jackson, Macon,	1			3
		Swain				

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.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective July 1, 1976, increased the number of full-time

assistant district attorneys in the fourth, ninth and thirtieth 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 allowed [five thousand

five hundred dollars (\$5,500)] per year, payable monthly, in lieu of necessary travel and subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education.

In addition to the above allowance, each superior court judge may receive an additional allowance of a maximum of one thousand five hundred dollars (\$1,500)

under the following conditions:

(1) He must submit proof satisfactory to the Director of the Administrative Office of the Courts that he has already spent the five thousand five hundred dollar (\$5,500) allowance for the purpose authorized;

(2) Thereafter, upon proper certification to the Administrative Office of the Courts, a judge of the superior court may receive a subsistence allowance of thirty-five dollars (\$35.00) per day while attending court and transacting official business outside his county of residence and mileage at the rate authorized for State employees for one round trip per week. (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.)

Editor's Note.

The 1975, 2nd Sess., amendment, effective July 1, 1976, added the second paragraph.

§ 7A-45. Special judges; appointment; removal; vacancies; authority.

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

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

Prosecutor Controls Calendar. - Under North Carolina practice, sanctioned by this section, the prosecutor controls the criminal calendar and decides when to set cases for trial. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975).

until Case No Defense Subpoenas

Calendared. — Until the prosecutor files his calendar criminal defendants are unable to subpoena witnesses, for this section requires defense subpoenas to state the date of trial, a detail which, of course, cannot be known until the case is calendared. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975).

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
Less than 10,000
10,000 to 19,999
20,000 to 49,999

Salary \$10,596 13,308 15.900

Population		Salary
50,000 to 99,999 100,000 to 199,000 [199,999]		17,988 20,892
200,000 and above	gualization and all harmonia exemptes I	25,260

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.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, increased all salaries in the schedule. The amendment also, apparently through inadvertence, substituted "199,000" for "199,999" in the next-to-last line of the schedule.

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

Editor's Note. —	Cumberland 3
Session Laws 1975, 2nd Sess., c. 983, s. 113,	Currituck 1
effective July 1, 1976, makes an appropriation to	Dare 1
provide for 155 new deputy clerks of court. The	Davidson 2
new positions are allocated to the clerks of the	Davie 1
superior courts in the numbers and to the	Duplin 1
counties as follows:	Durham 3
Alamance 2	Edgecombe 2
Alexander 1	Forsyth 4
Anson 1	Franklin 1
Ashe 1	Gaston 3
Avery 1	Gates 1
Beaufort 1	Graham 1
Bertie 1	Granville 1
Bladen 2	Greene 1
Brunswick 1	Guilford 4
Buncombe 3	Halifax 2
Burke 2	Harnett 1
Cabarrus 2	Haywood 2
Caldwell 2	Henderson 1
Camden 1	Hertford 1
Carteret 2	Hoke 1
Caswell 1	Hyde 1
Catawba 3	Iredell 2
Chatham 1	Jackson 1
Cherokee 1	Johnston 2
Chowan 1	Jones 1
Cleveland 2	Lee 1
Columbus 2	Lenoir 2
Craven 2	Lincoln 1

9 7A-133	1976 INTER	IM SUPPLEMENT	9 7A-133
Macon	1	Robeson	3
Madison	1	Rockingham	2
Martin	1 Martistrates	Rowan	2
McDowell	1	Rutherford	1
Mecklenburg	4	Sampson	2
Mitchell	1	Scotland	1
Montgomery	1	Stanly	2
Moore	1	Stokes	1
Nash	2	Surry	2
New Hanover	2	Transylvania	1
Northampton	1	Tyrrell	1
Onslow	3	Union	2
Orange	2	Vance	1
Pamlico	1	Wake	4
Pasquotank	0 1	Warren	î î
Pender	1	Washington	1
Perquimans	1	Watauga	2
Person	1	Wayne	3
Pitt	3	Wilkes	2 3 2
Polk	1	Wilson	2
Randolph	2	Yadkin	1
Richmond	1		

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:

Shree or	Selms	County	Magistrates MinMax.		Additional Seats of		
District	Judges		Min.	Max.		urt SI	
1	2		100	2	8 .	81	
		Chowan	2	3			
		Currituck	undaluja	2			
		Dare	2	3			
		Gates	2	3			
		Pasquotank	3	4			
		Perquimans	2	3			
2	2	Martin	3	5			
		Beaufort	4	5			
		Tyrrell	1	2			
		Hyde	$\bar{2}$	3			
		Washington	$\frac{2}{3}$	4			
3	4	Craven	5	7			
(1965) p	EL POLOTE	Pitt	9	11	Farmy Ayder		

District	Judges	County	Magi Min.	strates Max.	Additional Seats of Court	
		Pamlico	2	3	THE REAL PROPERTY.	
		Carteret	4	7		
4	4	Sampson	5	7		
		Duplin	5 9 2 8	10		
		Jones	2	3		
-	0	Onslow	6	10		
5	3	New Hanover	4	9		
6	3	Pender Northampton	5	6		
0	9	Halifax	7	11	Roanoke	
		пашах	,	11	Rapids,	
					Scotland Neck	
		Bertie	4	5	Deoriana Treek	
		Hertford	5	6		
7	4	Nash	7	10	Rocky Mount	
	-	Edgecombe	4	6	Rocky Mount	
		Wilson	Ã	6	avoorly made and	
8	5	Wayne	4 5 2 4 3 3	6 7	Mount Olive	
	4 1 1 1 1 1 1 1 1	Greene	2	3		
		Lenoir	4	3 7		
9	4	Person	3	4		
	the Committee	Granville	3	5		
		Vance	3	4		
		Warren	3	4		
		Franklin	3 .	5		
10	6	Wake	12	16	Apex	
					Wendell	
					Fuquay-Varina	
11	4	Harnett	7	10	Dunn	
		Johnston	10	12	Benson and	
					Selma	
		Lee	3	5		
12	5	Cumberland	10	15		
		Hoke	2	3 6		
13	3	Bladen	4	6	8	
		Brunswick	110,000	6	Shallotte	
Lt h		Columbus	6	8 8 9	Tabor City	
14	3 4	Durham	6	8	70 11	
15	4	Alamance	7	9	Burlington	
		Chatham	3	6	Siler City	
10		Orange	4	8	Chapel Hill	
16	4	Robeson	8	12	Fairmont	
					Maxton	
					Red Springs	
					Rowland	
		0 11 1	0		St. Pauls	
10		Scotland	2	3		
17	4	Caswell	2 2 4	3 4 8	Daidasilla	
		Rockingham	4	0	Reidsville	
					Eden Madison	

District	Judges	County	Magistrates MinMax.		Additional Seats of Court	
orthographic and the	Grade Editor Do	Stokes	2 3		trady mister turnigh	
		Surry	4	6	Mt. Airy	
18	8	Guilford	17	22	High Point	
19	5	Cabarrus	4	7	Kannapolis	
		Montgomery	2	3		
		Randolph	4	7	Liberty	
		Rowan	4	8	at the process from	
20	4	Stanly	5	6		
		Union	4	6		
		Anson	4 5 5 3 2 5 2	5		
		Richmond	5	6	Hamlet	
		Moore	5	7	Southern Pines	
21	5	Forsyth	3	15	Kernersville	
22	4	Alexander	2	3		
		Davidson	5	8	Thomasville	
		Davie	2	3 8 3 8 2 3 6		
		Iredell	4	8	Mooresville	
23	2	Alleghany	1 2 4 2 2 2 3 3 3 2 4	2		
		Ashe	2	3		
		Wilkes	4	6		
		Yadkin	2	3		
24	2	Avery	2	3		
		Madison	3	4		
		Mitchell	3	4		
		Watauga	3	4		
		Yancey	2	3 6		
25	5	Burke				
		Caldwell	4 6	7		
		Catawba	6	9	Hickory	
26 27	8 5	Mecklenburg	15	25	S 7A-192, Ro	
27	5	Cleveland	5	8		
		Gaston	10	18		
a a construction		Lincoln	3	5		
28	4	Buncombe	6	12		
29	3	Henderson	4	6		
		McDowell	3	4		
		Polk	2 6	3		
		Rutherford	6	8		
		Transylvania	$\frac{2}{3}$	3		
30	3	Cherokee	3	4		
		Clay	1	2		
		Graham	1 2 5 3 3	2 3 7	CAGRAGER	
		Haywood	5		Canton	
		Jackson	3	4		
		Macon	3	4		
		Swain	2	3		

 $(1965,\,c.\ 310,\,s.\ 1;\ 1967,\,c.\ 691,\,s.\ 8;\ 1969,\,c.\ 1190,\,s.\ 10;\,c.\ 1254;\ 1971,\,c.\ 377,\,s.\ 7;\,cc.\ 727,\,840,\,841,\,842,\,843,\,865,\,866,\,898;\ 1973,\,cc.\ 132,\,373,\,483;\,c.\ 838,\,s.\ 1;\,c.\ 1376;\ 1975,\,c.\ 956,\,ss.\ 8,\,10.)$

Editor's Note. -

The 1975 amendment increased by one the total number of judges in districts 3, 9, 16, 18 and 30, effective Dec. 6, 1976, and increased the quotas of magistrates in Carteret, Harnett, Chatham, Orange, Randolph, Moore, Davidson, Iredell, Caldwell, Buncombe, Cherokee,

Haywood, Jackson and Macon Counties, effective July 1, 1975.

Session Laws 1975, c. 956, s. 9, provides: "Candidates for the additional judgeships created in section 8 of this act shall run in the primary and general election of 1976."

ARTICLE 14.

District Judges.

§ 7A-146. Administrative authority and duties of chief district judge.

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

ARTICLE 16.

Magistrates.

§ 7A-172. Minimum and maximum salaries. — Magistrates shall receive not less than one thousand two hundred dollars (\$1,200) and not more than ten thousand seven hundred seventy-six dollars (\$10,776) per year. (1965, c. 310, s. 1; 1969, c. 1186, s. 6; 1971, c. 877, s. 3; 1973, c. 571, s. 3; c. 1236; 1975, 2nd Sess., c. 983, s. 12.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective
July 1, 1976, substituted "ten thousand seven

hundred seventy-six dollars (\$10,776)" for "ten thousand seventy-four dollars (\$10,074)."

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-192. By whom power of district court to enter interlocutory orders exercised.

Written Authorization for Hearing Motions in Chambers. — A district judge other than the chief district judge may hear motions and enter interlocutory orders during any session over which he has been assigned to preside, whether

the assignment be oral or written, but he may not hear motions in chambers without written authorization. Jim Walter Homes, Inc. v. Peartree, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

§ 7A-198. Reporting of civil trials.

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-219. Certain counterclaims; cross claims; third-party claims not permissible.

Applied in Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975).

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

Applied in Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975).

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

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

Concurrent Probate Jurisdiction and Appeal. — The effect of §§ 7A-241, 7A-251 and this section is to take from the clerk exclusive original jurisdiction of probate matters, to vest in the clerk and the superior court concurrent jurisdiction of probate matters and to provide

for appeals from the clerk directly to the judges of superior court, bypassing the district courts, on all such matters heard originally before the clerks. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

§ 7A-241. Original jurisdiction in probate and administration of decedents' estates.

The clerk is a part of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Section 28A-2-1 Does Not Conflict with Concurrent Clerk/Superior Court Jurisdiction. — The word "jurisdiction" in § 28A-2-1 is used in the sense of assigning original authority to the clerk, and was not intended to change the vesting of concurrent jurisdiction in the clerk and the superior court under this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Section Supports § 28A-2-1 Assignment of Authority. — The assignment of original authority of probate matters to the clerk in § 28A-2-1 is supported by, and not contravened by, this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

The effect of \$\\$ 7A-240, 7A-251 and this section is to take from the clerk exclusive original jurisdiction of probate matters, to vest

in the clerk and the superior court concurrent jurisdiction of probate matters and to provide for appeals from the clerk directly to the judges of superior court, bypassing the district courts, on all such matters heard originally before the clerks. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

And of Concurrent Jurisdiction of Clerk.—Since this section vests concurrent jurisdiction over probate matters in the clerk and the superior court, the clerk does not exercise original and exclusive jurisdiction. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Strict Construction of Appeal Procedure from Clerk Conflicts with Section. — Under a strict construction of §§ 1-272 and 1-273 as they affect § 7A-251, in probate matters originally heard by the clerk, an appeal whould lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the

clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice" and procedure provided by law" mandate of this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Superior Court Has Original Jurisdiction upon Appeal from Clerk. — Upon appeal from the clerk the superior court's jurisdiction is not derivative, and the judge of superior court has the right to hear and determine all matters in controversy as if the case was originally before him. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

De Novo Hearing by Superior Court Judge.

— Upon appeal from the order of the clerk of superior court the petitioners were entitled to a de novo hearing by the judge of superior court on both the right of respondent to qualify as

administratrix and her right to share in the estate of her deceased husband. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Judge Deals with Probate and Nonprobate Issues. — The judge of superior court in the exercise of his inherent powers upon appeal from clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which is not a probate matter. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Remand to Clerk for Correction of Error. — If the superior court finds error in the order of the clerk relative to the granting of letters of administration, it will not appoint a personal representative but must remand the cause to the clerk for this purpose consistent with the decision of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

§ 7A-251. Appeal from clerk to judge.

The clerk is a part of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

The effect of §§ 7A-240, 7A-241 and this section is to take from the clerk exclusive original jurisdiction of probate matters, to vest in the clerk and the superior court concurrent jurisdiction of probate matters and to provide for appeals from the clerk directly to the judges of superior court, bypassing the district courts, on all such matters heard originally before the clerks. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

And of Concurrent Jurisdiction of Clerk. — Since § 7A-241 vests concurrent jurisdiction over probate matters in the clerk and the superior court, the clerk does not exercise original and exclusive jurisdiction. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Strict Construction of Appeal Procedure from Clerk Conflicts with Section. — Under a strict construction of §§ 1-272 and 1-273 as they affect this section, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of § 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Superior Court Has Original Jurisdiction upon Appeal from Clerk. — Upon appeal from the clerk the superior court's jurisdiction is not derivative, and the judge of superior court has the right to hear and determine all matters in controversy as if the case was originally before him. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

De Novo Hearing by Superior Court Judge. — Upon appeal from the order of the clerk of superior court the petitioners were entitled to a de novo hearing by the judge of superior court on both the right of respondent to qualify as administratrix and her right to share in the estate of her deceased husband. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Judge Deals with Probate and Nonprobate Issues. — The judge of superior court in the exercise of his inherent powers upon appeal from clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which is not a probate matter. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Remand to Clerk for Correction of Error. — If the superior court finds error in the order of the clerk relative to the granting of letters of administration, it will not appoint a personal representative but must remand the cause to the clerk for this purpose consistent with the decision of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

ARTICLE 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions. § 7A-258. Motion to transfer.

Applied in Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of subdivision (a)(3). State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98 (1976).

Jurisdiction after "nol pros" in District Court. — And therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of this section, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98 (1976).

§ 7A-272. Jurisdiction of district court.

District Court Jurisdiction Lost after "Nol Pros". — A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of § 7A-271(a)(3), and therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of § 7A-271, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the

misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98 (1976).

Jurisdiction to Determine Paternity Issue.
— Since the district court has exclusive original jurisdiction to entertain a proceeding under the Uniform Reciprocal Enforcement of Support Act, it is clear that the district court has jurisdiction to determine the issue of paternity in such a case. Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

ARTICLE 23.

Jurisdiction and Procedure Applicable to Children.

§ 7A-278. Definitions.

Applied in In re Williams, 28 N.C. App. 462, 221 S.E.2d 759 (1976).

§ 7A-284. Immediate custody of a child.

When a child taken into custody under this section is not held in a juvenile detention home or jail, a hearing must be held within five days exclusive of Saturday, Sunday or holiday or else

the child must be released. See opinion of Attorney General to Mr. Thomas R. Odom, Attorney for Durham County, Department of Social Services, 45 N.C.A.G. 215 (1976).

§ 7A-285. Juvenile hearing.

Juvenile Proceedings Designed to Foster Individualized Disposition. - Juvenile proceedings are something less than a full blown determination of criminality. They are designed to foster individualized disposition of juvenile offenders under protection of the courts in accordance with constitutional safeguards. In re-Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

Entitled to Constitutional Juvenile

Safeguards. -

Juveniles in delinquency proceedings are entitled to constitutional safeguards similar to those afforded adult criminal defendants. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

Scope of juvenile due process is not as extensive as that incident to adversary adjudication for adult criminal defendants. In

re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).Requirements of Due Process. -

Due process for a juvenile includes written notice of specific charges in advance of hearing, notification to child and parent of the right to counsel and that, if necessary, counsel will be appointed; the privilege against self-incrimination, proof of the offense charged beyond a reasonable doubt and determination of delinquency based on sworn testimony subject to cross-examination in the absence of a valid confession. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

Applied in In re Williams, 28 N.C. App. 462,

221 S.E.2d 759 (1976).

§ 7A-286. Disposition.

Applied in In re Williams, 28 N.C. App. 462, 221 S.E.2d 759 (1976).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions. — (a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides:

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of two dollars (\$2.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the

fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of three dollars (\$3.00) in the district court, including cases before a magistrate, and the sum of fifteen dollars (\$15.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: Adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and

vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the Law-Enforcement Officers' Benefit and Retirement Fund, the sum of three dollars (\$3.00), to be remitted to the State Treasurer and administered as provided in Chapter 143, Article 12, of the General

Statutes.

(4) For support of the General Court of Justice, the sum of nineteen dollars (\$19.00) in the district court, including cases before a magistrate, and the sum of twenty-eight dollars (\$28.00) in the superior court, to be remitted to the State Treasurer.

(1975, 2nd Sess., c. 980, s. 1.)

Editor's Note. —

The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "nineteen dollars (\$19.00)" for "seventeen dollars (\$17.00)" and "twenty-eight dollars (\$28.00)" for "twenty

dollars (\$20.00)" in subdivision (4) of subsection

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

§ 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 five hundred dollars (\$500.00), excluding interest, the sum shall be five dollars (\$5.00). Sums collected

under this subsection shall be remitted to the State Treasurer.

(1975, 2nd Sess., c. 980, ss. 2, 3.)

Editor's Note. -

The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "twenty-eight dollars (\$28.00)" for "twenty dollars (\$20.00)" and

"eighteen dollars (\$18.00)" for "ten dollars (\$10.00)" in subdivision (2) of subsection (a).

As subsections (b) through (e) were not changed by the amendment, they are not set out.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 30.

Judicial Standards Commission.

§ 7A-376. Grounds for censure or removal.

Conduct Rather Than Motives Determines Disreputable Administration. — Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Whether a judge receives any personal benefit from his conduct is wholly irrelevant to inquiry into conduct of judicial officer. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being prejudicial to the administration of justice and that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

A judge may not escape responsibility for any judgments signed by him by delegating their preparation to counsel or anyone else. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Disposition of cases for reasons other than an honest appraisal of facts and law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Gross Abuse of Motor Vehicle Statutes Amounting to Prejudicial Conduct. — Judge's execution judgments allowing limited driving privileges under § 20-179 upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

Nature of Proceeding upon Recommendation of Commission. — A proceeding before the Supreme Court on the recommendation of the Judicial Standards Commission is neither criminal nor civil in nature, but is an inquiry into the conduct of a judicial officer, the purpose of which is not

primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system and the honor and integrity of its judges. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-451. Scope of entitlement.

There is no constitutional right to appointed counsel to seek discretionary review in either a State forum or the United States Supreme

Court. Morgan v. Yancy County Dep't of Cors., 527 F.2d 1004 (4th Cir. 1975).

§ 7A-454. Supporting services.

This section permits but does not compel providing an expert to criminally accused at State expense. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975).

Stated in In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

§ 7A-457. Waiver of counsel; pleas of guilty.

Refusal to Sign Waiver, etc. -

Refusal to sign a written waiver is a fact which may tend to show that no waiver occurred, but it is not conclusive in the face of other evidence tending to show waiver. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975).

A refusal to sign a waiver form does not necessarily preclude a valid oral waiver. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975).

Applied in State v. Monroe, 27 N.C. App. 405, 219 S.E.2d 270 (1975); State v. Hodge, 27 N.C. App. 502, 219 S.E.2d 568 (1975).

Chapter 8.

Evidence.

ARTICLE 3.

Public Records.

§ 8-34. Copies of official writings.

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but

for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

§ 8-35. Authenticated copies of public records.

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

The purpose of authentication and certification of records is to avoid the inconvenience and sometimes the impossibility of producing original public documents in court. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Admission of certified records tends to expedite trial of cases. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Public documents may be authenticated by mechanical reproduction of signature of authorized officer when he intends to adopt the mechanical reproduction as his signature. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

And Such Is Presumed. - When the

authorized officer of the Division of Motor Vehicles provides records of the Division pursuant to the provisions of § 20-222, it may be presumed that he intends to authenticate the documents and to adopt the mechanical reproduction of his name as his own signature. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Requirements of Mechanically Reproduced Signature. — This section does not impose the restriction upon the general rule that for a stamped, printed or typewritten signature to be a good signature, that the signature be made under the hand of the person making it. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Reading of Record by District Attorney. — There is no error in allowing a properly certified copy of a record to be read into evidence by the district attorney, as opposed to having the document passed among the jurors. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

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

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

ARTICLE 4.

Other Writings in Evidence.

§ 8-39. Parol evidence to identify land described.

In General. —
A deed purporting to convey an interest in

land is void unless it contains a description of the land sufficient to identify it or refers to

something extrinsic by which the land may be identified with certainty. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

The purpose of parol evidence, etc. -

When the deed itself, including the references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

Patently Ambiguous Description. — When it is apparent upon the face of the deed, itself, that there is uncertainty as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

A patent ambiguity in the description of the land is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

The description in a deed under which plaintiffs claimed title was patently ambiguous where it referred to nothing extrinsic to which one could turn in order to identify with certainty the land intended to be conveyed. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

Parol evidence may not be introduced to remove a patent ambiguity in the description of the land since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

Because Deed Containing Such Was Void.— Where the description of land in a deed under which plaintiffs claimed was patently ambiguous, the deed was void and could not be the basis for a valid claim of title in the plaintiffs to the land claimed by them. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

Scope of Descriptive Words, etc. -

Parol evidence is not admissible to enlarge the scope of the description in the deed. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

§ 8-45. Itemized and verified accounts.

Sufficiency of Verification. — Verification of the itemized account is sufficient if the affiant has personal knowledge of the account or is familiar with the books and records of the business and is in a position to testify as to the correctness of the records. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

Competency of Witness Required. -

The account must be sworn to by some person

who would be a competent witness to testify to the correctness of the account. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

Use Not Limited to Absence of Witness. — Nothing in this section or case law limits the use of a verified statement of the account to only those situations where the witness is unavailable to testify. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

§ 8-45.1. Photographic reproductions admissible; destruction of originals.

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but

for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

ARTICLE 7.

Competency of Witnesses.

§ 8-50. Parties competent as witnesses.

It is well established that an accomplice is always a competent witness. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

The fact that accomplice's testimony is usually induced by promise of or hope for leniency goes only to his credibility as a witness, and not to his competency as a witness. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Consolidation and Testimony of Codefendant. — Where the testimony of codefendant would have carried equal force if it

had been received without an order of consolidation, there was no abuse of discretion in the trial judge's order consolidating cases for trial. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

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

IV. SUBJECT MATTER OF THE TRANSACTION.

This section applies to caveat proceedings, etc. — $\,$

This section operates to exclude evidence by caveator in a caveat proceeding concerning any personal transactions or communications between him and decedent. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

Testimony Relating Solely to Issue of

Mental Capacity. -

This section does not prevent an interested witness, where there is an issue of mental capacity, from relating personal transactions and communications between the witness and a decedent as a basis for his opinion as to the mental capacity of the decedent. In re Will of Ricks, 28 N.C. App. 649, 222 S.E.2d 471 (1976).

But When Testimony Contradicts Charge of Undue Influence. — This section requires rejection of testimony of personal transactions and communications between an interested witness and a decedent when it affirmatively tends to prove vital and material facts which contradict a charge of undue influence. In re Will of Ricks, 28 N.C. App. 649, 222 S.E.2d 471 (1976).

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

Defendant Treated as Other witnesses. -

A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

A testifying defendant is subject to impeachment by cross-examination, generally to the same extent as any other witness. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Extent of Cross-Examination Permitted. — In accord with 1st paragraph in 1975 Cum. Supp. See State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

In cross-examination, the witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Same - Discretion of Trial Judge. -

In accord with 2nd paragraph in 1975 Cum. Supp. See State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Cross-Examination with Respect to Prior Convictions. —

Inquiry of a witness, including a defendant, into prior convictions for certain crimes is relevant to impeach the witness. State v. Collins, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

Trial judge did not err in admitting defendant's testimony under cross-examination

of prior criminal convictions where the district attorney repeatedly asked defendant what he had been convicted of, not what he had been charged with, it was defendant who unresponsively volunteered information as to charges, and defendant's motion to strike all testimony as to charges was allowed and the judge instructed the jury to disregard all of it. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

And Criminal Conduct. — Contention that cross-examination concerning criminal conduct is limited to inquiry about prior convictions is unsound. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

And Specific Acts of Misconduct. — Where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

An accused person who testifies as a witness may be cross-examined regarding prior acts of misconduct. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Such as Undesirable Discharge from Military. — Trial judge did not err in allowing cross-examination of defendant concerning the circumstances of his undesirable discharge from military service. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Cross-examination for impeachment purposes is not limited to conviction of crimes. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Contradiction of Testimony. — Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant had not voluntarily turned himself in to the police, and defendant had already testified to the contrary. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Cross Examination as to Unproved Accusations or Arrests, etc. —

Witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been arrested for, indicted for or accused of an unrelated criminal offense. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

It is improper to cross-examine a witness, including a defendant in a criminal trial, as to indictments, warrants or arrests which may

have been made against him. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

A defendant may not be asked on cross-examination for impeachment purposes if he has been accused, arrested or indicted for a particular crime, but he may be asked if he in fact committed the crime. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Failure to Take Stand. -

North Carolina cases do not prescribe any mandatory formula with regard to defendant's failure to testify not creating any presumption against him, but instead look to see if the spirit of this section has been complied with. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

Same — How Far Subject to Comment. — In accord with 2nd paragraph in original. See State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975).

This section unquestionably prohibits any mention before the jury of a defendant's failure to testify in his own behalf. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Proper Instruction. -

Any instruction is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975).

Trial judge's instruction to the jury that they "should" not consider defendant's failure to take the stand against him, rather than that they "shall" not consider his failure to take the stand against him, was not error. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

Where an instruction was unduly repetitious, but stripped of unnecessary verbiage, the instruction was that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent, this instruction met the requirements of this section. State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975).

Instruction Discretionary, etc. -

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975).

Under this section the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant so requests. State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975).

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

Quoted in Earles v. Earles, 26 N.C. App. 559, 216 S.E.2d 739 (1975).

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

Failure of Wife to Appear and Testify. — In a prosecution for first-degree murder, where the district attorney in his argument to the jury used the failure of defendant's wife to testify on defendant's behalf to the prejudice of the defense, the failure of the trial judge to intervene on his own motion and promptly instruct the jury that the wife's failure to testify and the improper argument regarding that fact must be disregarded and under no circumstances used to the prejudice of the defendant was reversible error. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

When defendant's wife was examined as witness for defendant, she was therefore

subject to be cross-examined to the same extent as if unrelated to him. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975).

As to Prior Inconsistent Statements. — In a prosecution for murder committed in the perpetration of an armed robbery and for conspiracy to commit armed robbery, if based on information and asked in good faith, it was permissible for the district attorney to ask defendant's wife about her prior inconsistent statements as they related to her previous relationship with the trigger man for purposes of impeachment. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975).

Chapter 9.

Jurors.

ARTICLE 2.

Petit Jurors.

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

The question of whether a juror is competent is one for the trial judge, etc.

Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

It is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Excluding Jurors for Opposition to Capital Punishment. —

In a first-degree murder trial where prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

§ 9-15. Questioning jurors without challenge; challenges for cause.

Questioning of Jurors by Court, etc. -

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

And Jurors May be Examined concerning Attitudes toward Capital Punishment. —

In accord with 3rd paragraph in 1975 Cum. Supp. See State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

Excluding Jurors for Opposition to Capital Punishment. —

In a first-degree murder trial where

prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

§ 9-18. Alternate jurors.

Requirements of this section and N.C. Const., Art. I, \$ 24 are mandatory. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Violation is Reversible Error Per Se. — The presence of an alternate in the jury room during the jury's deliberations violates this section and N.C. Const., Art. I, § 24 and constitutes reversible error per se. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Inquiry Into Effect of Presence of Alternate Juror. — If the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence,

may properly recall the jury and the alternate and, in open court, inquire of them whether there had been any discussion of the case. If the answer is "no," the alternate will be excused and the jury returned to consider its verdict. If the answer is "yes," there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

If alternate juror's presence in jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity, then the

rule of per se reversible error is not applicable. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Alternate Juror's Presence, etc. -

Case cited in 1975 Cum. Supp. reversed by State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

ARTICLE 3.

Peremptory Challenges.

§ 9-21. Peremptory challenges in criminal cases.

Purpose. -

The obvious purpose of this section is to protect defendants in criminal cases by giving them the last opportunity to challenge a venireman. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

The effect of this section, etc. -

In accord with 1975 Cum. Supp. See State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

Cross-Examination of Juror Irrevocably against Death Sentence Not Allowed. — To allow defense counsel to cross-examine a juror who has informed the court and counsel that he is irrevocably committed to vote against any verdict which would result in a death sentence would thwart the protective purposes of subsection (b) of this section. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

Chapter 12.

Statutory Construction.

§ 12-3. Rules for construction of statutes.

I. GENERAL CONSIDERATION.

The cardinal principle of statutory construction is to save and not to destroy. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Those seeking to be excluded from operation of a law must establish that statutory exception embraces them. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Those seeking to come within the exceptions to the open meetings law should have the burden of justifying their action. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

B. Criminal Statutes.

The doing of the act expressly inhibited by a criminal statute constitutes the crime. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

Whether a criminal intent is a necessary element of a statutory offense is a matter of

construction to be determined from the language of the statute in view of its manifest purpose and design. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

Duty to Adopt Constitutional Interpretation. — As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, the plain duty of the court is to adopt that which will save the act. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

Even to avoid a serious doubt about the constitutionality of a statute the rule is that as between two possible interpretations of the statute, the court should adopt that which will save the act. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

Construction so as to Avoid Constitutional Question. — If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

8 14-2

Chapter 14.

Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-2. Punishment of felonies: what constitutes life sentence.

The fact that others tried, etc. — In accord with 1975 Cum. Supp. See State v. Sligh, 27 N.C. App. 668, 219 S.E.2d 801 (1975). Applied in State v. McNeil, 28 N.C. App. 125, 220 S.E.2d 401 (1975).

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

Cited in State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

§ 14-4. Violation of local ordinances misdemeanor.

Applied in Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

Cited in Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

ARTICLE 2.

Principals and Accessories.

§ 14-5. Accessories before the fact; trial and punishment.

Elements of Crime. —

In accord with 1st paragraph in original. See State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

The only distinction between, etc. —

In accord with 1975 Cum. Supp. See State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

In Misdemeanors and Treason All Are Principals. — The distinction between

principals and accessories is made only in felonies. All persons who participate in treason or in misdemeanors, whether present or absent, are indictable and punishable as principals. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

The crime of accessory before the fact is included in the charge of the principal crime. State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

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

Applied in State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

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

I. IN GENERAL.

Definitions. -

In accord with originial. See State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Self-Defense. -

For discussion of burden on defendant to prove self-defense in light of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), see State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

A person may kill in self-defense if he be free from fault in bringing on the difficulty and if it is necessary, or appears to him to be necessary, to kill so as to save himself from death or great bodily harm. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

A person is justified in defending himself if he is without fault in provoking, or engaging in, or continuing a difficulty with another. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where the jury finds that the defendant intended to kill and inflicted injuries, to be completely absolved, the jury must find that he acted in self-defense against actual or apparent danger of death or greater bodily harm. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where a defendant in a prosecution for first-degree murder raises a defense of self-defense, the reasonableness of his belief that it was necessary to kill so as to save himself from death or great bodily harm, and the amount of force required, must be judged by the jury upon the facts and circumstances as they appeared to the defendant at the time of the killing. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Where the jury finds that the defendant did not intend to kill, the defendant is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Cited in Resendez v. Garrison, 528 F.2d 1310 (4th Cir. 1975).

II. MURDER IN GENERAL.

The corpus delicti in criminal homicide involves two elements: (1) the fact of the death, and (2) the existence of the criminal agency of another as the cause of death. State v. Jensen, 28 N.C. App. 436, 221 S.E.2d 717 (1976).

Malice-Definition.-

In accord with 2nd paragraph in original. See State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

In accord with 3rd paragraph in original. See State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975).

Same - Presumption. -

The killing of a person with a deadly weapon, when established beyond a reasonable doubt, raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Constitutionality of Burdens of Proof as to Malice and Unlawfulness. — Under the decision of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), the due process clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

The Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

Finding as to Mental Capacity Conclusive on Appeal. — Where the jury, by its verdict, has established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts, that finding, supported as it is by ample evidence, is conclusive on appeal. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

III. MURDER IN THE FIRST DEGREE.

Definition. -

In accord with 2nd paragraph in original. See State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975); State v. Barbour, 28 N.C. App. 259, 220 S.E.2d 812 (1976).

In first-degree murder the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

A specific intent to kill, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

Deliberation and Premeditation. -

Previously existing hostile feelings between defendant and deceased, a prior assault upon the deceased by defendant, the use of grossly excessive force and killing in an unusually brutal way have all been held to be circumstances tending to show premeditation and deliberation. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975).

Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) want of provocation on that part of the deceased, (2) the conduct of defendant before and after the killing, (3) the dealing of lethal blows after deceased has been felled and rendered helpless, (4) the vicious or brutal manner of the killing, (5) the number of shots fired. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

The use of grossly excessive force or the delivering of lethal blows after a deceased has been felled are among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975).

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are want of provocation on the part of the deceased, the conduct of defendant before and after the killing and the use of grossly excessive force. State v. Barbour, 28 N.C. App. 259, 220 S.E.2d 812 (1976).

Same - Premeditation. -

Premeditation means thought beforehand for some length of time. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976); State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Same - Deliberation. -

Deliberation means that the action was done

in a cool state of blood. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Deliberation does not require reflection or brooding for an apparent length of time, but rather an intention to kill executed by defendant in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion, suddenly aroused by just cause or legal provacation. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Same - Length of Time Immaterial. -

Where one forms a purpose to take the life of another and weighs this purpose in his mind long enough to form a fixed design or determination to kill at a subsequent time, no matter how soon or how late, and pursuant thereto kills, this would be a killing with premeditation and deliberation and would be murder in the first degree. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

Same — Inferred from Circumstances. — In accord with 2nd paragraph in 1975 Cum. Supp. See State v. Bock, 288 N.C. 145, 217 S.E.2d

In accord with 4th paragraph in 1975 Cum. Supp. See State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

Elements of first-degree murder are not usually susceptible to direct proof, but must be established, if at all, from the circumstances surrounding the homicide. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975).

While the State must prove premeditation and deliberation, ordinarily it is not possible to prove these elements directly. State v. Barbour, 28 N.C. App. 259, 220 S.E.2d 812 (1976).

Premeditation and deliberation must usually be inferred from various circumstances including (1) want of provocation on the part of the deceased, (2) the conduct of an accused before and after the killing and (3) that the killing was done in a vicious and brutal manner. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Premeditation and deliberation are not ordinarily susceptible of proof by direct evidence and therefore must usually be proved by circumstantial evidence. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

A murder perpetrated by means of poison,

In a prosecution for first-degree murder by poison, the evidence was sufficient to withstand

motions for directed verdict and for judgment of nonsuit, where defendant purchased rat poison with intent to kill deceased and, pursuant to a preconceived plan to do so, defendant poured it into tea prepared specially for deceased's consumption, deceased drank the tea and almost immediately become ill and died. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

An interrelationship between the felony and the homicide is prerequisite to application of felony-murder doctrine. State v. Bush, 289 N.C.

159, 221 S.E.2d 333 (1976).

Killing Committed in Perpetration, etc. — In accord with 1st paragraph in 1975 Cum. Supp. See State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

In accord with 3rd paragraph in 1975 Cum. Supp. See State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Killing in Perpetration of Robbery. -

This section expressly provides that a murder perpetrated in an attempt to commit robbery is murder in the first degree. State v. Carey, 288

N.C. 254, 218 S.E.2d 387 (1975).

In a prosecution for murder committed during perpetration of an armed robbery and for conspiracy to commit armed robbery, the proof of murder in the first degree is complete when the State proves beyond a reasonable doubt that the trigger man shot and killed the victim in the trigger man's attempt to rob him. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975).

Where a homicide is committed in the commission of, or in the attempt to commit, an armed robbery, the State is not required to prove premeditation and deliberation; this section pronounces it murder in the first degree. State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

A murder committed in the perpetration or attempted perpetration of robbery is murder in the first degree. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

All Conspirators Are Guilty, etc. -

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975).

The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment necessarily or probably required the use of force and violence which may result in the taking of life unlawfully, every party in such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975).

Constitutionality of Death Penalty. -

Judgment and sentence of death upon conviction of first-degree murder is not unconstitutional. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975).

Imposition of the death penalty upon conviction of first-degree murder is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975).

Defendants' contention that capital punishment under this section would violate the federal and State Constitutions has been rejected several times. State v. Bush, 289 N.C.

159, 221 S.E.2d 333 (1976).

Defendant's contention in a trial for first-degree murder that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected in many decisions. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Voluntary Intoxication, etc. —

If a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated intent to kill, essential elements of murder in the first degree are absent and it is said that the grade of the offense is reduced to murder in the second degree. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

Theory of Diminished Responsibility Not Adopted. — The Supreme Court has not adopted with respect to the specific intent to commit a crime such as first-degree murder what has been called the theory of diminished responsibility, under which some of the states hold that a defendant may offer evidence of an unusual or abnormal mental condition which is not sufficient to establish legal insanity, but tends to show that he did not have the capacity to premeditate or deliberate at the time of the murder. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

Defendant who does not have mental capacity to form intent to kill, or to premeditate and deliberate upon the killing, cannot be convicted of murder in the first degree. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

IV. MURDER IN THE SECOND DEGREE.

Definition. —

In accord with 1st paragraph in original. See State v. Davis, 289 N.C. 500, 223 S.E.2d 296

(1976); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

In accord with 3rd paragraph in original. See State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

Proximate cause is an element of second-degree murder and manslaughter. State v. Sherrill, 28 N.C. App. 311, 220 S.E. 2d 822 (1976).

But Not a Specific Intent to Kill. -

In accord with original. See State v. Williams,

288 N.C. 680, 220 S.E.2d 558 (1975).

Trial judge did not err in instructing the jury that second-degree murder differs from first-degree murder in that a specific intent to kill is not an element of second-degree murder. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

A specific intent to kill is not an element of second-degree murder or manslaughter. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Burden of Proof. -

For discussion of burden of proof on defendant to prove self-defense in light of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), see State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

Presumption. -

In accord with 4th paragraph in original. See State v. Barbour, 28 N.C. App. 259, 220 S.E.2d 812 (1976).

The intentional use of a deadly weapon proximately causing death gives rise to presumptions that (1) the killing was unlawful, and (2) the killing was done with malice. This is second-degree murder. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Presumptions Constitutional. — The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. State v. Lester, 289 N.C. 239, 221

S.E.2d 268 (1976).

Mullaney v. Wilbur, 421 U.S. 634, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) does not apply to the presumption of malice created when the State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death. State v. Johnson, 28 N.C. App. 265, 220 S.E.2d 834 (1976).

V. PLEADING AND PRACTICE.

Form of Indictment. -

An indictment under § 15-144 will support a verdict of murder in the first degree if the jury

finds beyond a reasonable doubt that an accused killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Indictment Procedure for Felony-Murder. The better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration or attempt to perpetrate a felony under the provisions of this section would be that the district attorney should not secure a separate indictment for the felony. If he does, and there is a conviction of both, the defendant will be sentenced for the murder and the judgment will be arrested for the felony under the merger rule. If the separate felony indictment is treated as surplusage only and the murder charge submitted to the jury under the felony-murder rule, then obviously the defendant cannot thereafter be tried for the felony. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975).

What State Must Prove. -

The State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

Plea of Not Guilty. -

Defendant's plea of not guilty puts into issue all of the elements of the charges against him and the burden remains on the State to satisfy the jury beyond a reasonable doubt of all of the elements of the offense charged, including the lesser offense of second-degree murder. State v. Griffin, 288 N.C. 487, 219 S.E.2d 48 (1975).

Accidental Death, etc. -

Assertion by an accused that a killing with a deadly weapon was accidental is in no sense an affirmative defense shifting the burden to him to satisfy the jury that death of the victim was in fact an accident. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Defendant's contention that decedent's death resulted from an accident is a denial that he committed the crime charged, and such contention is not an affirmative defense which results in the imposition of any burden of proof upon him. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

Effect of Solicitor's Announcement, etc. — The district attorney during the trial of defendant on a capital offense, and when defendant was voluntarily absent, could properly elect to waive the charge of first-degree murder and proceed with the prosecution of a noncapital offense, second-degree murder. State v. Mulwee, 27 N.C. App. 366, 219 S.E.2d 304, cert. denied, 288 N.C. 732, 220 S.E.2d 622 (1975).

Evidence of Premeditation, etc. -

Ordinarily, it is not possible to prove premeditation and deliberation by direct evidence. Therefore these elements of first-degree murder must be established by proof of circumstances from which they may be inferred. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975); State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975).

Among the circumstances to be considered by the jury in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of the defendant before and after the killing; the use of grossly excessive force; or the dealing of lethal blows after the deceased has been felled. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975); State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975).

Beyond Reasonable Doubt. -

In order to convict the defendant of first-degree murder, the State must satisfy the jury beyond a reasonable doubt of all the elements thereof, to-wit, an unlawful killing of a human being with malice and with a specific intent to kill and committed after premeditation and deliberation. State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975).

Photographs, etc. -

In a prosecution for first-degree murder, photographs of deceased and the clothing of deceased are admissible despite defendant's contention that since he did not controvert the killing, the photographs and clothing were prejudicial and inflammatory, since the burden was still on the State to prove its case beyond a reasonable doubt so as to convince the jury that there had been an unlawful killing with malice and that the circumstances of the killing justified a finding of premeditation, deliberation and a specific intent to kill. State v. Williams, 289 N.C. 439, 222 S.E.2d 242 (1976).

In a prosecution for first-degree murder a photograph is admissible for the purpose of illustrating the testimony of the doctor who examined the deceased. State v. Williams, 289

N.C. 439, 222 S.E.2d 242 (1976).

In a prosecution for first-degree murder the fact that a photograph depicts a gruesome scene

does not render it incompetent. State v. Williams, 289 N.C. 439, 222 S.E.2d 242 (1976).

Photograph Inadmissible. — In a prosecution for second-degree murder or involuntary manslaughter photographs depicting the way deceased looked at the hospital the night he died are not inadmissible because they were not made at the time of the event, or because they are gory or gruesome. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

Same - Self-Defense. -

For discussion of burden of defendant to prove self-defense in light of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), see State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

The court correctly refused to give an instruction on self-defense which omitted the requirement that before one may kill in self-defense he must have reasonable grounds to believe that it is necessary to kill to protect himself from death or great bodily harm. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

When the State or defendant produces evidence that defendant acted in self-defense in a prosecution for first-degree murder, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. State v. Davis, 289 N.C. 500, 223 S.E. 2d 296 (1976).

If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

The trial court is required to charge on self-defense, even without a special request, when, but only when, there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self-defense. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Guilty Plea to Capital Crime Not Accepted. —

When a defendant is charged with first-degree murder, he is not permitted to plead guilty to it. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975).

Sufficiency of Evidence for Submission to

Where defendant was not harmed by the victim in any way and did not believe he would have had any difficulty in defending himself against her, and the victim's death was an unnecessary and senseless killing; where the 55 stab wounds constituted grossly excessive force; and where force which would have been lethal had the victim not already been dead was applied when an automobile was driven over her felled body, the evidence was sufficient to take the issue of defendant's guilt of first-degree murder to the jury. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975).

In a prosecution for first-degree murder, the evidence was sufficient to withstand a motion for nonsuit where it tended to show that deceased died as a result of a gunshot wound inflicted by a shot fired from a trailer, defendant, a short time before the shooting, had test fired a 12 gauge shotgun, 12 gauge shotgun wadding was found in a straight line between the trailer and the bodies after the shooting, a freshly-fired 12 gauge shotgun was later found in defendant's house hidden between the quilts and mattress of a bed and defendant was the only person in the trailer when the fatal shots were fired. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

In a prosecution for first-degree murder, where defendant admitted to State's witness that he and his brother had a blunt instrument and a knife when they decided to rob decedent, and evidence showed that decedent died of injuries inflicted by both blunt and sharp objects, the evidence was sufficient to withstand a motion for nonsuit even though defendant's admissions did not include the actual use of the weapons against decedent. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

Trial judge's charge to jury in prosecution for first-degree murder placing burden on defendant to rebut presumption of malice so as to reduce the charge from second-degree murder to manslaughter was not error where all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation, and the jury returned a verdict of murder in the first degree never reaching the questions raised as to instructions relating to second-degree murder and manslaughter. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Refusing to Instruct or Error in Instruction as to Manslaughter. —

In a prosecution for first-degree murder, a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Instruction on Reasonable Doubt, etc. -

A trial judge is not required to define "reasonable doubt" without a request to do so, but if he does undertake to define it, the definition should be in substantial accord with the definitions of this court. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

In a prosecution for first-degree murder, trial judge did not err in charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instruction on Inability to Form Specific Intent. — The trial court did not err in instructing the jury that in order to find that defendant could not form a specific intent to commit a felony or that the defendant was mentally incapable of premeditation and deliberation that they must find that the defendant was "utterly incapable" (or "utterly unable") of forming a specific intent. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975).

Alibi Instruction Not Required. — In prosecution for first-degree murder, where the record shows that the crime was committed on a certain corner at a specified time, and defendant testified that he was on that corner at that time, there was insufficient evidence to require instruction on alibi even had there been a special request for it. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Instruction on Accident. — In a prosecution for murder and assault with a deadly weapon with intent to kill where the trial judge instructs the jury on the defense of accident it is not error if the court does not define the word "accident." State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727 (1976).

Harmless Error. -

In a prosecution for first-degree murder, the trial judge's characterization of deceased as the common-law husband of the defendant in his charge to the jury was harmless error. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

Clothing Admissible. — In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Victim's Clothing, etc. -

In a prosecution for first-degree murder the clothing of deceased is admissible if its appearance throws any light on the circumstances of the crime. State v. Williams, 289 N.C. 439, 222 S.E.2d 242 (1976).

The clothing of the deceased worn at the time of a homicide is another circumstance showing the manner of the killing. State v. Williams, 289

N.C. 439, 222 S.E.2d 242 (1976).

"Fruit" of Plain View Search Admissible. — In a prosecution for first-degree murder, where a State trooper had stopped defendants' car for reckless driving and had subsequently observed the butt of a revolver protruding from under the center armrest, the revolver was properly admissible in evidence as the fruit of a lawful warrantless "plain view" seizure under circumstances requiring no search. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

§ 14-18. Punishment for manslaughter.

Definitions. —

In accord with 1st paragraph in original. See State v. Spencer, 27 N.C. App. 301, 219 S.E.2d 231 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner. Culpable negligence under the criminal law is

such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. State v. Newcomb, 26 N.C. App. 595, 216 S.E.2d 730 (1975).

Proximate cause is an element of second-degree murder and manslaughter. State v. Sherrill, 28 N.C. App. 311, 220 S.E.2d 822 (1976).

Applied in State v. Allmond, 27 N.C. App. 29, 217 S.E.2d 734 (1975).

ARTICLE 7.

Rape and Kindred Offenses.

§ 14-21. Rape; punishment in the first and second degree.

The distinguishing features between the former law and that provided in this section are that rape is now divided into two degrees, and that subdivision (a)(2) of this section now requires that the "force" be such that "the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon . . . "State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Rape Defined. -

In accord with 3rd paragraph in original. See State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

"By Force". -

Under subdivision (b) of this section, the "force" necessary to constitute an offense need not be actual physical force. Constructive force is sufficient, and the female submission under fear or duress takes the place of actual physical force. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Actual Threat Does Not Have to Continue Until Moment of Rape. — Subdivision (a)(2) of this section does not require that the defendant must continue to display the deadly weapon in

a threatening manner until the moment of the rape. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Constitutionality of Death Penalty. -

Defendant's contention in a prosecution for first-degree rape and kidnapping that the court erred in sentencing him to death, saying this was cruel and unusual punishment, has been consistently rejected. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

The most generally permissible method of proving character, etc. —

The general character of the prosecutrix in a rape case may be shown as bearing upon the question of consent. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

The prosecutrix may be cross-examined concerning specific acts of unchastity for the sole purpose of impeaching credibility, but the defendant is bound by her answer. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

But testimony of specific acts of unchastity, etc. —

A witness called by the defendant cannot be

asked about specific acts of misconduct by prosecutrix. This witness must confine himself to testimony concerning general reputation for chastity. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

Specific acts of unchastity with persons other than defendant are inadmissible in rape cases. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

Corroborative Evidence. —

Evidence of independent witnesses as to the physical condition of the prosecutrix on the night the intercourse occurred corroborates her testimony. State v. Tuttle, 28 N.C. App. 198, 220 S.E. 2d 630 (1975).

Evidence Sufficient to Carry Question, etc. -

In a prosecution for first-degree rape and

kidnapping where the defendant told the prosecutrix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit this case to the jury on first-degree rape and kidnapping. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Applied in State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975); State v. Caldwell, 27 N.C. App. 323, 219 S.E.2d 235 (1975).

Cited in State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

§ 14-22. Punishment for assault with intent to commit rape.

Intent. —
In accord with 1st paragraph in original. See

State v. Bradshaw, 27 N.C. App. 485, 219 S.E.2d 561 (1975).

ARTICLE 8.

Assaults.

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

The term "inflicts serious injury," etc. — In accord with original. See State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720 (1976).

"Serious injury" under subsection (b) of this section is the same as under subsection (a) of this section. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720 (1976).

Facts of Particular Case, etc. —

In accord with original. See State v. Pearson, 27 N.C. App. 157, 218 S.E.2d 192 (1975); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720 (1976).

Injury Must Fall Short, etc. -

In accord with original. See State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720 (1976).

Intent to Kill May Be Inferred, etc. -

In accord with 1st paragraph in original. See State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727 (1976).

In a prosecution for assault with a deadly weapon with intent to kill, an altercation, the shooting and resulting death of decedent soon after defendant pointed the pistol at another's chest and pulled the trigger, and other circumstances, are sufficient evidence of intent to kill. State v. Reives, 29 N.C. App. 11, 222

S.E.2d 727 (1976).

The right of self-defense is available only to a person who is without fault. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

If a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Instruction on self-defense, etc. -

Where there is evidence that defendant acted in defense of his home, an instruction on the defendant's right to act in self-defense without an instruction also on the defendant's right to act in defense of home contains prejudicial error. State v. Edwards, 28 N.C. App. 196, 220 S.E.2d 158 (1975).

A pistol, etc. -

A pistol is a deadly weapon per se. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727 (1976). An unexplained misfiring of a loaded pistol

does not change its deadly character. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727 (1976).

Instruction as to Serious Injury. -

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's instruction to the jury that a serious injury is any physical injury that causes great pain and suffering was not error since it imposed a greater degree of injury than necessary. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720 (1976).

Burden of Proof. -

In accord with 2nd paragraph in original. See State v. Turner, 29 N.C. App. 33, 222 S.E.2d 745 (1976).

It has long been the rule in North Carolina that a defendant, in cases not involving homicide, does not have the burden of satisfying the jury that he acted in self-defense. State v. Smith, 28 N.C. App. 314, 220 S.E.2d 858 (1976).

Erroneous Instructions. —

The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a

verdict of not guilty by reason of self-defense was not a permissible verdict in the case. State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

In a prosecution for murder and assault with a deadly weapon with intent to kill where the trial judge instructs the jury on the defense of accident it is not error if the court does not define the word "accident." State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727 (1976).

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, an instruction on self-defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Instruction was erroneous and prejudicial because it invaded the province of the jury to determine whether nightstick used by the defendant was a "deadly weapon." State v. Buchanan, 28 N.C. App. 163, 220 S.E.2d 207 (1975).

Stated in State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

Constitutionality. —

A sentence of imprisonment which is within the limitation authorized by statute cannot be held cruel or unusual in the constitutional sense. State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

Definition. — An assault is an intentional offer or attempt by force or violence to do injury to the person of another. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

An assault is a show of violence causing a reasonable apprehension of immediate bodily harm. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

Under common law, test for simple assault requires an overt act or an attempt with force and violence to do some immediate physical injury to the person of another. State v. Sawyer, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Punishment - Extent. -

As long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

"Show of Violence" Rule. — In some cases of assault, North Carolina has adopted the "show of violence" rule which requires a reasonable apprehension on the part of the assailed witness of immediate bodily harm or injury which caused him to engage in a course of conduct he would not have otherwise followed. State v. Sawyer, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Where evidence discloses actual battery, whether victim is "put in fear" is inapposite. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

A criminal assault may be committed with an automobile. State v. Sawyer, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Applied in State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

§ 14-34. Assaulting by pointing gun.

Assault with a Deadly Weapon. -

If a pistol is a deadly weapon and is pointed at the person of another, then such pointing is

an assault with a deadly weapon. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727 (1976).

§ 14-34.1. Discharging firearm into occupied property.

Instruction Held Proper. -

A correct charge would provide that the accused would be guilty if he intentionally, without legal justification or excuse, discharged a firearm into an occupied building with knowledge that the building was then occupied by one or more persons, or when the accused had reasonable grounds to believe that the building might be occupied by one or more persons. State v. Burris, 27 N.C. App. 656, 219 S.E.2d 807 (1975).

Instruction Held Erroneous. —

In a prosecution for willfully or wantonly discharging a firearm into an occupied dwelling in violation of this section, the trial court erred in giving an instruction which equated willful or wanton conduct with knowledge that the house in question was occupied by one or more persons when the defendant fired the shot. State v. Leeper, 27 N.C. App. 420, 219 S.E.2d 253 (1975).

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

Threats by actions may be more effective than when made by mere words, and defendant's uninvited entrance into the car in itself constituted a threat under this section. State v. Ballard, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Defendant's conduct on first entering a car and in directing the driver/victim where to drive constituted such a threat as to put an ordinarily prudent person in fear for her life or personal safety so as to secure control of her person against her will, and from that point on there was an ample showing of asportation to constitute the crime of kidnapping. State v. Ballard, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Threat and Weapon. — In a prosecution for first-degree rape and kidnapping where the defendant told the prosecutrix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit this case to the jury on first-degree rape and kidnapping. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Sufficiency of Indictment. -

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In accord with 2nd paragraph in 1975 Cum. Supp. See State v. Norwood, 289 N.C. 424, 222

S.E.2d 253 (1976).

An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of North Carolina Const., Art. I, §§ 22 and 23 for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

ARTICLE 11. Abortion and Kindred Offenses. s or instruments to destroy unborn child. § 14-44. Using drugs or instruments to destroy unborn child.

Cited in Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

Cited in Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975).

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.

Count Charging Violation of This Section as Embracing a Charge under § 14-127. — See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite

while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

Applied in State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.

Description in the indictment of the property damaged as a "1974 Ford Torino owned by the North Carolina State Bureau of Investigation, being at the time occupied by another, Albert Stout, Jr.," was sufficient to inform defendant with certainty as to the crime that he had allegedly committed. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where

defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

§ 14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite while they were beside the victim's car with its

hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

In General. -

To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Burglary, whether in the first degree or in the second degree, is the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

First and Second Degree, etc. -

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Elements of Burglary in First Degree. -

The crime of burglary in the first degree is complete when an occupied dwelling is broken and entered in the nighttime with the intent to commit larceny therein whether or not anything was actually stolen from the house. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

A "breaking," etc. -

A "breaking" is an essential element of the crime of first-degree burglary. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

If any force at all is employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open or closed, there is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

A breaking may be actual or constructive. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads: (1) when entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened, (2) when in consequence of violence commenced, or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters, (3) when entrance is obtained by procuring the servants or some inmate to remove the fastening, (4) when some process of law is fraudulently resorted to for the

purpose of obtaining an entrance, (5) when some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knocks at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Proof that a breaking occurred, etc. -

In a prosecution for first-degree burglary and second-degree rape, defendant's entry was accomplished by a "breaking" notwithstanding the fact that the prosecuting witness "cracked" her door to see who was there. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Indictment Must Charge Intended Felony. —

In specifying the felony intended in an indictment for burglary it is enough to state the offense generally and to designate it by name. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

But Not Fully and Specifically. — In an indictment for burglary the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The indictment for burglary need not set out the felony which the defendant, at the time of the breaking and entering, intended to commit within the dwelling in as complete detail as would be required in an indictment for the actual commission of that felony. It must, however, state with certainty the felony which the State alleges he intended, at the time of his breaking and entering, to commit within the dwelling. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

Indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

It is not required that indictment for first-degree burglary describe property which defendant intended to steal, or that which he did steal. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

It is not necessary that an indictment for burglary describe the property stolen by the burglar. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Burglary Indictment Insufficient. — An indictment alleging that defendant broke and entered, with intent to commit a felony within, to wit: "by sexually assaulting a female," did not charge the defendant with the crime of burglary and would not support the imposition of a sentence to life imprisonment for first-degree burglary. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

Intent. -

In a prosecution for first-degree burglary, where the State's evidence showed that defendant entered an occupied dwelling in the nighttime by climbing a ladder to reach a second-floor balcony, and defendant had done work for the owner of the house and was

familiar with the layout of the house, intent to commit the felony of larceny could be inferred by the jury and motion to dismiss was properly denied. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

An unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

In a prosecution for first-degree burglary, where the State attempts to show intent to commit larceny, the fact that defendant did not disturb any of the valuables in the house does not aid him. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

In the absence of evidence of other intent or explanation for breaking and entering, the usual object or purpose of burglarizing a dwelling house at night is theft. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

There is no requirement that there be an individual asleep in the house which is broken into in order for burglary to be committed. Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975).

§ 14-52. Punishment for burglary.

Applied in Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975).

Cited in State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

§ 14-54. Breaking or entering buildings generally.

If evidence offered at trial fails to show ownership as alleged in indictment of premises entered and property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

In a prosecution for breaking or entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d

534 (1976).

Possession of Recently Stolen Property. -

Even though property found in a defendant's possession is not listed in a bill of indictment charging that defendant with the felonies of breaking or entering and larceny, a presumption that defendant broke or entered and stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment. State v. Fair,

29 N.C. App. 147, 223 S.E.2d 407 (1976).

Indictment under This Section or § 14-51. -Though not sufficient as an indictment for burglary, an indictment, under which the defendant was tried for and convicted of burglary in the first degree, alleging that the defendant, at the specified time, broke and entered the dwelling house therein described, was sufficient to support a conviction under subsection (b) for wrongfully breaking and entering a building. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

Evidence held sufficient to overrule nonsuit,

In prosecution for breaking and entering, where the State's evidence established that: (1) defendant's right thumbprint was found on the lock at the scene of the crime, a fact defendant solemnly admitted in open court; (2) no other fingerprints - of defendant or anyone else were found at the scene; and (3) when informed of the fingerprint defendant stated to the police that he had never been in the business establishment alleged to have been broken into, a statement now conceded to be false, defendant's motion to nonsuit on the breaking and entering count was properly denied. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

In prosecution for breaking and entering testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when

accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

Applied in State v. McNeil, 28 N.C. App. 125,

220 S.E.2d 401 (1975).

§ 14-56. Breaking or entering into railroad cars, motor vehicles, or trailers; breaking out.

Evidence of Control by Defendant Lacking.

— In a prosecution for breaking and entering a motor vehicle and larceny, evidence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks,

without any evidence that any of the stolen items were under the actual control of defendant, is insufficient to carry the question of defendant's guilt to the jury. State v. Millsaps, 29 N.C. App. 176, 223 S.E.2d 559 (1976).

ARTICLE 15.

Arson and Other Burnings.

§ 14-62. Burning of churches and certain other buildings.

I. IN GENERAL.

Applied in State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

Ownership, etc. -

In a prosecution for breaking or entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

If the evidence offered at trial fails to show

the ownership as alleged in the indictment of the premises entered and the property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

§ 14-71. Receiving stolen goods.

Reasonable Belief and Knowledge Differentiated. — "To reasonably believe" and "to know" are not interchangeable terms. While the latter may be implied or inferred from circumstances establishing the former, it does

not follow that reasonable belief and implied knowledge are synonymous. The State must establish that the defendant received the goods "knowing the same to have been feloniously stolen or taken," and this is not necessarily accomplished by establishing the existence of circumstances "such as to cause the defendant to reasonably believe" the goods were stolen.

State v. Hobbs, 26 N.C. App. 588, 217 S.E.2d 7 (1975), decided under this section as it stood before the 1975 amendment.

§ 14-72. Larceny of property; receiving stolen goods not exceeding \$200.00 in value.

Allegation of Ownership. —

In a prosecution for larceny the State must prove that the person alleged in the indictment to have a property interest in the property stolen has ownership, meaning title to the property or some special property interest. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The purpose of the requirement that ownership be alleged in an indictment for larceny is to (1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The indictment in a larceny case must allege a person who has a property interest in the property stolen. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Or Else a Nonsuit. — In a prosecution for larceny, if the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Not in a Servant. — In an indictment for larceny, it is not sufficient to charge the stolen property to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no property, his possession is the possession of his master. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

But There May Be Joint Property Interests. — There is no fatal variance in an indictment for larceny where the indictment alleges that two persons had a property interest in the stolen property when in fact, one was the bailee or special owner of the property, and the other had legal title to the property, since the property may be laid in either the owner, the special owner or both. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

When State Must Prove, etc. -

Although an indictment charges, and all the evidence tends to show, that the value of the stolen property was more than \$200, the jury, under appropriate instructions, must find from

the evidence beyond a reasonable doubt that this is the fact. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

It is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than \$200; and, value in excess of \$200 being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. The basis for this requirement is the elementary proposition that the credibility of the testimony, even though unequivocal and uncontradicted, must be passed upon by the jury. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

The principle of law, etc. -

In accord with 1st paragraph in original. See State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

In accord with 3rd paragraph in original. See State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

In accord with 4th paragraph in original. See State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Even though property found in a defendant's possession is not listed in a bill of indictment charging that defendant with the felonies of breaking or entering and larceny, a presumption that defendant broke or entered and stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment. State v. Fair, 29 N.C. App. 147, 223 S.E.2d 407 (1976).

The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Strength of Recent Possession Presumption Depends on Lapse of Time. — The presumption that the possessor is the thief, which arises from the possession of stolen goods, is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Presumption Is an Evidential Fact. — The presumption that the possessor is the thief, which arises from the possession of stolen goods, is to be considered by the jury merely as

an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

However, recent possession is not evidence of guilt; it just raises an inference that will permit the case to go to the jury under proper instructions from the court. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

"Value," etc. -

The word "value" as used in this section does not mean the price at which the owner would sell, but means fair market value. State v. Haney, 28 N.C. App. 222, 220 S.E.2d 371 (1975).

Acquittal of Breaking and Entering Doesn't Preclude Conviction of Larceny. — Where trial proceeded on the theory that defendant was guilty, if at all, as an aider and abettor of two other principal perpetrators, a not guilty verdict on a count of breaking and entering is not necessarily a finding by the jury that larceny was not committed by defendant pursuant to a breaking. It could be a finding simply that defendant was not an aider and abettor on the breaking count. The jury could, therefore, consistently with its verdict on the breaking count find that felonious larceny was committed pursuant to a breaking by the principal perpetrators and defendant, by reason of aiding and abetting, was guilty of the felony as a principal in the second degree, provided, of course, this theory of the case was presented to them in the trial judge's instructions. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

§ 14-72.2. Unauthorized use of a conveyance.

Quoted in State v. Kaerner, 28 N.C. App. 223, 220 S.E.2d 397 (1975).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

A taking with "felonious intent," etc. —

The felonious intent to take the goods of another and appropriate them to defendant's own use is a necessary element of armed robbery. State v. Webb, 27 N.C. App. 391, 219 S.E.2d 268 (1975).

"Intent to Rob" Is, etc. -

The expression "intent to rob" is a sufficient definition of "felonious intent" as applied to the robbery statute, in the absence of evidence raising an inference of a different intent or purpose. State v. Webb, 27 N.C. App. 391, 219 S.E.2d 268 (1975).

The offense requires the taking, etc. -

The taking and carrying away is an essential element of the crime of robbery. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

Nor Need Intent to Kill. -

The crime of armed robbery includes an assault on the person with a deadly weapon, but it does not include the additional elements of (1) intent to kill or (2) inflicting serious injury. State v. Kearns, 27 N.C. App. 354, 219 S.E.2d 228 (1975).

An indictment for robbery with firearms will support a conviction, etc. —

In accord with 6th paragraph in original. See

State v. Fletcher, 27 N.C. App. 672, 221 S.E.2d 101 (1975).

Evidence. -

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where the evidence tended to show that the night manager of a motel sensed an object against his head which felt like a pistol barrel and he heard it click, a toy pistol was found in defendant's room, and money and a .38 caliber pistol were taken in the robbery. State v. Dark, 26 N.C. App. 610, 216 S.E.2d 498 (1975).

Principals Equally Guilty. — All who are present at the place of a crime and are either aiding, abetting, assisting or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

By its express terms, this section extends to one who aids and abets in an attempt to commit armed robbery. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

What constitutes attempt. —

The act of attempt must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

Failure to Instruct on Common-Law Robbery. —

In an armed robbery prosecution where there is no other evidence of a weapon, and the robbery victim is not sure whether defendant actually had a weapon, it is error for the trial judge to fail to charge on the lesser offense of common-law robbery. State v. Jackson, 27 N.C. App. 675, 219 S.E.2d 816 (1975).

When Instruction on Common-Law Robbery Not Required. —

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

Maximum Punishment. -

In a prosecution for armed robbery, the trial court did not err in sentencing defendant to prison "for the term of not less than thirty (30) years" without specifying a minimum term, since the maximum punishment for armed robbery was 30 years (now life), and the judge set the minimum sentence at the maximum allowed by law. State v. Lipscomb, 27 N.C. App. 416, 219 S.E.2d 349 (1975).

Failing to Submit Issues of Assault, etc. — Even though the crime of attempted armed robbery as defined in this section includes the crime of assault with a deadly weapon, the absence of any evidence that the defendant committed such a crime of lesser degree made it unnecessary for the court to submit to the jury as one of its permissible verdicts the crime of assault with a deadly weapon. State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

Crime of Armed Robbery Includes, etc. — In accord with 1st paragraph in 1975 Cum. Supp. See State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

But Felonious Assault under § 14-32, etc. — In accord with 1st paragraph in 1975 Cum. Supp. See State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

Applied in State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Portee, 28 N.C. App. 507, 221 S.E.2d 722 (1976).

Cited in State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

Indictment -

The false instrument must be as such as does, or may, tend to prejudice the right of another, and such tendency must be apparent to the court, either from the face of the writing itself, or from it, accompanied by the averment of extraneous facts, that show the tendency to injure. If the forged writing itself shows such tendency, then it will be sufficient to set it forth in the indictment, alleging the false and fraudulent intent; but where such tendency does

not so appear, the extraneous facts, necessary to make it apparent, must be averred. This is essential, so as to enable the court to see in the record, that the indictment charges a complete offense. State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Uttering Distinct from Forgery. — In accord with original. See State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Applied in State v. Freeman, 28 N.C. App. 346, 220 S.E.2d 844 (1976).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

Uttering Distinct from Forgery. — In accord with original. See State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-127. Wilful and wanton injury to real property.

Count Charging Violation of § 14-49 as See State v. Bindyke, 288 N.C. 608, 220 S.E.2d Embracing a Charge under This Section. — 521 (1975).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARITCLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

Definition. -

In accord with original. See State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511 (1975).

Scope of Section. -

This section is broad enough to include the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511 (1975).

Proof of penetration, etc. -

In accord with original. See State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511 (1975).

Applied in State v. Speight, 28 N.C. App. 201, 220 S.E.2d 628 (1975); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

§ 14-190.1. Obscene literature and exhibitions.

Positive and Negative Findings Required. — This section, in addition to requiring positive findings on the questions of offensive display of sexual conduct patently offensive to the average person, requires an additional negative finding that the material lacks serious literary, artistic, political, educational or scientific value. State ex rel. Yeager v. Neal, 26 N.C. App. 741, 217 S.E.2d 576 (1975).

§ 14-190.2. Adversary hearing prior to seizure or criminal prosecution.

Applied in State ex rel. Yeager v. Neal, 26 N.C. App. 741, 217 S.E.2d 576 (1975).

§ 14-190.9. Indecent exposure.

Cited in Freewood Associates v. Davie County Zoning Bd. of Adjustment, 28 N.C. App. 717, 222 S.E.2d 910 (1976). ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.

Applied in Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. Punishment for perjury.

Law of perjury was intended to afford defendant greater protection against the chance of unjust conviction than is ordinarily afforded in prosecuting for crime. State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

Circumstantial evidence of perjury alone is not sufficient. State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976). Corroborating Evidence. — To sustain a conviction for perjury, the falsity of the oath must be directly proved by one witness and there must be corroborating evidence of independent and supplemental character, sufficient to resolve "the dilemma of weighing [one] oath against [another]." State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.

Applied in State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.1. Definitions.

Subdivision (8) Not Essential Part of \$ 14-288.4(a)(4)a. — See State v. Strickland, 27

N.C. App. 40, 217 S.E.2d 125, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

§ 14-288.4. Disorderly conduct.

Constitutionality of Subsection (a)(4)a. — Subsection (a)(4)a makes it clear that a violation of the statute occurs when a person intentionally refuses to vacate any building or facility of any public or private educational institution after having been ordered to do so by the chief

administrative officer of the institution or his authorized representative, and the statute is not unconstitutionally vague. State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

Legislative Guidelines Not Needed. - The

validity of subsection (a)(4)a making it a misdemeanor to refuse to vacate an educational institution building after having been ordered to do so by the chief administrative officer of the institution or his representative does not depend upon the enactment by the legislature of

detailed guidelines for the guidance of the specified school officials in the exercise of their responsibility to control the use of the buildings and facilities under their care. State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

§ 14-288.5. Failure to disperse when commanded, misdemeanor; prima facie evidence.

Evidence Required. — It was necessary under this section for the State to present evidence of defendant's failure to disperse on command to do so and that the officer had

reasonable ground to believe that disorderly conduct was occurring by an assemblage of three or more persons. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

Sufficiency of Evidence. -

In accord with 1st paragraph in original. See State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

Instruction. — In a prosecution for possession of lottery tickets, the trial court properly instructed the jury that the State had the burden of proving that the defendant knew that the pieces of paper with the numbers on them were lottery tickets, but the court erred in instructing that, "under our law unless the defendant introduces evidence of lack of knowledge, this element may be presumed." State v. Mayo, 27 N.C. App. 336, 219 S.E.2d 255 (1975).

In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery, where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complies with the requirements of § 1-180. State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

§ 14-292. Gambling.

Applied in Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

Chapter 15.

Criminal Procedure.

ARTICLE 1.

General Provisions.

§ 15-10.2. Mandatory disposition of detainers — request for final disposition of charges; continuance; information to be furnished prisoner.

Prisoner Must Follow, etc. -

Defendant's letter requesting a speedy trial did not comply with the provisions of this section where, for example, he failed to send the letter by registered mail to the district attorney; he failed to give notice of his place of confinement; and he failed to include a certificate from the Secretary of Correction. Having failed to follow the provisions of the statute, defendant was not entitled to the statutory relief. State v. Wright, 28 N.C. App. 426, 221 S.E.2d 751 (1976).

ARTICLE 7.

Fugitives from Justice.

§ 15-48. Outlawry for felony.

Rescission of Order. - Neither statutory provision nor necessity requires the rescission of an order declaring defendant an outlaw once defendant is in custody. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

This section only applies so long as defendant remains at large. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Stated in State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

ARTICLE 11.

Forfeiture of Bail.

§ 15-116. Judges may remit forfeited recognizances.

Applied in State v. Harold, 27 N.C. App. 588, 219 S.E.2d 528 (1975); State v. See, 28 N.C. App. 725, 222 S.E.2d 722 (1976).

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

Indictment Will Support Conviction, etc. -The essentials for bills of indictment charging homicide make no distinction between an indictment charging murder in the first degree from one charging murder in the second degree. State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819 (1976).

Killing with Malice, etc. -

An indictment under this section will support a verdict of murder in the first degree if the jury finds beyond a reasonable doubt that an accused

killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. State v. Bush, 289 N.C. 159, 221 S.E.2d 333

Reading to Jury Not Prejudicial. - An indictment closely following this section could not have prejudiced defendant by its being read in the presence of the jury, even though it is true that in some instances bills of indictment charging murder will contain the words "premeditation and deliberation," the elements that distinguish murder in the first degree from murder in the second degree. State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819 (1976).

Applied in State v. Johnson, 28 N.C. App. 265,

220 S.E.2d 834 (1976).

Cited in State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976); State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

§ 15-153. Bill or warrant not quashed for informality.

I. NATURE AND PURPOSE.

Purpose of Section. -

The purpose of the rule as to variance in an indictment is to avoid surprise and to protect the accused from another prosecution for the same offense. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

II. GENERAL EFFECT.

Plain, Intelligible and Explicit Charge,

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Following Words of Statute. -

An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Identifying Premises Entered. — An indictment for burglary is fatally defective if it fails to identify the premises broken into and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

But Felony Need Not Be Set Out As Specifically. — In an indictment for burglary, the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In specifying the felony intended in an indictment for burglary it is enough to state the offense generally and to designate it by name. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

It is not necessary that an indictment for burglary describe the property stolen by the burglar. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

III. DEFECTS CURED.

C. Allegations Differing from Proof.

Number of Victims. — In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

§ 15-155. Defects which do not vitiate.

In General. -

The purpose of the rule as to variance in an indictment is to avoid surprise and to protect the accused from another prosecution for the same offense. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

Variance. —

In a prosecution for armed robbery, where the

indictment referred only to the robbery of a single victim but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718 (1976).

ARTICLE 17.

Trial in Superior Court.

§ 15-170. Conviction for a less degree or an attempt.

The misdemeanor of larceny, etc. — In accord with original. See State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, cert. denied, 288 N.C. 733, 220 S.E.2d 352 (1975).

§ 15-173. Demurrer to the evidence.

No Difference in Motion to Dismiss, etc. -The test of the sufficiency of the evidence to withstand motions for a directed verdict and for judgment of nonsuit is the same. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

Motions for a directed verdict and for a judgment of nonsuit are the same in legal effect. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

On motion to nonsuit, the court is required, etc.

Nonsuit should be denied where there is sufficient evidence, direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

Upon considering a motion for nonsuit, the

court must find that there is substantial evidence both that an offense charged has been committed and that the defendant committed it before such motion can be overruled. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Motion for directed verdict or for judgment of nonsuit should be denied when, upon such consideration of the evidence, there is substantial evidence to support a finding that an offense charged in the bill of indictment has been committed and the defendant committed it. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

Upon motions for directed verdict of not guilty and nonsuit, the court must find that there is substantial evidence both that an offense charged has been committed and that the defendant committed it before it can overrule the motions. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Upon motion for judgment as of nonsuit in a criminal prosecution, the questions before the court are whether there is substantial evidence of each essential element of the crime charged, and whether the accused was the perpetrator of the charged offense. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Whether Competent or Incompetent. -All admitted evidence which is favorable to the State, whether competent or incompetent, must be taken into account and so considered by the court when ruling upon a motion for nonsuit. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371

All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be taken into account and must be so considered by the court in ruling upon the motion for directed verdict or for judgment of nonsuit. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

Incompetent evidence admitted is considered as if it were competent in considering a motion for nonsuit. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Sufficiency of Evidence. -

In accord with 40th paragraph in original. See State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303

In accord with 8th paragraph in 1975 Supplement. See State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975); State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

In considering a motion for nonsuit the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Motion to nonsuit requires the trial court to consider the evidence in the light most favorable to the State, take it as true and give the State the benefit of every reasonable inference to be drawn therefrom. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

For the purpose of ruling upon a motion for judgment as of nonsuit, the evidence for the State is taken to be true, every reasonable inference favorable to the State is to be drawn therefrom and discrepancies therein are to be disregarded. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

In considering a motion for nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and the

State is entitled to the benefit of all inferences which may reasonably be drawn therefrom. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

In ruling on defendant's motions for nonsuit or for directed verdict of not guilty the trial judge must consider the State's evidence in the light most favorable to the State without considering the evidence of defendant in conflict therewith. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

In considering a motion for directed verdict or for judgment of nonsuit the evidence for the State must be deemed to be true and must be considered in the light most favorable to it, the State being entitled to the benefit of all inferences in its favor which may reasonably be drawn therefrom. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

Upon motion for nonsuit, in determining whether there is substantial evidence of each essential element of the crime, and whether the accused was the perpetrator of the crime, the evidence before the court must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference which may be drawn from the evidence. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

Same — Circumstantial Evidence. —

In accord with 8th paragraph in original. See State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

Same - Prosecution for Homicide. -

In a prosecution for first-degree murder, the evidence was sufficient to withstand a motion for nonsuit where it tended to show that deceased died as a result of gunshot wounds inflicted by a shot fired from a trailer, defendant, a short time before the shooting, had test fired a 12 gauge shotgun, 12 gauge shotgun wadding was found in a straight line between the trailer and the bodies after the shooting, a freshly-fired 12 gauge shotgun was later found in defendant's house hidden between the quilts and mattress of a bed and defendant was the only person in the trailer when the fatal shots were fired. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

In a prosecution for first-degree murder, where defendant stole an automobile and drove it into a ditch in the vicinity of the home occupied by deceased, defendant then went to the home

of deceased, and thereafter defendant fatally attacked him with a knife, and defendant then robbed the body of deceased, ransacked the dwelling and left deceased lying in a pool of his own blood, there was sufficient substantial evidence to permit the jury to find that after premeditation and deliberation defendant formed a fixed purpose to kill and did kill the deceased. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

In a prosecution for first-degree murder, where defendant drove a stolen automobile into a ditch in the vicinity of the home of deceased, killed deceased and then robbed deceased's body, the evidence was sufficient to permit a jury to find that defendant killed deceased while in the perpetration of a robbery. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

In a prosecution for first-degree murder, where defendant admitted to State's witness that he and his brother had a blunt instrument and a knife when they decided to rob decedent, and evidence showed that decedent died of injuries inflicted by both blunt and sharp objects, the evidence was sufficient to withstand a motion for nonsuit even though defendant's admissions did not include the actual use of the weapons against decedent. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

In a prosecution for first-degree murder and armed robbery where the jury could find that (1) defendant borrowed the murder weapon on a date previous to the commission of the crimes; (2) defendant had possession of the murder weapon and the victim's weapon on the afternoon the crimes were committed; (3) defendant sent his girl friend to retrieve the murder weapon from its hiding place in order to sell it to a man who, upon cleaning the pistol, found that it had been fired twice; (4) defendant had asked another individual a few days before the shooting to help him rob two stores but was refused; (5) defendant and an accomplice were in possession of several hundred dollars on the afternoon of the crimes and several payroll checks that had already been endorsed, at least two of which were identified as having been cashed at the store at which the crime was committed the night before the shooting; and (6) defendant admitted telling his girl friend that he and an accomplice had killed and robbed the victim, the evidence presented by the State was sufficient to carry the case to the jury on the murder charge contained in the bill of indictment. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

In a prosecution for first-degree murder by poison, the evidence was sufficient to withstand motions for directed verdict and for judgment of nonsuit, where defendant purchased rat poison with intent to kill deceased and, pursuant to a preconceived plan to do so, defendant poured it into tea prepared specially for deceased's consumption, deceased drank the tea and almost immediately became ill and died. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

Same - Rape. -

In a prosecution for first-degree rape and kidnapping where the defendant told the prosecutrix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit this case to the jury on first-degree rape and kidnapping. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Same - Breaking and Entering, etc. -

If the evidence offered at trial fails to show the ownership as alleged in the indictment of the premises entered and the property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

In a prosecution for breaking and entering a motor vehicle and larceny, evidence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks, without any evidence that any of the stolen items were under the actual control of defendant, is insufficient to carry the question of defendant's guilt to the jury. State v. Millsaps, 29 N.C. App. 176, 223 S.E.2d 559 (1976).

§ 15-174. New trial to defendant.

Motion for Continuance. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

Incorrect Charge to Jury. — A new trial is necessary where the court charges the jury correctly at one point and incorrectly at another, particularly when the incorrect portion of the charge is contained in the application of the law to the facts. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

New trial must result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

In prosecution for breaking and entering, testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

Conflicting Evidence. -

Contradictions and discrepancies even in the State's evidence are matters for the jury and do not warrant nonsuit. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Any contradictions and discrepancies in the evidence are resolved in favor of the State for the purpose of considering a motion for nonsuit. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Same — Injury by Means of Dynamite. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

A defendant who, himself, injects incompetent evidence into the trial, may not urge its admission as ground for a new trial. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

When Motion for Nonsuit Proper. — A motion for a new trial does not properly present the question of the sufficiency of the evidence to justify the submission of the case to the jury, which is more properly raised by a motion for nonsuit. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Defendant Must Show Prejudice. — New trials are not given, even in capital cases, where there is no reasonable basis for supposing that, but for the error, a different result would have been reached. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

ARTICLE 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.3. Informing and questioning potential jurors on consequences of guilty verdict.

Cited in State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

§ 15-176.4. Instruction to jury on consequences of guilty verdict.

Instruction Mandatory. — This section makes it mandatory that the trial judge give the instruction upon the request of either party. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Prejudice Must Be Shown. — Trial judge erred when he refused to give the instruction mandated by this section, but there was no

prejudice to the defendant since the jury knew the sentence of death would be imposed upon the return of a verdict of guilty of the crime of rape. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Cited in State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

§ 15-176.5. Argument to jury on consequences of guilty verdict.

Cited in State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

ARTICLE 18.

Appeal.

§ 15-179. When State may appeal.

Appeal from Directed Verdict. — An appeal by the State from an order of the superior court directing a verdict for defendant is not

authorized under this section. State v. Brown, 29 N.C. App. 180, 223 S.E.2d 572 (1976).

§ 15-180.2. Appeal after plea of guilty or nolo contendere.

Applied in State v. Carr, 27 N.C. App. 39, 217 247, 218 S.E.2d 494 S.E.2d 714 (1975); State v. West, 27 N.C. App. N.C. App. 676, 219 S

247, 218 S.E.2d 494 (1975); State v. Pierce, 27 N.C. App. 676, 219 S.E.2d 815 (1975).

ARTICLE 20.

Suspension of Sentence and Probation.

§ 15-197. Suspension of sentence and probation.

The purpose of probation is to avoid promise of reform. Clearly, therefore, probation imprisonment so long as the guilty man gives is not intended to be the equivalent of

imprisonment. The aim of the statute is reformatory. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975).

A person does not serve a prison sentence while on probation or parole any more than he does while free on bail. In both instances, there are certain restrictions generally on the person's movements but the person's condition is very different from that of confinement in a prison. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975).

§ 15-200. Termination of probation; arrest; subsequent disposition.

Constitutionality. —

The case cited under this catchline in the 1975 Supplement was reversed in 529 F.2d 990 (4th Cir. 1975).

There is nothing unusual in the denial by North Carolina law of credit for probation or parole time against a prison sentence; it is common to both State and federal probation and parole systems and the validity of such denial has been universally recognized both in federal and State decisions. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975).

The refusal to credit probation time against the prison sentence is not double jeopardy, or an extension or enlargement of the original sentence of imprisonment, since the period of probation is not counted as a part of the period of imprisonment. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975).

The primary purpose, etc. -

In accord with original. See Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975).

The probationary judgment does not have to be formally introduced into evidence at the revocation hearing if the record indicates, as in the case at bar, that the judge has the order before him, and where reference is made in the judgment to specific conditions that defendant allegedly violated. State v. Hogan, 27 N.C. App. 34, 217 S.E.2d 712 (1975).

Imprisonment Is for Original Crime. — A petitioner, upon revocation of his suspended sentence, suffers imprisonment under a sentence, not for the matters that may have caused the revocation of his probation, but for the crime for which he was originally found guilty. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975).

Probation Is Punishment. -

The case cited under this catchline in the 1975 Supplement was reversed in 529 F.2d 990 (4th Cir. 1975).

§ 15-200.1. Notice of intention to pray revocation of probation or suspension; appeal from revocation.

Sufficiency of Evidence. — In accord with original. See State v. Martin, 27 N.C. App. 666, 220 S.E.2d 94 (1975).

Applied in State v. Simpson, 27 N.C. App. 400, 219 S.E.2d 239 (1975).

ARTICLE 22.

Review of Criminal Trials.

§ 15-217. Institution of proceeding; effect on other remedies.

Review on Habeas Corpus in Federal Court, etc. —

A State prisoner who seeks federal habeas corpus must present to the State courts the same claim he urges upon the federal courts, in order that it may be found that he has exhausted his

State remedies. Vester v. Lewis, 403 F. Supp. 255 (E.D.N.C. 1975).

Once the federal claim has been fairly presented to the State courts, the exhaustion requirement is satisfied. Vester v. Lewis, 403 F. Supp. 255 (E.D.N.C. 1975).

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

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Venue.

Sec.

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15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge.

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SUBCHAPTER X. TRIAL.

Article 58.

Procedures Relating to Guilty Pleas in Superior Court.

15A-1026. Record of proceedings.

SUBCHAPTER I. GENERAL.

ARTICLE 3.

Venue.

§ 15A-131. Venue generally.

(f) For the purposes of this Article, pretrial proceedings are proceedings occurring after the initial appearance before the magistrate and prior to arraignment. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 134.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "are proceedings occurring after the initial appearance before the magistrate and" for "include all proceedings" in subsection (f).

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

ARTICLE 4.

Entry and Withdrawal of Attorney in Criminal Case.

§ 15A-141. When entry of attorney in criminal proceeding occurs. — An

attorney enters a criminal proceeding when he:

(3) Appears in a criminal proceeding for a limited purpose and indicates the extent of his representation by filing written notice thereof with the clerk; or

(1975, 2nd Sess., c. 983, s. 135.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, deleted "or entering oral notice thereof in open court at the time of his initial appearance" following "the clerk" in subdivision (3).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (3) are set out.

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

Seizure and Introduction of Evidence,

In a prosecution for first-degree murder, where a State trooper had stopped defendants' car for reckless driving and had subsequently observed the butt of a revolver protruding from under the center armrest, the revolver was properly admissible in evidence as the fruit of a lawful warrantless "plain view" seizure under circumstances requiring no search. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Where the circumstances require no search the constitutional immunity never arises, and the guarantee against unreasonable searches and seizures does not prohibit a warrantless seizure where the contraband subject matter is fully disclosed and open to the eye and hand. State v. Smith, 289 N.C. 143, 221 S.E. 2d 247 (1976).

Warrant Not Required Where Article Seized,

In accord with 1st paragraph in original. See State v. Smith, 289 N.C. 143, 221 S.E.2d 247

When officers are conducting a valid search

for one type of contraband and find other types of contraband, the law is not so unreasonable as to require them to turn their heads. State v. Oldfield, 29 N.C. App. 131, 223 S.E.2d 569 (1976).

By being lawfully on the premises officers are entitled to seize such evidentiary objects connected with defendants as are in plain view. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

The plain view doctrine is firmly established and consistently supported by both State and federal courts. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

A police officer may search the person, etc. —

In accord with 1st paragraph in original. See State v. Hughes, 27 N.C. App. 164, 218 S.E.2d 211 (1975).

Where the arrest is lawful, the police have the right, without a search warrant, to conduct a contemporaneous search of the person and area within the immediate control for weapons or for fruits of the crime or weapons used in its commission. State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975).

ARTICLE 11.

Search Warrants.

§ 15A-244. Contents of the application for a search warrant.

Sufficiency of Affidavit, etc. — In accord with original. See State v. English, 27 N.C. App. 545, 219 S.E.2d 549 (1975).

Probable cause cannot be shown, etc. — Probable cause cannot be shown by affidavits

which are purely conclusory and do not set forth any of the underlying circumstances upon which that conclusion is based. State v. English, 27 N.C. App. 545, 219 S.E.2d 549 (1975).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

An affidavit may be based on hearsay, etc. -

In a prosecution for possession of more than one ounce of marijuana, irrespective of the challenged hearsay in the affidavit to obtain a warrant, the information in the affidavit of the purchase of tetrahydrocannabinols only a few minutes before issuance of the warrant, along with the detailed description of the location of the trailer to be searched, and the results of

three weeks of surveillance of the premises constituted probable cause to issue the search warrant. State v. Oldfield, 29 N.C. App. 131, 223 S.E.2d 569 (1976).

Former Practice. — It was not necessary under former § 15-26 that the affidavit contain within itself all the evidence properly presented to the magistrate. State v. Woods, 26 N.C. App. 584, 216 S.E.2d 492, cert. denied, 288 N.C. 396, 218 S.E.2d 469 (1975).

§ 15A-246. Form and content of the search warrant.

Description in Warrant, etc. -

A description of a mobile home to be searched was not fatally defective when the warrant named the son as owner when in fact it was rented to the son by his father or when there was another mobile home of the same color as that described in the warrant but which was not owned by either of these parties or occupied by the defendant. State v. Woods, 26 N.C. App. 584, 216 S.E.2d 492, cert. denied, 288 N.C. 396, 218 S.E.2d 469 (1975).

Common Sense Interpretation. - Search

warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion, as they are normally drafted by nonlawyers in the midst and haste of a criminal investigation. State v. Hansen, 27 N.C. App. 459, 219 S.E.2d 641 (1975).

Technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place now in the area of search warrants. State v. Hansen, 27 N.C. App. 459, 219 S.E.2d 641 (1975).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

Scope of Warrant Not Exceeded. -

The trial court in a prosecution for possession of heroin did not err in allowing testimony with respect to a box and its contents found in the trunk of defendant's automobile which was

parked in defendant's driveway, since a search warrant authorized a search of the premises of defendant. State v. Logan, 27 N.C. App. 150, 218 S.E.2d 213 (1975).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-301. Criminal process generally. — (a) Formal Requirements. —

(1) A record of each criminal process issued in the trial division of the General Court of Justice must be maintained in the office of the clerk.

(2) Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it.

(d) Return.

(1) The officer who serves or executes criminal process must enter the date of the service or execution on the process and return it to the clerk of

court in the county in which issued.

(2) If criminal process is not served or executed within the number of days indicated below, it must be returned to the clerk of court in the county in which it was issued, with the reason for the failure of service or execution noted thereon.

a. Warrant for arrest — 90 days.
b. Order for arrest — 90 days.
c. Criminal summons — 90 days or the date the defendant is directed to appear, whichever is earlier.

(3) Failure to return the process to the clerk does not invalidate the process, nor does it invalidate service or execution made after the period specified in subdivision (2).

(4) The clerk to which return is made may redeliver the process to a law-enforcement officer for further attempts at service. If the process is a criminal summons, he may reissue it only upon endorsement of a new designated time and date of appearance.

(1975, 2nd Sess., c. 983, ss. 136, 137.)

Editor's Note. - The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "record" for "copy" and "maintained" for "filed" in subdivision (1) of subsection (a) and added the second sentence of subdivision (4) of subsection (d).

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

§ 15A-303. Criminal summons.

(d) Order to Appear. — The summons must order the person named to appear in a designated court at a designated time and date and answer to the charges made against him and advise him that he may be held in contempt of court for failure to appear. Except for cause noted in the criminal summons by the issuing official, an appearance date may not be set more than one month following the issuance or reissuance of the criminal summons.

(1975, 2nd Sess., c. 983, s. 138.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, added the As the rest of the section was not changed by the amendment, only subsection (d) is set out. second sentence of subsection (d).

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

I. GENERAL CONSIDERATION.

Cited in State v. Weddington, 28 N.C. App. 269, 220 S.E.2d 853 (1976).

II. ARREST WITHOUT WARRANT.

A. In General.

An arrest without warrant, etc. -

In accord with 1st paragraph in original. See State v. Little, 27 N.C. App. 54, 218 S.E.2d 184 (1975).

Likelihood of Escape. -

In accord with 1975 Supp. See State v. Little, 27 N.C. App. 54, 218 S.E.2d 184 (1975).

The existence of probable cause, etc. —

In accord with 1st paragraph in original. See State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975).

In accord with 2nd paragraph in original. See State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975).

To establish probable cause, etc. —

In accord with original. See State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975).

Probable cause and reasonable ground,

etc. -

"Reasonable ground" and "probable cause" are basically equivalent terms with similar

meanings. State v. Young, 27 N.C. App. 308, 219 S.E.2d 261 (1975).

Reasonable Ground for Belief. -

The basis of reasonable ground for belief that felony has been committed is drawn from the totality of facts and circumstances surrounding the arrest, known to the officers. State v. Little, 27 N.C. App. 54, 218 S.E.2d 184 (1975).

B. Illustrative Cases.

1. Offenses in Presence of Officer.

Carrying Concealed Weapon. -

Where a fully-justified frisk by a police officer revealed that defendant was carrying a revolver, and the officer had probable cause to arrest him for carrying a concealed weapon in violation of § 14-269, at that point, the officer had absolute knowledge that defendant was violating the statute and that he was committing a misdemeanor in his presence. Thus, defendant's arrest for carrying a concealed weapon was not in violation of his constitutional rights, and the police officer did not exceed his authority under State law to arrest without a warrant. State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

SUBCHAPTER V. CUSTODY.

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance. — (a) Appearance before Magistrate. —

(1) A law-enforcement officer making an arrest with or without a warrant must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501.

(2) The magistrate must proceed in accordance with this section, except in those cases in which he has the power to determine the matter pursuant to G.S. 7A-273. In those cases, if the arrest has been without a warrant, the magistrate must prepare a magistrate's order containing a statement of the crime with which the defendant is charged.

(3) If the defendant brought before a magistrate is so unruly as to disrupt and impede the proceedings, becomes unconscious, is grossly intoxicated, or is otherwise unable to understand the procedural rights afforded him by the initial appearance, upon order of the magistrate he may be confined or otherwise secured. If this is done, the

magistrate's order must provide for an initial appearance within a reasonable time so as to make certain that the defendant has an opportunity to exercise his rights under this Chapter.

(1975, 2nd Sess., c. 983, s. 141.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective
July 1, 1976, added subdivision (3) of subsection
(a)

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

ARTICLE 25.

Commitment.

§ 15A-521. Commitment to detention facility pending trial.

(c) Copies and Use of Order, Receipt of Prisoner. -

(1) The order of commitment must be delivered to a law-enforcement officer, who must deliver the order and the prisoner to the detention facility named therein.

(2) The jailer must receive the prisoner and the order of commitment, and note on the order of commitment the time and date of receipt. As used in this subdivision, "jailer" includes any person having control of a detention facility.

(3) Upon releasing the prisoner pursuant to the terms of the order, or upon delivering the prisoner to the court, the jailer must note the time and date on the order and return it to the clerk.

(4) Repealed by Session Laws 1975, 2nd Sess., c. 983, s. 142. (1975, 2nd Sess., c. 983, s. 142.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, deleted subdivision (4) of subsection (c), relating to filing

of the order of commitment.

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

Section Inapplicable to Detention of Federal Prisoner in Local Jail. — See opinion of Attorney General to Mr. Louis A. Giovanetti, Special Agent, United States Department of Justice, Federal Bureau of Investigation, 45 N.C.A.G. 258 (1976).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge.

(c) Unless the defendant is released pursuant to Article 26 of this Chapter, Bail, first appearance before a "trict court judge must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, whichever occurs first. If the defendant is not taken into custody, or is released pursuant to Article 26 of this Chapter, Bail, within 96 hours after being taken into custody, first appearance must be held at the next session of district court held in the county. This subsection does not apply to a defendant whose first appearance before a district court judge has been set in a criminal summons pursuant to G.S. 15A-303(d).

(d) Upon motion of the defendant, the first appearance before a district court

judge may be continued to a time certain. The defendant may not waive the holding of the first appearance before a district court judge but he need not appear personally if he is represented by counsel at the proceeding. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 139, 140.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, deleted the former third sentence of subsection (c), which related to continuance of the first appearance with the consent of the defendant and the solicitor, and the former fourth sentence of subsection (c), which was identical to the second

sentence of present subsection (d), added the present third sentence of subsection (c) and added subsection (d).

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

Practice under Former § 15-88. — See Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974).

§ 15A-606. Demand or waiver of probable-cause hearing.

Hearing Not Required Prior to Enactment of Section. — See State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

ARTICLE 31.

The Grand Jury and Its Proceedings.

§ 15A-630. Notice to defendant of true bill of indictment. — Upon the return of a bill of indictment as a true bill the presiding judge must immediately cause notice of the indictment to be mailed or otherwise given to the defendant unless he is then represented by counsel of record. The notice must inform the defendant of the time limitations upon his right to discovery under Article 48 of this Chapter, Discovery in the Superior Court, and a copy of the indictment must be attached to the notice. If the judge directs that the indictment be sealed as provided in G.S. 15A-623(f), he may defer the giving of notice under this section for a reasonable length of time. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, s. 143.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, rewrote this section.

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-644. Form and content of indictment, information or presentment.

The office of an indictment, etc. -

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Language of Statute Sufficient. — An indictment for a statutory offense is sufficient

as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

An indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

It is not required that the indictment for first-degree burglary describe the property which the defendant intended to steal, or that which he did steal. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

In an indictment for burglary the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The indictment for burglary must specify the particular felony which the defendant is alleged

to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of North Carolina Const., Art. I, §§ 22 and 23 for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

SUBCHAPTER VII. SPEEDY TRIAL; AT-TENDANCE OF WITNESSES.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Policy of appropriate promptness.

Fundamental Law. — The right of an accused to have a speedy trial is part of the fundamental law of this State. State v. Dietz, 27 N.C. App. 296, 219 S.E.2d 256 (1975).

Delay in Bringing Charges. - For case

involving delay in bringing charges, as opposed to delay in bringing defendant to trial once charges are made, see State v. Dietz, 27 N.C. App. 296, 219 S.E.2d 256 (1975).

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-723. Form of demand for extradition.

"Substantially Charged" Test. — A governor's warrant should not be issued when the demanding state's request and supporting information does not refer to all the key

elements of the offense with which the accused has been charged. Ewing v. Waldrop, 397 F. Supp. 509 (W.D.N.C. 1975).

§ 15A-740. Guilt or innocence of accused, when inquired into.

Applied in Ewing v. Waldrop, 397 F. Supp. 509 (W.D.N.C. 1975).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure.

The common law, etc. —
In accord with original. See State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975).

No right of discovery in criminal cases existed at common law. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Right Given by Former Statute. —

A refusal to grant a pretrial motion for discovery is not reversible error unless the movant shows that evidence favorable to him was suppressed. State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

The purpose of former § 15-155.4, etc. — In accord with 1st paragraph in original. See State v. Branch, 288 N.C. 514, 220 S.E.2d 495

List of State's Witnesses. — In the absence of a statute requiring the State to furnish it, the

defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975).

Absent a statutory requirement, the defendant in a criminal case is not entitled to a list of witnesses who are to testify against him, and neither former § 15-155.4 nor this section requires this. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

§ 15A-910. Regulation of discovery — failure to comply.

Discretion of Trial Judge. — Where a discovery order to supply defendant with certain information had been issued and the State had purported to comply with it, and no evidence of bad faith on the part of the State was shown, permitting witnesses whose names the State had failed to supply to defendant to testify and

accepting photographs into evidence which also had not been supplied to defendant, were matters within the discretion of the trial judge, not reviewable on appeal in the absence of a showing of an abuse of discretion. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

Separate Offenses in Same Count. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single

offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

§ 15A-925. Bill of particulars.

Cited in State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

§ 15A-926. Joinder of offenses and defendants.

I. GENERAL CONSIDERATION.

In General. -

In accord with 1st paragraph in original. See State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), decided under former § 15-152.

The trial judge may consolidate for trial two or more indictments in which the defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of the other. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Two acts constituting essential parts of a single transaction may be charged together as a single offense, and defendant is not entitled to complain that only one offense was charged even though each act would have been ground

for a separate charge. State v. Dietz, 289 N.C. 488. 223 S.E.2d 357 (1976).

The trial judge may, in his discretion, order the consolidation for trial of two or more indictments in which the defendants are charged with crimes of the same class when the crimes are so connected in time or place that evidence at trial of one of the indictments will be competent and admissible at the trial of the others. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975).

Where there are two indictments in which both defendants are charged with the same crimes, then they may be consolidated for trial in the discretion of the court. State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975).

Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense. State v. Autry, 27 N.C. App. 639, 219 S.E.2d 795 (1975).

Consolidation Is within Discretion, etc. -

The motion to consolidate is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Whether defendants jointly indicted will be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that a joint trial had deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed upon appeal. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

The question of consolidation of indictments against defendants charged with committing similar offenses at the same time and place is addressed to the sound discretion of the trial court. State v. Samuel, 27 N.C. App. 562, 219 S.E.2d 526 (1975).

Motion for consolidation of cases for trial is addressed to the trial judge's sound discretion. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Exercise of Discretion by Court. -

In ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Exercise of discretion by the trial judge in consolidating cases for trial will not be disturbed absent a showing that defendant has been deprived of a fair trial by the order of consolidation. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

If consolidation of charges hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

Defendant's unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing a motion to consolidate charges for trial. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

II. ILLUSTRATIVE CASES.

A. Joinder of Offenses.

In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of § 7A-271(a)(3), and therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the inder exception of § 7A-271, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98 (1976).

Separate Charges of First-Degree Murder.—Defendant's unsupported contention that he was prejudiced by the consolidation for trial of separate charges of first-degree murder because without the consolidation he would have had the election of testifying in one case without being forced to testify in the other was not sufficient to show abuse of discretion by the trial judge where the charged crimes were continuing criminal acts which permit the admission in evidence of each in the trial of the other. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

Discretion of Trial Judge. — Ordinarily, motions for separate trial lie within the sound

discretion of the trial judge. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Prejudice to Defendant Shown. — Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded

under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

§ 15A-928. Allegation and proof of previous convictions in superior court.

Stated in State v. Moore, 27 N.C. App. 245, 218 S.E.2d 496 (1975).

ARTICLE 52.

Motions Practice.

§ 15A-954. Motion to dismiss — grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

Speedy Trial. — The length of the delay is not per se determinative of the question of whether a defendant has been denied a speedy trial. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

The right to a speedy trial is necessarily relative, for inherent in every criminal prosecution is the probability of delay. State v. Smith, 289 N.C. 143, 221 S.E. 2d 247 (1976).

Smith, 289 N.C. 143, 221 S.E.2d 247 (1976). In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, defendant was not denied his right to a speedy trial by a preindictment delay of four and one-half months, where the delay was necessary to protect an undercover investigation, and defendant failed to show that any evidence was lost as a result of the delay which would have been helpful to his defense. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

The burden is on an accused who asserts denial of his right to a speedy trial to show the delay was due to the neglect or willfulness of the prosecution. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

The right to a speedy trial is an integral part of the fundamental law of this State. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Undue delay which is arbitrary and oppressive or the result of deliberate prosecution efforts "to hamper the defense" violates the

constitutional right to a speedy trial. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Where the record indicates that the delay in the prosecution of a case was due to congested criminal dockets, good-faith efforts to obtain custody of absent codefendants and understandable difficulty in locating out-of-state witnesses, one of whom was a fugitive from justice, an 11-month delay was not unreasonable and the delay itself was not prejudicial to defendant in preparing and presenting his defense. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Interrelated factors to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

The question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

§ 15A-957. Motion for change of venue.

Discretion of Trial Judge. -

A motion for change of venue is addressed to the sound discretion of the trial judge and his

ruling will not be overturned in the absence of an abuse of discretion. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Motion for change of venue or for a special venire from another county on grounds of the prominence of the victim and inflammatory publicity is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

No Prejudice Shown. — Defendants' motion for change of venue in a prosecution for first-degree murder was properly denied where, with the exception of the coverage of defendants' arrest, the newspaper articles alleged to be prejudicial were of a very general nature and likely to be found in any jurisdiction to which the trial might be moved, the coverage of the arrest indicated only that defendants were charged with a crime and in no way intimated defendants were guilty, and the record did not indicate that any prospective jurors had read or

been influenced by the articles. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

In a trial for first-degree murder, where the accounts carried by the local news media did not appear to have been beyond the bounds of propriety or to have been inflammatory, the prominence of the victim did not seem to have unfairly affected the trial, and defendant failed to include in the record the voir dire examination of the jury, thereby failing to disclose that the defendant exhausted his peremptory challenges, that he had to accept any juror objectionable to him or even that any juror had prior knowledge or opinion as to this case, there was no abuse of discretion by the trial judge in denying defendant's motion for change of venue or for special venire. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

§ 15A-958. Motion for a special venire from another county.

Discretion of Trial Judge. — Motion for change of venue or for a special venire from another county on grounds of the prominence of the victim and inflammatory publicity is

addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

To challenge the admissibility of in-court identification testimony defendant is required to interpose at least a general objection when such evidence is offered in addition to filing a pretrial motion to suppress evidence. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

A pretrial motion to suppress identification evidence which the trial judge has not heard and ordinarily will not hear until it is offered at trial will not suffice to challenge the admissibility of in-court identification testimony. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Absent an objection to in-court identification testimony when such evidence is offered, or a request for a voir dire to probe the competency of the proffered evidence, the trial judge is not required to conduct a voir dire, make findings of fact and determine whether the proffered testimony meets the test of admissibility. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

Cited in State v. Brown, 29 N.C. App. 180, 223 S.E.2d 572 (1976).

SUBCHAPTER X. TRIAL.

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1026. Record of proceedings. — A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and preserved. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the assent of the defendant, his counsel, and the prosecutor be recorded. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1975, 2nd Sess., c. 983, s. 144.)

Editor's Note. —
The 1975 amendment substituted
"prosecutor" for "solicitor" in the second and
third sentences of the section.

The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "preserved" for "transcribed" at the end of the first sentence.

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

Testimony Properly Allowed. — The district attorney's failure to disclose to defense counsel an agreement with a State witness under this section did not warrant suppression of the witness's testimony where the trial judge

granted a recess as required by this section, and the record showed that defense counsel had known of the agreement for over three weeks. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

§ 15A-1055. Evidence of grant of immunity or testimonial arrangement may be fully developed; impact may be argued to the jury.

No Prejudicial Error Shown. — Trial judge's refusal to inform the jury of an agreement between the district attorney and a State witness under § 15A-1054 was not prejudicial error where the jury was fully informed of the agreement prior to the time it began

deliberations by trial judge's instructions following the testimony, and by defense counsel's cross-examination of the witness concerning promises made to him. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Chapter 17.
Habeas Corpus.

ARTICLE 2.

Application.

§ 17-4. When application denied.

Administrative Discretion. — The difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial

scrutiny. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

In practical terms, the questions of grade of conduct, privileges, disciplinary action and commendations are strictly administrative and not judicial matters. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

ARTICLE 6.

Proceedings and Judgment.

§ 17-33. When party discharged.

Administrative Discretion. — Where defendant, a youthful offender, was unsatisfied with an essentially administrative determination whereby his correctional status was affected adversely, diminishing his prospect for an early release, standing by itself, raises no habeas corpus question. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

In practical terms, the questions of grade of conduct, privileges, disciplinary action and commendations are strictly administrative and not judicial matters. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976). The difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny. In re Imprisonment of Stevens, 28 N.C. App. 471, 221 S.E.2d 839 (1976).

Chapter 18A.

Regulation of Intoxicating Liquors.

ARTICLE 1.

General Provisions.

§ 18A-3. Manufacture, sale, etc., forbidden except as expressly authorized.

Guilty Knowledge. — American I Alcoholic C employees and is responsible for their conduct. 513 (1975).

American Legion v. North Carolina State Bd. of Alcoholic Control, 27 N.C. App. 266, 218 S.E.2d 513 (1975).

ARTICLE 2.

A.B.C. Boards and Enforcement.

Part 2. Enforcement.

§ 18A-19. Director of Enforcement; hearing officers; State A.B.C. officers.

This Section and § 18A-20 Read Together. — This section and § 18A-20 are aimed at a similar problem. Analogous in function, they are to be construed cumulatively as part of a regulatory package although not necessarily in parimateria. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

Power of Entry and Inspection. — To engraft the implied demand and refusal provision of subsection (c) of this section onto the broad right of entry and inspection of \$18A-20(b) would frustrate legislative purpose. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

§ 18A-20. Powers of local officers.

This Section and § 18A-19 Read Together. — This section and § 18A-19 are aimed at a similar problem. Analogous in function, they are to be construed cumulatively as part of a regulatory package although not necessarily in parimateria. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

Power of Entry and Inspection. — To engraft the implied demand and refusal provision of § 18A-19(c) onto the broad right of entry and inspection of subsection (b) of the present section would frustrate legislative purpose. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

Consent to Search. — By seeking liquor licenses, licensees (here permittees) waive their Fourth Amendment rights and consent to administrative searches. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

Local law-enforcement officers are not required to request and obtain permission to enter the premises of an alcoholic beverage permittee before entering such premises for the purpose of checking for violations of the alcoholic beverage control laws under the authority of this section. Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

ARTICLE 4.

Malt Beverages and Wine.

Part 2. Permits.

§ 18A-43. Revocation or suspension of permit.

Applied in Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975). Sec

Chapter 20.

Motor Vehicles.

Article 2.

Uniform Driver's License Act.

Part 7. Title and Registration Fees.

Sec.

20-85. Schedule of fees.

Article 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

20-183.7. Fees to be charged by safety equipment inspection station.

Article 3.

Motor Vehicle Act of 1937.

20-7. Operators' and chauffeurs' licenses;

expiration; examinations; fees.

Part 5. Issuance of Special Plates.

20-81. Official license plates.

ARTICLE 1.

Division of Motor Vehicles.

§ 20-4.01. Definitions.

Operator. — In a prosecution for driving under the influence and driving while license was revoked, evidence that defendant was seated behind the wheel of a car which had the motor running was sufficient to prove that defendant was the operator of the car under subdivision (25). State v. Turner, 29 N.C. App. 163, 223 S.E.2d 530 (1976).

"Public vehicular area" includes streets

leading into privately owned trailer parks which rent, lease and sell individual lots. See opinion of Attorney General to Mr. Henry A. Harkey, Assistant District Attorney, 45 N.C.A.G. 284 (1976).

Applied in State v. Springs, 26 N.C. App. 757, 217 S.E.2d 200 (1975); State v. Lesley, 29 N.C. App. 169, 223 S.E.2d 532 (1976).

ARTICLE 1A.

Reciprocity Agreements as to Registration and Licensing.

§ 20-4.2. Definitions.

Applied in Cox v. Miller, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

ARTICLE 2.

Uniform Driver's License Act.

§ 20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees.

(j) The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund. (1975, c. 875, s. 4.)

Editor's Note. -

Session Laws 1975, c. 875, s. 4, effective July 1, 1975, rewrote subsection (j), which formerly provided that the fees should be placed in the

"Operators' and Chauffeurs' License Fund" to be used for the administration of this section.

As the rest of the section was not changed by the amendment, only subsection (j) is set out. Firemen classified as "drivers" and other city employees operating motor vehicles, not exempt pursuant to § 20-8, should obtain a

chauffeur's license. See opinion of Attorney General to Mr. W. A. Watts, Charlotte Deputy City Attorney, 45 N.C.A.G. 192 (1976).

§ 20-7.1. Notification of change of address.

License Must Show Current Address. — See opinion of Attorney General to Mr. Edward

Powell, Commissioner of Motor Vehicles, 45 N.C.A.G. 194 (1976).

§ 20-9. What persons shall not be licensed.

A petitioner seeking judicial review of a decision of the North Carolina Driver License Medical Review Board must file such petition in the Superior Court of Wake County pursuant to § 150A-45 and may not obtain a hearing under § 20-25 in the superior court of the county in which he resides. Cox v. Miller, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

§ 20-16. Authority of Division to suspend license.

Provisions of Subsection (d), etc. — In accord with original. See State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975).

Stated in Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests.

Defendant's Rights Not Denied. — Where defendant was fully and completely advised of his rights before a breathalyzer test was administered to him, the officer's error in stating that defendant could have a physician, registered nurse or a qualified technician or qualified person of his own choosing to administer the test under the direction of a law officer instead of stating that defendant could have a qualified person of his own choosing to

administer a test or tests in addition to any administered at the direction of the law-enforcement officer did not deny defendant his rights. State v. Green, 27 N.C. App. 491, 219 S.E.2d 529 (1975).

Applied in State v. Sawyer, 26 N.C. App. 728, 217 S.E.2d 116 (1975).

Cited in In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

§ 20-25. Right of appeal to court.

Provisions Satisfy Requirements of Due Process. —

In accord with original. See State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975).

A petitioner seeking judicial review of a decision of the North Carolina Driver License Medical Review Board must file such petition in the Superior Court of Wake County pursuant to \$ 150A-45 and may not obtain a hearing under the present section in the superior court of the county in which he resides. Cox v. Miller, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

§ 20-26. Records; copies furnished.

Accidents Are Not Required to Be Shown on Records. — See opinion of Attorney General to Mr. Fred Colquitt, Director, Driver's License

Section, Department of Motor Vehicles, 45 N.C.A.G. 218 (1976).

§ 20-28. Unlawful to drive while license suspended or revoked.

A valid conviction under subsection (a) requires proof of three elements. The State must prove that the defendant (1) operated a motor vehicle, (2) on a public highway, (3) while her driver's license was suspended. State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975).

Operation Must Have Occurred during,

In accord with 4th paragraph in original. See State v. Springs, 26 N.C. App. 757, 217 S.E.2d 200 (1975).

Offense Must Have Occurred upon, etc. -In accord with original. See State v. Springs, 26 N.C. App. 757, 217 S.E.2d 200 (1975).

Evidence Sufficient to Prove Defendant Was Operator. — In a prosecution for driving under the influence and driving while license was revoked, evidence that defendant was seated behind the wheel of a car which had the motor running was sufficient to prove that defendant was the operator of the car under § 20-4.01(25). State v. Turner, 29 N.C. App. 163, 223 S.E.2d 530

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-42. Authority to administer oaths and certify copies of records.

Admissibility of Division Records. — There is no error in allowing a properly certified copy of a record of the Division to be read into evidence by the district attorney, as opposed to having the document passed among the jurors. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

No Restriction on Signature Rule. - This section does not impose upon the general rule (that a stamped, printed or typewritten signature is a good signature), the restriction that the signature be made under the hand of the person making it. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

§ 20-48. Giving of notice.

Provisions Satisfy Requirements, etc. — In accord with original. See State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975).

The holding in State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970) was not abrogated by the holding in the United States Supreme Court in Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). See State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975).

Giving notice to the defendant as provided in

this section satisfies the requirements of due process with respect to the notice of an opportunity for a hearing as well as of the suspension itself. State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975).

Notice of Suspension, etc. -

In accord with 1st paragraph in original. See State v. Atwood, 27 N.C. App. 445, 219 S.E.2d 521 (1975).

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.

Editor's Note. -

effective July 1, 1976, provides: "G.S. 20-63(h) authorizes and directs the Division of Motor Vehicles insofar as practicable to enter into

commission contracts with persons, firms, etc., Session Laws 1975, 2nd Sess., c. 983, s. 93, in localities throughout North Carolina to issue registration plates, registration certificates and certificates of title at a rate per registration plate as may be set by the General Assembly.

The commission contract rate for fiscal year 1976-77 shall be forty cents (40ϕ) per registration

plate, and the rate shall remain the same until changed by the General Assembly."

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

But Defendant May Be Entitled, etc. — Where ownership of the vehicle involved in the injury complained of was sufficient to take the case to the jury under this section, the trial court's directed verdict in favor of defendant

owner was harmless error where the evidence

clearly established that the driver of the vehicle was on a purely personal mission at the time of the accident, thereby entitling defendant, without request, to a peremptory instruction on the issue of the owner's liability. Gwaltney v. Keaton, 29 N.C. App. 91, 223 S.E.2d 506 (1976).

Part 5. Issuance of Special Plates.

§ 20-81. Official license plates. — (a) License plates issued to State officials by the Division of Motor Vehicles of the Department of Transportation, upon which is inscribed any special numbering or designation different from the numbering and designation inscribed upon plates issued to the general public pursuant to G.S. 20-63, shall be assessed a fee of ten dollars (\$10.00), in addition to any fees charged under G.S. 20-87 and 20-88. These plates shall be subject to the same transfer provisions as provided in G.S. 20-64.

(b) The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Official's Registration Plate Fund." After deducting the costs of the plates, plus budgetary requirements for handling and issuance, to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred in accordance with G.S. 20-81.3(c). (1937, c. 407, s. 45;

1961, c. 360, s. 17; 1975, c. 432.)

Editor's Note. -

Session Laws 1975, c. 432, effective Jan. 1, 1976, rewrote this section to read as set out above. Prior to the 1975 amendments, this section provided only that official license plates should be subject to the transfer provisions in § 20-64.

This section was also rewritten by Session Laws 1975, c. 865, ratified June 26, 1975, and made effective July 1, 1975. It is possible that c. 865, having the later ratification date, could be interpreted as repealing c. 432, or that c. 432, having the later effective date, could be interpreted as repealing c. 865 as of Jan. 1, 1976. The section as rewritten by c. 865 is set out in the 1975 Supplement to Volume 1C of the General Statutes.

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees. — There shall be paid to the Division for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

(8) Each application for removing a lien from a certificate of title 2.00 (1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9; 1955, c. 554, s. 4; 1961, c. 360, s. 19; c. 835, s. 11; 1975, c. 430; c. 716, s. 5; c. 727; c. 875, s. 4; c. 879, s. 46.)

Editor's Note. -

Session Laws 1975, c. 875, s. 4, effective July 1, 1975, deleted the former last sentence, which required fees collected under subdivisions (7)

and (8) to be placed in a "Lien Recording Fund," to be used for the administration of the laws relating to perfection of security interests in vehicles.

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106. Receiving or transferring stolen vehicles.

The Purpose of This Section, Etc. -

In accord with 1975 Supp. See State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

The State attempts to accomplish the purpose of discouraging the possession of stolen automobiles by making the act of possessing a stolen automobile punishable as a felony. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516

(1976).

No Felonious Intent Required. — Neither the construction of this section nor the purpose for which it was enacted compels a requirement that the doer of the act have a felonious intent. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-124. Brakes.

Fold-Out Camper Trailers Are Not House Trailers. — See opinion of Attorney General to The Honorable Donald R. Kincaid, Member of Senate, N.C. General Assembly, 45 N.C.A.G. 210 (1976).

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor.

Elements of Offense. -

In accord with 2nd paragraph in original. See State v. Griggs, 27 N.C. App. 159, 218 S.E.2d 200 (1975)

Prospective Effect of 1973 Act. — See State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975).

"Operator" under § 20-4.01(25). — In a prosecution for driving under the influence and driving while license was revoked, evidence that defendant was seated behind the wheel of a car which had the motor running was sufficient to prove that defendant was the operator of the car under § 20-4.01(25). State v. Turner, 29 N.C. App. 163, 223 S.E.2d 530 (1976).

Section Applicable to Persons Operating Bicycles with Helper Motors. — See opinion of Attorney General to Mr. Michael F. Royster,

Assistant District Attorney, Twenty-Sixth Judicial District, 45 N.C.A.G. 286 (1976).

Charge on Lesser Included Offense. — In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

Applied in State v. Sawyer, 26 N.C. App. 728, 217 S.E.2d 116 (1975); State v. Hurley, 28 N.C. App. 478, 221 S.E.2d 743 (1976); State v. Lesley, 29 N.C. App. 169, 223 S.E.2d 532 (1976).

§ 20-139.1. Result of a chemical analysis admissible presumption.

North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other

writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

in

evidence:

Refusal of arresting officer to sign forms authorizing that blood sample be sent from hospital that did not perform certain type of analysis to hospital that did was not a violation of defendant's rights under subsection (d) of this section so as to render prior breathalyzer results inadmissible, since the officer complied with the mandate of this section by taking defendant to a physician of his choice for the prior test and it was defendant's responsibility to obtain an analysis of the blood sample. State v. Sawyer, 26 N.C. App. 728, 217 S.E.2d 116 (1975).

Result of Breathalyzer Test, etc. -

In an action to recover damages for injuries received when defendant's car struck the motorcycle upon which plaintiff was a passenger, there was no prejudice to defendant by the admission of the results of the blood alcohol test performed upon the motorcycle's driver since there was no evidence tending to establish any connection between the driver's drinking and the cause of the accident. Gwaltney v. Keaton, 29 N.C. App. 91, 223 S.E.2d 506 (1976).

Compliance with Requirements of Section,

etc. -

All that this section requires of the arresting

officer is that he assist defendant in contacting the doctor; he is not required in addition to transport defendant to the doctor. State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975).

The State's failure to lay the proper foundation for the admission of evidence of the results of the breathalyzer test entitles defendant to a new trial. State v. Gray, 28 N.C. App. 506, 221 S.E.2d 765 (1976).

Failure to Comply with Subsection (b). — The failure of the State to produce evidence of the test operator's compliance with subsection (b) must be deemed prejudicial error. State v. Gray, 28 N.C. App. 506, 221 S.E.2d 765 (1976).

The burden of proving compliance with subsection (b) lies with the State and the failure to offer any proof is not sanctioned by the courts. State v. Gray, 28 N.C. App. 506, 221 S.E.2d 765 (1976).

Prospective Effect of 1973 Act. — See State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975).

Applied in State v. Hurley, 28 N.C. App. 478, 221 S.E.2d 743 (1976).

§ 20-140. Reckless driving.

Charge on Lesser Included Offense. — In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his

motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

§ 20-141. Speed restrictions.

Applied in McDougald v. Doughty, 27 N.C. App. 237, 218 S.E.2d 482 (1975).

Cited in Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

§ 20-150. Limitations on privilege of overtaking and passing.

Negligence Per Se. -

Where plaintiff's driver overtook and attempted to pass defendant's truck at an intersection within a municipality, he was guilty of negligence per se under subsection (c) of this section, and this was so without regard to his knowledge of whether he was within the city limits of the municipality. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

The meaning of subsection (c), etc. -

Since subsection (c) of this section does not contain the words "knowingly," "willfully" or

any other words of like import, it was the obvious intent of the legislature to make the performance of a specific act a criminal violation and to thereby place upon the individual the burden to know whether his conduct is within the statutory prohibition. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Subsection (c) of this section is a safety statute enacted for the public's common safety and welfare. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d

536 (1975).

Subsection (c) of this section requires one to observe street intersections within corporate limits whether marked or unmarked. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Violations of subsection (c) of this section have been held to constitute negligence per se. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

§ 20-156. Exceptions to the right-of-way rule.

Instructions to Jury. -

While use of the words "dominant" and "servient" may not be precisely correct in referring to the roads in question under subsection (a) of this section in instructions to the jury, where judge instructs upon proper principles of law applicable to each motorist, defendant was not prejudiced thereby. Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

Duty of Driver Entering Highway, etc. —

In order to comply with subsection (a) of this section, the driver of a vehicle about to enter or cross a highway from an alley, building entrance, private road or driveway is only required to look for vehicles approaching on the highway at a time when his lookout may be

effective, to see what he should see, and to yield the right-of-way to vehicles on the highway which, in the exercise of reasonable care, he sees or should see are being operated at such a speed or distance as to make his entry onto the highway unsafe, by delaying his entry onto the highway until a reasonable and prudent man would conclude that the entry could be made in safety. Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

Subsection (a) of this section does not require omniscience on the part of a motorist entering a public highway from a private drive. Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

§ 20-158. Vehicle control signs and signals.

Stated in Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Cited in Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

Part 11. Pedestrians' Rights and Duties.

§ 20-174. Crossing at other than crosswalks; walking along highway.

But It Is Duty of Pedestrian, etc. -

A pedestrian who crosses the street at a point where he does not have the right-of-way must constantly watch for oncoming traffic before he steps into the street and while he is crossing. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Duty of Motorist to Child. -

The presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

The presence of children on or near a highway is a warning signal to a motorist, who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

Violation of Section Not Negligence Per Se. —

Violations of this section do not constitute negligence per se. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

The failure of a pedestrian, etc. -

In accord with 7th paragraph in original. See Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Although the failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right-of-way to a motor vehicle is not contributory negligence per se but is only evidence of negligence, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the

right-of-way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. Foster v. Shearin, 28 N.C. App. 51, 220 S.E.2d 179 (1975).

Upon consideration of a motion for a directed verdict, where it appears that plaintiff was proceeding along a dirt pathway beyond the curb on the north side of a street when she was confronted with an automobile blocking a driveway which traversed the path, plaintiff left the dirt path and walked along a gutter between the driveway and the portion of the street upon which vehicles ordinarily traveled, plaintiff was never more than 12 inches from the north curb of the street, and just before she reached the curb on the western side of the driveway she was struck by defendant's automobile, the evidence permits diverse inferences as to whether plaintiff acted in a reasonable manner and whether her acts proximately caused her injuries, and thus, the issue of contributory negligence should have been submitted to the

jury. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

The issue of contributory negligence was properly submitted to the jury in an action by a pedestrian for personal injuries sustained when he was struck by defendant's car, where evidence showed that plaintiff was crossing the roadway at an unmarked crossing in the path of an oncoming car which had the right-of-way. Maness v. Ingram, 29 N.C. App. 26, 222 S.E.2d 737 (1976).

It is to be left to the jury to consider a violation of subsection (d) of this section as evidence of negligence along with other evidence in determining whether or not the plaintiff contributed to his own injury and was, therefore, guilty of contributory negligence. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

Applied in Clark v. Bodycombe, 27 N.C. App. 146, 218 S.E.2d 216 (1975); Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

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.

Judgment upon Ex Parte Request. — Judge's execution judgments allowing limited driving privileges under this section upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the

judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

ARTICLE 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

§ 20-183.7. Fees to be charged by safety equipment inspection station. — Every inspection station, except self-inspectors as designated herein, shall charge a fee of three dollars ten cents (\$3.10) for inspecting a motor vehicle to determine compliance with this Article and shall give the operator a receipt indicating the articles and equipment approved and disapproved; provided, that inspection stations approved by the Commissioner, and operated under rules, regulations and supervision of any governmental agency, when inspecting vehicles required to be inspected by such agencies' rules and regulations and by the provisions of this Part, may, upon approval by such inspection station and the payment of a fee of thirty-five cents ($35_{\it e}$), attach to the vehicle inspected a North Carolina inspection certificate as required by this Part. When the receipt is presented to the inspection station which issued it, at any time within 90 days,

that inspection station shall reinspect the motor vehicle free of additional charge until approved. When said vehicle is approved, and upon payment to the inspection station of the fee, the inspection station shall affix a valid inspection certificate to said motor vehicle, and said inspection station shall maintain a record of the motor vehicles inspected which shall be available for 18 months. The Division of Motor Vehicles shall receive thirty-five cents (35¢) for each inspection certificate, and these proceeds shall be placed in the Highway Fund. (1965, c. 734, s. 1; 1969, c. 1242; 1973, c. 1480; 1975, c. 547; c. 716, s. 5; c. 875, s. 4.)

Editor's Note. -

§ 20-222

The third 1975 amendment, effective July 1, 1975, rewrote the last sentence, which formerly provided for a fee of thirty-five cents $(35\mathfrak{g})$ for each inspection certificate, the proceeds to be placed in the "Motor Vehicle Safety Equipment

Inspection Fund," to be used for the administration of this Article.

Pursuant to Session Laws 1975, c. 716, s. 5, "Division" has been substituted for "Department" in the last sentence of the section as amended by Session Laws 1975, c. 875, s. 4.

ARTICLE 8.

Habitual Offenders.

§ 20-222. Commissioner to certify record to superior court.

Adoption of Mechanical Reproduction as Signature. — When the authorized officer of the Division of Motor Vehicles provides records of the Division pursuant to the provisions of this section, it may be presumed that he intends to authenticate the documents and to adopt the mechanical reproduction of his name as his own signature. State v. Watts, 289 N.C. 445, 222

S.E.2d 389 (1976).

No Restriction on Signature Rule. — This section does not impose upon the general rule (that a stamped, printed or typewritten signature is a good signature), the restriction that the signature be made under the hand of the person making it. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.21. "Motor vehicle liability policy" defined.

II. THE OMNIBUS CLAUSE.

Liberal Construction in Interpreting Scope,

The legislature favors adoption of a liberal rule of construction in applying the coverage under the omnibus clause. Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

etc.

It was the necessity of proof of permission that the 1967 amendment to subsection (b)(2) was designed to obviate. Although lawful possession by the operator may be shown by evidence of permission granted to the operator to take the vehicle in the first instance, the plaintiff is not required to show more than lawful possession at the time of the accident.

Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

When lawful possession is shown, further proof is not required that the operator had the owner's permission to drive on the very trip and occasion of a collision. Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

Lawful Possession Submitted to Jury. — Plaintiff, once having offered evidence tending to show lawful possession of the truck by a driver, was entitled to have the issue of lawful possession submitted to the jury. Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-300. Appeals from actions of Commissioner.

Applied in Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975).

§ 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.

The notice provision comtemplates an analysis of relevant market conditions within the trade area at or about the time that the notice of the new dealership is made, not the distant past or future. Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975).

Further Notice under Subdivision (5) Required. — Where a motorcycle manufacturer gave plaintiff dealer notice under subdivision (5) of this section of its intention to grant a new motorcycle franchise in plaintiff's trade area on or before September 1, 1973, but the manufacturer did not grant such a franchise by

that date, the failure of plaintiff to request a hearing by the Commissioner of Motor Vehicles within 30 days after receipt of such notice did not give the manufacturer the right to grant a new franchise at any time in the future without giving plaintiff further notice under subdivision (5); and where the manufacturer granted a new franchise on October 14, 1974, without giving additional notice to plaintiff, the 30-day time limitation never began to run, and plaintiff properly filed its petition for a hearing on October 19, 1974. Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975).

Chapter 22.

Contracts Requiring Writing.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.

I. IN GENERAL.

Applied in Howard v. Hamilton, 28 N.C. App. 670, 222 S.E.2d 913 (1976).

§ 22-2. Contract for sale of land; leases.

I. IN GENERAL.

A deed is a contract which must meet the requirements of the statute of frauds. Overton v. Boyce, 26 N.C. App. 680, 217 S.E.2d 704 (1975).

To be specifically enforceable an option-contract must meet the requirements of the statute of frauds. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Parol trust device is used to prevent a party from retaining property unfairly after purchasing it as the agent for another party. Britt v. Allen, 27 N.C. App. 122, 218 S.E.2d 218 (1975).

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

When Patent Ambiguity Exists. -

When a description in a contract to convey land leaves the land in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty, it is patently ambiguous and parol evidence is not admissible to aid the description. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

When description in contract to convey land is patently ambiguous the deed or contract is void. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Whether a description in a contract to convey land is patently ambiguous is a question of law. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Sufficiency of Description. -

A description in a contract to convey land is patently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Requisites of Deeds. -

A valid contract to convey land must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, must contain a description of the land, the subject matter of the contract, which is either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. Watts v. Ridenhour, 27 N.C. App. 8, 217 S.E.2d 211 (1975).

A contract to convey a part of a tract of land, to be valid, must definitely identify the portion to be conveyed or designate the means or source by which it can be positively identified. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to convey, excepting a part of the land described, is valid provided land excepted can be identified. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to convey 200 acres of a larger described tract is saved from patent ambiguity by the provision that the acreage is "to be determined by a new survey furnished by the sellers." Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Excepted property in a contract to convey land is described with sufficient certainty if the exact location thereof is left to the election of the grantor or is capable of subsequent ascertainment otherwise. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Conveyance of Remainder. — In a contract to convey land, once lands to be retained by the sellers are surveyed and the description of the property obtained, a conveyance, excepting the land to be retained by metes and bounds as shown by the survey, operates as a conveyance of the remainder. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

1976 INTERIM SUPPLEMENT

Chapter 25.

Uniform Commercial Code.

Article 1.

General Provisions.

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Sec.

25-1-105. Territorial application of the act; parties' power to choose applicable

Part 2. General Definitions and Principles of Interpretation.

25-1-201. General definitions.

Article 2.

Sales.

Part 1. Short Title, General Construction and Subject Matter.

25-2-107. Goods to be severed from realty; recording.

Article 5.

Letters of Credit.

25-5-116. Transfer and assignment.

Article 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

Part 1. Short Title, Applicability and Definitions.

25-9-101. Short title.

25-9-102. Policy and subject matter of article.

25-9-103. Perfection of security interests in multiple-state transactions.

25-9-104. Transactions excluded from article.

25-9-105. Definitions and index of definitions. 25-9-106. Definitions: "Account"; "general

initions: intangibles." "Purchase 25-9-107. Definitions: money security interest."

25-9-108. When after-acquired collateral not security for antecedent debt.

25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory.

25-9-110. Sufficiency of description.

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25-9-113. Security interests arising under article on sales.

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25-9-201.1. [Repealed.]

25-9-202. Title to collateral immaterial.

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25-9-205. Use or disposition of collateral without accounting permissible.

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25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.

25-9-303. When security interest is perfected; continuity of perfection.

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.

25-9-305. When possession by secured party perfects security interest without filing.

25-9-306. "Proceeds"; secured party's rights on disposition of collateral.

25-9-307. Protection of buyers of goods.

25-9-308. Purchase of chattel paper instruments.

Sec. 25-9-309. Protection of purchasers of instruments and documents.

25-9-310. Priority of certain liens arising by operation of law.

25-9-311. Alienability of debtor's rights; judicial process.

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ARTICLE 1.

General Provisions.

PART 1.

SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT.

§ 25-1-102. Purposes; rules of construction; variation by agreement.

Applied in Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

§ 25-1-103. Supplementary general principles of law applicable.

Trust Doctrine. — One principle made applicable by this section is the doctrine of trust pursuit under which a cestui que trust is enabled to follow the trust funds through changes in

their state and form in the hands of the trustee. Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

§ 25-1-105. Territorial application of the act; parties' power to choose

applicable law.

(2) Where one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102). Bulk transfers subject to the article on bulk transfers. (G.S. 25-6-102).

Applicability of the article on investment securities. (G.S. 25-8-106).

Perfection provisions of the article on secured transactions. (G.S. 25-9-103). (1965, c. 700, s. 1; 1975, c. 862, s. 1.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, substituted the last line in subsection (2) for a provision which read: "Policy and scope of the article on secured transactions §§ 25-9-102 and 25-9-103."

Because of the postponed effective date of the

1975 amendment, subsection (2) of this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1976 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

§ 25-1-106. Remedies to be liberally administered.

Applied in Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

PART 2.

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

§ 25-1-201. General definitions. — Subject to additional definitions contained in the subsequent articles of this chapter which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this chapter:

(9) "Buyer in ordinary course of business" means a person who 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 in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

bulk or as security for or in total or partial satisfaction of a money debt.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (G.S. 25-2-401) is limited in effect to a reservation of a "security

interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under G.S. 25-2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (G.S. 25-2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(1975, c. 862, ss. 2, 3.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, added the second sentence in subsection (9), substituted "accounts or chattel paper" for "accounts, chattel paper, or contract rights" in the third sentence of subsection (37).

Because of the postponed effective date of the 1975 amendment, subsections (9) and (37) as amended were not set out in the text in the 1975 Cumulative Supplement, but were carried in a note. The amended subsections are therefore set out in this 1976 Interim Supplement.

As the rest of the section was not changed by the amendment, only the introductory language and subsections (9) and (37) are set out.

"Conspicuousness". — Determination of conspicuousness is a question of law for the court. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Applied in Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976); Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

§ 25-1-204. Time; reasonable time; "seasonably."

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

§ 25-1-205. Course of dealing and usage of trade.

Trade Usage May Be Matter of Fact or Law.

— Ordinarily, the existence and the scope of a usage of trade are questions of fact to be determined by the fact finder. When, however, it is established that a usage of trade is embodied

in a written code or similar writing, the interpretation of the writing becomes a question of law for the court. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

ARTICLE 2.

Sales.

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-103. Definitions and index of definitions.

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

§ 25-2-104. Definitions: "Merchant"; "between merchants"; "financing agency."

"Farmer" as "Merchant" Matter for Proof.

— Since the growing and marketing of corn and soybeans is an important part of the agricultural economy of the area, and the procedures for marketing these crops are well known, it cannot

be said that a particular "farmer," or a grower, is not a "merchant" within the code definition, but rather is a matter for proof. Currituck Grain Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

§ 25-2-105. Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit."

Quoted in Currituck Grain Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

§ 25-2-106. Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation."

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

§ 25-2-107. Goods to be severed from realty; recording. — (1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land

is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third-party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

(1965, c. 700, s. 1; 1975, c. 862, s. 4.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted "sale of minerals or the like (including oil and gas)" for "sale of timber, minerals or the like" near the beginning of subsection (1) and inserted "or of timber to be cut" near the middle of subsection (2).

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

PART 2.

FORM, FORMATION AND READJUSTMENT OF CONTRACT.

§ 25-2-201. Formal requirements: statute of frauds.

Statute Not Defense for Merchant. - If a merchant receives a written confirmation sufficient as against the sender and fails to give written notice within 10 days, the statute of frauds would not be a defense. Currituck Grain Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Nonmerchant who signs nothing ordinarily will not be bound to a contract under the statute of frauds provision of this section. Currituck Grain Inc. v. Powell, 28 N.C. App. 563,

222 S.E.2d 1 (1976).

"Farmer" as "Merchant" Matter for Proof. - Since the growing and marketing of corn and soybeans is an important part of the agricultural economy of the area, and the procedures for marketing these crops are well known, it cannot be said that a particular "farmer," or a grower, is not a "merchant" within the code definition. but rather is a matter for proof. Currituck Grain Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

§ 25-2-202. Final written expression; parol or extrinsic evidence.

Parol Evidence as to Lease-Purchase Agreement. - Under paragraph (a), parol evidence raised by operation of a course of performance may be used in order to help

explain and supplement a particular lease-purchase agreement. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

§ 25-2-208. Course of performance or practical construction.

Fact that exclusion of warranty raised by parties' course of performance is oral does not vitiate its utility or relevance. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Parol Evidence as to Lease-Purchase Agreement. — Under § 25-2-202(a), parol

evidence raised by operation of a course of performance may be used in order to help explain and supplement a particular lease-purchase agreement. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

PART 3.

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT.

§ 25-2-302. Unconscionable contract or clause.

Under subsection (1) determination of unconscionability is a question of law for the 689, 220 S.E.2d 361 (1975).

court. Billings v. Joseph Harris Co., 27 N.C. App.

§ 25-2-309. Absence of specific time provisions; notice of termination.

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

§ 25-2-313. Express warranties by affirmation, promise, description, sample.

Applied in Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

Disclaimer and Substitution of § 25-2-719 (1)(a) Limitations. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under § 25-2-315 and this section, substituting in place thereof the

limitations of § 25-2-719(1)(a). Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Applied in Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

§ 25-2-315. Implied warranty: Fitness for particular purpose.

Disclaimer and Substitution of § 25-2-719(1)(a) Limitations. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under § 25-2-314 and this section, substituting in place

thereof the limitations of § 25-2-719(1)(a). Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Applied in Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

§ 25-2-316. Exclusion or modification of warranties.

To be valid under this section, disclaimer provision must be stated in express terms, mention "merchantability" in order to disclaim the implied warranty of merchantability, and be conspicuously displayed. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Fact that exclusion of warranty raised by parties' course of performance is oral does not vitiate its utility or relevance. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Disclaimer and Substitution of § 25-2-719(1)(a) Limitations. — A merchant seller may disclaim all liability under subsection (2) stemming from any breach of warranties of merchantability and fitness under §§ 25-2-314 and 25-2-315, substituting in place thereof the limitations of § 25-2-719(1)(a). Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

PART 4.

TITLE, CREDITORS AND GOOD FAITH PURCHASES.

§ 25-2-403. Power to transfer; good faith purchase of goods; "entrusting."

"Good faith" in the context of this section means "honesty in fact" in the transaction involved. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

Burden of proof of transfer of good title rests upon party making later purchase. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

To prevail the subsequent purchaser must prove (1) that he was a purchaser, (2) that he purchased in good faith and (3) that he gave value. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

Vendee May Transfer Good Title, etc. -

This section allows a person who has obtained delivery of goods under a transaction of purchase to transfer a good title to a "good faith purchaser for value" even though such person obtained delivery in exchange for a check which is later dishonored or procured the delivery through criminal fraud. Landrum v. Armbruster, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

PART 5.

PERFORMANCE.

§ 25-2-508. Cure by seller of improper tender or delivery; replacement.

Buyer's Obligation Abrogated after "Reasonable Time". — Where defendants were not able to and did not make a conforming delivery within a "reasonable time" or within the "contract time," the plaintiff buyer had no

further obligations to purchase or accept any mobile home from defendant, whether the original unit was in a repaired condition or was a replacement. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

§ 25-2-511. Tender of payment by buyer; payment by check.

Applied in Berube v. Mobile Homes Sales & Serv., 28 N.C. App. 160, 220 S.E.2d 636 (1975).

§ 25-2-512. Payment by buyer before inspection.

Mere fact that plaintiff paid before delivery does not constitute acceptance of goods or impair buyer's right to inspect or any of his remedies. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

PART 6.

Breach, Repudiation and Excuse.

§ 25-2-602. Manner and effect of rightful rejection.

Remaining in Mobile Home after Revocation or Rejection. — The fact that plaintiff stayed in a mobile home unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

Finding of Revocation or Rejection Warrants Same Relief. — Any error committed by the district court in finding a rejection instead of a revocation of acceptance must be deemed harmless since evidence warranted a finding of

revocation. In either case the plaintiff's relief is the same. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

Recovery upon Revocation or Rejection. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

§ 25-2-608. Revocation of acceptance in whole or in part.

Remaining in Mobile Home after Revocation or Rejection. — The fact that plaintiff stayed in a mobile home unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

Finding of Revocation or Rejection Warrants Same Relief. — Any error committed by the district court in finding a rejection instead of a revocation of acceptance must be deemed harmless since evidence warranted a finding of

revocation. In either case the plaintiff's relief is the same. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

Recovery upon Revocation or Rejection. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

§ 25-2-610. Anticipatory repudiation.

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

PART 7.

REMEDIES.

§ 25-2-708. Seller's damages for nonacceptance or repudiation.

Applied in Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

§ 25-2-710. Seller's incidental damages.

Applied in Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

§ 25-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

Recovery of Price Paid and Damages. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

§ 25-2-715. Buyer's incidental and consequential damages.

Recovery of Price Paid and Damages. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975).

§ 25-2-719. Contractual modification or limitation of remedy.

Unconscionability relates to contract terms that are oppressive. It is applicable to one-sided provisions, denying the contracting party any opportunity for meaningful choice. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Disclaimer and Substitution of Liabilities under This Section. — A merchant seller may

disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under §§ 25-2-314 and 25-2-315, substituting in place thereof the limitations of subdivision (1)(a) of this section. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

ARTICLE 3.

Commercial Paper.

PART 1.

SHORT TITLE, FORM AND INTERPRETATION.

§ 25-3-118. Ambiguous terms and rules of construction.

Subsection (e) of this section does not change the rule in this State that a prior endorser is not entitled to recover from a subsequent endorser in the absence of an

agreement otherwise establishing liability. Wilson v. Turner, 29 N.C. App. 101, 223 S.E.2d 539 (1976).

PART 4.

LIABILITY OF PARTIES.

§ 25-3-403. Signature by authorized representative.

A party's undisclosed intention not to be personally obligated, by itself, is irrelevant under subdivision (2)(b) of this section. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

Intent Insufficient to Invoke Exception. — It takes more than an intention of one party undisclosed to the other to establish the requisite understanding between the parties necessary to invoke the exception to personal liability under subdivision (2)(b) of this section. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

Intent as to Burden. — The clear intent of the statute is that the signing party has the burden to otherwise establish, else he incurs the personal obligation which the statute imposes. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976).

Subdivision (2)(b) allows introduction of parol evidence to establish requisite agency status to avoid personal liability. North Carolina Equip. Co. v. DeBruhl, 28 N.C. App. 330, 220 S.E.2d 867 (1976).

By Parol. — When the plaintiff who sues the agent personally is one who dealt directly with the agent, and the signature either names the principal or indicates the representative capacity, subdivision (2)(b) permits the agent to introduce parol evidence of his agency status to avoid personal liability. North Carolina Equip. Co. v. DeBruhl, 28 N.C. App. 330, 220 S.E.2d 867 (1976).

Alter Ego Doctrine Inapplicable. — Evidence establishing that defendant's den was the corporate office, that defendant had not read the corporate bylaws and that he was not familiar with the corporation's tax matters was not sufficient evidence to show that the corporation was "ignored as a separate entity," and was insufficient to apply the alter ego doctrine and hold defendant personally liable. North Carolina Equip. Co. v. DeBruhl, 28 N.C. App. 330, 220 S.E.2d 867 (1976).

§ 25-3-414. Contract of indorser; order of liability.

Presumption as to Order of Liability Unchanged. — The Uniform Commercial Code did not change the North Carolina rule that endorsers are presumed to be liable in the order

in which their signatures appear on the instrument. Wilson v. Turner, 29 N.C. App. 101, 223 S.E.2d 539 (1976).

ARTICLE 5.

Letters of Credit.

§ 25-5-109. Issuer's obligation to its customer.

Drawee bank is involved only with documents, not with merchandise. Its involvement is altogether separate and apart from the transaction between the buyer and seller; its duties and liability are governed exclusively by the terms of the letter, not the terms of the parties' contract with each other. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. 1975).

Drawee bank is not to be embroiled in disputes between buyer and seller, the

beneficiary of the credit. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. 1975).

No Recovery from Drawee. — The beneficiary must meet the terms of the credit — and precisely — if it is to exact performance of the issuer. Failing such compliance there can be no recovery from the drawee bank. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. 1975).

§ 25-5-116. Transfer and assignment.

(2) Even though the credit specifically states that it is nontransferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under article 9 on secured transactions and is governed by that article except that

(a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of the security

interest under article 9; and

(b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignment and

a request to pay the assignee; and
(c) after what reasonably appears to be such a notification has been received
the issuer may without dishonor refuse to accept or pay even to a person
otherwise entitled to honor until the letter of credit or advice of credit is
exhibited to the issuer.

(1975, c. 862, s. 5.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted "of an account" for "of a contract right" near the beginning of the second sentence in subsection (2).

Because of the postponed effective date of the 1975 amendment, subsection (2) as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1976 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

ARTICLE 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

Editor's Note.

This Article 9 of the Uniform Commercia! Code was amended and rewritten by Session Laws 1975, c. 862, s. 7, effective July 1, 1976. In accordance with the standing policy adopted for handling amendments with postponed effective dates in the General Statutes, the amended Article was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note following the heading of Article 9. The amended Article is therefore set out in this 1976 Interim Supplement.

PART 1.

SHORT TITLE, APPLICABILITY AND DEFINITIONS.

§ 25-9-101. Short title. — This article shall be known and may be cited as Uniform Commercial Code — Secured Transactions. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-102. Policy and subject matter of article. — (1) Except as otherwise

provided in G.S. 25-9-104 on excluded transactions, this article applies

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) to any sale of accounts or chattel paper.

(2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in G.S. 25-9-310.

(3) The application of this article to a security interest in a secured obligation

is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply. (1965, c. 700, s. 1; 1975, c. 862,

Editor's Note. -

The 1975 amendment, effective July 1, 1976, rewrote the introductory paragraph of subsection (1), substituted "or accounts" for "accounts or contract paper" in paragraph (1)(a) and deleted "contract rights" following "accounts" in paragraph (1)(b).

§ 25-9-103. Perfection of security interests in multiple-state transactions.

- (1) Documents, Instruments and Ordinary Goods.

(a) This subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5).

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of a security interest in collateral 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.

(c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or nonperfection of the security interest from the time it attaches until 30 days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the 30-day period.

(d) When collateral is brought into and kept in this State while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is

required by part 3 of this article to perfect the security interest,

(i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this State, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

(ii) if the action is taken before the expiration of the period specified in

subparagraph (i), the security interest continues perfected thereafter; (iii) for the purpose of priority over a buyer of consumer goods (subsection (2) of G.S. 25-9-307), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii).

(2) Certificate of Title.

(a) This subsection applies to goods covered by a certificate of title issued under a statute of this State or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

(c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this State and thereafter covered by a certificate of title issued by this State is subject to the

rules stated in paragraph (d) of subsection (1).

(d) If goods are grought into this State while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this State and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

(3) Accounts, General Intangibles and Mobile Goods.

(a) This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road-building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).

(b) The law (including the conflict of laws rules) of the jurisdiction in which

the debtor is located governs the perfection and the effect of perfection or

nonperfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or nonperfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the

foreign air carrier.

(e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

(4) Chattel Paper. — The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a nonpossessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

(5) Minerals. — Perfection and the effect of perfection or nonperfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead, are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —
The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-104. Transactions excluded from article. — This article does not apply

(a) to a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

(b) to a landlord's lien; or

(c) to a lien given by statute or other rule of law for services or materials except as provided in G.S. 25-9-310 on priority of such liens; or

(d) to a transfer of a claim for wages, salary or other compensation of an employee; or

(e) to a transfer by a government or governmental subdivision or agency; or (f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to any assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or

(g) to a transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds (G.S. 25-9-306) and priorities in

proceeds (G.S. 25-9-312); or

(h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

(i) to any right of setoff; or

(j) except to the extent that provision is made for fixtures in G.S. 25-9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

(k) to a transfer in whole or in part of any claim arising out of tort; or (1) to a transfer of an interest in any deposit account (subsection (1) of G.S. 25-9-105), except as provided with respect to proceeds (G.S. 25-9-306) and priorities in proceeds (G.S. 25-9-312). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note.

The 1975 amendment, effective July 1, 1976, deleted "such as the Ship Mortgage Act, 1920" following "United States" in subsection (a), provision excluding "any deposit, savings, substituted present subsection (e) for a provision passbook or like account maintained with a bank, railway rolling stock; or," rewrote subsection (f),

added the exception clause in subsection (g) and the clause in parentheses in subsection (h), rewrote subsection (k) so as to eliminate a which read "to an equipment trust covering savings and loan association, credit union or like organization," and added subsection (1).

§ 25-9-105. Definitions and index of definitions. — (1) In this article unless the context otherwise requires:

(a) "Account debtor" means the person who is obligated on an account, chattel

paper or general intangible;

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

(c) "Collateral" means the property subject to a security interest, and includes

accounts and chattel paper which have been sold;

(d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of a collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;

(e) "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit; (f) "Document" means document of title as defined in the general definitions

of article 1 (G.S. 25-1-201), and a receipt of the kind described in subsection (2) of G.S. 25-7-201:

(g) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests;

(h) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (G.S. 25-9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and removed under a conveyance

or contract for sale, the unborn young of animals, and growing crops;
(i) "Instrument" means a negotiable instrument (defined in G.S. 25-3-104), or a security (defined in G.S. 25-8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with

any necessary indorsement or assignment;
(j) "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

(k) An advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation;

(l) "Security agreement" means an agreement which creates or provides for

a security interest;

(m) "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

(2) Other definitions applying to this article and the sections in which they

"Account." (G.S. 25-9-106). "Attach." (G.S. 25-9-203).

"Construction mortgage." (G.S. 25-9-313(1)).
"Consumer goods." (G.S. 25-9-109(1)).
"Equipment." (G.S. 25-9-109(2)).
"Farm products." (G.S. 25-9-109(2)).

"Construction mortgage." (G.S. 25-9-313(1)).

"Consumer goods." (G.S. 25-9-109(1)).

"Equipment." (G.S. 25-9-109(2)).

"Farm products." (G.S. 25-9-313(1)).

"Fixture." (G.S. 25-9-313(1)).

"Fixture filing." (G.S. 25-9-313(1)).

"General intangibles." (G.S. 25-9-106).

"Inventory." (G.S. 25-9-109(4)).

"Lien creditor." (G.S. 25-9-301(3)).

"Proceeds." (G.S. 25-9-306(1)) "Proceeds." (G.S. 25-9-306(1)).

"Proceeds." (G.S. 25-9-306(1)).
"Purchase money security interest." (G.S. 25-9-107).

"United States." (G.S. 25-9-103).
(3) The following definitions in other articles apply to this article: "Check." (G.S. 25-3-104).

"Contract for sale." (G.S. 25-2-106). "Contract for sale." (G.S. 25-2-106).
"Holder in due course." (G.S. 25-3-302).

"Note." (G.S. 25-3-104). "Sale." (G.S. 25-2-106).

(4) In addition article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —

The 1975 amendment, effective July 1, 1976, eliminated references to contract rights in paragraphs (a), (c) and (d) and present paragraph (m) of subsection (1), inserted "but" near the middle of the first sentence of paragraph (b) of subsection (1), added present paragraphs (e), (g), (j) and (k) in subsection (1) and redesignated former paragraphs (e), (f), (g), (h) and (i) as (f), (h), (i), (l) and (m), respectively, added the language beginning "and a receipt" at the end

of present paragraph (f) and substituted the language beginning "or minerals" for "contract rights and other things in action" at the end of the first sentence and inserted the provision as to standing timber in the second sentence of present paragraph (h). In subsection (2), the amendment deleted a reference to contract rights and added the references to "attach," "construction mortgage," "fixture," "fixture filing" and "United States."

§ 25-9-106. Definitions: "Account"; "general intangibles". — "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts. (1945, c. 196, s. 1; 1957, c. 504; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, added "whether or not it has been earned by performance" at the end of the first sentence, deleted the second sentence, which defined "contract right," deleted "contract rights"

preceding "chattel paper" in the present second sentence, added "and money" at the end of that sentence and substituted "are accounts" for "are contract rights and neither accounts nor general intangibles" at the end of the last sentence.

§ 25-9-107. Definitions: "Purchase money security interest". — A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its

price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-108. When after-acquired collateral not security for antecedent debt. — Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory". - Goods are

(1) "consumer goods" if they are used or bought for use primarily for

personal, family or household purposes;
(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the

definitions of inventory, farm products or consumer goods;
(3) "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment. (1965,

c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-110. Sufficiency of description. — For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-111. Applicability of bulk transfer laws. — The creation of a security interest is not a bulk transfer under article 6 (see G.S. 25-6-103). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment. effective July 1, 1976, reenacted this section without change.

§ 25-9-112. Where collateral is not owned by debtor. — Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under G.S. 25-9-502(2) or under G.S. 25-9-504(1), and is not liable for the debt or for any deficiency after resale, and he has the same right as the debtor

(a) to receive statements under G.S. 25-9-208;

(b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under G.S. 25-9-505;

(c) to redeem the collateral under G.S. 25-9-506;

(d) to obtain injunctive or other relief under G.S. 25-9-507(1); and

(e) to recover losses caused to him under G.S. 25-9-208(2). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. - The 1975 amendment. effective July 1, 1976, reenacted this section without change.

§ 25-9-113. Security interests arising under article on sales. — A security interest arising solely under the article on sales (article 2) is subject to the provisions of this article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(a) no security agreement is necessary to make the security interest

enforceable: and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governed by the article on sales (article 2). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. - The 1975 amendment. effective July 1, 1976, reenacted this section without change.

§ 25-9-114. Consignment. — (1) A person who delivers goods under a consignment which is not a security interest and who would be required to file under this article by paragraph (3)(c) of G.S. 25-2-326 has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee, and also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if

(a) the consignor complies with the filing provision of the article on sales with

respect to consignments (paragraph (3)(c) of G.S. 25-2-326) before the consignee

receives possession of the goods; and

(b) the consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and

(c) the holder of the security interest receives the notification within five years before the consignee receives possession of the goods; and

(d) the notification states that the consignor expects to deliver goods on

consignment to the consignee, describing the goods by item or type.

(2) In the case of a consignment which is not a security interest and in which the requirements of the preceding subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor. (1975, c. 862, s. 7.)

Editor's Note. - Session Laws 1975, c. 862, s. 10, makes the act effective July 1, 1976.

PART 2.

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO.

§ 25-9-201. General validity of security agreement. — Except as otherwise provided by this Chapter a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-201.1: Repealed by Session Laws 1975, c. 862, s. 6, effective July 1, 1976.

§ 25-9-202. Title to collateral immaterial. — Each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-203. Attachment and enforceability of security interest; proceeds; formal requisites. — (1) Subject to the provisions of G.S. 25-4-208 on the security interest of a collecting bank and G.S. 25-9-113 on a security interest arising under the article on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land

concerned; and

(b) value has been given; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.

(3) Unless otherwise agreed a security agreement gives the secured party the

rights to proceeds provided by G.S. 25-9-306.

(4) A transaction, although subject to this article, is also subject to the North Carolina Consumer Finance Act (being G.S. 53-164 through 53-191), G.S. 24-1 and 24-2, and G.S. 91-1 through 91-8, the Retail Installment Sales Act (being Chapter 25A of the North Carolina General Statutes), and in the case of conflict between the provisions of this article and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which

is specified therein. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 2; c. 196, s. 2; 1955, c. 386, s. 1; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-204. After-acquired property; future advances. — (1) Except as provided in subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

(2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (G.S. 25-9-314) when given as additional security unless the debtor acquired rights in them within 10 days after the

secured party gives value.

(3) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (subsection (1) of G.S. 25-9-105). (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 2; c. 196, s. 1; 1955, c. 386, s. 1; c. 816; 1957, cc. 504, 999; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-205. Use or disposition of collateral without accounting permissible. — A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee. (1945, c. 196, s. 7; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, preceding "or chattel paper" near the middle of effective July 1, 1976, deleted "contract rights" the first sentence of the section.

§ 25-9-206. Agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists. — (1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the article on commercial paper (article 3). A buyer

who as part of one transaction signs both a negotiable instrument and a security

agreement makes such an agreement.

(2) When a seller retains a purchase money security interest in goods the article on sales (article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —
The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-207. Rights and duties when collateral is in secured party's possession. — (1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(2) Unless otherwise agreed, when collateral is in the secured party's

possession.

(a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(b) the risk of accidental loss or damage is on the debtor to the extent of any

deficiency in any effective insurance coverage;

(c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

(d) the secured party must keep the collateral identifiable but fungible

collateral may be commingled;

(e) the secured party may repledge the collateral upon terms which do not

impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-208. Request for statement of account or list of collateral. — (1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor

he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good-faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars (\$10.00) for each additional statement furnished. (1965, c. 700, s. 1; 1975,

c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

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". — (1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under G.S. 25-9-312; (b) a person who becomes a lien creditor before the security interest is

perfected:

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without

knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within 10 days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time

of filing.
(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

(4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted present paragraph (1)(b) for a provision which read: "a person who becomes a lien creditor without knowledge of the security interest and before it is perfected," inserted "or is a buyer of farm products in ordinary course of business" in paragraph (1)(c), deleted "contract rights" following "of accounts" near the beginning of paragraph (1)(d), substituted "after the debtor

receives possession of the collateral" for "after the collateral comes into possession of the debtor" in subsection (2), and deleted the former second sentence of subsection (3), which read: "Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest." The amendment also added subsection (4).

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply. — (1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under

G.S. 25-9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under G.S. 25-9-304 or in proceeds for a 10-day period under G.S. 25-9-306;

(c) a security interest created by an assignment of a beneficial interest in a

trust or a decedent's estate;

(d) a purchase money security interest in consumer goods; but compliance with G.S. 20-58 et seq. is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in G.S. 25-9-313;

(e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the

outstanding accounts of the assignor;

(f) a security interest of a collecting bank (G.S. 25-4-208) or arising under the article on sales (see G.S. 25-9-113) or covered in subsection (3) of this section;

(g) an assignment for the benefit of all the creditors of the transferor, and

subsequent transfers by the assignee thereunder.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to

(a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this article for filing of the security interest; or

filing of the security interest; or

(b) the following statute of this State: G.S. 20-58 et seq. as to any personal property required to be registered pursuant to Chapter 20 of the General Statutes; but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this article (part 4) apply to a security interest in that collateral created by him as debtor; or

(c) a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of

perfection (subsection (2) of G.S. 25-9-103).

(4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in G.S. 25-9-103 on multiple-state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects the security interest is subject to this article.

(5) The filing provisions of this article do not apply to a security interest in property of any description or any interest therein created by a deed of trust or mortgage made by a public utility as defined in G.S. 62-3(23) or by any electric or telephone membership [corporation] domesticated or incorporated in North Carolina, but the deed of trust or mortgage shall be registered in the county or counties in which such deed of trust or mortgage is required by G.S. 47-20

to be registered.

(6) The filing provisions of this article do not apply to any security interest created in connection with the issuance of any bond, note or other evidence of indebtedness for borrowed money by this State or any political subdivision or agency thereof. (1866-7, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, rewrote paragraphs (c) and (d), deleted "or contract rights" following "outstanding accounts" in paragraph (e), and added

paragraph (g), all in subsection (1), and rewrote subsections (3) and (4). The amendment also, apparently through inadvertence, omitted "corporation" following "telephone membership" in subsection (5).

§ 25-9-303. When security interest is perfected; continuity of perfection.— (1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in G.S. 25-9-302, 25-9-304, 25-9-305 and 25-9-306. If such steps are taken before the security interest attaches, it is perfected at the time it attaches.

(2) If a security interest is originally perfected in any way permitted under this article and is subsequently perfected in some other way under this article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this article. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, "at the time" in the second sentence of effective July 1, 1976, deleted "when" following subsection (1).

§ 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. — (1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of G.S. 25-9-306 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by

perfecting a security interest in the document, and any security interest in the

goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written

security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has

issued a negotiable document therefor

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection (3) of G.S. 25-9-312; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21-day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this article. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

effective July 1, 1976, inserted "money or" near the beginning of the second sentence in subsection (1), added "of this section and

Editor's Note. — The 1975 amendment, subsections (2) and (3) of G.S. 25-9-306 on proceeds" at the end of that sentence and inserted the language beginning "but priority between" at the end of paragraph (5)(g).

§ 25-9-305. When possession by secured party perfects security interest without filing. — A security interest in letters of credit and advices of credit (subsection (2)(a) of G.S. 25-5-116), goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this article. The security interest may be otherwise perfected as provided in this article before or after the period of possession by the secured party. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, inserted "money" near the middle of the first sentence.

§ 25-9-306. "Proceeds"; secured party's rights on disposition of collateral. (1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds

are "noncash proceeds."

(2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt

of the proceeds by the debtor unless

(a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

(b) a filed financing statement covers the original collateral and the proceeds

are identifiable cash proceeds; or

(c) the security interest in the proceeds is perfected before the expiration of

the 10-day period.

Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected

security interest only in the following proceeds:

(a) in identifiable noncash proceeds and in separate deposit accounts

containing only proceeds;

(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a depost account prior to the insolvency proceedings; and

(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) subject to any right to setoff; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such periods and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules

determine priorities:

(a) If the goods were collateral at the time of sale, for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the

perfected status; in any other case, the secured party must take possession of

the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under G.S. 25-9-308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security

interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods. (1945, c. 196, s. 8; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —

The 1975 amendment, effective July 1, 1976, rewrote subsection (1) and substituted "unless the disposition" for "by the debtor unless his action" in subsection (2). In subsection (3) the amendment substituted present paragraph (a) for a provision which read "a filed financing statement covering the original collateral also covers proceeds; or," added present paragraph (b) and redesignated former paragraph (b) as present paragraph (c) and added the last paragraph of the subsection. In subsection (4) the amendment added "only in the following proceeds" at the end of the introductory language, added "and in separate deposit accounts containing only proceeds" at the end of paragraph (a), substituted "neither commingled with other money nor" for "not commingled with other money or" in paragraph (b), substituted "a deposit account" for "bank account" in paragraph (c) and rewrote paragraph (d).

Continuously Perfected Security Interest. —

If the security interest in the original collateral is perfected and the filed financing statement covering the original collateral also covers proceeds, the security interest in the proceeds is a "continuously perfected security interest." Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

There is no express limitation on right of secured party to trace proceeds subject to his security interest into a bank account of the debtor. Michigan Nat'l Bank v. Flowers Mobile Homes Sales, 26 N.C. App. 690, 217 S.E.2d 108

(1975).

Bank's Right to Damage Proceeds on Collateral. — The bank had the right to require defendant to turn over to the bank for application on a note the proceeds of a check issued for damages to collateral machinery rather than allowing defendants to use the proceeds to repair the machinery. Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

§ 25-9-307. Protection of buyers of goods. — (1) A buyer in ordinary course of business (subsection (9) of G.S. 25-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such

goods.

(3) A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the

purchase and before the expiration of the 45-day period. (1945, c. 182, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, deleted "and in the case of farm equipment having an original purchase price not in excess of twenty-five hundred dollars (\$2,500.00) (other than fixtures, see § 25-9-313)" following

"consumer goods" near the beginning of subsection (2), deleted "or his own farming operations" following "household purposes" near the end of subsection (2) and added subsection (3).

§ 25-9-308. Purchase of chattel paper and instruments. — A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument

(a) which is perfected under G.S. 25-9-304 (permissive filing and temporary perfection) or under G.S. 25-9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest;

or

(b) which is claimed merely as proceeds of inventory subject to a security interest (G.S. 25-9-306) even though he knows that the specific paper or instrument is subject to the security interest. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-309. Protection of purchasers of instruments and documents. — Nothing in this article limits the rights of a holder in due course of a negotiable instrument (G.S. 25-3-302) or a holder to whom a negotiable document of title has been duly negotiated (G.S. 25-7-501) or a bona fide purchaser of a security (G.S. 25-8-301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this article does not constitute notice of the security interest to such holders or purchasers. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-310. Priority of certain liens arising by operation of law. — When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-311. Alienability of debtor's rights; judicial process. — The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. - The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-312. Priorities among conflicting security interests in the same collateral. — (1) The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: G.S. 25-4-208 with respect to the security interests of collecting banks in items being collected, accompanying documents and proceeds; G.S. 25-9-103 on security interests related to other jurisdictions; G.S. 25-9-114 on consignments.

(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

(3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory

to a buyer if

(a) the purchase money security interest is perfected at the time the debtor

receives possession of the inventory; and

(b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party, or (ii) before the beginning of the 21-day period where the purchase money security interest is temporarily perfected without filing or possession (subsection (5) of G.S. 25-9-304); and

(c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor

receives possession of the collateral or within 10 days thereafter.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

(b) So long as conflicting security interests are unperfected, the first to attach

has priority.

(6) For the purposes of subsection (5) a date of filing or perfection as to

collateral is also a date of filing or perfection as to proceeds.

(7) If future advances are made while a security interest is perfected by filing or the taking of possession, the security interest has the same priority for the purposes of subsection (5) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 196, s. 4; 1955, c. 816; 1957, c. 999; 1965, c. 700, s. 1; 1967, c. 24, s. 13; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, rewrote subsections (1) and (3), inserted "or its proceeds" near the middle of subsection (4), substituted "according to the following rules"

for "as follows" at the end of the introductory language in subsection (5) and rewrote the remainder of that subsection, rewrote subsection (6) and added subsection (7).

§ 25-9-313. Priority of security interests in fixtures. — (1) In this section and in the provisions of part 4 of this article referring to fixture filing, unless the context otherwise requires

(a) goods are "fixtures" when they become so related to particular real estate

that an interest in them arises under real estate law;

(b) a "fixture filing" is the filing of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of G.S. 25-9-402 or of a mortgage or deed of trust conforming to the requirements of subsection (6) of G.S. 25-9-402;

(c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the

acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this article in ordinary building materials incorporated into an improvement on land.

(3) This article does not prevent creation of an encumbrance upon fixtures

pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting

interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of

the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method

permitted by this article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where (a) the encumbrancer or owner has consented in writing to the security

interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest

continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner

of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —
The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-314. Accessions. — (1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to G.S.

25-9-315(1).

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

(3) The security interests described in subsections (1) and (2) do not take

priority over

(a) a subsequent purchaser for value of any interest in the whole; or

(b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or

(c) a creditor with a prior perfected security interest in the whole to the extent

that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a

subsequent purchaser within this section.

(4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-315. Priority when goods are commingled or processed. — (1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if

(a) the goods are so manufactured, processed, assembled or commingled that

their identity is lost in the product or mass; or

(b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled. In a case to which paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under G.S. 25-9-314.

(2) When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total

product or mass. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-316. Priority subject to subordination. — Nothing in this article prevents subordination by agreement by any person entitled to priority. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-317. Secured party not obligated on contract of debtor. — The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 867, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment. — (1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in G.S. 25-9-206 the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and

any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may

pay the assignor.

(4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, inserted "or a part thereof" near the beginning of subsection (2), substituted "contract has not been fully earned by performance" for "contract right has not already become an account" near the beginning of the first sentence of subsection (2), substituted "that the amount due or to become

due" for "that the account" in the first sentence of subsection (3) and substituted present subsection (4) for a provision which read: "A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective."

PART 4.

FILING.

§ 25-9-401. Place of filing; erroneous filing; removal of collateral. — (1) The

proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the register of deeds in the county of the debtor's residence or if the debtor is not a resident of this State then in the office of the register of deeds in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the register of deeds in the county where the land is located;

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, then in the office of the register

of deeds in the county where the land is located;

(c) in all other cases, in the office of the Secretary of State and in addition, if the debtor has a place of business in only one county of this State, also in the office of the register of deeds of such county, or, if the debtor has no place of business in this State, but resides in the State, also in the office of the register

of deeds of the county in which he resides.

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this State continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter

changed.
(4) The rules stated in G.S. 25-9-103 determine whether filing is necessary in

this State.

(5) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s, 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, deleted "contract rights" preceding "or general intangibles" near the beginning of paragraph (1)(a), inserted "growing or to be grown" and deleted "on which the crops are growing or to

be grown" following "the land" near the end of that paragraph, rewrote paragraph (1)(b), deleted "If collateral is brought into this State from another jurisdiction" at the beginning of subsection (4) and added subsection (5).

§ 25-9-402. Formal requisites of financing statement; amendments; mortgage as financing statement. — (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the

security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must indicate that the collateral is or includes crops and must contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this State.

(2) A financing statement which otherwise complies with subsection (1) is sufficient when it is signed by the secured party instead of the debtor if it is

filed to perfect a security interest in

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this State, or when the debtor's location is changed to this State. Such a financing statement must state that the collateral was brought into this State or that the debtor's location was changed to this State under such

(b) proceeds under G.S. 25-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original

collateral: or

(c) collateral as to which the filing has lapsed; or

(d) collateral acquired after a change of name, identity or corporate structure of the debtor (subsection (7)).

(3) A form substantially as follows is sufficient to comply with subsection (1): Name of debtor (or assignor)

Address Name of secured party (or assignee)

1. This financing statement covers the following types (or items) of property:

2. (If collateral is crops) The above described crops are growing or are to be

(Describe Real Estate)

Where appropriate substitute either 'The above timber is standing on . . . or 'The above minerals or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on . . .'

(Describe Real Estate)

(If the debtor does not have an interest of record)

The name of a record owner is

4. (If products of collateral are claimed) Products of the collateral are also covered.

whichever | Signature of Debtor (or Assignor) | sapplicable | Signature of Secured Party (or Assignee) (use

(4) A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this article, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

(5) A financing statement covering timber to be cut or covering minerals of the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or a financing statement filed as a fixture filing (G.S. 25-9-313) must contain a description of the real estate. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner. A financing statement filed as a fixture filing (G.S. 25-9-313) must bear the statement "Collateral is or includes fixtures" or its substantial equivalent or have checked the appropriate box identifying "FIXTURES." If a copy of a security agreement is filed as a financing statement, as authorized by G.S. 25-9-402, to perfect security interests in fixtures, the secured party or other filer shall stamp or print conspicuously on the face of the first page of such copy the legend "Collateral is or includes fixtures."

(6) A mortgage or deed of trust is effective as a financing statement filed as

a fixture filing from the date of its recording if

(a) the goods are described in the mortgage or deed of trust by item or type; and

(b) the goods are or are to become fixtures related to the real estate described in the mortgage or deed of trust; and

(c) the mortgage or deed of trust complies with the requirements for a

financing statement in this section; and

(d) the mortgage or deed of trust is duly recorded in the real estate records. Such a mortgage or deed of trust shall not be indexed or filed in the Uniform Commercial Code files. No fee with reference to such a mortgage or deed of trust is required other than the regular recording and satisfaction fees with respect

to the mortgage or deed of trust.

(7) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners. Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

(8) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not

seriously misleading.

(9) The Secretary of State shall have the authority to promulgate, issue and prescribe such financing statement forms and such other forms as he deems necessary to be used as standard forms for any filing contemplated by any section of this article. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; C. S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —
The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer. — (1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the

filing officer constitutes filing under this article.

(2) Except as provided in subsection (6), or in article 12 of chapter 44, a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period, whichever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien

creditor before lapse.

(3) A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under subsection (6) shall be retained.

(4) A filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statement according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

(5) The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be four dollars (\$4.00) for an approved statutory form statement as prescribed in G.S. 25-9-402 when printed on a standard-size form approved by the Secretary of State, and for all other statements, a five dollar (\$5.00) minimum charge for up to and including three

pages and one dollar (\$1.00) per page for all over three pages. There shall be an additional fee of two dollars (\$2.00) for each financing statement and continuation statement subject to subsection (5) of G.S. 25-9-402.

(6) A real estate mortgage which is effective as a fixture filing under subsection (6) of G.S. 25-9-402 remains effective as a fixture filing until the mortgage is redeemed or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(7) When a financing statement covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or is filed as a fixture filing, the filing officer, in addition to complying with subsection (4) of this

section, shall

(a) index the statements in the Uniform Commercial Code index to financing statements so as to reflect the name of any record owner given in the statement. When the debtor is not the record owner, the filing officer shall enter the name of the record owner in the place designated for entry of the name of the debtor and shall stamp or print conspicuously beneath the surname of the record owner the legend "RECORD OWNER" and shall note therein the file number of the financing statement. When the debtor is also the record owner, the filing officer shall make one index entry in the name of the debtor and shall stamp or print conspicuously beneath his surname the legend, "RECORD OWNER." The filing officer shall also:

(b) index the statements in the real estate indexes under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this State provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-404. Termination statement. — (1) If a financing statement covering consumer goods is filed on or after July 1, 1976, then within one month or within 10 days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. In other cases whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than

the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. If the affected secured party fails to file such a termination statement as required by this subsection, or to send such a termination statement within 10 days after proper demand therefor, he shall be liable to the debtor for one hundred dollars (\$100.00), and in addition for any loss caused to the debtor by such failure.

(2) On presentation to the filing officer of such a termination statement he must note it in the Uniform Commercial Code index and also, if the financing statement to be terminated is subject to subsection (5) of G.S. 25-9-402, in the real estate index. The termination statement shall then remain in the file for such period of time as the financing statement or a continuation statement would be effective under the five-year life provided in G.S. 25-9-403, and then may be destroyed. The filing officer shall remove from the files, mark "terminated" and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto. If the filing officer has received the termination statement in duplicate, he shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof.

(3) There shall be no fee charged for termination statements. (1945, c. 182,

s. 5; c. 196, s. 3; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115,

s. 1; 1973, c. 1316, ss. 2, 3; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-405. Assignment of security interest; duties of filing officer; fees. — (1) A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in G.S. 25-9-403(4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be four dollars (\$4.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a five-dollar (\$5.00) minimum charge for up to and including three pages and one dollar (\$1.00) per

page for all over three pages.

(2) A secured party may assign of record all or part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the Uniform Commercial Code index of the financing statement, and in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to subsection (5)

of G.S. 25-9-103, he shall index in the real estate index the assignment under the name of the assignor as grantor and, to the extent that the law of this State provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be three dollars (\$3.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a four-dollar (\$4.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages. When the assignment is of a financing statement subject to subsection (5) of G.S. 25-9-402, there shall be an additional fee of two dollars (\$2.00). Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (subsection (6) of G.S. 25-9-402) may be made only by an assignment of the mortgage in the manner provided by the law of the State other than this Chapter.

(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record. (1965, c. 700, s. 1; 1967, c. 24, s. 23; 1969,

c. 1115, s. 1; 1973, c. 1316, ss. 4, 5; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, inserted "financing" preceding "statement" in two places in the first sentence of subsection (1) and deleted the former second sentence of subsection (1), which read: "Either the original

secured party or the assignee may sign this statement as the secured party." In subsection (2) the amendment inserted "in the place where the original financing statement was filed" near the beginning of the first sentence, rewrote the fourth sentence and added the last sentence.

§ 25-9-406. Release of collateral; duties of filing officer; fees. — A secured party of record may, by his signed statement, release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be three dollars (\$3.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a four-dollar (\$4.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages. There shall be an additional fee of two dollars (\$2.00) when the statement of release affects a financing statement subject to subsection (5) of G.S. 25-9-402. (1965, c. 700, s. 1; 1967, c. 24, s. 25; 1969, c. 1115, s. 1; 1973, c. 1316, s. 6; 1975, c. 862, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, added the third and the last sentences of the

section and inserted "of release" following "statement" near the beginning of the fourth sentence.

§ 25-9-407. Information from filing officer. — (1) If the person filing any financing statement, termination statement, statement of assignment or statement of release furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the

filing of the original and deliver or send the copy to such person.

(2) Upon request of any person, the filing officer shall issue his certificate for which he shall not be liable showing whether there is on file, on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be three dollars (\$3.00) plus one dollar (\$1.00) for each financing statement and for each statement of assignment reported therein. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of one dollar (\$1.00) per page. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1973, c. 1316, s. 7; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-408. Financing statements covering consigned or leased goods. — A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee" or the like instead of the terms specified in G.S. 25-9-402. The provisions of this part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (G.S. 25-1-201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing. (1975, c. 862, s. 7.)

Editor's Note. Session Laws 1975, c. 862, s. 10, makes the act effective July 1, 1976. The former § 25-9-408,

catchlined "Recording of financing statement and security agreement in lieu of filing," was repealed by Session Laws 1967, c. 562, s. 1.

PART 5.

DEFAULT.

§ 25-9-501. Default; procedure when security agreement covers both real and personal property. — (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in G.S. 25-9-207. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this part,

those provided in the security agreement and those provided in G.S. 25-9-207.

(3) To the extent that they give rights to the debtor and impose duties on the

secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (3) of G.S. 25-9-504 and 25-9-505) and with respect to redemption of collateral (G.S. 25-9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:
(a) subsection (2) of G.S. 25-9-502 and subsection (2) of G.S. 25-9-504 insofar

as they require accounting for surplus proceeds of collateral;
(b) subsection (3) of G.S. 25-9-504 and subsection (1) of G.S. 25-9-505 which

deal with disposition of collateral;

(c) subsection (2) of G.S. 25-9-505 which deals with acceptance of collateral as discharge of obligation;

(d) G.S. 25-9-506 which deals with redemption of collateral; and

(e) subsection (1) of G.S. 25-9-507 which deals with the secured party's liability

for failure to comply with this part.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions

of this part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C. S., s. 2488; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, "(subsection (1) of § 25-9-505)" near the middle effective July 1, 1976, substituted "(subsection of subsection (3). (3) of G.S. 25-9-504 and 25-9-505)" for

§ 25-9-502. Collection rights of secured party. — (1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under G.S. 25-9-306.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. - The 1975 amendment, following "sale of accounts" in the last sentence effective July 1, 1976, deleted "contract rights" of subsection (2).

§ 25-9-503. Secured party's right to take possession after default. — Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under G.S. 25-9-504. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition. — (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred

by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under

which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for

any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim

of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations

he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party,

other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. - The 1975 amendment, effective July 1, 1976, inserted "or lease" and "leasing" near the beginning of subdivision (1)(a), deleted "contract rights" preceding

"chattel paper" in subsection (2) and rewrote the former third sentence of subsection (3) as the present third, fourth and fifth sentences.

§ 25-9-504.1. Payment of surplus to clerk. — (1) Any surplus remaining after the application of the proceeds of the sale or other disposition as set out in G.S. 25-9-504(1) and (2) shall be paid to the person or persons entitled thereto, if the party who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale or other disposition was held, if the disposition took place in this State. If the sale or other disposition took place outside this State, then the secured party or person making the sale or other disposition shall pay said surplus money to the clerk of superior court of any county in this State in which the secured party or other party conducting the said sale or disposition does business. Said payment discharges the secured party from liability to the extent of the amount so paid. Said clerk of superior court shall accept such surplus from said secured party and shall execute a receipt therefor.

(2) Said clerk of superior court is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto or until it is paid out under the order of a court of competent jurisdiction. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-504.2. Special proceedings to determine ownership of surplus. — (1) A special proceeding may be instituted before the clerk of superior court by any person claiming any portion of the surplus paid into the clerk's office under G.S. 25-9-504.1, to determine who is entitled thereto.

(2) All other persons who have filed with the clerk notice of their claim to the aforesaid surplus or any part thereof, or who, as far as the petitioner(s) know, asserts any claim to said surplus or any part thereof, shall be made defendants in the proceeding.

(3) If any answer is filed raising issues of fact as to the ownership of the surplus (money), the proceeding shall be transferred to the civil issue docket of

the district or superior court for trial.

(4) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who have asserted a claim to the fund by petition or answer. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. —
The 1975 amendment, effective July 1, 1976,
reenacted this section without change.

§ 25-9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation. — (1) If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty percent (60%) of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under G.S. 25-9-504, and if he fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under G.S. 25-9-507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under G.S. 25-9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote the second sentence of subsection (2).

§ 25-9-506. Debtor's right to redeem collateral. — At any time before the secured party has disposed of collateral or entered into a contract for its disposition under G.S. 25-9-504 or before the obligation has been discharged under G.S. 25-9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the

collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, made certain changes in punctuation.

§ 25-9-507. Secured party's liability for failure to comply with this part.— (1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus 10 percent (10%) of the principal amount of the debt or the time price differential plus 10

percent (10%) of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted the section without change.

§ 25-9-508. Application of statute of limitations to serial notes. — When a series of notes maturing at different times is secured by a security agreement and the exercise of the power of sale or foreclosure for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale or foreclosure for the satisfaction of indebtedness represented by other notes of the series not so barred. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. —
The 1975 amendment, effective July 1, 1976,
reenacted this section without change.

§ 25-9-509. Power of sale barred when foreclosure barred. — (1) Except as provided in subsection (2), no person shall exercise any power of sale contained in any security agreement, or provided by statute, when an action to foreclose the lien contained in said security agreement is barred by the statute of

limitations.

(2) If a sale pursuant to a power of sale contained in a security agreement, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose the lien of such security agreement, the sale may be completed, although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of public sale is first posted or published as provided in this article. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. —
The 1975 amendment, effective July 1, 1976, reenacted this section without change.

PART 6.

PUBLIC SALE PROCEDURES.

§ 25-9-601. Disposition of collateral by public sale. — Disposition of collateral by public proceedings as permitted by G.S. 25-9-504 may be made in accordance with the provisions of this part. The provisions of this part are not mandatory for disposition by public proceedings, but any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part shall conclusively be deemed to be commercially reasonable in all aspects. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-602. Contents of notice of sale. — The notice of sale shall substantially:

(a) Refer to the security agreement pursuant to which the sale is held;

(b) Designate the date, hour and place of sale consistent with the provisions of the security agreement and the provisions found in part 6 of article 9 of chapter 25 of the General Statutes;

(c) Describe personal property to be sold substantially as it is described in the security agreement pursuant to which the power of sale is being exercised, and may add such further description as will acquaint bidders with the nature of the property;

(d) State the terms of the sale provided by the security agreement pursuant to which the sale is held, including the amount of the cash deposit, if any, to be

made by the highest bidder at the sale;

(e) Include any other provisions required by the security agreement to be

included therein; and

(f) State that the property will be sold subject to taxes and special assessments if it is to be so sold. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-603. Posting and mailing notice of sale. — (1) In each public sale conducted hereunder, the notice of sale shall be posted on a bulletin board provided for the posting of such legal notices, in the courthouse, in the county in which the sale is to be held, for at least five days immediately preceding the sale.

(2) In addition to the posting of notice required by subsection (1), the secured party or other party holding such public sale shall, at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to

each debtor obligated under the security agreement:

(a) at the actual address of the debtors, if known to the secured party, or (b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address.

(3) In the case of consumer goods, no other notification need be sent. In other cases, in addition to mailing a copy of the notice of sale to each debtor, the secured party shall also mail a copy of said notice by registered or certified mail to any other secured party from whom the secured party has received (before sending the notice of sale to the debtor(s)) written notice of a claim of an interest in the collateral. (1967, c. 562, s. 3; 1969, c. 1115, s. 1; 1975, c. 862, s. 7.)

Editor's Note. -The 1975 amendment, effective July 1, 1976, rewrote subsection (3).

§ 25-9-604. Exception as to perishable property. — If, in the opinion of a secured party about to conduct a public sale of personal property hereunder, the property is perishable because subject to rapid deterioration or threatens to decline speedily in value, he may report such fact, together with a description of the property to the clerk of the superior court of the county in which the property is to be sold, and apply for authority to sell the property at an earlier date than is provided in this article. Upon the clerk's determination that the property is such perishable or speedily depreciating property, he shall order a sale thereof to be held at such time and place and upon such notice, if any, as he deems advisable. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section

§ 25-9-605. Postponement of public sale. — (1) Any person exercising a power of sale or conducting a public sale hereunder may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date

(a) When there are no bidders, or(b) When, in his judgment, the number of prospective bidders at the sale is

substantially decreased by inclement weather or by any casualty, or
(c) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable in his judgment, to hold the sale on that day, or

(d) When he is unable to hold the sale because of illness or for other good reason, or

(e) When other good cause exists.

(2) Upon postponement of a public sale, the person exercising the power of sale shall personally, or through his agent or attorney:

(a) at the time and place advertised for the sale, publicly announce the

postponement thereof, and

(b) on the same day, attach to or enter on the original notice of sale or a copy thereof, posted on the bulletin board provided therefor, as provided by G.S. 25-9-603, a notice of the postponement.

(3) The posted notice of postponement shall: (a) state that the public sale is postponed,

(b) state the hour and date to which the public sale is postponed,

(c) substantially state the reason for the postponement, and

(d) be signed by the person authorized to hold the public sale, or by his agent

or attorney.

(4) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to hold the public sale may readvertise the property in the same manner as he was required to advertise the sale which was not held, and may hold a public sale at such later date as is fixed in the new notice of sale. (1967, c. 562, s. 3; 1975, c. 682, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-606. Procedure upon dissolution of order restraining or enjoining sale. — (1) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, as provided in G.S. 25-9-603, provide by order that the public sale shall be held without additional notice at the time and place originally fixed therefor; or he may, in his discretion, make an order with respect thereto as provided in subsection (2).

(2) When, after the date fixed for a public sale, a judge dissolves an order restraining or enjoining said sale, he shall, by order, fix the time and place for the sale to be held upon notice to be given and in such manner and for such length

of time as he deems advisable. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-607. Disposition of proceeds of sale. — The proceeds of any sale or other disposition of the collateral shall be applied by the person making the sale in the manner prescribed by G.S. 25-9-504(1) and (2), 25-9-504.1 and 25-9-504.2. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Chapter 25A.

Retail Installment Sales Act.

§ 25A-43. Unconscionability.

Quoted in Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Chapter 28A.

Administration of Decedents' Estates.

ARTICLE 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

Concurrent Jurisdiction under § 7A-241. — The word "jurisdiction" in this section is used in the sense of assigning original authority to the clerk, and was not intended to change the vesting of concurrent jurisdiction in the clerk and the superior court under § 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

Effect of Reconciliation upon Separation Agreement. — Where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is rescinded for every purpose including the wife's right to share in husband's estate and her right to administer the estate, insofar as it remains executory. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d

370 (1976).

Error Remanded for Correction by Clerk. — If the superior court finds error in the order of the clerk relative to the granting of letters of administration, it will not appoint a personal representative but must remand the cause to the clerk for this purpose consistent with the decision of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

I. IN GENERAL.

Cited in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

IV. DISTRIBUTION OF RECOVERY.

Proceeds Paid as Is Intestate Personalty. — The legislature intended that the proceeds of a recovery, or settlement, in an action for wrongful death shall be distributed to the same persons, and in the same proportionate shares, as the personal property of the decedent, remaining after the payment of all debts and

other claims and expenses of administration, would be distributed if the decedent died intestate. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

Abandoning Father Not Entitled to Share.

— Plaintiff father, having abandoned the deceased when the latter was a minor child, could not share in the proceeds of the settlement of the claim for wrongful death now in the hands of the administratrix. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-6. Order of payment of claims.

Execution on a personal money judgment after the death of the debtor is barred. The holder of the judgment must look to the duly appointed administrator for payment of the judgment according to the priorities prescribed by this section. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

A tax judgment is strictly in rem, a specific judgment against the property of the listed taxpayer and tantamount to a judgment directing the sale of the property to satisfy the tax lien. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Tax Judgment Is Not "Debt" under This Section. — As a judgment against the property of the listed taxpayer, directing the sale of the property to satisfy the tax lien, the tax judgment established under § 105-375 is not a "debt" within the meaning of this section, nor does it affix a lien to the taxpayer's property. It represents a final order for the sale of the delinquent taxpayer's property. Henderson

County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Docketed Tax Judgment Subjects Property to Foreclosure. — Once a tax judgment is docketed, the real property described in the judgment is subject to impending foreclosure, provided execution is properly issued. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Time of Execution on Tax Judgment Immaterial. — Given the unique nature of a tax judgment, the death of the taxpayer before execution of the judgment is immaterial. Once judgment against the land is rendered and docketed, the fate of the property described therein is inexorably set into motion. And unless the taxes due are paid before the actual sale of the property, the property can be sold upon execution whether the execution is issued before or after the death of the taxpayer. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

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Chapter 29.

Intestate Succession.

ARTICLE 1.

General Provisions.

§ 29-1. Short title.

Adopted Child Stranger to Bloodline of Natural Parents. — The General Assembly, on its own motion and also in response to judicial decisions, has, with every amendment and every rewrite of § 48-23, evidenced its intent that by adoption the child adopted becomes legally a child of its new parents, and the adoption makes him legally a stranger to the bloodline of his natural parents. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-13. Descent and distribution upon intestacy.

Separation Agreement Rescinded by Reconciliation. — Where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is rescinded for

every purpose, the wife's right to share in husband's estate and her right to administer the estate, insofar as it remains executory. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

§ 29-14. Share of surviving spouse.

Separation Agreement Rescinded by Reconciliation. — Where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is rescinded for

every purpose, the wife's right to share in husband's estate and her right to administer the estate, insofar as it remains executory. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

§ 29-15. Shares of others than surviving spouse.

Section 31A-2 must be deemed a part of the Intestate Succession Act and a modification of subdivision (3), as fully as if it had been written thereinto or specifically designated as an amendment thereto. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

Abandoning Father Not Entitled to Share.

— Plaintiff father, having abandoned the deceased when the latter was a minor child, could not share in the proceeds of the settlement of the claim for wrongful death now in the hands of the administratrix. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

Adopted Child Stranger to Natural Parents' Bloodline. — The General Assembly, on its own motion and also in response to judicial decisions, has, with every amendment and every rewrite of § 48-23, evidenced its intent that by adoption the

child adopted becomes legally a child of its new parents, and the adoption makes him legally a stranger to the bloodline of his natural parents. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

Chapter 31.

Wills.

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

Caveator's Release and Renunciation Satisfied Propounder's Burden of Proof. — In a caveat proceeding the propounders satisfied their burden of showing that there was no genuine issue of fact in controversy and that

they were entitled to judgment as a matter of law when they submitted caveator's release and renunciation in support of their motion for summary judgment. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

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Chapter 31A.

Acts Barring Property Rights.

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

This section must be deemed a part of the Intestate Succession Act and a modification of § 29-15(3), as fully as if it had been written thereinto or specifically designated as an amendment thereto. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

Or Wrongful Death Proceeds. -

Plaintiff father, having abandoned the deceased when the latter was a minor child, could not share in the proceeds of the settlement of the claim for wrongful death now in the hands of the administratrix. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

ARTICLE 3.

Wilful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

Applied in Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739 (1976).

§ 31A-5. Entirety property.

This section is not unconstitutional. Since tenancy by the entirety is a purely voluntary method of acquiring and retaining realty, there is no discriminatory State action in violation of the Fourteenth Amendment. Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739 (1976).

Different solutions depending upon whether husband or wife is the slayer is not discriminatory against wife-slayer. Such disposition was deemed necessary in order to prevent the slayer-husband from having his vested property right forfeited for crime or taken without due process, because North Carolina is one of only three states that have retained the common-law incident of tenancy by the entirety that "the husband has the control and use of the property and is entitled to the possession, income, and usufruct thereof during their joint lives." Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739 (1976).

ARTICLE 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

Applied in Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739 (1976).

Chapter 31B.

Renunciation of Transfers by Will, Intestacy, Appointment or Insurance Contract Act.

§ 31B-1. Right to renounce succession.

Release Binding If for Fair Consideration.

— The release by an heir of an expectant share is binding if the release is given for a valuable consideration and the consideration given for the

release is not "grossly inadequate," or procured by fraud or undue influence. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976).

Chapter 35.

Persons with Mental Diseases and Incompetents.

ARTICLE 1.

Definitions.

§ 35-1.1. Definitions of mental disease, mental defective, etc.

Expert Help to Comply. — The definitions of "mental disease," "mental illness" and "mental defective" are capable of being understood and complied with by the triers of fact with the help of experts in the field. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

ARTICLE 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

§ 35-36. Sterilization of mental defectives in State institutions.

Contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization under this section is not a criminal proceeding. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Equal Protection Not Violated. — Sections 35-36 and 35-37 do not violate the equal protection clauses of the United States or North Carolina Constitutions since they provide for the sterilization of all mentally ill or retarded persons inside or outside an institution who meet the requirements of these statutes. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Since the North Carolina law applies equally to all those named, §§ 35-36 through 35-50, inclusive, do not violate the equal protection clauses of the United States or North Carolina Constitutions. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Neither Vague nor Arbitrary. — Sections 35-36 through 35-50, inclusive, provide a sufficient judicial standard and are not unconstitutionally vague or arbitrary. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Compelling State Interest. — State interests in the sterilization of mentally ill or retarded persons rise to the level of a compelling State interest. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

To Prevent Burden on State. — The people of North Carolina have a right to prevent the procreation of children who will become a burden on the State. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Reasonable classification. - Considering the

object of §§ 35-36 through 35-50, which is to prevent the procreation of children by a mentally ill or retarded individual who probably would be unable to care for a child or children, and who is likely to procreate a child or children who probably would have serious physical, mental or nervous diseases or deficiencies, the classification under these statutes is reasonable. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Reasonable Exercise of Police Power. — The sterilization of mentally ill or retarded persons under the safeguards as set out in §§ 35-36 through 35-50, inclusive, is a valid and reasonable exercise of the police power. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The right to procreate is not absolute but is vulnerable to a certain degree of State regulation. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The welfare of all citizens should take precedence over the rights of individuals to procreate. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The interest of the unborn child is sufficient to warrant sterilization of a retarded individual. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The object of §§ 35-36 through 35-50, inclusive, is to prevent the procreation of children by a mentally ill or retarded individual who, because of physical, mental or nervous disease or deficiency which is not likely to materially improve, would probably be unable to care for a child or children who would likely, unless sterilized, procreate a child or children who probably would have serious physical,

mental or nervous diseases or deficiencies. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Welfare of the parent and the future life and health of the unborn child are the chief concerns of the State in authorizing sterilization of individuals under certain circumstances. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The sterilization of a mentally ill or retarded individual at certain times may be in the best

interest of that individual. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Under sterilization statutes the State may only be providing for the welfare of a mentally ill or retarded individual when that individual is unable to do so for himself. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Cited in Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975)

§ 35-37. Sterilization of mental defectives not in State institutions.

Sections 35-36 and 35-37 do not violate equal protection clauses of the United States or North Carolina Constitutions since they provide for the sterilization of all mentally ill or retarded

persons inside or outside an institution who meet the requirements of these statutes. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

§ 35-43. Hearing before the judge of district court.

Provisions of this section far exceed minimum requirements of procedural due process. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Safeguards Intended. — It is clear from the language of this section that the General Assembly intended to provide the mentally ill and defective with sufficient safeguards to prevent misuse of this potentially dangerous procedure. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Adequate Judicial Standard. — This section provides an adequate judicial standard to guide the court in reaching a decision as to whether to authorize the sterilization of an individual. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Clear, Strong and Convincing Proof Required. — Although this section does not specify the burden of proof that the petitioner must meet before the order authorizing the sterilization can be entered, in keeping with the intent of the General Assembly that the rights of the individual must be fully protected, the evidence must be clear, strong and convincing before such an order may be entered. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

No constitutional mandate requires State to obtain medical expert on behalf of indigent respondent. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The right of cross-examination is specifically provided by this section. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Invoked by Written Objection. — In order to assure the right of cross-examination under this section, the only requirement is that the respondent, his guardian, attorney or other interested party object in writing to the sterilization. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Which Is Not an Undue Burden. — Since respondent is represented at every stage of the proceeding, the requirement that respondent, his guardian, attorney or other interested party object in writing to the sterilization is not unduly burdensome. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Chapter 38.

Boundaries.

§ 38-3. Procedure.

Applied in Simpson v. Lee, 26 N.C. App. 712, 217 S.E.2d 80 (1975).

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Chapter 39.

Conveyances.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Reverter Ineffective. — Provisions in a deed for the reverter of title to the grantor are not valid and effective where they appear only at the end of the description and are not referred to elsewhere in the deed. Whetsell v. Jernigan, 29 N.C. App. 136, 223 S.E.2d 397 (1976).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-13.3. Conveyances between husband and wife.

Wife May Freely Convey. — Sections 39-13.3 and 52-6 express a clear legislative intent that so long as the provisions of § 52-6 are complied with, a wife may convey her separate property to her husband, or to her husband and herself,

as freely and with the same consequences as the husband may convey his property to his wife. Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976).

Chapter 40.

Eminent Domain.

ARTICLE 1.

Right of Eminent Domain.

§ 40-3. Right to enter on and purchase lands.

Constitutionality. — Statutes authorizing bodies having the power of eminent domain to enter onto land for purposes of conducting preliminary surveys and the like, containing no provision for compensation to the landowner for such use of the land, are not violative of constitutional provisions against the taking of private property for public purposes without

prior payment of just compensation. Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975).

Acts Not Constituting a Taking. -

An entry under this section for the purpose of laying out the proposed route for an easement does not constitute a taking. Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975).

ARTICLE 2.

Condemnation Proceedings.

§ 40-11. Proceedings when parties cannot agree.

Applied in Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975).

§ 40-12. Petition filed; contains what; copy served.

Description of Property, etc. — In accord with 3rd paragraph in original. See

Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975).

Chapter 41.

Estates.

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Antenuptial Contract and Will as Not Affecting Wife's Right to Bank Funds. — Notwithstanding the terms of an antenuptial contract and the terms of decedent/husband's will in keeping with the contract, the wife is also entitled to the funds on deposit in a joint bank

account, the contract for which was entered into after the marriage. Harden v. First Union Nat'l Bank, 28 N.C. App. 75, 220 S.E.2d 136 (1975).

Bank, 28 N.C. App. 75, 220 S.E.2d 136 (1975).
Applied in Johnson v. Northwestern Bank, 27
N.C. App. 240, 218 S.E.2d 722 (1975).

§ 41-11. Sale, lease or mortgage in case of remainders.

I. GENERAL CONSIDERATION.

Cited in Simpson v. Simpson, 29 N.C. App. 14, 222 S.E.2d 747 (1976).

Chapter 43.

Land Registration.

ARTICLE 3.

Procedure for Registration.

§ 43-11. Hearing and decree.

Cited in Taylor v. Johnston, 27 N.C. App. 186, 218 S.E.2d 500 (1975).

Chapter 44A.

Statutory Liens and Charges.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

Applied in MSR Enterprises, Inc. v. GMC, 27 N.C. App. 94, 218 S.E.2d 234 (1975).

§ 44A-2. Persons entitled to lien on personal property.

Lien Not Extinguished and Property Subject to Redelivery to Lienholder. — Where before an automobile was delivered to its owner, defendant had a lien on the vehicle for the entire amount due to it for repairs and services pursuant to subsection (d), and in order to obtain the vehicle, the owner gave defendant a check

for the balance due, which was returned uncashed because of insufficient funds, defendant's lien was not extinquished and the property was subject to redelivery to defendant through the remedy of claim and delivery. Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975).

§ 44A-3. When lien arises and terminates.

No Relinquishment for Worthless Check. — Property was not voluntarily relinquished by the lienholder when the owner obtained its delivery by giving to the lienholder a worthless check. Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-10. Effective date of liens.

Claim of lien is not fatally defective because of obvious scrivener's error in stating the date

of first furnishing it. Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975).

§ 44A-12. Filing claim of lien.

Claim of lien is not fatally defective because of obvious scrivener's error in stating the date of first furnishing it. Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975).

But Barring Such Error. - Barring an

obvious error, easily discernible to the title examiner, the plaintiff is bound by the date stated in his claim of lien. Beach & Adams Bldrs., Inc. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975).

§ 44A-13. Action to enforce lien.

Date Binding. — Barring an obvious error, easily discernible to the title examiner, the plaintiff is bound by the date stated in his claim

of lien. Beach & Adams Bldrs., Inc. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975).

The date of last furnishing is not statutorily required, but it cannot be deemed mere "surplusage" when supplied even voluntarily. To do so would do injury to the purpose of the lien statute in that title examiners would,

barring an obvious error, reasonably rely on the date actually furnished. Beach & Adams Bldrs., Inc. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975).

§ 44A-16. Discharge of record lien.

Applied in Beach & Adams Bldrs., Inc. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-18. Grant of lien; subrogation; perfection.

Applied in Interior Distributors, Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975).

Cited in Olney Paint Co. v. Zalewski, 29 N.C. App. 149, 223 S.E.2d 573 (1976).

§ 44A-19. Notice to obligor.

Applied in Interior Distributors, Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975).

§ 44A-20. Duties and liability of obligor.

Applied in Interior Distributors, Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975).

§ 44A-21. Pro rata payments.

Applied in Interior Distributors, Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975).

Chapter 45.

Mortgages and Deeds of Trust.

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

Applied in Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

Chapter 46.

Partition.

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

Cited in Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Chapter 47B.

Real Property Marketable Title Act.

§ 47B-3. Exceptions.

Applicable Only to Nonpossessory Interest.

— This act applies only against nonpossessory interest and does not apply to a claim against a

party in present, actual and open possession of property. Taylor v. Johnston, 27 N.C. App. 186, 218 S.E.2d 500 (1975).

Chapter 48.

Adoptions.

§ 48-1. Legislative intent; construction of chapter.

Strict Construction. — Since the adoption statute is in derogation of the common law and works a change in the canons of descent, it must be construed strictly and not so as to enlarge or confer any rights not clearly given. Crumpton v.

Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

For Historical Perspective on Adoption Statutes. — See Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

§ 48-23. Legal effect of final order.

Intent to Make Adopted Child Stranger to Natural Parents' Bloodline. — The General Assembly, on its own motion and also in response to judicial decisions, has, with every amendment and every rewrite of this section, evidenced its intent that by adoption the child adopted becomes legally a child of its new parents, and the adoption makes him legally a stranger to the bloodline of his natural parents. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

Necessity of Substitution of Families. — The prevalence of adoptions in today's society points to the absolute necessity that adoption effect a complete substitution of families. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

Adopted Child Same As Legitimete Child when Order Signed. — This section relieves the natural parents of all legal obligations, divests them of all rights with respect to the person adopted, and with respect to the person adopted, gives him the same legal status he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

This section mandates that an adopted child shall have the same legal status as he would have had if he were born the legitimate child of the adoptive parents at the date of the final order of adoption. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

Applicability of Rule of Construction. — The rule of construction under this section that in a will the word "child" shall be construed to include any adopted person unless the contrary plainly appears by the terms of the will itself shall apply whether the will was executed before or after the final order of adoption and whether the will was executed before or after the enactment of the statute. Simpson v. Simpson, 29 N.C. App. 14, 222 S.E. 2d 747 (1976).

29 N.C. App. 14, 222 S.E.2d 747 (1976).

"My Issue" in Testamentary Trust Created Prior to Statute. — The use of the words "my issue" is not a plain indication of a contrary intent by the terms of a will executed prior to this statute sufficient to prevent the adopted children of an heir from sharing in the distribution of the principal upon termination of the trust created by the will. Stoney v. MacDougall, 28 N.C. App. 178, 220 S.E.2d 368 (1975).

Escheats Prevented. — The legislation omitted from this section a provision of former § 48-6 allowing inheritance by, from or through natural parents, and vice versa, only to prevent escheats. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390 (1976).

§ 48-36. Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.

Adoption of Adult under Provisions Applicable to Minors Would Be Invalid. — See opinion of Attorney General to Dr. Renee P. Hill, Director, Division of Social Services, N.C. Department of Human Resources, 45 N.C.A.G. 242 (1976).

Chapter 48A.

Minors.

§ 48A-1. Common-law definition of "minor" abrogated.

Cited in White v. White, 289 N.C. 592, 223 S.E.2d 377 (1976).

§ 48A-2. Age of minors.

Contempt Available to Enforce Support Ordered beyond Minority. — A court may enforce by contempt proceedings its order, entered by consent, that child support payments

be made beyond the time for which there is a duty to provide support. White v. White, 289 N.C. 592, 223 S.E.2d 377 (1976).

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

The question of paternity, etc. — In accord with 1st paragraph in 1975 Cum. Supp. See Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975).

In accord with 2nd paragraph in 1975 Cum.

Supp. See Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975).

Applied in Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761 (1975).

ARTICLE 3.

Civil Actions regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

The legislature, by enacting this section, intended to establish a means of support for illegitimate children. Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761 (1975).

"Out of wedlock" refers to the status of the child and not to the status of the mother. Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761 (1975).

Action by Illegitimate Child of Married Woman. — This section is applicable to all

illegitimate children and therefore does not preclude an illegitimate child of a married woman from instituting suit for support. Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761 (1975).

In actions under this section, etc. — In accord with 1975 Cum. Supp. See Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975).

§ 49-15. Custody and support of illegitimate children when paternity established.

Court Decides Payments, etc. — In accord with 1975 Cum. Supp. See Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975).

Chapter 50.

Divorce and Alimony.

§ 50-5. Grounds for absolute divorce.

Answer Amounting to Counterclaim. — Where the complaint in a suit for an absolute divorce alleged facts entitling either or both of the parties to the marriage to an absolute divorce, defendant's answer admitting these allegations together with his prayer for an

absolute divorce on the same grounds was, in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

(1)

Adultery may be proven by circumstantial evidence, the evidence must be more than that which raises a suspicion or conjecture and must show more than a mere opportunity. Owens v. Owens, 28 N.C. App. 713, 222 S.E.2d 704 (1976).

Based on Facts of Each Case. — It is unwise to adopt general rules as to what will or will not constitute proof of adultery, but the determination must be made with reference to the facts of each case. Owens v. Owens, 28 N.C. App. 713, 222 S.E.2d 704 (1976).

In some cases evidence of opportunity and incriminating or improper circumstances, without evidence of inclination or adulterous disposition, may be such as to lead a just and reasonable man to the conclusion of adulterous intercourse. If so, the evidence should be submitted on an issue of adultery to the jury so that it may judge the probative force of the evidence. Owens v. Owens, 28 N.C. App. 713, 222 S.E.2d 704 (1976).

§ 50-6. Divorce after separation of one year on application of either party.

Plaintiff Cannot Dismiss Claim in Face of Counterclaim. — The rationale for the rule that where plaintiff seeks divorce upon the ground of one year's separation and defendant in his answer likewise prays for a divorce upon the same ground, defendant's prayer is in effect a counterclaim and plaintiff therefore cannot voluntarily dismiss her claim without

defendant's consent, is that it would be manifestly unjust to allow a plaintiff, who comes into court upon solemn allegations which, if true, entitle defendant to some affirmative relief against the plaintiff, to withdraw, ex parte, the allegations after defendant has demanded the relief to which they entitle him. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

§ 50-7. Grounds for divorce from bed and board.

(1)

Abandonment or desertion, as a marital wrong committed by one spouse against the other, does not occur if the parties live apart by mutual agreement. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

When the complaining spouse has consented to a separation which was not caused by the other's misconduct, the plaintiff cannot obtain a divorce or alimony on the basis of abandonment. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

Consent Barring Divorce. — The consent which will bar a divorce, or a claim for alimony, on the grounds of abandonment is a positive willingness on the part of the complainant — a consent not induced by the misconduct of the other spouse—to cease cohabitation. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary or affect the right to divorce or alimony. Nor, under such circumstances, is the innocent party obliged to protest, to exert physical force or other importunity to prevent the other party from leaving. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

When Abandonment Justified. -

Where the agreement to separate is induced by the misconduct of one spouse, the other can still maintain the charge of voluntary abandonment. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

Err in Granting Motion to Strike Verification. — Such uncertainties as plaintiff expressed under cross-examination as to the exact nature of his act in verifying a complaint were an insufficient basis to warrant impeachment of his verification. Accordingly, the court erred in allowing defendant's motion to strike the verification and in dismissing plaintiff's complaint. Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976).

§ 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.

And It Applies to All Divorce Actions. —
The provisions of this section are not limited to actions in consequence of adultery or actions for divorce on account of adultery, but apply in "all divorce actions, including actions for alimony without divorce." Earles v. Earles, 26 N.C. App. 559, 216 S.E.2d 739 (1975).

Inadmissible Testimony as to Adultery. — Testimony by a wife concerning her husband's relationship with another woman will be excluded under this section when it clearly implies an act of adultery, even though the words "adultery" or "intercourse" are not used. But when there is no clear implication of intercourse, the testimony is admissible. Traywick v. Traywick, 28 N.C. App. 291, 221 S.E.2d 85 (1976).

§ 50-11. Effects of absolute divorce.

This section is declarative of the common law in the respect that one of the rights which determines and ceases after a judgment of absolute divorce is the right to support. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Support Right Terminated. — One of the rights arising out of the marriage, which ceases and determines after a judgment of absolute divorce, is the right to support. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

The legislature intended by subsection (c) to bar a decree of alimony for dependent spouse if this spouse both initiated an action for and obtained a divorce on the ground of the statutory separation period. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

The words "or at the time of" in subsection (c) were added to complement the provisions of § 50-16.8(b) which allow procedurally the questions of divorce and alimony to be determined in a single action. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

In this section a "divorce obtained by the dependent spouse" means a divorce which is pursued to completion by that spouse. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Divorce Based on Counterclaim Rather Than Plaintiff's Claim. — Where a judgment of absolute divorce was entered, but the plaintiff had already disclaimed any desire for the divorce before the divorce action came on for hearing, and had attempted to take a voluntary dismissal of her action and stated unequivocally that she did not seek nor intend to obtain an absolute divorce by virtue of her complaint, and the only evidence establishing the grounds for divorce came from the defendant who testified in accordance with his "counterclaim," plaintiff did not obtain a divorce within the meaning of this section. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Alimony Decree on Remand Relates Back. — If alimony is found to be appropriate after a hearing on remand, the ensuing judgment or decree awarding it will relate back to the time when the application for alimony should have been considered, which is "before or at the time of the rendering of the judgment for absolute divorce." McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Applied in Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

§ 50-11.2. Judgment provisions pertaining to care, custody, tuition and maintenance of minor children.

Agreement Presumed Just and Reasonable.

— Where parties to a separation agreement

agree upon the amount of the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable and that upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

But Is Not Final and Binding. — While the marital and property rights of the parties under

the provisions of a valid separation agreement cannot be ignored or set aside by the court without the consent of the parties, such agreements are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

§ 50-13.1. Action or proceeding for custody of minor child.

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

§ 50-13.2. Who entitled to custody; terms of custody; taking child out of State.

Agreement Presumed Just and Reasonable. — Where parties to a separation agreement agree upon the amount of the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable and that upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

Or Separation Agreement. —

While the marital and property rights of the parties under the provisions of a valid separation agreement cannot be ignored or set aside by the court without the consent of the parties, such agreements are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

§ 50-13.4. Action for support of minor child.

The ultimate object, etc. -

While it is the legal obligation of the father to provide for the support of his minor children, and while the welfare of the child is a primary consideration in matters of custody and maintenance, "yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs." Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

Trial Court Must Find, etc. -

There must be a specific finding of fact supported by competent evidence to the effect that the defendant possesses the means to comply with the court order. Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975).

Present Earnings Examined. — In determining the ability of the father to support the child, the court ordinarily should examine the father's present earnings, rather than select

the earnings for a single year in the past and use that as the basis for an award. Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award for child support should be based on the amount which defendant is earning when the award is made. Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

To base an award for child support on capacity to earn rather than actual earnings, there should be a finding, based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

And May Be Committed, etc. -

In accord with 1975 Cum. Supp. See Fitch v.

Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975).

Applied in Tidwell v. Booker, 27 N.C. App.

435, 219 S.E.2d 648 (1975); Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

§ 50-13.5. Procedure in actions for custody or support of minor children.

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

Finding of Failure to Pay Support Not Required. — Where cause was heard upon plaintiff's motion for an increase in child support payments and upon defendant's motion for a modification of the child custody order, the trial court's award of attorney fees did not have to be supported by a finding that the party ordered

to furnish support (defendant) had refused to provide support which was adequate at the time of the institution of the action. Fellows v. Fellows, 27 N.C. App. 407, 219 S.E.2d 285 (1975).

Applied in Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975); Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

§ 50-13.7. Modification of order for child support or custody.

Agreement Presumed Just and Reasonable.

— Where parties to a separation agreement agree upon the amount of the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon

is just and reasonable and that upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

§ 50-16.2. Grounds for alimony.

"Abandonment". -

An action under this section for permanent alimony based on abandonment involves the withdrawal of the supporting spouse from the house and from cohabitation with the dependent spouse. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Action for alimony on ground of abandonment is claim of "injury to person or property" under § 1-75.4(3). Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

The fundamental characteristic

indignities is that it must consist of a course of conduct or continued treatment which renders the condition of the injured party intolerable and life burdensome. The indignities must be repeated and persisted in over a period of time. Traywick v. Traywick, 28 N.C. App. 291, 221 S.E.2d 85 (1976).

Wife is not always entitled to alimony when her husband "threatens" her, however mildly, on several occasions. Traywick v. Traywick, 28 N.C.App. 291, 221 S.E.2d 85 (1976).

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

DELTA PRINTED AND ASSESSMENT OF STREET, THE STREET, TH

§ 50-16.3. Grounds for alimony pendente lite.

The facts required by the statutes, etc. — In accord with 1975 Cum. Supp. See Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

There is some language in Supreme Court decisions which leaves the impression that the allowance of counsel fees and subsistence pendente lite lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion. The correct rule is that the facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

While it is not required that the trial judge make findings of fact as to each allegation and evidentiary fact presented, it is necessary for the trial judge to make findings of fact from which it can be determined upon appellate review that an award of alimony pendente lite is justified and appropriate. Travis v. Travis, 27 N.C. App. 575, 219 S.E.2d 512 (1975).

Applied in Hill v. Hill, 27 N.C. App. 423, 219

S.E.2d 273 (1975).

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

§ 50-16.4. Counsel fees in actions for alimony.

Elements to Be Considered. —

In accord with 2nd paragraph in 1975 Cum. Supp. See Guy v. Guy, 27 N.C. App. 343, 219

S.E.2d 291 (1975).

The court erred in awarding plaintiff counsel fees pendente lite where no findings were made that plaintiff is entitled to the relief demanded, is a dependent spouse and has insufficient means whereon to subsist during prosecution of

the suit and to defray the necessary expenses thereof. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

Applied in Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975); Hill v. Hill, 27 N.C. App.

423, 219 S.E.2d 273 (1975).

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

§ 50-16.5. Determination of amount of alimony.

The purpose of the award, etc. — Supp. See Taylor v In accord with 1st paragraph in 1975 Cum. S.E.2d 737 (1975).

Supp. See Taylor v. Taylor, 26 N.C. App. 592, 216 S.E. 2d 737 (1975).

§ 50-16.6. When alimony not payable.

Applied in Owens v. Owens, 28 N.C. App. 713, 222 S.E.2d 704 (1976).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

The security interest to which this section refers is an interest in real estate which secures the payment of an obligation. Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975).

This section does not authorize court to

direct that alimony be paid by transfer of title to real estate. Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975).

Applied in Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite.

Alimony Application Not Required in Divorce Action. — Nothing in this section indicates that an application for either alimony or alimony pendente lite must be contained in the pleadings or an amendment thereto in an action for absolute divorce. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

"Application". — The legislature intended the word "application" as used in subsections (b) and (d) of this section and in Rule 7(b)(1) to have reference to the same kind of procedure. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d

490 (1976).

The term "application" as used in this section means a motion in the cause, the procedure for which is governed by the North Carolina Rules of Civil Procedure. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Alimony Motion Timely Filed. — Where motion for alimony did not specify a date for a hearing, but was served, by depositing it in the mail, properly addressed to defendant's attorney, at least five days before an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Applied in Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975); Hill v. Hill, 27 N.C. App. 423, 219 S.E.2d 273 (1975).

§ 50-16.9. Modification of order.

A change in circumstances, etc. -

A court is not warranted in modifying or changing a prior valid order absent a showing of a change in conditions. Vandooren v. Vandooren, 27 N.C. App. 279, 218 S.E.2d 715 (1975).

Original Circumstances Must Be Shown. — Where neither party moving for a modification of an award of alimony presented evidence as to the circumstances of the parties on which the original award of alimony was based, and no finding was made as to such circumstances, it cannot be determined if there was a change of circumstances and defendant's motion to reduce

the amount of the award should be denied. Gill v. Gill, 29 N.C. App. 20, 222 S.E.2d 754 (1976).

Movant for Modification Has Burden, etc.—
The party moving for modification of an award of alimony has the burden of showing a change of circumstances. Gill v. Gill, 29 N.C. App. 20, 222 S.E.2d 754 (1976).

This section does not contemplate that jury should pass on requests for reductions in alimony because of changed circumstances; the motion is addressed to the trial judge. Shankle v. Shankle, 26 N.C. App. 565, 216 S.E.2d 915 (1975).

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-6. Contracts of wife with husband affecting corpus or income of estate; authority, duties and qualifications of certifying officer; certain conveyances by married women of their separate property.

II. TRANSACTIONS INCLUDED.

Wife's Conveyance of Separate Property. — Section 39-13.3 and this section express a clear legislative intent that so long as the provisions of this section are complied with, a wife may convey her separate property to her husband, or to her husband and herself, as freely and with the same consequences as the husband may convey his property to his wife. Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976).

§ 52-10. Contracts between husband and wife generally; releases.

Applied in Nye v. United States, 407 F. Supp. 1345 (M.D.N.C. 1975).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-9. How duties of support are enforced.

Jurisdiction to Determine Paternity. —
Since the district court has exclusive original
jurisdiction to entertain a proceeding under the
Uniform Reciprocal Enforcement of Support

Act, it is clear that the district court has jurisdiction to determine the issue of paternity in such a case. Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

Chapter 55.

Business Corporation Act.

Article 11. Fees and Taxes.

Sec. 55-155. Fees.

ARTICLE 4.

Powers and Management.

§ 55-17. General powers.

I. IN GENERAL.

Ratification of and Liability for Pre-Incorporation Contract. — Although a corporation may not technically ratify a contract made on its behalf prior to its incorporation, since it could not at that time have authorized

such action on its behalf, it may, after it comes into existence, adopt such contract by its corporate action, which adoption may be express or implied, and thereby become liable for its performance. Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976).

§ 55-35. Duty of directors and officers to corporation.

Cited in Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976).

ARTICLE 10.

Foreign Corporations.

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State.

Cited in Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

ARTICLE 11.

Fees and Taxes.

§ 55-155. Fees. — (a) In addition to any taxes prescribed by G.S. 55-156, the Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

(1)	For filing an application to reserve or register a corporate name	
	and for filing an application to renew such a registration (G.S.	
	55-12(f) and (h)),\$	5.00
(2)	For filing a notice of transfer of a reserved corporate name (G.S.	
	55-12(g)),	5.00
(3)	For filing articles of incorporation (G.S. 55-7),	5.00
(4)	For filing an application of a foreign corporation for a certificate	
	of authority to transact business in this State and issuing a	
	certificate of authority (G.S. 55-138),	5.00

(6) H	For filing a statement of classification of shares (G.S. 55-42(e)), \$For filing a statement of the change of a registered office or registered agent, or both, of a domestic or foreign corporation	5.00
	(G.S. 55-14, 55-142, 55-153),	3.00
	55-14(d))	1.00
	For filing a notice of resignation of a nonresident director under	1 00
(Q) I	G.S. 55-33(a),	1.00 5.00
	The filling anti-land of amount (CC FF 100)	5.00
111	For filing a copy of an amendment to the articles of	0.00
(/	incorporation of a foreign corporation holding a certificate of	
	authority to transact business in this State (G.S. 55-147),	5.00
(12)	For filing a restated charter (G.S. 55-105),	5.00
(13)	For filing an application of a foreign corporation for an amended	
	certificate of authority to transact business in this State and	= 00
	issuing an amended certificate of authority (G.S. 55-149), For filing articles of merger or consolidation (G.S. 55-109),	5.00
(15)	Repealed by Session Laws 1969, c. 751, s. 45.	5.00
(16)	For filing a copy of articles of merger of a foreign corporation	
` '	holding a certificate of authority to transact business in this	
	State (G.S. 55-148),	5.00
(17)	For filing a statement setting forth the name and address in this	
	State of the registered agent of a foreign corporation not	= 00
(18)	transacting business in this State (G.S. 55-145), For receiving any service of process as statutory agent either	5.00
(10)	of a corporation or of a director of a corporation (G.S. 55-15(b),	
	55-33(d), 55-146),	3.00
	which amount may be recovered from the adverse party as	
	taxable costs by the party to the action or proceeding causing	
	such service to be made if such party prevails in the action or	
(10)	proceeding. For issuing a certificate of revocation of authority of a foreign	
(19)	corporation (G.S 55-152),	5.00
(20)	Repealed by Session Laws 1969, c. 751, s. 45.	0.00
(21)	For filing an application for withdrawal of a foreign corporation	
(0.0)	and issuing a certificate of withdrawal (G.S. 55-150),	5.00
	For filing articles of voluntary dissolution by directors (G.S.	= 00
(92)	55-116), For filing articles of voluntary dissolution by written consent of	5.00
(20)	shareholders (G.S. 55-117)	5.00
(24)	shareholders (G.S. 55-117),	0.00
	and stockholders (G.S. 55-118),	5.00
(25)	For filing a statement of revocation of dissolution (G.S. 55-120),	2.00
(26)	For filing a certificate of completed liquidation (G.S. 55-121),	2.00
(21)	For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation	
	(G.S. 55-4(c)):	
	For the first page thereof,	1.00
	For each additional page,	.40
	For affixing his certificate and official seal thereto,	2.00

(28) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation:	
For each page,	\$.20 2.00
(29) For filing any other document not herein specifically provided	- 00
for,	5.00

Editor's Note. — The 1975, 2nd Sess., As subsections (b) and (c) were not changed by amendment substituted "\$3.00" for "\$1.00" in the amendment, they are not set out. subdivision (18).

Chapter 55A.

Nonprofit Corporation Act.

Article 9. Fees and Taxes.

55A-77. Fees.

ARTICLE 4.

Powers and Management.

§ 55A-27.1. Form of records.

records doctrine, recognized by this section, is an App. 227, 218 S.E.2d 869 (1975). exception to the hearsay rule applicable to

Exception to Hearsay Rule. — The business private sector records. In re Arthur, 27 N.C.

ARTICLE 9.

Fees and Taxes.

	1 con and 1 anco.	
§ 55A and ren	A-77. Fees. — (a) The Secretary of State shall collect the following nit them to the State Treasurer for the use of the State:	g fees
(1)	For filing articles of incorporation (G.S. 55A-7), For filing an application of a foreign corporation for a certificate of authority to conduct affairs in this State and issuing a	\$5.00
(3)	certificate of authority (G.S. 55A-61), For filing an application of a foreign corporation for an amended certificate of authority to conduct affairs in this State and	5.00
(4)	issuing an amended certificate of authority (G.S. 55A-71),	5.00
(4) (5)	For filing articles of amendment (G.S. 55A-36),	5.00
	conduct affairs in this State (G.S. 55A-69),	5.00
(6)	For filing articles of merger or consolidation (G.S. 55A-41),	5.00
7	For filing a copy of articles of merger of a foreign corporation	0.00
(')	holding a certificate of authority to conduct affairs in this State	F 00
(0)	(G.S. 55A-70),	5.00
(8)	For receiving any service of process as statutory agent of a corporation (G.S. 55A-13, 55A-68, 55A-75),	3.00
	which amount may be recovered from the adverse party as taxable costs by the party to the action or proceeding causing such service to be made if such party prevails in the action or	
403	proceeding.	
(9)	For filing a notice of resignation of a registered agent (G.S. 55A-12(d)),	1.00
(10) For filing a statement of the change of registered office or registered agent of a domestic or foreign corporation (G.S.	3.00
(11	55A-65, 55A-75, 55A-12),	5.00
) For filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal (G.S. 55A-72),	5.00
(12	S) Issuance of a certificate of revocation of authority (G.S.	
	55A-74),	5.00

 (13) For filing articles of dissolution (G.S. 55A-48), (14) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation (G.S. 55A-4(c)): 	\$5.00
for the first page thereof,	1.00
for each additional page,	.40
for affixing his certificate and official seal thereto,	2.00
(15) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation:	
for each page, for affixing his certificate and official seal thereto,	.20
for affixing his certificate and official seal thereto,	2.00
(16) For filing an application to reserve or register a corporate name and for filing an application to renew such a registration (G.S.	
55A-10(e) and (f)),	5.00
(17) For filing any other document not herein specifically provided	
for,	5.00
(1975, 2nd Sess., c. 981, s. 2.)	

Editor's Note. — The 1975, 2nd Sess., amendment substituted "\$3.00" for "\$1.00" in subdivision (8) of subsection (a).

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

Chapter 55C.

Foreign Trade Zones.

Sec.

55C-1. Public corporations authorized to apply for privilege of establishing a foreign trade zone.

55C-2. "Public corporation" defined.

55C-3. Private corporations authorized to

Sec.

apply for privilege of establishing a foreign trade zone.

55C-4. Public or private corporation establishing foreign trade zone to be governed by federal law.

§ 55C-1. Public corporations authorized to apply for privilege of establishing a foreign trade zone. — Any public corporation of the State of North Carolina, as that term is hereinafter defined is hereby authorized to make application for the privilege of establishing, operating and maintaining a foreign trade zone in accordance with an act of Congress approved June 18, 1934, entitled, "An Act to Provide for the Establishment, Operation and Maintenance of Foreign Trade Zones in Ports of Entry of the United States," to expedite and encourage foreign commerce, and for other purposes. (1975, 2nd Sess., c. 983, s. 132.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 983, s. 152, makes this Chapter effective July 1, 1976.

- § 55C-2. "Public corporation" defined. The term "public corporation" for the purposes of this Chapter, means the State of North Carolina or any political subdivision thereof, or any public agency of this State or any political subdivision thereof, or any public board, bureau, commission or authority created by the General Assembly. (1975, 2nd Sess., c. 983, s. 132.)
- § 55C-3. Private corporations authorized to apply for privilege of establishing a foreign trade zone. Any private corporation hereafter organized under the laws of this State for the specific purpose of establishing, operating and maintaining a foreign trade zone in accordance with the act of Congress referred to in G.S. 55C-1 is likewise authorized to make application for the privilege of establishing, operating and maintaining a foreign trade zone in accordance with the said act of Congress. (1975, 2nd Sess., c. 983, s. 132.)
- § 55C-4. Public or private corporation establishing foreign trade zone to be governed by federal law. Any public or private corporation authorized by this Chapter to make application for the privilege of establishing, operating, and maintaining said foreign trade zone, whose application is granted pursuant to the terms of the aforementioned act of Congress is hereby authorized to establish such foreign trade zone and to operate and maintain the same subject to the conditions and restrictions of the said act of Congress and any amendments thereto, and under such rules and regulations and for the period of time that may be prescribed by the board established by said act of Congress to carry out the provisions of such act. Any other provision of law notwithstanding, property which is located in a foreign trade zone established pursuant to this Chapter shall be subject to ad valorem taxes. (1975, 2nd Sess., c. 983, s. 132.)

Chapter 58.

Insurance.

SUBCHAPTER I. INSURANCE DEPARTMENT.

Article 2.

Commissioner of Insurance.

Sec.

58-6. Salary of Commissioner of Insurance. 58-21.1. Annual statements by professional liability insurers.

SUBCHAPTER III. FIRE INSURANCE.

Article 21.

Insuring State Property.

58-194.2. Insurance and official fidelity bonds for State agencies to be placed by Insurance Department; costs of such placement.

SUBCHAPTER V. ACCIDENT AND HEALTH INSURANCE.

Article 26A.

Joint Action to Insure Elderly.

58-254.16 to 58-254.18. [Reserved.]

Article 26B.

North Carolina Health Care Excess Liability Fund.

58-254.19. Findings of General Assembly; legislative intent.

Sec.

58-254.20. Definitions.

58-254.21. North Carolina Health Care Excess Liability Fund; creation; investment; coverage.

58-254.22. Withdrawals; fidelity bond; fund accounting and audit.

58-254.23. Board of Governors; creation; membership; terms; vacancies; powers and duties; manager of fund; immunity from liability of board members, officers and employees.

58-254.24. Participation in the fund. 58-254.25. Assessment for the fund.

58-254.26. Payment of claims by the fund; claims management and services; personal liability for malpractice and amount of compensation not limited; actions against Board or fund.

58-254.27. Commencement of operations; effective date of coverage.

58-254.28. Acceptance of and compliance with Article and rules and regulations of the Board.

58-254.29. Records.

SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 2.

Commissioner of Insurance.

§ 58-6. Salary of Commissioner of Insurance. — The salary of the Commissioner of Insurance shall be thirty-two thousand five hundred forty-four dollars (\$32,544) a year, payable monthly. (1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; c. 771, s. 3; Rev., s. 2756; 1907, c. 830, s. 10; c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; C. S., s. 3874; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342; 1945, c. 383; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 6; 1967, c. 1130; c. 1237, s. 6; 1969, c. 1214, s. 6; 1971, c. 912, s. 6; 1973, c. 778, s. 6; 1975, 2nd Sess., c. 983, s. 21.)

Editor's Note. — July 1, 1976. The 1975, 2nd Sess., amendment, effective to \$32,544.

July 1, 1976, increased the salary from \$31,000 to \$32,544

§ 58-9. Powers and duties of Commissioner.

May Not Make Substantive Law. — An promulgate rules and regulations which alter or administrative agency has no power to add to the law it was set up to administer or

which have the effect of substantive law. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Authority to Regulate Rates. -

The Commissioner's power to make "rules and regulations" can in no way grant him the authority to carry out the "legislative power" of setting rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Nothing in the statutes grant to the Commissioner of Insurance the express or implied authority to set rates for credit life insurance. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d

409 (1975).

Neither Express nor Implied Power to Set Rates. — Clearly, subdivision (1) contains no express grant of authority to set rates and it is not such an implied power as is reasonably necessary for the Commissioner's proper functioning. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Effect of Companies' Acquiescence in Rate Setting. — Commissioner's contention that acquiescence by companies writing credit life insurance in rates set by prior Commissioners of Insurance gives present Commissioner the authority to fix credit life rates is untenable. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Rate-making authority, as distinguished from purely administrative functions, must be derived from a clear statutory enactment granting the Commissioner of Insurance such power. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Nothing in § 58-54.3 grants authority to the Commissioner of Insurance to take any action whatsoever. It merely prohibits unfair methods of competition or unfair or deceptive acts or practices in the insurance industry, which are exhaustively defined in § 58-54.4. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Clearly Article 3A of this Chapter generally and § 58-54.3 specifically contain no authority to issue orders setting premium rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28

N.C. App. 7, 220 S.E.2d 409 (1975).

Commissioner Lacks Authority to Remedy Unfair Trade Practices. — Sections 58-54.5, 58-54.6 and 58-54.7, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . . ," grant no remedial power to the Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-9.3. Court review of orders and decisions.

Differentiation between This Section and § 58-9.4. — This section omits any grant to the Commissioner of the authority to seek judicial review, whereas § 58-9.4 expressly grants him such authority. This omission in an adjacent section of the facility act and in a section that expressly excepts the situation provided for in § 58-9.4 indicates a clear legislative intent to differentiate between these two sections. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

The powers of the Commissioner are not to be construed broadly so as to include a right of appeal under this section. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

The Commissioner was not intended to be the representative of the public or to be deemed an aggrieved person so as to permit him to appeal pursuant to the provisions of this section. State

Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Nor under § 58-248.33. — The Commissioner is not expressly granted the power to appeal by § 58-248.33. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

But Standing Requirement of Section Applicable in Appeal. — Where a case involves the right of the Commissioner to seek review before the Court of Appeals and not before the superior court, this section is not expressly applicable. However, since by statutory interpretation and implication this section would extend its application to the analogous, higher appeal to the Court of Appeals, its requirement that the person must be aggrieved in order to appeal still applies. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Applied in State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-9.4. Court review of rates and classification.

Differentiation between § 58-9.3 and This Section. - Section 58-9.3 omits any grant to the Commissioner of the authority to seek judicial review, whereas this section expressly grants him such authority. This omission in an adjacent section of the facility act and in a section that expressly excepts the situation provided for in this section indicates a clear legislative intent to differentiate between these two sections. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

This section applies only to orders affecting premium rates on any class of risks or the propriety of a given classification or classification assignment. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Not Applicable to Appointment of Agent Representative. — Where a case involves the appointment of an agent to represent an insurance company, neither this section nor the exceptions to § 58-9.3, other than that for an order covered by this section, are applicable. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Applied in State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-21.1. Annual statements by professional liability insurers. — (a) Every insurance company authorized to write professional liability insurance in the State shall file in the office of the Commissioner of Insurance, on or before the first day of February in each year, in form and detail as the Commissioner of Insurance prescribes, a statement showing the items set forth hereinafter, as of the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the Commissioner of Insurance or some officer authorized by law to administer oaths. The Commissioner of Insurance shall, in December of each year, furnish to each of the insurance companies authorized to write professional liability insurance in the State forms for the annual statements: Provided that the Commissioner may, for good and sufficient cause shown by an applicant company, extend the filing date of such annual statement for such company, for a reasonable period of time, not to exceed 30 days.

PROFESSIONAL LIABILITY INSURERS: ANNUAL STATEMENT

(1) Number of claims pending at beginning of year; (2) Number of claims pending at end of year;

(3) Number of claims pending at end of year;

a. Highest award
b. Lowest award
c. Average award;

(4) Number of claims closed no payment;

(5) Number of claims to court in which award (4) Number of claims closed no payment;
(5) Number of claims to court in which award paid;
(6) Number of claims out of court in which award paid;

(7) Average amount per claim set up in reserve;
(8) Total premium collection;
(9) Total expenses less reserve expenses; and

(10) Total reserve expenses.

(b) The information contained within the reports as required by this section is to be used for internal statistical purposes only. Therefore, such information shall be privileged and not be disseminated to the general public however the statistics obtained therefrom should be available to the public. (1975, 2nd Sess., c. 977, s. 6.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 977, s. 10, makes this section effective July 1, 1976.

Session Laws 1975, 2nd Sess., c. 977, s. 7,

contains a severability clause. Session Laws 1975, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

§ 58-27.2. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.

The Commissioner of Insurance has no authority to disapprove proposed rates without conducting a public hearing. State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 29 N.C. App. 182, 223 S.E.2d 512 (1976).

No Affirmation of Order without Hearing and Notice. — To affirm an order denying rate

increases when there was no opportunity for notice and hearing subjects both the public and the insurance carriers to danger of arbitrary action by the Commissioner. State ex rel. Commissioner of Ins. v. Compensation Rating & Inspection Bureau, 28 N.C. App. 409, 221 S.E.2d 96 (1976).

ARTICLE 3A.

Unfair Trade Practices.

§ 58-54.1. Declaration of purpose.

Federal Anti-Trust Law Applicable. — This Article was enacted to regulate trade practices in the insurance business in accordance with directives from federal anti-trust law. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

No Rate Setting Authority. — Clearly Article 3A of this Chapter generally and § 58-54.3 specifically contain no authority to issue orders setting premium rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.3. Unfair methods of competition or unfair and deceptive acts or practices prohibited.

Nothing in this section grants authority to the Commissioner of Insurance to take any action whatsoever. It merely prohibits unfair methods of competition or unfair or deceptive acts or practices in the insurance industry, which are exhaustively defined in § 58-54.4. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Limited Remedial Powers. — Moreover, §§ 58-54.5, 58-54.6 and 58-54.7, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by G.S. 58-54.3 . . . ," grant no remedial power to the Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders.

State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Charging of Excessive Rates Not within This Section. — Nothing in § 58-54.4 declares the charging of excessive rates to be an act or practice within the prohibition of this section. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Nor Orders Setting Rates. — Clearly Article 3A of this Chapter generally and this section specifically contain no authority to issue orders setting premium rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.

Nothing in this section declares the charging of excessive rates to be an act or practice within the prohibition of \$58-54.3. State ex rel.

Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.5. Power of Commissioner.

Limited Remedial Power. — Sections 58-54.6, 58-54.7, and this section, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . . ," grant no remedial power to the

Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.6. Hearings, witnesses, appearances, production of books and service of process.

Limited Remedial Power. — Sections 58-54.5, 58-54.7, and this section, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . . ," grant no remedial power to the

Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

§ 58-54.7. Cease and desist orders and modifications thereof.

Limited Remedial Power. — Sections 58-54.5, 58-54.6 and this section, which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by § 58-54.3 . . . ," grant no remedial power to the

Commissioner to remedy unfair trade practices other than the power to investigate, bring charges and issue cease and desist orders. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 21.

Insuring State Property.

§ 58-194.2. Insurance and official fidelity bonds for State agencies to be placed by Insurance Department; costs of such placement. — All insurance and all official fidelity and surety bonds authorized for the several departments, institutions, and agencies shall be effected and placed by the Insurance Department, and the cost of such placement shall be paid by the department, institution, or agency involved upon bills rendered to and approved by the Insurance Commissioner. (1975, c. 875, s. 11.)

Editor's Note. — Session Laws 1975, c. 875, s. 64, makes the act effective July 1, 1975.

SUBCHAPTER IV. LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-195.2. Credit life insurance defined.

Nothing in statutes grant to Commissioner express or implied authority to set rates for credit life insurance. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

The conspicuous absence of express rate-making authority with regard to credit life insurance when such authority existed with regard to credit accident and health insurance manifests the fact that no such authority has been conferred. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Nor Does Companies' Acquiescence Raise Such Authority. — Commissioner's contention

that acquiescence by companies writing credit life insurance in rates set by prior Commissioners of Insurance gives present Commissioner the authority to fix credit life rates is untenable. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

Former Statute's Authority Inapplicable. — Since former § 54-260.2 applied only to credit accident and health insurance defined in § 58-254.8, it had no application to credit life insurance and cannot be seen as granting implied authority to set credit life rates. State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-248.33. The Facility; functions; administration.

Subsection (g)(1) makes the Board of Governors of the Facility the public's representative to the exclusion of all others except where the facility act expressly provides otherwise. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

The Commissioner was not intended to be the representative of the public or to be deemed an aggrieved person so as to permit him to appeal pursuant to the provisions of § 58-9.3. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Thus the Commissioner is not expressly granted the power to appeal by this section. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

§ 58-248.34. Plan of operation.

Stated in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

§ 58-248.39. Hearings; review.

Cited in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-254.8. Credit accident and health insurance.

Cited in State ex rel. Commissioner of Ins. v. Integon Life Ins. Co., 28 N.C. App. 7, 220 S.E.2d 409 (1975).

ARTICLE 26A.

Joint Action to Insure Elderly.

§§ 58-254.16 to 58-254.18: Reserved for future codification purposes.

ARTICLE 26B.

North Carolina Health Care Excess Liability Fund.

§ 58-254.19. Findings of General Assembly; legislative intent. — The General Assembly finds that the cost of professional liability insurance has risen to levels which many health care providers find intolerable; and that the cost of one million dollars (\$1,000,000) excess coverage is approximately twice this inflated cost of primary coverage of one hundred-three hundred thousand dollars (\$100,000-\$300,000); and that health care providers in North Carolina are unable to obtain excess liability insurance above one million dollars (\$1,000,000); that said excess coverage has been made unavailable in the past by the withdrawal of the major health care liability insurer from the State, and there is no assurance that said excess coverage will continue to remain available; and that the ever increasing costs of health care, the inflationary economic trends in North Carolina and the nation, the acceleration of the frequency of claims against North Carolina's health care providers, and the increased risks commensurate with advanced health care treatments and procedures are mandating the necessity of the availability of liability insurance in excess of limits presently obtainable.

The General Assembly further finds that the inability of health care providers to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the curtailment of health care. The General Assembly finds and declares that the uninterrupted delivery of health care services is essential to the health and welfare of the citizens of North Carolina. The General Assembly further finds and declares that it is essential to the health and welfare of the citizens of North Carolina that all health care providers have excess health care liability insurance. It is declared to be the policy and intent of the General Assembly that a health care provider who participates in the plan set forth in this Article, maintains the designated amounts of professional liability protection, and contributes to the fund for the protection of his patients shall be deemed to have fulfilled the objectives of this public policy. (1975, 2nd

Sess., c. 978, ss. 1, 2.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 978, s. 4, contains a severability clause.

§ 58-254.20. Definitions. — The following terms as used in this Article shall have the meanings hereinafter respectively ascribed to them:

(1) "Board" means the Board of Governors of the North Carolina Health

Care Excess Liability Fund provided for in G.S. 58-254.23.

(2) "Commissioner" means the Commissioner of Insurance of the State of North Carolina.

(3) "Fund" means the North Carolina Health Care Excess Liability Fund

provided for in G.S. 58-254.21.

(4) "Health care provider" means any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of, or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any person acting at the direction or under the supervision of a health care

provider.
(5) "Manager" means the person appointed by the Board to administer the fund as provided for in G.S. 58-254.23. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.21. North Carolina Health Care Excess Liability Fund; creation; investment; coverage. — (a) The North Carolina Health Care Excess Liability Fund is created to be collected and received by the Board for exclusive use for

the purposes stated in this Article.

(b) All moneys which belongs to the fund and are collected or received under this Article shall be held in trust, deposited in a segregated account, invested and reinvested by the Board in accordance with the reserve investment requirements of G.S. 58-79.1, and shall not become a part of the general fund of the State. All interest and revenues from moneys belonging to the fund shall inure solely to the benefit and use of the fund. The Board shall be authorized to withdraw funds from such account as amounts payable under G.S. 58-254.26 and other expenses become due and payable. No part of the revenues or assets of the fund shall inure to the benefit of or be distributable to the Board or any member thereof or any officer or employee of the Board, except for services rendered. All expenses and salaries connected with the administration and operation of the fund shall be paid out of the fund.

(c) Profits of the Fund. — The Board shall establish a surplus account which in the sound business judgment of the Board will be sufficient to meet the normal contingencies of its operations. All other profits shall be returned to the

participating health care providers by adjustment of the assessments.

(d) Restrictions of Use by State. — No moneys, funds, reserves, investments and property, whether real or personal, acquired, administered, possessed or held by the fund, nor any profits earned by the fund, may be taken, used or appropriated by the State of North Carolina for any purpose whatsoever. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.22. Withdrawals; fidelity bond; fund accounting and audit. — (a) Moneys shall be withdrawn from the fund only upon vouchers approved and as authorized by the Board.

(b) Persons authorized to receive deposits, withdraw, issue vouchers or

otherwise disburse any fund moneys shall post a blanket fidelity bond in an amount to be determined by the Board and reasonably sufficient to protect fund assets. The cost of such bond shall be paid from the fund.

(c) Annually, the Board shall furnish an audited financial report to the

Commissioner, the State Auditor and to fund participants upon request. The report shall be prepared by an independent certified public accountant in

accordance with accepted accounting procedures.

(d) The Board shall report annually to the General Assembly and the Governor on the financial condition of the fund and its statistical claims experience and may make recommendations as to any further legislative actions which may be needed to carry out the intent of this Article. All such reports shall be made freely available to the public. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.23. Board of Governors; creation; membership; terms; vacancies; powers and duties; manager of fund; immunity from liability of Board members, officers and employees. — (a) There is hereby created the Board of Governors of the North Carolina Health Care Excess Liability Fund with the power to:

(1) Adopt such rules and regulations as may be necessary for the

interpretation and implementation of this Article.

(2) Employ such officers and employees as it deems necessary to carry out the provisions of this Article or to perform the duties and exercise the powers conferred upon it by law. The compensation for such officers and employees shall be fixed by the Board.

(3) Sue and be sued in all actions arising out of any act or omission in

connection with the business or affairs of the fund.

(4) Enter into any contracts or obligations relating to the fund which are authorized or permitted by law, including, but not limited to, contracts for claims-management services such as the evaluation, negotiation, defense and settlement of medical malpractice claims against participating health care providers.

(5) Conduct all business affairs and perform all acts relating to the fund,

whether or not specifically designated in this Article.

(b) The membership of and appointments to the Board shall be as follows: (1) Two members to be appointed by the Lieutenant Governor from a list of two nominees per appointment submitted by the North Carolina Medical Society;

(2) Two members to be appointed by the Speaker of the House from a list of two nominees per appointment submitted by the North Carolina

Hospital Association;

(3) One member to be appointed by the Governor from a list of two nominees submitted by the North Carolina Nurses' Association;

(4) One member to be appointed by the Governor from a list of two nominees submitted by the North Carolina Dental Society; and(5) One member from a health care profession other than those enumerated

in subdivisions (1) through (4) of this subsection to be appointed by the

(c) Members appointed pursuant to this section shall be residents of the State and shall serve terms of four years: Provided that the initial appointees shall serve terms as follows:

(1) Members appointed by the Governor shall serve initial terms of two, three and four years.

(2) Members appointed by the Lieutenant Governor shall serve initial terms of two and three years; and

(3) Members appointed by the Speaker of the House shall serve initial terms of two and four years.

(d) The Commissioner shall be an ex officio member of the Board. The Commissioner or his designee shall have a vote on all matters before the Board.

(e) Initial appointments to the Board shall be made within 30 days of May 13, 1976. The organizational meeting of the Board shall be held upon the call of the Commissioner and within 30 days after initial appointments are completed.

(f) Any appointment to fill a vacancy on the Board created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term. At the expiration of each member's term, the appointing authority shall reappoint or replace the member with a member from the same category. At its organizational meeting and on or after July 1 of each year thereafter, the Board shall designate by election one of its members as chairman. The Board shall also elect or appoint, and prescribe the duties of such other officers as the Board deems necessary or advisable, including a secretary and treasurer.

(g) Any appointing authority shall have the power to remove any member for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13. Compensation and allowances for members of the Board shall be as provided in G.S. 138-5. The Commission shall not receive said compensation and allowances.

(h) There shall be a manager of the fund who shall be appointed by the Board. The manager shall conduct the business affairs of the fund under the general direction of the Board. Before entering the duties of the office, the manager shall qualify by giving an official bond approved by the Board. The Board may delegate to the manager of the fund, under such rules and regulations and subject to such conditions as it from time to time prescribes, any power, function or duty conferred by law on the Board in connection with the administration, management and conduct of the business affairs of the fund. The manager may exercise such powers and functions and perform such duties with the same force and effect as the Board.

(i) There shall not be any personal liability on the part of any member of the Board, or any officer or employee of the fund, for, or on account of, any act performed or obligation entered into in an official capacity, when done in good faith, without intent to defraud, and in connection with the administration, management, or conduct of the fund or affairs relating thereto. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.24. Participation in the fund. — (a) When a health care provider has proved to the satisfaction of the Board that he is insured by an insurer licensed and approved by the Commissioner or under a self-insurance plan approved by the Board against legal liability for damages arising out of professional malpractice in the sums required under subsection (b) of this section, and if the health care provider has paid the current assessment required under G.S. 58-254.25, the health care provider shall be deemed to be a bona fide participant in the fund and shall become subject to the provisions of this Article and the rules and regulations of the Board. The financial responsibility requirements herein shall include an obligation of the insurer or self-insurer to defend an action against the participating health care provider irrespective of payment or offer of payment of the limits provided by such insurer or self-insurer.

(b) The minimum amount of professional liability insurance or self-insurance

required to be maintained by a participating health care provider shall be one hundred thousand dollars (\$100,000) for each occurrence or claim made and one hundred thousand dollars (\$100,000) aggregate for occurrences or claims made in any one year.

(c) If a health care provider participating in the fund has insurance or self-insurance coverage in excess of the amounts stated in subsection (b) of this section, the Board may grant an appropriate reduction of his assessment for the

fund.

- (d) The Board shall afford a participating health care provider the same type of coverage, occurrence or claims made, as is provided by his insurer or approved self-insurer in subsection (a) of this section. (1975, 2nd Sess., c. 978, s. 3.)
- § 58-254.25. Assessment for the fund. (a) A health care provider who wishes to participate in the fund and be subject to the provisions of this Article and the rules and regulations of the Board shall, in addition to complying with the provisions of G.S. 58-254.24, not later than the date or dates specified by the Board in each year, pay to the fund an assessment to be determined by the Board.

(b) Moneys received by the Board under subsection (a) of this section shall be handled in accordance with the provisions of G.S. 58-254.21 and 58-254.22.

(c) Any health care provider who carries a claims-made policy or is protected by an approved self-insurance plan and who discontinues participation in the fund may obtain full occurrence coverage from the Board by purchasing a reporting endorsement on the claims-made policy or self-insurance plan by payment of the assessment then required by the Board on the same basis as the insurer or self-insurer requires a reporting endorsement premium to be paid.

(d) The fund shall be subject to the premium tax law as stated in North

Carolina G.S. 105-228.5. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.26. Payment of claims by the fund; claims management and services; personal liability for malpractice and amount of compensation not limited; actions against Board or fund. — (a) Any amount due from a judgment, arbitration award or Board-approved settlement which is in excess of a participating health care provider's insurance or self-insurance coverage required by G.S. 58-254.24 shall be paid from the fund in an amount not to exceed two million dollars (\$2,000,000) for each occurrence or claim made and two million dollars (\$2,000,000) aggregate for occurrences in or claims made in any one year. The purpose of this Article is to afford a participating health care provider with effective excess coverage of \$2,000,000 per occurrence or claim made and \$2,000,000 aggregate per annum.

(b) Payment of claims by the fund as provided in subsection (a) of this section shall only be made when the Board issues a voucher or other appropriate request

after the Board receives either of the following:

(1) A certified copy of a final judgment or arbitration award against a participating health care provider.

(2) A certified copy of a Board-approved settlement between a participating health care provider and a claimant.

Any and all payments of claims from the fund on behalf of a participating health care provider shall inure to the benefit of said health care provider.

(c) A participating health care provider or his insurer or self-insurer or any claimant shall notify the Board of all claims made or reported or actions filed against said health care provider. Such notice shall be in writing, mailed to the Board within a reasonable time to provide the Board adequate preparation time to defend or negotiate said claim or action, and shall include the date of the

alleged occurrence, the date of the making, reporting or filing of said claim or action, and the amount demanded, if declared, by the claimant. The Board shall not pay claims on behalf of or provide the services in subsection (d) of this section to any participating health care provider unless adequate notice to the Board has been provided.

(d) The Board may provide for claims management and services, including the legal defense of participating health care providers in actions filed against them

and in settlement negotiations.

(e) Nothing in this Article shall be deemed or construed to:

(1) Limit the personal liability of any participating health care provider for malpractice arising out of the performance of or failure to perform professional services;

(2) Limit the amount of compensation from any final judgment, arbitration award or Board-approved settlement to any claimant injured as a result

of said malpractice; or

(3) Permit the filing by any claimant of an action against the Board or fund except upon a final judgment obtained by the claimant against a participating health care provider or upon a Board-approved settlement agreement.

(f) The fund shall not be liable for awards for punitive damages against

participating health care providers. (1975, 2nd Sess., c. 978, s. 3.)

§ 58-254.27. Commencement of operations; effective date of coverage. —
(a) The fund shall provide the excess coverage provided in this Article only for causes of action arising out of occurrences on or after the effective date of participation of a health care provider.

(b) The Board may provide coverage by the fund when, in the Board's discretion, the fund has sufficient moneys and a sufficient number of

participation agreements. (1975, 2nd Sess., c. 978, s. 3.)

- § 58-254.28. Acceptance of and compliance with Article and rules and regulations of the Board. Compliance with the provisions of G.S. 58-254.24 and 58-254.25 shall constitute, on the part of a participating health care provider, a conclusive and unqualified acceptance of the provisions of this Article and the rules and regulations of the Board. (1975, 2nd Sess., c. 978, s. 3.)
- § 58-254.29. Records. Records held by the fund shall not be subject to the provision of Chapter 132 of the General Statutes pertaining to public records. (1975, 2nd Sess., c. 978, s. 3.)

Chapter 59.
Partnership.

ARTICLE 2.

Uniform Partnership Act.

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners.

Dairy Partnership Contribution. — A "milk base" owned by defendant and used by a dairy partnership was a "contribution" to the

partnership property as contemplated by subdivision (1) of this section. Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740 (1975).

Chapter 61.

Religious Societies.

§ 61-4. Trustees may convey property.

Applied in Immanuel Baptist Tabernacle Emmanuel Tabernacle Church, Apostolic Faith, Church of Apostolic Faith v. Southern 27 N.C. App. 127, 218 S.E.2d 223 (1975).

Chapter 62. Public Utilities.

ARTICLE 1.

General Provisions.

§ 62-1. Short title.

Scope of Regulatory Authority. - The Utilities Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by this Chapter, and the Commission may not, by its order, require or authorize a rule or practice by a public utility company which is forbidden

by statute, or authorize such company to refuse to perform a duty imposed upon it by statute, unless this Chapter has conferred such authority upon the Commission. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

§ 62-2. Declaration of policy.

Applied in State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975): State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975).

§ 62-3. Definitions.

Multistate Foreign Corporation. -

The General Assembly intended Article 8 to apply to all public utilities doing business in this State whether they be foreign or domestic corporations and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

Rate Formula Permissible. - The definition of "rate" contained in this section is worded in such a broad manner as to encompass the use of a formula, and the fact that the formula must be computed each month does not render it so imprecise as to be statutorily impermissible. State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975).

Applied in State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220

S.E.2d 304 (1975).

ARTICLE 3.

Powers and Duties of Utilities Commission.

§ 62-30. General powers of Commission.

The Commission has no jurisdiction, etc. — Utilities Comm'n v. National Merchandising

In accord with original. See State ex rel. Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

§ 62-31. Power to make and enforce rules and regulations for public utilities.

Applied in State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

§ 62-32. Supervisory powers; rates and service.

I. GENERAL CONSIDERATION.

Applied in State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975).

ARTICLE 4.

Procedure before the Commission.

§ 62-73. Complaints against public utilities.

Standing of Manufacturer and Distributor of Plastic Telephone Directory Covers to Complain and Appeal. — See State ex rel.

Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

I. GENERAL CONSIDERATION.

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976).

§ 62-92. Parties on appeal.

Standing of Manufacturer and Distributor of Plastic Telephone Directory Covers to Complain and Appeal. — See State ex rel.

Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

§ 62-96. Appeal to Supreme Court.

Standing of Manufacturer and Distributor of Plastic Telephone Directory Covers to Complain and Appeal. — See State ex rel.

Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

ARTICLE 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity.

By this section the State, etc. — This State has adopted the policy of granting to a telephone company a monopoly upon the rendering of telephone service within its service area. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Nothing in this Chapter confers upon a telephone company a monopoly upon advertising by its business subscribers. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

Fuel adjustment clause formula used by power company qualified as a valid part of a rate or rate schedule within the meaning of this section. State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975).

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976).

§ 62-133. How rates fixed.

I. GENERAL CONSIDERATION.

Applied in State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975).

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976).

III. FIXING OF RATES.

B. Rate Base — Value of Investments, Property, etc.

Contributions in aid of utility construction must be excluded from rate base. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

The term, "the public utility's property used and useful in providing the service," appearing in subdivision (b)(1) was not intended by the legislature to include that portion of the utility plant in service represented by contributions made by the utility's patrons in aid of construction. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

No Matter What Source. — It makes no difference whether contributions to the utility company were made initially by customers or by land development companies, or whether some of the latter were closely related to the utility company. The controlling factor is whether the utility company's customers ultimately bore the cost of such contributions. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

Commission not required, etc. -

The case cited under this catchline in the 1975 Supp. was affirmed in state ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

"Contribution" Correctly Excluded. — The Utilities Commission did not err in excluding

from the rate base of a water utility an amount representing the difference between the original cost of a water system constructed by the developers of a real estate subdivision and the price paid to such developers by the water utility where the Commission found that such difference amounted to an indirect payment from the customers to the utility through the purchase of their lots, which allowed the original owners to sell the water system to the utility for less than the probable cost of installation. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

C. Operating Expenses and Working Capital.

Depreciation Deductions. —

In accord with 1st paragraph in original. See State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

The purpose of an annual allowance for depreciation and the resulting accumulation of a depreciation reserve is not, as is sometimes erroneously supposed, to provide the utility with a fund by which it may purchase a replacement for the property when it is worn out. The purpose of the allowance is to enable the utility to recover the cost of such property to it. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

Depreciation Based on Original Cost. — Subdivision (b)(3) clearly directs that the annual allowance for depreciation of durable properties, such as a pipeline, be based upon the original cost of the property to the utility and not upon either its current fair value or the cost of installation borne by a former owner, such as the real estate developers in the present case. State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

§ 62-133.1. Small water and sewer utility rates.

Cited in State ex rel. Utilities Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

§ 62-134. Change of rates; notice; suspension and investigation.

Fuel Adjustment Clause. — For case discussing procedure to be followed in request for coal adjustment clause prior to the 1975 amendment, see State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975).

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976).

§ 62-135. Temporary rates under bond.

Applied in State ex rel. Utilities Comm'n v. Edmisten, 26 N.C. App. 613, 216 S.E.2d 743 (1975).

§ 62-140. Discrimination prohibited.

Commission May Not Permit Unjustified Service Refusal. — A refusal by a telephone company to serve without a reasonable justification therefor is a violation of the company's duty and the Commission has no authority to permit it. State ex rel. Utilities Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

ARTICLE 8.

Securities Regulation.

§ 62-160. Permission to pledge assets.

Applicable to Interstate Corporations. — The General Assembly intended this Article to apply to all public utilities doing business in this State whether they be foreign or domestic corporations and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

§ 62-161. Assumption of certain liabilities and obligations to be approved by Commission; refinancing of public utility securities.

The regulation and control by this State, etc. —

Cases cited under this catchline in 1975 Supp. were affirmed in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

Applicable to Interstate Corporation. — The

General Assembly intended this Article to apply to all public utilities doing business in this State whether they be foreign or domestic corporations and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

§ 62-171. Commission may act jointly with agency of another state where public utility operates.

The regulation and control by this State,

Cases cited under this catchline in 1975 Supp. were affirmed in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

Applicable to Interstate Corporations. — The General Assembly intended this Article to

apply to all public utilities doing business in this State whether they be foreign or domestic corporations and even though they are also engaged in interstate commerce. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

equity if it is (i) to writing, (i) entered to

ARTICLE 12.

Motor Carriers.

§ 62-262. Applications and hearings.

Applied in State ex rel. Utilities Comm'n v. Home Transp. Co., 28 N.C. App. 340, 220 S.E.2d 871 (1976).

Chapter 75.

Monopolies, Trusts and Consumer Protection.

§ 75-1. Combinations in restraint of trade illegal.

Enforceable Covenant Not to Compete. — By this section, contracts in restraint of trade are made illegal in North Carolina; however, in this State a covenant not to compete is enforceable in equity if it is (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties and (6) not against public polity. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

The language of this section closely parallels that of Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1973 Ed.), which prohibits "unfair or deceptive acts or practices in commerce." Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Stipulated Facts Constituting Violation. — Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law

whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. However, where the parties stipulated certain facts, the Supreme Court, based on these facts, held as a matter of law that the false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in commerce contrary to the provisions of this section, and treble damages should have been awarded as provided by § 75-16 in the amount of \$1800. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Cited in Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976).

§ 75-2. Any restraint in violation of common law included.

Applied in Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

§ 75-4. Contracts to be in writing.

A covenant not to compete is enforceable in equity if it is (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties and (6) not against public policy. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

New Contract Required. — When the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

§ 75-16. Civil action by person injured; treble damages.

Punitive damages may be awarded only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Plaintiff was not entitled to treble damages under this section where he sought to rescind the sale of a car and to recover the sale price on the ground the year model of the car had been misrepresented by the seller. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

Sec.

75A-16. Filing and publication of rules and regulations; furnishing copies to owners.

ARTICLE 1.

Boating Safety Act.

§ 75A-16. Filing and publication of rules and regulations; furnishing copies to owners. — A copy of the regulations adopted pursuant to this Chapter, and of any amendments thereto, shall be filed in the office of the Wildlife Resources Commission and in the office of the clerks of the superior courts of the counties in which such boats are operated. Rules and regulations shall be published by the Wildlife Resources Commission in a convenient form, and a copy of such rules and regulations shall be furnished each owner who secures a certificate of number pursuant to this Chapter. (1959, c. 1064, s. 16; 1975, 2nd Sess., c. 983, s. 68.)

Editor's Note. — The 1975, 2nd Sess., amendment deleted "and in the office of the Secretary of State of North Carolina" following

"Wildlife Resources Commission" in the first sentence.

Chapter 76.
Navigation.

ARTICLE 1.

Cape Fear River.

§ 76-1. Board of commissioners of navigation and pilotage.

Cross Reference. —
As to transfer of the board of commissioners of navigation and pilotage for the Cape Fear

River to the Department of Transportation, see § 143B-354.

ARTICLE 6.

Morehead City Navigation and Pilotage Commission.

§ 76-59. Board of commissioners of navigation and pilotage.

Cross Reference. —

As to transfer of the board of commissioners of navigation and pilotage for Old Topsail Inlet and Beaufort Bar to the Department of Transportation, see § 143B-354.

Editor's Note. -

Session Laws 1951, c. 776, s. 2, transfers to the State Ports Authority all powers and functions of the Morehead City port commission.

Chapter 84.

Attorneys-at-Law.

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.

Discretion of Court. -

In accord with 1975 Supp. See State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Control of the arguments of counsel to the jury must be left largely in the sound discretion of the trial judge. State v. McCall, 289 N.C. 512, 223 S.E.2d 303'(1976).

Arguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

What constitutes an abuse of the privilege of argument to the jury must ordinarily be left to the sound discretion of the trial judge. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

It is a basic right of a litigant to have his counsel argue his case to the jury on questions of law and of fact. Board of Transp. v. Wilder, 28 N.C. App. 105, 220 S.E.2d 183 (1975).

Wide latitude is given counsel, etc. -

In accord with 1st paragraph in 1975 Supp. See State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Wide latitude is given to counsel in the argument of contested cases. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Wide latitude should be given counsel to argue to the jury all the law and the facts presented by the evidence and all reasonable inferences therefrom. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Counsel may not "travel outside the record" in his argument to the jury. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Counsel may not travel outside the record and place before the jury an incompetent and prejudicial theory of the case grounded wholly on personal beliefs and opinions not supported by the evidence. State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975).

Improper to Comment on Character or Conduct of Opposing Party or Attorney. — Where counsel's remarks are not sustained by the facts it is improper for counsel in argument to make statements reflecting on the character

or conduct of the opposite party or his attorney. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

It is improper for a lawyer in his argument to assert his opinion that a witness is lying. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

While counsel can argue to the jury that they should not believe a witness, he should not call him a liar. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Incompetent and Prejudicial Matters. -

Counsel may not by his argument place before the jury incompetent and prejudicial matter not admissible into evidence. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

When evidence forbidden by statute is argumentatively placed before the jury and used to the prejudice of the defense, it is the duty of the trial judge to intervene on his own motion and instruct the jury that the evidence, and the improper argument concerning the evidence, must be disregarded and under no circumstances used to the prejudice of the defendant. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

A prosecuting attorney may not place before the jury incompetent and prejudicial matters not admissible in evidence or include in his argument facts not included in the evidence. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

An objection to argument of counsel must be made at the time of the argument, so as to give the court an opportunity to correct the transgression, if any. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Or Before Verdict. — Exception to improper remarks of counsel during argument must be taken before verdict. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976); State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Or Else Waived. — Objection to any impropriety in counsel's argument to the jury is waived by waiting until after the verdict to enter the objection. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the admission of incompetent evidence, must be made in apt time or else be lost. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Capital Case Exception. - An exception to the general rule that objections to counsel's argument to the jury must be made before verdict is recognized in capital cases where the improper argument was so prejudicial in nature that, in the opinion of the court, no instruction by the trial court could have removed it from the minds of the jury had the objection been seasonably made. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Alford, 289 N.C. 372. 222 S.E.2d 222 (1976).

Defense Counsel "Opened the Door" to Prosecutor's Attacks. — Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Duty of Court to Censor Remarks. -

In accord with 1st paragraph in 1975 Supp. See State v. Britt. 288 N.C. 699, 220 S.E.2d 283

In accord with 2nd paragraph in 1975 Supp. See State v. Britt. 288 N.C. 699, 220 S.E.2d 283

Grounds for Review of Judge's Discretion. Exercise of the trial judge's discretion in controlling jury arguments is not reviewed unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Chapter 90.

Medicine and Allied Occupations.

Article 1A.

Treatment of Minors.

Sec.

90-21.6 to 90-21.10. [Reserved.]

Article 1B.

Medical Malpractice Actions.

90-21.11. Definition.

Sec.

90-21.12. Standard of health care.

90-21.13. Informed consent to health care treatment or procedure.

90-21.14. First aid or emergency treatment; liability limitation.

ARTICLE 1A.

Treatment of Minors.

§§ 90-21.6 to 90-21.10: Reserved for future codification purposes.

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. **Definition.** — As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home. (1975, 2nd Sess., c. 977, s. 4.)

Cross References. — As to limitation of actions for malpractice, see §§ 1-15, 1-17. As to the North Carolina Health Care Excess Liability Fund, see §§ 58-254.19 through 58-254.29. As to liability insurance or self-insurance covering health-care practitioners employed by the University of North Carolina, see §§ 116-219 through 116-222.

Editor's Note. — Session Laws 1975, 2nd Sess., c. 977, s. 10, makes this Article effective July 1, 1976.

Session Laws 1975, 2nd Sess., c. 977, s. 7, contains a severability clause. Session Laws 1975, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

§ 90-21.12. Standard of health care. — In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and

experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. (1975, 2nd Sess., c. 977, s. 4.)

§ 90-21.13. Informed consent to health care treatment or procedure. — (a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience

situated in the same or similar communities; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of

subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.

(c) A valid consent is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give

consent.

(d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

(e) In the event of any conflict between the provisions of this section and those of Article 7 of Chapter 35 and Articles 1A and 19 of Chapter 90, the provisions of those Articles shall control and continue in full force and effect. (1975, 2nd

Sess., c. 977, s. 4.)

§ 90-21.14. First aid or emergency treatment; liability limitation. — (a) Any person who renders first aid or emergency health care treatment to a person who is unconscious, ill or injured,

(1) When the reasonably apparent circumstances require prompt decisions

and actions in medical or other health care, and

(2) When the necessity of immediate health care treatment is so reasonably apparent that any delay in the rendering of the treatment would seriously worsen the physical condition or endanger the life of the

shall not be liable for damages for injuries alleged to have been sustained by the person or for damages for the death of the person alleged to have occurred

by reason of an act or omission in the rendering of the treatment unless it is established that the injuries were or the death was caused by gross negligence, wanton conduct or intentional wrongdoing on the part of the person rendering the treatment.

(b) Nothing in this section shall be deemed or construed to relieve any person from liability for damages for injury or death caused by an act or omission on the part of such person while rendering health care services in the normal and

ordinary course of his business or profession.

(c) In the event of any conflict between the provisions of this section and those of G.S. 20-166(d), the provisions of G.S. 20-166(d) shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4.)

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-87. Definitions.

"Delivery" Means "Transfer". — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to

prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under this section. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

§ 90-88. Authority to control.

Stated in State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

§ 90-94. Schedule VI controlled substances.

Findings Not Required as to Marijuana. — The requirement that the Drug Authority make findings as to whether a substance comes within this section applies only to drugs the Authority may wish to add, delete or reschedule, and not to substances, such as marijuana, which have already been included by the General Assembly. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, it is not necessary for the State to show that the Drug Authority has made a finding that marijuana is a controlled substance since it has been listed as such under this section. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

§ 90-95. Violations; penalties.

This section does not deprive a juvenile of the right of confrontation and cross-examination, although the juvenile has no right of appeal to the superior court for trial de novo where he could cross-examine the SBI chemist who prepared the report, since the juvenile is afforded a right of access to the report in ample time to prepare for trial and has the right to subpoena the person who prepared the report. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

Constructive Possession Defined. — In accord with 1975 Supp. See State v. Wells, 27 N.C. App. 144, 218 S.E.2d 225 (1975).

Establishing Possession. -

In accord with 4th paragraph in original. See State v. Wells, 27 N.C. App. 144, 218 S.E.2d 225 (1975).

Establishing Intent to Distribute. -

This section clearly permits North Carolina courts and juries to examine and utilize the quantities of drugs seized as one possible indicator of intent to distribute. State v. Mitchell. 27 N.C. App. 313, 219 S.E.2d 295 (1975).

Possession for Sale Inferred. — The quantity of narcotics found in defendant's possession, its packaging, its location and the paraphernalia for measuring and weighing are all circumstances from which it could properly be inferred that it was possessed for sale rather than for personal use. State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975).

"Delivery" Means "Transfer". - In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under § 90-87. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357

Sale and Delivery Charged as Single Offense. - In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Finding of Marijuana to Be a Controlled Substance Not Required. - In a prosecution for

§ 90-112. Forfeitures.

Cited in State v. Rogers, 28 N.C. App. 110, 220 S.E.2d 398 (1975).

felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, it is not necessary for the State to show that the Drug Authority has made a finding that marijuana is a controlled substance since it has been listed as such under § 90-94. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Transportation Allegations as to Surplusage. - Since January 1, 1972, the transportation of a controlled substance has not been a separate substantive criminal offense, but in any allegations charging that defendant "did feloniously possess" the controlled substance heroin and that he "did transport said substance." the allegations concerning transportation may be treated as surplusage. State v. Rogers, 28 N.C. App. 110, 220 S.E.2d 398 (1975).

Punishment. —

The trial court erred in sentencing defendant to imprisonment for 10 years for felonious possession of heroin where the indictment did not charge defendant with a prior conviction of that offense and the State did not prove a prior conviction, a sentence of five years being the maximum that could be imposed in such case. State v. Moore, 27 N.C. App. 245, 218 S.E.2d 496 (1975).

Chapter 93.

Public Accountants.

Sec.

93-12. Board of Certified Public Accountant Examiners.

§ 93-12. Board of Certified Public Accountant Examiners. — The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of four persons to be appointed by the Governor, all of whom shall be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter. 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. The powers and duties of the Board shall be as follows:

(9) Adoption of Rules of Professional Conduct; Disciplinary Action. — The Board shall have the power to adopt rules of professional ethics and conduct to be observed by certified public accountants and public accountants engaged in the public practice of accountancy in this State. The rules so adopted shall be publicized and filed in the office of the Attorney General as provided by Chapter 150A. The Board shall have the power to revoke, either permanently or for a specified period, any certificate issued under the provisions of this Chapter to a certified public accountant or public accountant or to censure the holder of any such certificate for any one or combination of the following causes:

 a. Conviction of a felony under the laws of the United States or of any state of the United States.

b. Conviction of any crime, an essential element of which is dishonesty, deceit or fraud.

c. Fraud or deceit in obtaining a certificate as a certified public

accountant.

 d. Dishonesty, fraud or gross negligence in the public practice of accountancy.

e. Violation of any rule of professional ethics and professional conduct adopted by the Board.

Any disciplinary action taken shall be in accordance with the provisions of Chapter 150[A] of the General Statutes.

(1975, 2nd Sess., c. 983, s. 69.)

Editor's Note. -

The 1975, 2nd Sess., amendment substituted "filed in the office of the Attorney General as provided by Chapter 150A" for "a certified copy filed in the office of the Secretary of State of

North Carolina within 60 days after adoption" in the second sentence of subdivision (9).

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (9) are set out.

Chapter 93A.

Real Estate Brokers and Salesmen.

§ 93A-6. Revocation or suspension of licenses by Board.

Strict Construction. — This section is penal in nature, is in derogation of the common law and must be strictly construed. North Carolina Real Estate Licensing Bd. v. Woodard, 27 N.C. App. 398, 219 S.E.2d 271, cert. denied, 288 N.C. 731, 220 S.E.2d 621 (1975).

Finding Inadequate to Suspend License. — Finding by the Real Estate Licensing Board that "there is substantial evidence" that a real estate agent acted in violation of subdivision (8) of subsection (a) in certain respects is insufficient to support a suspension of the agent's license since it is necessary for the Board to find that the agent "is deemed guilty of" a violation of the statute before his license can be suspended. North Carolina Real Estate Licensing Bd. v. Woodard, 27 N.C. App. 398, 219 S.E.2d 271, cert. denied, 288 N.C. 731, 220 S.E.2d 621 (1975).

Chapter 95.

Department of Labor and Labor Regulations.

Article 1.

Article 16.

Department of Labor.

Occupational Safety and Health Act of North Carolina.

Sec. 95-2.

Election of Commissioner; term; salary; vacancy.

Sec.

95-131. Development and promulgation of standards; adoption of federal standards and regulations.

ARTICLE 1.

Department of Labor.

§ 95-2. Election of Commissioner; term; salary; vacancy. — The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. The term of office of the Commissioner of Labor shall be four years, and he shall receive a salary of thirty-two thousand five hundred forty-four dollars (\$32,544) a year, payable monthly. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the City of Raleigh and shall be provided for as are other public offices of the State. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C. S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 5; 1967, c. 1130; c. 1237, s. 5; 1969, c. 1214, s. 5; 1971, c. 912, s. 5; 1973, c. 778, s. 5; 1975, 2nd Sess., c. 983, s. 20.)

Editor's Note. — sentence, increasing the salary from \$31,000 to The 1975 amendment rewrote the second \$32,544.

ARTICLE 2.

Maximum Working Hours.

§ 95-17. Limitations of hours of employment; exceptions.

Cited in Nance v. Union Carbide Corp., Consumer Prods. Div., 397 F. Supp. 436 (W.D.N.C. 1975).

ARTICLE 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

This section does not justify denial by city of request to withhold union dues from paychecks of city employees. Local 660,

International Ass'n of Firefighters v. City of Charlotte, 518 F.2d 82 (4th Cir. 1975).

ARTICLE 16.

Occupational Safety and Health Act of North Carolina.

\$ 95-131. Development and promulgation of standards; adoption of federal standards and regulations. — (a) All occupational safety and health standards promulgated under the federal act by the Secretary, and any modifications, revision, amendments or revocations in accordance with the authority conferred by the federal act or any other federal act or agency relating to safety and health and adopted by the Secretary shall in all respects be the rules and regulations of the Commissioner of this State unless the Commissioner shall make, promulgate and publish an alternative State rule, regulation or standard as effective as the federal requirement and providing safe and healthful employment in places of employment as required by the federal act and standards and regulations heretofore referred to and as provided by the Occupational Safety and Health Act of 1970. All standards and regulations promulgated under the federal act by the Secretary, and any modifications, revisions, or revocations in accordance with the authority conferred by the federal act, or any other federal act or agency relating to safety and health and adopted by the Secretary, shall become effective upon the date the same is filed by the Commissioner in the office of the Attorney General.

(1975, 2nd Sess., c. 983, s. 81.)

Editor's Note. —
The 1975, 2nd Sess., amendment substituted
"Attorney General" for "Secretary of State" at
the end of subsection (a).

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

Chapter 96.

Employment Security.

ARTICLE 1.

Employment Security Commission.

§ 96-4. Administration.

Due Process Not Express. — To acknowledge that constitutional restraints exist upon a State government in dealing with its employees is not to say that all such employees have a right to due process notice and hearing before they can be removed from their employment. Nantz v. Employment Security Comm'n, 28 N.C. App. 626, 222 S.E.2d 474 (1976).

Applicability of State Personnel Commission System and Administrative Procedure Act. — Effective February 1, 1976,

pursuant to § 126-2 et seq., a State Personnel Commission system is established which provides for due process rights of State employees and also provides that the Administrative Procedure Act, Chapter 150A of the General Statutes of North Carolina, shall apply to hearings before the Personnel Commission. Nantz v. Employment Security Comm'n, 28 N.C. App. 626, 222 S.E.2d 474 (1976).

ARTICLE 2.

Unemployment Insurance Division.

§ 96-13. Benefit eligibility conditions.

Editor's Note. -

The following paragraphs, treating the case of In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623 (1972), should be substituted for the four paragraphs dealing with that case in the replacement volume.

Significance of Claimant's Age in Determining Labor Market. — For a case discussing the significance of the fact that employers in a locality do not customarily employ persons of claimant's advanced age, see In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd, 281 N.C. 598, 189 S.E.2d 245 (1972).

Retirement Alone Insufficient to Exclude Claimant from Labor Force. — Although the circumstances of a claimant's work separation are to be considered in determining whether he is available for work and genuinely attached to the labor market, the fact that he voluntarily retired is alone not sufficient to support a conclusion that the claimant is not realistically an active member of the labor force. In re

Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd on other grounds, 281 N.C. 598, 189 S.E.2d 245 (1972).

"Able to Work". -

The terms "able to work," "available for work" and "suitable employment" are not precise terms capable of application with mathematical precision. In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd on other grounds, 281 N.C. 598, 189 S.E.2d 245 (1972); In re Beatty, 22 N.C. App. 563, 207 S.E.2d 321 (1974).

Quantum of Proof of Availability for Work.

— The Commission erred in requiring a 70-year-old claimant to show by clear, cogent and convincing evidence that she had reentered the labor force after having voluntairly retired from her job as a laundry worker. Under former § 143-318(1), the claimant had the burden to show that she was "available for work" only by the greater weight of the evidence. In re Thomas, 281 N.C. 589, 189 S.E.2d 245 (1972).

Chapter 97.

Workmen's Compensation Act.

ARTICLE 1.

Workmen's Compensation Act.

§ 97-1. Official title.

Construction. -

The Workmen's Compensation Act should be construed liberally, so that its benefits are not denied upon technical and narrow interpretation. Conklin v. Hennis Freight Lines, 27 N.C. App. 260, 218 S.E.2d 484 (1975).

The strict rules applicable to ordinary civil actions are not appropriate in proceedings under the Act. Conklin v. Hennis Freight Lines, 27 N.C. App. 260, 218 S.E.2d 484 (1975).

§ 97-2. Definitions.

I. IN GENERAL.

Applied in Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975).

II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

B. Employee.

1. In General.

Question whether employer-employee relationship exists, etc. —

The existence of the employer-employee relationship at the time of an accident is a jurisdictional fact. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Common-Law Tests Applicable. — Whether an employer-employee relationship existed at the time of the injury by accident is to be determined by the application of the ordinary common-law tests. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Statutory definition of "employee" adds nothing to common-law meaning of the term. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act, in case of injury sustained by accident arising out of and in the course of his employment. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

One who seeks to avail himself of the Workmen's Compensation Act, etc. —

It is well settled that to be entitled to maintain

That one employee is peculiarly disposed to injury because of an infirmity or disease incurred prior to his employment affords no sound basis for a reduction in the employer's liability. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

a proceeding for compensation under the Workmen's Compensation Act the claimant must have been an employee of the alleged employer at the time of his injury, or, in case of a claim for death benefits, the deceased must have been such an employee when injured. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Where worker was hired by agent, etc. -

Decedent was not an employee in the meaning of subdivision (2) of this section when he was shot and killed during a robbery while in defendant's store, where decedent had previously been dismissed from defendant's employment but continued to assist his wife when she succeeded him as acting manager of the store, defendant's agent had no authority to allow decedent to continue working at the store, and both decedent and his wife knew that defendant's agent was acting in excess of his authority in permitting decedent to continue working in the store. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

B. Accident.

An injury, in order to be compensable, must result from an accident, etc. —

An injury to be compensable must result from an accident, which is to be considered as a separate event preceding and causing the injury, and the mere fact of injury does not of itself establish the fact of accident. Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975).

Accident and injury are considered

In accord with 3rd paragraph in original. See Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975).

Accident involves the interruption of the work routine, etc. —

An accident has occurred only where there has been an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine. Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975).

Injury Not Resulting from Accident. -

Injury arising out of lifting objects in the ordinary course of an employee's business is not caused by accident where such activity is performed in the ordinary manner, free from confining or otherwise exceptional conditions and surroundings. Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975).

C. Arising Out of and in the Course of Employment.

3. Time, Place and Circumstances of Accident.

b. Injuries While Going to and from Work.

(1) General Rule.

Accident after Work, and off Employer's Premises. — Where accident occurred at a time after plaintiff had completed her regular work shift, had "clocked out" on the time clock provided by her employer for that purpose, had left her employer's premises for the day and at a place which was not on her employer's premises and over which it had no control, the accident did not arise "in the course of" her employment. Taylor v. Albain Shirt Co., 28 N.C. App. 61, 220 S.E.2d 144 (1975).

(4) Where Employer Furnishes Transportation.

Employer would not expose himself to liability for workmen's compensation purposes by gratuitously furnishing transportation for his employees. Travelers Ins.

Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75 (1976).

d. Injuries during Lunch Hour.

Illustrative Cases — Compensation Awarded. — Plaintiff's cleaning of an oil breather cap from a co-employee's car during his lunch period was a reasonable activity and the risk inherent in such activity was a risk of the employment giving rise to compensation because of injury sustained in cleaning the cap. Watkins v. City of Wilmington, 28 N.C. App. 553, 221 S.E.2d 910 (1976).

4. Evidence and Burden of Proof.

Burden of Proof Is on Claimant. -

In accord with 1st paragraph in original. See Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

V. DISABILITY.

"Disability" Construed. -

In accord with original. See Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

Disability is defined in terms of a diminution in earning power. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

Disability is more than mere physical injury and is markedly different from technical or functional disability. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

Disability is the event of being incapacitated from the performance of normal labor. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

IX. HERNIA.

Unusual Circumstances or Exertion Required. —

In accord with 2nd paragraph in original. See Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975).

§ 97-17. Settlements allowed in accordance with Article.

An approved compensation agreement is binding on the parties unless and until set aside by the Industrial Commission. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

In approving a settlement agreement the Industrial Commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by

a court decree. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

The Industrial Commission's approval of settlement agreements is as conclusive as if made upon a determination of facts in an adversary proceeding. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

An agreement for the payment of

compensation, when approved by the Industrial Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Cited in Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

§ 97-22. Notice of accident to employer.

Exceptions to Required Written Notice. — This section clearly requires written notice by an injured employee to his employer with 30 days after the occurrence of the accident or death unless the commission is satisfied of two things: (1) that there was reasonable excuse for not giving the written notice, and (2) the employer was not prejudiced thereby. Pierce v. Autoclave Block Corp., 27 N.C. App. 276, 218 S.E.2d 510 (1975).

§ 97-29. Compensation rates for total incapacity.

Applied in Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975).

§ 97-30. Partial incapacity.

Commission Erred in Basis for Compensation. — Where there was evidence that plaintiff had a 35 percent permanent disability of the spine with 25 percent attributable to the preexisting injury and 10 percent attributable to aggravation by the subsequent injury at defendant's printing plant,

the Industrial Commission erred in concluding that plaintiff's compensation should be based on the percentage of disability attributable to the injury sustained in defendant's plant. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

§ 97-31. Schedule of injuries; rate and period of compensation.

Applied in Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975).

Cited in Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

§ 97-33. Prorating in event of earlier disability or injury.

This section is designed to prevent double recoveries. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975); Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Inapplicable where No Recovery for Earlier Injury. — Neither this section nor § 97-35 are

applicable where plaintiff receives no compensation for his earlier injury which arose out of a noncompensable automobile accident separate and apart from any employment. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

§ 97-34. Employee receiving an injury when being compensated for former injury.

Restricted Application. — Application of this section and § 97-35 is restricted to those

instances where the employee (1) receives an injury for which compensation is payable while

he is still receiving or entitled to compensation for a previous injury in the same employment, or (2) receives a permanent injury specified in § 97-31 after having sustained another permanent injury in the same employment. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

Restricted Application. — Application of § 97-34 and this section is restricted to those instances where the employee (1) receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, or (2) receives a permanent injury specified in § 97-31 after having sustained another permanent injury in the same employment. Pruitt v. Knight

Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976)

Neither § 97-33 nor this section are applicable where plaintiff receives no compensation for his earlier injury which arose out of a noncompensable automobile accident separate and apart from any employment. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

Order of Priority, etc.-

When the legislature, in former § 28-173, provided that the proceeds of an action for wrongful death "shall be disposed of as provided in the Intestate Succession Act," and when it provided in this section that the order of priority among claimants to death benefits payable under the Workmen's Compensation Act "shall

be governed by the general law applicable to the distribution of the personal estate of persons dying intestate," it had in mind the same law; i.e., the Intestate Succession Act as modified by Chapter 31A, entitled, "Acts Barring Property Rights." Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

§ 97-40.1. Second Injury Fund.

Commission Erred in Finding Basis for Compensation. — Where there was evidence that plaintiff had a 35 percent permanent disability of the spine with 25 percent attributable to the preexisting injury and 10 percent attributable to aggravation by the subsequent injury at defendant's printing plant,

the Industrial Commission erred in concluding that plaintiff's compensation should be based on the percentage of disability attributable to the injury sustained in defendant's plant. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

§ 97-47. Change of condition; modification of award.

Cited in Pruitt v. Knight Publishing Co., 289
N.C. 254, 221 S.E.2d 355 (1976).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.

Commission Acts in Judicial Capacity. — In approving a settlement agreement the Industrial Commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by a court decree. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Conclusiveness of Commission's Approval.—The Industrial Commission's approval of settlement agreements is as conclusive as if made upon a determination of facts in an adversary proceeding. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

An agreement for the payment of compensation, when approved by the Industrial

Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

An approved compensation agreement is binding on the parties unless and until set aside by the Industrial Commission. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

§ 97-84. Determination of disputes by Commission or deputy.

Fact-Finding Body.-

In accord with 7th paragraph in original. See Smith v. William Muirhead Constr. Co., 27 N.C. App. 286, 218 S.E.2d 717 (1975).

Specific findings of fact, etc.-

When evidence is presented in support of a

material issue raised, it becomes necessary for the Commission to make a finding one way or the other. Smith v. William Muirhead Constr. Co., 27 N.C. App. 286, 218 S.E.2d 717 (1975).

§ 97-85. Review of award.

Power to Modify or Strike Out Findings of Fact.—

The power of the Commission to review and reconsider the evidence carries with it the power to modify or strike out findings of fact made by the hearing commissioner. Smith v. William Muirhead Constr. Co., 27 N.C. App. 286, 218 S.E.2d 717 (1975).

Applied in Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975); Watkins v. City of Wilmington, 28 N.C. App. 553, 221 S.E.2d 910 (1976).

Cited in Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

Jurisdictional Facts, etc. -

A court reviewing an award by the Industrial Commission has the right, and the duty, to make its own independent findings of jurisdictional facts from its consideration of all the evidence in the record. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Notwithstanding this section, the finding of a jurisdictional fact by the Industrial Commission

is not conclusive upon appeal even though there be evidence in the record to support such finding. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Existence of employer-employee relationship at time of an accident is a jurisdictional fact. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Chapter 104A.

Degrees of Kinship.

§ 104A-1. Degrees of kinship; how computed.

Applied in Pritchett v. Thompson, 28 N.C. App. 458, 221 S.E.2d 757 (1976).

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

Article 4.

Schedule D. Income Tax.

Division I. Corporation Income Tax.

Sec.

105-130.7. Deductible portion of dividends.

Article 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

105-163.6. Payment of amounts withheld; personal liability for failure to withhold; limitation of recovery.

Article 5.

Schedule E. Sales and Use Tax.
Division III. Exemptions and
Exclusions.

Sec.

105-164.13. Retail sales and use tax.

SUBCHAPTER I. LEVY OF TAXES.

ARTICLE 2A.

Schedule B-A. Cigarette Tax.

§ 105-113.5. Privilege tax levied.

Cited in United States v. Brewer, 528 F.2d 492 (4th Cir. 1975).

ARTICLE 2B.

Schedule B-B. Soft Drink Tax.

§ 105-113.41. Short title.

Quoted in Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

§ 105-113.42. Purpose of Article.

Quoted in Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

§ 105-113.43. Liability for tax.

Quoted in Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

§ 105-113.44. Definitions.

"Base product" refers to a product which is used to complete a drink not specifically exempted from the act. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

"Base products" are taxable as such only when used to complete a soft drink which, if sold bottled, would be subject to the tax. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221

S.E.2d 297 (1976).

"Base Product" Not to Be Universalized. — The definition of "base product" contained in this section "may not be lifted out of its context so as to universalize its meaning." Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

§ 105-113.45. Taxation rate.

Effect of Bifurcated Tax System. — The effect of the statutory scheme for administering the bifurcated system of taxation which characterizes the Soft Drink Tax Act is to tax the sale or distribution of the soft drink itself when practical but tax the sale or distribution of the ingredients thereof when this would be impractical. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

The Soft Drink Tax Act establishes a bifurcated scheme of taxation whereby (1) "bottled soft drinks" not otherwise exempt are subjected to a "crown tax" levied upon the sale of each individual bottle of "soft drink" and (2) "base products," "soft drink syrups," "soft drink powders" and "simple syrups," ingredients used to make "open-cup soft drinks," are subjected to a tax levied upon the sale of individual units of each. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

"Base products" are taxable as such only when used to complete a soft drink which, if sold bottled, would be subject to the tax. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

Legislature did not intend to treat frozen concentrated orange juice as either a "base product" or a "soft drink syrup" and did not impose the soft drink excise tax upon it. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

Expressly Excluded. — The definition of "base product" contained in this section must be construed in the broad context of the act as a whole, giving effect to the necessary implications arising from the fact that natural orange juice, including reconstituted frozen concentrated orange juice, is expressly excluded from taxation under the act. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

Unless a soft drink is subject to taxation if sold bottled, its ingredients cannot be taxed. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

Not Frozen Concentrated Orange Juice. — Since natural orange juice is exempt from taxation when sold bottled, frozen concentrated orange juice, as an ingredient of natural orange juice, cannot be taxed under the act. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

The legislature did not intend to treat frozen concentrated orange juice as either a "base product" or a "soft drink syrup" and did not impose the soft drink excise tax upon it. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

"Open-Cup Soft Drinks". — Since the ingredients used to make "open-cup soft drinks" are taxed, there is no provision in the Soft Drink Tax Act for taxing the "open-cup" (as opposed to "bottled") sales of any soft drink. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

§ 105-113.47. Natural fruit or vegetable juice or natural liquid milk drinks exempted from tax.

Legislature intended to exclude from taxation the sale of all natural fruit juices, however packaged. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

Additives and Percentage of Natural Fruit Juice Taxation Criteria. — By enactment of the Soft Drink Tax Act the legislature intended to tax only those "soft drinks," including fruit juice drinks, to which coloring, artificial flavoring or

preservative has been added, or which contain less than 35 percent of natural fruit juice. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

Frozen concentrated orange juice is not a fruit juice drink; rather, it is merely one dehydrated form of natural orange juice and, however packaged and however sold, is exempt from taxation unless color, artificial flavoring or preservative has been added to it. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

"Base". -Taxation of frozen concentrated orange juice as a "base product" is contrary to the intent of the legislature to exclude from taxation the sale of all natural fruit juices, however packaged, and largely nullifies the exemption contained in this section. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

So Not Taxable. - Since natural orange juice

is exempt from taxation when sold bottled, frozen concentrated orange juice, as an ingredient of natural orange juice, cannot be taxed under the act. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

Neither the sale of natural orange juice nor the sale of bottled fruit juice drinks containing 35 percent or more of natural orange juice is a taxable event under the Soft Drink Tax Act. Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976).

ARTICLE 4.

Schedule D. Income Tax.

DIVISION I. CORPORATION INCOME TAX.

§ 105-130.7. Deductible portion of dividends. — Dividends from stock issued by any corporation shall be deducted to the extent herein provided.

(1) As soon as may be practicable after the close of each calendar year, the Secretary of Revenue shall determine from each corporate income tax return filed with him during such year, and due from the filing corporation during such year, the proportion of the entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein; if a corporation has a net income in North Carolina and a net loss from all sources wherever located, or if a corporation has a net loss in North Carolina and a net income from all sources wherever located, the Secretary shall require the use of the allocation fraction determined under the provisions of G.S. 105-130.4. A corporation which is a stockholder in any such corporation shall be allowed to deduct the same proportion of the dividends received by it from such corporation during its income year ending at or after the end of such calendar year. No deduction shall be allowed for any part of any dividend received by such corporation from any corporation which filed no income tax return with the Secretary of Revenue during such calendar year.

(2) Dividends received by a corporation from stock in any insurance company of this State taxed under the provisions of G.S. 105-228.5 shall be deductible by such corporation, and a proportionate part of any dividends received from stock in any foreign insurance corporation shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this State to total premiums collected both in and out of this State.

(3) A corporation shall be allowed to deduct such proportionate part of dividends received by it from a regulated investment company or a real estate investment trust, as defined in G.S. 105-130.12, as represents and corresponds to income received by such regulated investment company or real estate investment trust which would not be taxed by this State if received directly by the corporation.

(4) Notwithstanding the provisions of subdivisions (1) through (3) of this section, a corporation which, at the close of its taxable year, has its commercial domicile within North Carolina shall be allowed to deduct all dividends received from corporations in which it owns more than fifty percent (50%) of the outstanding voting stock.

(5) Notwithstanding any other provisions of this Division, a corporation which is a shareholder in a holding company having its commercial domicile in North Carolina shall be allowed as a deduction an amount equal to those dividends received by it from such holding company, multiplied by a fraction, the numerator of which shall be the dividends received by such holding company attributable to North Carolina, and the denominator of which shall be the gross dividends received by such holding company. For purposes of this section, "dividends attributable to North Carolina" shall be the amount of dividend income received by the holding company on stock owned in other corporations equal to the total of the proportion of each of such corporation's dividends as shall be determined deductible by the Secretary under subdivisions (1) through (3) of this section; provided that a holding company having its commercial domicile in North Carolina which owns more than fifty percent (50%) of the outstanding voting stock of one or more holding companies as defined in this subdivision shall be permitted a deduction for all dividends received from such holding companies and all other corporations in which it owns more than fifty percent (50%) of the outstanding voting stock. A shareholder of such a holding company shall determine the deductible portion of its dividends received from such holding company as hereinabove provided except that the amounts received from a subsidiary holding company as "dividends attributable to North Carolina" shall be determined as though the subsidiary corporation of the subsidiary holding company had paid the dividends directly to the parent holding company.

For the purposes of this section and unless the context clearly requires a different meaning, "holding company" shall mean any corporation having its commercial domicile in North Carolina whose ordinary gross income consists of fifty percent (50%) or more of dividend income received from corporations in which it owns more than fifty percent (50%) of the outstanding voting stock, and "subsidiary" shall mean any corporation, more than fifty percent (50%) of whose

outstanding voting stock is owned by another corporation.

(6) In no case shall the total amount of dividends that are allowed as a deduction to a corporation as a result of the application of subdivisions (1) through (3) of this section be in excess of fifteen thousand dollars (\$15,000) for the taxable year. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1124; 1973, c. 476, s. 193; c. 1053, s. 3; 1975, c. 661, s. 2.)

Editor's Note.—

The second 1973 amendment, effective for taxable years beginning on and after Jan. 1, 1974, deleted former subdivision (3), providing for deduction of dividends received by a corporation from stock in a bank or trust company taxed under Article 8C of this Chapter, renumbered former subdivisions (4) through (6)

as (3) through (5), and substituted "(3)" for "(4)" near the beginning of present subdivision (4) and near the middle of the second sentence of present subdivision (5).

The 1975 amendment, effective for income years beginning on and after July 1, 1975, added

subdivision (6).

In this section as set out in the 1974 and 1975

Supplements, subdivision (3) was shown as repealed by the second 1973 amendatory act and the original numbers of the remaining subdivisions were unchanged, and in the 1975 Supplement the new subdivision added by the 1975 amendment was designated (7). This codification conformed to a standing policy

adopted by the Division of Legislative Drafting and Codification of Statutes; however, it had the effect of distorting the meaning of the reference to subdivisions (1) through (3) in the new subdivision added in 1975. The two amendments have, therefore, been recodified in accordance with the directions of the amendatory acts.

ARTICLE 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

§ 105-163.6. Payment of amounts withheld; personal liability for failure to withhold; limitation of recovery.

(b) Notwithstanding any of the other provisions of this section, all transient employers shall make return and pay over to the Secretary on a monthly basis the amounts required to be withheld under G.S. 105-163.2. Such returns and payments to the Secretary by transient employers shall be made on or before the fifteenth day of the month following the month for which such amounts were deducted and withheld from the wages of his employees.

(c) Notwithstanding any of the other provisions of this section, all employers engaged in any business which is seasonal shall make return and pay over to the Secretary on a monthly basis the amounts required to be withheld under G.S. 105-163.2. Such returns and payments to the Secretary by employers engaged in such seasonal business shall be made on or before the fifteenth day of the month following the month for which such amounts were deducted and withheld

from the wages of his employees.

(c1) Notwithstanding any of the other provisions of this section, every employer required to deduct and withhold under the provisions of G.S. 105-163.2 an average of three thousand dollars (\$3,000) or more per month during the preceding calendar year (or during so much of such year as he paid wages) and every employer who begins paying wages during a calendar year and whose liability to deduct and withhold under G.S. 105-163.2 can reasonably be expected to average three thousand dollars (\$3,000) or more per month in that calendar year, shall make returns and pay over to the Secretary each month the amounts required to be withheld under G.S. 105-163.2. Returns and payments to the Secretary by such employers shall be made on or before the fifteenth day of the month following the month for which such amounts were required to be withheld from the wages of employees.

When an employer has become subject to the requirements of this subsection, he shall continue to make returns and payments to the Secretary on that basis. However, an employer required under the provisions of this subsection to file monthly returns who, in a later calendar year, is required to deduct and withhold under G.S. 105-163.2 an average of less than three thousand dollars (\$3,000) per month may make application to the Secretary for authority to use the quarterly basis for filing and making payments. Such authority, when granted, shall be in writing, shall commence on a date set by the Secretary, and shall continue until the Secretary, in the exercise of his discretion, shall revoke it in writing.

effective on a date set by him.

(f) Any person required to collect, truthfully account for, and pay over any amounts required to be deducted and withheld under G.S. 105-163.2, who fails

to collect and pay over such amount shall, in addition to other penalties provided by law, be personally liable to a penalty equal to the total amount not collected or not accounted for and paid over. No penalty shall be imposed under G.S. 105-163.17 for any offense to which this subsection is applicable. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; c. 1287, s. 7; 1975, 2nd Sess., c. 979, s. 1.)

Editor's Note .-

The 1975 2nd Sess., amendment, effective Oct. 1, 1976, substituted "fifteenth day" for "last day" in the second sentences of subsections (b) and (c), added subsection (c1) and substituted

"subsection" for "section" in the second sentence of subsection (f).

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

ARTICLE 5.

Schedule E. Sales and Use Tax.

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:

Unclassified Group.

(31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess.,

Editor's Note.-

As the rest of the section was not changed by The 1975, 2nd Sess., amendment, effective the amendment, only the introductory July 1, 1976, added subdivision (31). paragraph and subdivision (31) are set out.

ARTICLE 9.

Schedule J. General Administration; Penalties and Remedies.

§ 105-232. Corporate rights restored; receivership and liquidation.

Applied in Stegall Milling Co. v. Hettiger, 27 N.C. App. 76, 217 S.E.2d 767 (1975).

§ 105-241.2. Administrative review.

Cited in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

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.

The tax status of the goods must be determined by the original bill of lading at the time they are stored in the public warehouse. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975).

Exemption under subdivision (10) applies only when, among other things, the goods move into this State from some place without the State. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975).

Assuming that goods are otherwise qualified for exemption under subdivision (11), they must also (1) be placed in a public warehouse for transshipment to an out-of-state destination and (2) be so designated on the original bill of lading. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975).

Goods designated for transshipment "to an out-of-state or within the state destination" are not goods designated to an out-of-state destination within the meaning of subdivision (11). Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975).

Evidence that most of the goods were eventually shipped to points without the state is immaterial. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975).

ARTICLE 17.

Administration of Listing. § 105-312. Discovered property; appraisal; penalty.

Express Retroactive Effect. — The intention of the legislature to give the New Machinery Act of 1971 retroactive effect is expressly declared in § 105-395. In re Appeal of Pilot Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378

(1976). Immaterial irregularities in notice do not invalidate taxes imposed. In re Appeal of Pilot Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378 (1976).

ARTICLE 25.

Levy of Taxes and Presumption of Notice.

§ 105-348. All interested persons charged with notice of taxes.

Quoted in Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

ARTICLE 26.

Collection and Foreclosure of Taxes.

§ 105-369. Sale of tax liens on real property for failure to pay taxes.

Cited in Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

Cited in Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

§ 105-375. In rem method of foreclosure.

Due Process Satisfied. — The notice requirement of this section is not constitutionally compelled. Due process of law imports notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Due process was satisfied when the listing taxpayer was notified, at least two weeks prior to docketing a tax judgment, "that the judgment will be docketed and that execution will issue thereon in the manner provided by law." Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Notice Requirements. — The county must make a reasonable effort to apprise the listing taxpayer of the impending execution sale by mailing registered or certified notice to the taxpayer's last known address. Personal service of notice is clearly not required, nor is notice to the actual owner of the property at the time of the issuance of execution. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Notice requirement for execution sales is directory only, and failure to comply with the notice requirement prior to an execution sale does not render the sale invalid or void with respect to an innocent purchaser who lacks knowledge of the irregularity. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

No Impairment of Authority to Issue Execution. — The mere absence of a registered mail notice to the taxpayer's last known address prior to execution, while irregular and potentially unfair to the taxpayer, does not impair the authority of the court to issue execution upon a valid tax judgment and direct the sale of the property to satisfy the judgment. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

But May Expose Sale to Attack. — The notice requirement of this section is not a hollow gesture. Failure to furnish this notice may expose the sale to attack, provided such action is brought within the pertinent statute of limitations. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Failure to comply with the notice requirement of this section could constitute an inequitable element and when coupled with gross inadequacy of consideration would open the door to a successful attack of a tax sale. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

It is not necessary that the listing taxpayer be living at the time notice is due. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Nor Heirs. — The notice requirement of this section is not compelled by due process. Furthermore, due process having been satisfied by notice to the listing taxpayer as provided by this section, the county is not required to shoulder the intolerable burden of directly notifying the heirs of a listing taxpayer who died prior to issuance of execution. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

A tax judgment is strictly in rem, a specific judgment against the property of the listed taxpayer and tantamount to a judgment directing the sale of the property to satisfy the tax lien. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Judgment Not a "Debt". — As a judgment against the property of the listed taxpayer, directing the sale of the property to satisfy the tax lien, the tax judgment established under this section is not a "debt" within the meaning of \$28A-19-6, nor does it affix a lien to the taxpayer's property. It represents a final order for the sale of the delinquent taxpayer's property. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Docketing, Execution, Foreclosure. — Once a tax judgment is docketed, the real property described in the judgment is subject to impending foreclosure, provided execution is properly issued. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Execution sale authorized by this section is analogous to an execution sale conducted under the authority of § 1-339.41. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

When Taxpayer Dies. — Given the unique nature of a tax judgment, the death of the taxpayer before execution of the judgment is immaterial. Once judgment against the land is

rendered and docketed, the fate of the property described therein is inexorably set into motion. And unless the taxes due are paid before the actual sale of the property, the property can be sold upon execution whether the execution is issued before or after the death of the taxpayer. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

ARTICLE 30.

General Provisions.

§ 105-394. Immaterial irregularities.

Immaterial irregularities in notice do not invalidate taxes imposed. In re Appeal of Pilot

Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378 (1976).

§ 105-395. Application and effective date of Subchapter.

Retroactive Effect. — The intention of the legislature to give the New Machinery Act of 1971 retroactive effect is expressly declared in

this section. In re Appeal of Pilot Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378 (1976).

Chapter 106. Agriculture.

Article 1.

Department of Agriculture.

Part 2. Commissioner of Agriculture.

Sec.

106-11. Salary of Commissioner of Agriculture.

Article 4C.

Structural Pest Control Act.

106-65.23. Structural pest control program of Department of Agriculture maintained; Structural Pest Control Committee maintained; appointment; terms; quorum.

106-65.24. Definitions.

106-65.25. Phases of structural pest control; license required; exceptions.

106-65.26. Qualifications for certified applicator and licensee; applicants for certified applicator's identification card and license.

Sec.

106-65.27. Examinations of applicants; fee; license not transferable.

106-65.28. Revocation or suspension of license or identification card.

106-65.29. Rules and regulations.

106-65.30. Inspectors; inspections and reports of violations; designation of resident

106-65.31. Annual certified applicator card and license fee; registration of servicemen, salesmen, solicitors, and estimators; identification cards.

106-65.32. Proceedings and hearings under Article; record of hearings and judgments; certified copy of revocation of license or identification card sent to clerk of superior court.

ARTICLE 1.

Department of Agriculture.

Part 2. Commissioner of Agriculture.

§ 106-11. Salary of Commissioner of Agriculture. — The salary of the Commissioner of Agriculture shall be thirty-two thousand five hundred forty-four dollars (\$32,544) a year, payable monthly. (1901, c. 479, s. 4; 1905, c. 529; Rev., s. 2749; 1907, c. 887, s. 1; 1913, c. 58; C. S., s. 3872; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 338; 1943, c. 499, s. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 4; 1967, c. 1130; c. 1237, s. 4; 1969, c. 1214, s. 4; 1971, c. 912, s. 4; 1973, c. 778, s. 4; 1975, 2nd Sess., c. 983, s. 19.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective

July 1, 1976, increased the salary from \$31,000 to \$32,544.

ARTICLE 4C.

Structural Pest Control Act.

§ 106-65.23. Structural pest control program of Department of Agriculture maintained; Structural Pest Control Committee maintained; appointment; terms; quorum. — The Commissioner of Agriculture shall maintain a structural pest control program within the Department of Agriculture. The Commissioner is authorized to appoint personnel and request funds in addition to any fees authorized in this Article to implement the rules and regulations promulgated by the Structural Pest Control Committee consistent with the State Government Reorganization Act, G.S. 143A-6. A structural pest control employee of the

Department of Agriculture shall act as secretary to the Structural Pest Control

Committee herein created.

There is hereby created a Structural Pest Control Committee to be composed of five members. The Commissioner of Agriculture shall designate one member of the Board of Agriculture who shall serve as an ex officio member of said Committee for such time as he is a member of the Board of Agriculture. The Commissioner of Agriculture shall designate an employee of the Department of Agriculture to serve on said Committee at the pleasure of the Commissioner. The dean of the School of Agriculture of North Carolina State University at Raleigh shall appoint one member of the Committee who shall serve for one term of two years and who shall be a member of the entomology faculty of said University. The vacancy occurring on the Committee by the expired term of the member from the entomology faculty of said University shall be filled by the dean of the School of Agriculture of North Carolina State University at Raleigh who shall designate any person of his choice from the entomology faculty of said University to serve on said Committee at the pleasure of the dean. The Governor shall appoint two members of said Committee who are actively engaged in the pest control industry, who are licensed in at least two phases of structural pest control as provided under G.S. 106-65.25(a), and who are residents of the State of North Carolina but not affiliates of the same company. The initial Committee members from the pest control industry shall be appointed as follows: one for a two-year term and one for a three-year term. After the initial appointments by the Governor, all ensuing appointments by the Governor shall be for terms of four years. Any vacancy occurring on the Committee by reason of death, resignation, or otherwise shall be filled by the Governor or the Commissioner of Agriculture, as the case may be, for the unexpired term of the member whose seat is vacant. A member of the Committee appointed by the Governor shall not succeed himself.

It shall be the duty of the Structural Pest Control Committee, in addition to conducting hearings relating to the suspension and revocation of licenses issued under this Article, and in addition to making rules and regulations pursuant to G.S. 106-65.29, to report annually to the Board of Agriculture the results of all hearings conducted by the Committee and to report the financial status of this

Division of the Department of Agriculture.

The Director shall be responsible for and answerable to the Commissioner of Agriculture as to the operation and conduct of the Structural Pest Control

Division.

Each member of the Committee who is not an employee of the State shall receive as compensation for services per diem and necessary travel expenses and registration fees in accordance with the provisions as outlined for members of occupational licensing boards and currently provided for in G.S. 93B-5. Such per diem and necessary travel expenses and registration fees shall apply to the same effect that G.S. 93B-5 might hereafter be amended.

Three members of the Committee shall constitute a quorum but no action at any meeting of the Committee shall be taken without three votes in accord. The

chairman shall be entitled to vote at all times.

The Committee shall meet at such times and such places in North Carolina as the chairman shall direct; provided, however, that three members of the Committee may call a special meeting of the Committee on five days' notice to the other members thereof.

All members of the Committee shall be appointed or designated, as the case may be, prior to and shall commence their respective terms on July 1, 1967.

At the first meeting of the Committee they shall elect a chairman who shall

serve as such at the pleasure of the Committee. (1955, c. 1017; 1957, c. 1243, s. 1; 1967, c. 1184, s. 1; 1969, c. 541, s. 7; 1973, c. 556, s. 1; 1975, c. 570, ss. 1, 2.)

Editor's note. -

The 1975 amendment, effective July 1, 1976, rewrote the first two paragraphs as the present first paragraph and rewrote the present fifth paragraph.

Because of the postponed effective date of the

1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 106-65.24. Definitions. — For the purposes of this Article, the following terms, when used in the Article or the rules and regulations, or orders made pursuant thereto, shall be construed respectively to mean:

(1a) "Applicant for a certified applicator's identification card" means any person making application to use restricted use pesticides in any phase

of structural pest control.

(2) "Applicant for a license" means any person in charge of any individual, firm, partnership, corporation, association, or any other organization or any combination thereof, making application for a license to engage in structural pest control, control of structural pests or household pests, or fumigation operations, or any person qualified under the terms of this Article.

(8) Repealed by Session Laws 1975, c. 570, s. 4, effective July 1, 1976.

(1975, c. 570, ss. 3, 4.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, substituted "'Applicant for a license'" for "'Applicant'" in subdivision (2), added subdivision (1a) and repealed subdivision (8), defining "Director."

Because of the postponed effective date of the 1975 amendment, the new, amended and repealed subdivisions were not set out in the text in the 1975 Cumulative Supplement, but the amendment was carried in a note. The amendment is therefore set out in this 1976 Interim Supplement.

As the other subdivisions were not changed by

the amendment, they are not set out.

§ 106-65.25. Phases of structural pest control; license required; exceptions.

(b) This Article shall not apply to any person doing work on his own property or to any regular employee of any person, firm or corporation doing work on the property of such person, firm or corporation, under the direct supervision of the person who owns or is in charge of the property on which work is being done unless a restricted use pesticide is being used. Any person, including agents or agencies of the federal, State or local governments, using a restricted use pesticide, whether it be on his own property or on the property of another in, on, or around food handling establishments, human dwellings, institutions such as schools and hospitals, industrial establishments including warehouses and grain elevators and any other structures and adjacent areas, public or private, or for the protection of stored, processed, or manufactured products in any phase of structural pest control, must (i) qualify as a certified applicator for that phase of structural pest control, or (ii) be under the direct supervision of a certified applicator possessing a valid identification card for that phase of structural pest control.

(b1) Persons who (i) demonstrate to the public the proper use and techniques of application of pesticides or supervise such demonstration and/or (ii) conduct field research with pesticides, and in doing so, use or supervise the use of

restricted use pesticides must possess a valid certified applicator's identification card. Included in the first group are such persons as extension specialists and county agents, commercial representatives demonstrating pesticide products, and those individuals demonstrating methods used in public programs. The second group includes local, State, federal, commercial and other persons conducting field research on or utilizing restricted use pesticides.

The above standards do not apply to the following persons for purposes of

these regulations:
(1) Persons conducting laboratory type research involving restricted use

pesticides; and

(2) Doctors of medicine and doctors of veterinary medicine applying pesticides as drugs or medication during the course of their normal practice.

(1975, c. 570, s. 5.)

Editor's Note.

The 1975 amendment, effective July 1, 1976, rewrote subsection (b) and added subsection

Because of the postponed effective date of the 1975 amendment, the new and amended subsections were not set out in the text in the 1975 Cumulative Supplement, but were carried in a note. They are therefore set out in this 1976 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsections (b) and (b1) are

§ 106-65.26. Qualifications for certified applicator and licensee; applicants for certified applicator's identification card and license. — (a) An applicant for a certified applicator's identification card or license must present satisfactory evidence to the Committee concerning his qualifications for such card or license.

(b) Certified Applicator. — Each applicant for a certified applicator's identification card must demonstrate that he possesses a practical knowledge of the pest problems and pest control practices associated with the phase or phases of structural pest control for which he is seeking certification.

(c) Licensee. — The basic qualifications for a license shall be:

(1) Qualify as a certified applicator for the phase or phases of structural pest control for which he is making application; and

(2) Two years as an employee or owner-operator in the field of structural pest control, control of wood-destroying organisms or fumigation, for

which license is applied; or

(3) One or more years' training in specialized pest control, control of wood-destroying organisms or fumigation under university or college supervision may be substituted for practical experience. Each year of such training may be substituted for one year of practical experience; provided, however, if applicant has had less than 12 months' practical experience, the Committee is authorized to determine whether said applicant has had sufficient experience to take the examination; or

(4) A degree from a recognized college or university with training in entomology, sanitary or public health engineering, or related subjects; provided, however, if applicant has had less than 12 months' practical experience, the Committee is authorized to determine whether said applicant has had sufficient experience to take the examination.

(d) All applicants for license must have practical experience and knowledge of practical and scientific facts underlying the practice of structural pest control, control of wood-destroying organisms or fumigation. No person who has within five years of his application been convicted of or has entered a plea of guilty or a plea of nolo contendere to a crime involving moral turpitude, or who has forfeited bond to a charge involving moral turpitude, shall be entitled to take an examination or the issuance of a license under the provisions of this Article. (1955, c. 1017; 1967, c. 1184, s. 5; 1973, c. 556, s. 4; 1975, c. 570, s. 6.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 106-65.27. Examinations of applicants; fee; license not transferable. (a) Certified Applicator. — All applicants for a certified applicator's identification card shall demonstrate practical knowledge of the principles and practices of pest control and safe use of pesticides. Competency shall be determined on the basis of written examinations to be provided and administered by the Committee and, as appropriate, performance testing. Testing shall be based upon examples of problems and situations appropriate to the particular phase or phases of structural pest control for which application is made and include where relevant the following areas of competency:

(1) Label and labeling comprehension.

(2) Safety factors associated with pesticides — toxicity, precautions, first aid, proper handling, etc.

(3) Influence of and on the environment.

- (4) Pests identification, biology, and habits.
- (5) Pesticides types, formulations, compatibility, hazards, etc.
 (6) Equipment types and uses.

(7) Application techniques. (8) Laws and regulations.

An applicant for a certified applicator's identification card shall submit with his application for examination an examination fee of ten dollars (\$10.00) for each of the phases of structural pest control in which he chooses to be examined. An examination for one or more phases of structural pest control may be taken at the same time. If an applicant fails to pass an examination for one or more phases of structural pest control, he shall be entitled to take one additional examination, at a regularly scheduled examination, without the payment of another examination fee. Frequency of such examinations shall be in the discretion of the Committee, consideration being given to the number of applications received, provided that a minimum of two examinations shall be given annually. The examination will cover the phase or phases of structural pest control for which application is being made. The ten dollar (\$10.00) fee shall not apply to agents or agencies of the federal, State, or local governments.

(b) License. — Each applicant for an original license must demonstrate upon written examination, to be provided and administered by the Committee, his competency as a structural pest control operator for the phase or phases in which he is applying for a license. Frequency of such examinations shall be in the discretion of the Committee, consideration being given to the number of applications received, provided that a minimum of two examinations shall be given annually. The examination will cover the phase or phases of structural pest

control for which application is being made.

An applicant shall submit with his application for examination an examination fee of twenty-five dollars (\$25.00) for each of the phases of structural pest control in which he chooses to be examined. An examination for one or more phases of structural pest control may be taken at the same time. If an applicant fails to pass an examination for one or more phases of structural pest control, he shall be entitled to take one additional examination, at a regularly scheduled examination, without the payment of another examination fee. Agents or agencies of the federal, State or local governments are not exempt from this fee.

(c) A license shall not be transferable. When there is a transfer of ownership, management of operation of a business of a license hereunder, the new owner, manager or operator (as the case may be) whether it be an individual, firm, partnership, corporation, or other entity, shall have 90 days from such sale or transfer, or until the next meeting of the Committee following the expiration of said 90-day period, to have a qualified licensee to operate said business. During this 90-day period the use of any restricted use pesticide by any person representing said business agent or agency shall be by or under the direct supervision of a person possessing a valid certified applicator's identification card.

(d) The Committee shall by regulation provide for:

(1) Establishing categories of certified applicators, along with such appropriate subcategories as are necessary, to meet the requirements of this Article;

(2) All licensees licensed prior to October 21, 1976, to become qualified as

certified applicators; and

(3) Requalifying certified applicators thereafter as required by the federal government at intervals no more frequent than that specified by federal law and federal regulations. (1955, c. 1017; 1967, c. 1184, s. 6; 1973, c. 556, ss. 5, 6; 1975, c. 570, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 106-65.28. Revocation or suspension of license or identification card. — (a) Any license or certified applicator's identification card may be revoked or suspended by a majority vote of the Committee, after notice and hearing, as provided in G.S. 106-65.32, for any one or more of the following causes:

(1) Misrepresentation for the purpose of defrauding; deceit or fraud; the making of a false statement with knowledge of its falsity for the purpose of inducing others to act thereon to their damage; or the use of methods or materials which are not reasonably suitable for the purpose contracted.

(2) Failure of the licensee or certified applicator to give the Committee, the Commissioner, or their authorized representatives, upon request, true information regarding methods and materials used, or work performed.

(3) Failure of the license holder [or] certified applicator to make registrations herein required or failure to pay the registration fees.(4) Any misrepresentation in the application for a license or certified

applicator's identification card.

(5) Wilful violation of any rule or regulation adopted pursuant to this

Article.

(6) Aiding or abetting a licensed or unlicensed person or a certified

applicator or a noncertified person to evade the provisions of this Article, combining or conspiring with such a licensed or unlicensed person or a certified applicator or noncertified person to evade the provisions of this Article, or allowing one's license or certified applicator's identification card to be used by an unlicensed or noncertified person.

(7) Impersonating any State, county or city inspector or official.

(8) Storing or disposing of containers or pesticides by means other than those prescribed on the label or adopted regulations.

(9) Using any registered pesticide in a manner inconsistent with its labeling.
(10) Payment, or the offer to pay, by any licensee to any party to a real estate transaction of any commission, bonus, rebate, or other thing of value as compensation or inducement for the referral to such licensee of structural pest control work arising out of such transaction.

(b) Suspension of any license or certified applicator's identification card under the provisions of this Article shall not be for less than 10 days nor more than

two years, in the discretion of the Committee.

If a license or certified applicator's identification card is suspended or revoked under the provisions hereof, the licensee shall within five days of such suspension or revocation, surrender all licenses and identification cards issued

thereunder to the Commissioner or his authorized representative.

Any licensee whose license or certified applicator whose identification card is revoked under the provisions of this Article shall not be eligible to apply for a new license or certified applicator's identification card hereunder until two years have elapsed from the date of the order revoking said license or certified applicator's identification card, or if an appeal is taken from said order of revocation, two years from the date of the order or final judgment sustaining said revocation.

The lapsing of a State structural pest control license or certified applicator's identification card by operation of law or the voluntary surrender of a license by a licensee or a certified applicator's identification card by a certified applicator shall not deprive the Committee of jurisdiction to proceed with any investigation or disciplinary proceedings against such licensee or certified applicator, or to render a decision suspending or revoking such license or certified applicator's identification card. (1955, c. 1017; 1967, c. 1184, s. 7; 1973, c. 556, ss. 7, 8; 1975, c. 19, s. 30; c. 570, ss. 8-13.)

Editor's Note. -

The first 1975 amendment corrected an error in this section as it appeared in the 1974 Cumulative Supplement by substituting "or" for "of" between "methods" and "materials" near the end of subdivision (a)(1). The error had already been corrected in the section as set out in the Replacement Volume.

The second 1975 amendment, effective July 1, 1976, rewrote the section so as to substitute "Commissioner" for "Director" and to add the provisions relating to certified applicators

throughout the section and added subdivision (10) of subsection (a). The amendatory act directed that the new subdivision be added at the end of the section, but the intention was plainly to add it to subsection (a).

Because of the postponed effective date of the second 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 106-65.29. Rules and regulations. — The Committee is hereby authorized and empowered to make such reasonable rules and regulations with regard to structural pest control as may be necessary to protect the interests, health and safety of the public. Such rules and regulations shall not become effective until

a public hearing shall have been held and notification of such hearing shall have been given to all licensees and certified applicators. (1955, c. 1017; 1967, c. 1184, s. 8; 1975, c. 570, s. 14.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, added "and certified applicators" at the end of the section.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 106-65.30. Inspectors; inspections and reports of violations; designation of resident agent. — For the enforcement of the provisions of this Article the Commissioner is authorized to appoint one or more qualified inspectors and such other employees as are necessary in order to carry out and enforce the provisions of this Article. The inspectors shall be known as "structural pest control inspectors." The Commissioner shall enforce compliance with the provisions of this Article by making or causing to be made periodical and unannounced inspections of work done by licensees and certified applicators under this Article who engage in or supervise any one or more phases of structural pest control as defined in G.S. 106-65.25. The Commissioner shall cause the prompt and diligent investigation of all reports of violations of the provisions of this Article and all rules and regulations adopted pursuant to the provisions hereof; provided, however, no inspection shall be made by a representative of the Commissioner of any property without first securing the permission of the owner or occupant thereof.

Prior to the issuance or renewal of a license or certified applicator's identification card, every nonresident owner of a business performing any phase of structural pest control work shall designate in writing to the Commissioner or his authorized agent a resident agent upon whom service of notice or process may be made to enforce the provisions of this Article and rules and regulations adopted pursuant to the provisions hereof or any civil or criminal liabilities arising hereunder. (1955, c. 1017; 1967, c. 1184, s. 9; 1973, c. 556, s. 9; 1975, c.

570, s. 15.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 106-65.31. Annual certified applicator card and license fee; registration of servicemen, salesmen, solicitors, and estimators; identification cards. — (a) Certified Applicator's Card. — The fee for issuance or renewal of a certified applicator's identification card for any one phase or more of structural pest control, as the same is defined in G.S. 106-65.25, shall be thirty dollars (\$30.00). Certified applicator's identification cards shall expire on June 30 of each year and shall be renewed annually. All certified applicators who fail or neglect to renew their certified applicator's identification card issued under the provisions of this Article on or before June 30 of each year in which they hold a valid certified applicator's identification card but make application before October 1 of that year shall be renewed without the applicant having to be reexamined unless under the provisions of this Article the applicant is scheduled for periodic

reexamination (G.S. 106-65.27(e)(2) [106-65.27(d)(3)]). All applicants submitting applications for the renewal of their certified applicator's identification cards after June 30 and before October 1 of that year shall (i) not use or supervise the use of any restricted use pesticides after June 30 of that year until he has been issued a valid certified applicator's identification card and (ii) pay, in addition to the annual certification fee, the sum of five dollars (\$5.00) for each phase of structural pest control in which he is applying for certification before his certified applicator's identification card is renewed.

Any certified applicator whose identification card is lost or destroyed may

secure a duplicate identification card for a fee of five dollars (\$5.00).

The fees for a certified applicator's identification shall not apply to agents or

agencies of the federal, State, or local governments.

(b) License. — The fee for the issuance of a license for any phase of structural pest control, as the same is defined in G.S. 106-65.25, shall be one hundred dollars (\$100.00); provided, that when or any time after the fee for a license for any one phase is paid, the holder of said license may secure a license for either or both of the other two phases for an additional fee of fifty dollars (\$50.00) per license phase. Licenses shall expire on June 30 of each year and shall be renewed annually. Any licensee who fails or neglects to renew any license issued under the provisions of this Article on or before August 1 of each year shall pay, in addition to the annual fee, the sum of ten dollars (\$10.00) for each phase before his license is renewed.

Any licensee whose license is lost or destroyed may secure a duplicate license

for a fee of five dollars (\$5.00).

A license holder shall register with the North Carolina Department of Agriculture within 75 days of employment the names of all certified applicators, estimators, salesmen, servicemen and solicitors (not common laborers) and shall pay a registration fee of twenty dollars (\$20.00) for each name registered, which fee shall accompany the registration. This registration fee shall not apply to a certified applicator. All registrations expire when a license expires. Each employee of a licensee for whom registration is made and registration fee paid shall be issued an identification card which shall be carried on the person of the employee at all times when performing any phase of structural pest control work. An identification card shall be renewed annually by payment of a renewal fee of twenty dollars (\$20.00). An identification card shall be displayed upon demand to the Commissioner, or his authorized representative, or to the person for whom any phase of structural pest control work is being performed. When an identification card is lost or destroyed, the licensee shall secure a duplicate identification card for which he shall pay a fee of one dollar (\$1.00). This one dollar (\$1.00) fee shall not apply to a certified applicator's identification card. The licensee shall be responsible for registering and securing identification cards for all employees who are estimators, salesmen, servicemen, and solicitors.

It shall be unlawful for an estimator, serviceman, salesman or solicitor to engage in the performance of any work covered by this Article without having first secured and having in his possession an identification card. It shall be unlawful for a licensee to direct or procure any salesman, serviceman or estimator to engage in the performance of any work covered by this Article without having first applied for an identification card for such employee or agent; provided, however, that the licensee shall have 75 days after employing a serviceman, salesman or estimator within which to apply for an identification

card

All registrations and applications for licenses and identification cards shall be filed with the North Carolina Department of Agriculture.

No person shall act as an estimator, serviceman, salesman, solicitor, or agent for any licensee under this Article nor shall any such person be issued an identification card by the Structural Pest Control Committee who has within three years of the date of application for an identification card been convicted of, plead guilty or nolo contendere, or forfeited bond in any court, State or federal, to a crime involving moral turpitude or to any violation of the North Carolina Structural Pest Control Act or to any regulation promulgated by the Structural Pest Control Committee. This provision shall not apply to any person whose citizenship has been restored as provided by law.

No person or business shall advertise as a contractor for structural pest control services nor actually contract for such services unless that person or business advertises or contracts in the name of the company shown on the license certificate of the licensee or identification card of the certified applicator who will perform the services. (1955, c. 1017; 1957, c. 1243, s. 4; 1967, c. 1184,

s. 10; 1973, c. 47, s. 2; c. 556, s. 10; 1975, c. 570, s. 16.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 106-65.32. Proceedings and hearings under Article; record of hearings and judgments; certified copy of revocation of license or identification card sent to clerk of superior court. — Proceedings under this Article shall be taken by the Structural Pest Control Committee for matters within its knowledge or upon accusations based on information of another. Said accusation must be in writing and under oath, verified by the person making the same. If by a member of the Committee, he shall be disqualified from sitting in judgment at the hearing on said accusation. Upon receiving such accusation, the Committee shall serve notice upon the accused at least 20 days before the date of the hearing notice by registered mail, or personally, of the time, place of hearing, and a copy of the charges. The Committee for sufficient cause, in its discretion, may postpone or continue said hearing from time to time, or if after proper notice no appearance is made by the accused, it may enter judgment at the time of hearing as prescribed herein, either by suspending or revoking the license or certified applicator's identification card of the accused. Both the Committee and the accused may have the benefit of counsel and the right to cross-examine witnesses, to take depositions and to compel attendance of witnesses as in civil cases by subpoena issued by the secretary of the Committee under the seal of the Committee and in the name of the State of North Carolina. The testimony of all witnesses at any hearing before the Committee shall be under oath or

The record of all hearings and judgments shall be kept by the secretary of the Committee and in the event of suspension or revocation of license, the Committee shall, within 10 days, transmit a certified copy of said judgment to the clerk of the superior court of the county of the residence of the accused or his resident agent, and the clerk shall file said judgment in the judgment docket of said county.

Any licensee or certified applicator may appeal to the Superior Court of Wake County the revocation or suspension of a license or certified applicator's identification card issued under the provisions of this Article and such appeal shall be made pursuant to the provisions of Chapter 150A of the General

Statutes. (1955, c. 1017; 1957, c. 1243, s. 5; 1967, c. 1184, s. 11; 1973, c. 556, s. 11; 1975, c. 570, s. 17.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, inserted "or certified applicator's identification card" near the end of the fifth sentence of the first paragraph and inserted "or certified applicator's identification card" and "or certified applicator" in the last paragraph.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

ARTICLE 8.

Sale, etc., of Agricultural Liming Material, etc.

§ 106-89. Certified analysis as evidence.

Written Hearsay Allowed. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for

statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975).

ARTICLE 17.

Marketing and Branding Farm Products.

§ 106-189.1. Apples marked as to grade; penalty.

Constitutionality. — This section violates the commerce clause and is unconstitutional.

Washington State Apple Adv. Comm'n v. Holshouser, 408 F. Supp. 857 (E.D.N.C. 1976).

ARTICLE 28B.

Regulation of Production, Distribution, etc., of Milk and Cream.

§ 106-266.6. Definitions.

The Milk Commission has no regulatory authority except such as is conferred upon it by this Article. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976). Cited in Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740 (1975).

§ 106-266.8. Powers of Commission.

Equalization Fund Payments Order Void. — An order requiring a distributor of milk reconstituted from milk powder from another state to make specified payments into an equalization fund set up by the Milk Commission to compensate North Carolina milk producers is in excess of the statutory authority of the Commission and is void. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

\$ 106-266.9. Distributors to be licensed; prices and practices of distributors regulated.

This section applies only to the pricing of milk and practices designed to bring about variations from the prices fixed by the Milk Commission. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

Section Does Not Authorize Compensatory
Payment. — This section may not be construed
to authorize an order requiring a distributor of
milk reconstituted from milk powder from

another state to make compensatory payments to North Carolina milk producers with whom it has no dealings. In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

§ 106-266.15. Appeals.

Cited in Arcadia Dairy Farms, Inc. v. North Carolina Milk Comm'n, 289 N.C. 472, 223 S.E.2d 333 (1976).

ARTICLE 29.

Inspection, Grading and Testing Milk and Dairy Products.

§ 106-267. Inspection, grading and testing dairy products.

Cited in In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

ARTICLE 31.

North Carolina Seed Law.

§ 106-277. Purpose.

Protective Purpose, etc. -

The North Carolina Seed Law is aimed at protecting farmers by strict labeling, quality control inspections and branding regulations.

The seed law has no effect on a nonconflicting disclaimer which governs activity beyond its scope. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

ARTICLE 34.

Animal Diseases.

Part 7. Rabies.

§ 106-381. Confinement or leashing of vicious animals.

Purpose. — This section was enacted for the specific purpose of protecting the public from dogs which have become vicious or a menace to public health. Swaney v. Shaw, 27 N.C. App. 631, 219 S.E.2d 803 (1975).

Ordinance Valid.

A town ordinance dealing with dogs running at large was not inconsistent with this section. The statute is designed to provide minimum protection against vicious dogs in all parts of the State — rural, urban, small villages and large cities. It stands to reason that with more concentrated population, cities are justified in adopting stricter regulations for dogs, and a city

is authorized to require "a higher standard of conduct or condition" with respect to the keeping of dogs within its corporate limits than is required by this section for the State generally. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Violation Negligence Per Se. — The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence per se, unless the statute, itself, otherwise provides. Swaney v. Shaw, 27 N.C. App. 631, 219 S.E.2d 803 (1975).

Chapter 108. Social Services.

ARTICLE 2.

Programs of Public Assistance.

Part 3. The Administration of Aid to the Aged and Disabled and Aid to Families with Dependent Children.

§ 108-45. Confidentiality of records.

Although the Public Assistance Recipient Check Register Is a Public Record, It May Not Be Used for Any Commercial or Political Reason, Including Publication by the Media. — See opinion of Attorney General to Dr. Renee P. Hill, Director, Division of Social Services, N.C. Department of Human Resources, 45 N.C.A.G. 273 (1976).

ARTICLE 3.

Inspection and Licensing Authority.

Part 2. Licensing of Private Institutions.

§ 108-77. Licensing of homes for the aged and infirm.

Licensing regulation must bear a reasonable relationship to the legitimate State objective of promoting the safety and welfare of the aged or infirm. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

Validity of Regulation Prohibiting Use of an Attic for Sleeping. — See Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975), decided prior to 1975 amendment.

Chapter 109.

Bonds.

ARTICLE 5.

Actions on Bonds.

§ 109-34. Liability and right of action on official bonds.

By Virtue or under Color of Office. -

The last clause of this section has been held to enlarge the conditions of the official bond to extend to all official duties of the office. State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

Same — Acts Which Should Have Been Performed. —

This section has been broadly construed over its long history to cover not only acts done by the officer but also acts that should have been done. State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

Action on Negligence. — This section, in so many words, provides for the prosecution of a cause of action based on negligence. State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

A prison official is liable when he knows of, or, in the exercise of reasonable care, should anticipate danger to the prisoner, and with such knowledge or anticipation fails to take the proper precautions to safeguard his prisoners. State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

Chapter 113.

Conservation and Development.

SUBCHAPTER IV. CONSERVATION OF FISHERIES RESOURCES.

Article 16.

Cultivation of Oysters and Clams.

Sec.

113-202. New leases and renewal leases of oyster and clam bottoms; termination of leases issued prior to January 1, 1966.

Article 17.

Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department.

113-221. Filing, codification and publication of

Sec.

regulations; effective date of regulations; proclamations suspending or implementing regulations; presumption of publication; judicial notice of codifications; Secretary's certificates as evidence.

Article 23.

Administrative Provisions; Regulatory
Authority of Wildlife Resources
Commission.

113-301. Filing and publication of regulations.

SUBCHAPTER IV. CONSERVATION OF FISHERIES RESOURCES.

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.

(d) Any person desiring to apply for a lease must make written application to the Secretary on forms prepared by the Department containing such information as deemed necessary to determine the desirability of granting or not granting the lease requested. Except in the case of renewal leases, the application must be accompanied by a survey, made at the expense of the

applicant, showing the area proposed to be leased.

The survey must conform to standards prescribed by the Secretary concerning accuracy of survey and the amount of detail that must be shown. If on the basis of the application information and survey the Secretary deems that granting the lease would benefit the oyster and clam culture of North Carolina, the Secretary, in the case of initial lease applications, must order an investigation of the bottom proposed to be leased. The investigation is to be made by the Secretary or his authorized agent and by a qualified assistant appointed by the board of county commissioners of the county in which the bottom, or the greater portion of the bottom, is located to determine whether there is a natural oyster or clam bed within the bounds of the proposed lease. In the event a natural oyster or clam bed is encountered, the Secretary in his discretion may either recommend that the lease be denied or that it be amended so as to exclude such bed. In the event the Secretary authorizes amendment of the application, the applicant must furnish a new survey meeting requisite standards showing the area proposed to be leased under the amended application. At the time of making application for an initial lease, the applicant must pay a filing fee of twenty-five dollars (\$25.00).

Editor's Note. -Subsection (d) of this section is set out to they are not set out. correct an error in the replacement volume.

As the other subsections were not affected.

ARTICLE 17.

Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department.

§ 113-221. Filing, codification and publication of regulations; effective date of regulations; proclamations suspending or implementing regulations; presumption of publication; judicial notice of codifications; Secretary's certificates as evidence. — (a) All regulations of the Marine Fisheries Commission promulgated under the authority of this Subchapter must be filed with the Attorney General in accordance with Chapter 150[A] of the General Statutes. In addition, all such regulations of the Marine Fisheries Commission the violation of which constitutes a crime must be filed with the clerk of superior court of each county containing coastal fishing waters within its borders. (1975, 2nd Sess., c. 983, s. 70.)

Editor's Note. -The 1975, 2nd Sess., amendment substituted "Attorney General" for "Secretary of State" 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 23.

Administrative Provisions; Regulatory Authority of Wildlife Resources Commission.

§ 113-301. Filing and publication of regulations. — (a) All regulations of the Wildlife Resources Commission promulgated under the authority of this Chapter or any other statutes, including provisions in Chapters 75A and 143 of the General Statutes of North Carolina, must be filed with the Attorney General in accordance with Chapter 150[A] of the General Statutes. In addition, all such regulations of the Wildlife Resources Commission the violation of which constitutes a crime must be filed with the clerk of the superior court:

(1) Of every county in the State, in the case of regulations of general application; and

(2) Of the county or counties affected, in the case of special or local regulations affecting only a particular area. (1975, 2nd Sess., c. 983, s. 71.)

Editor's Note. -The 1975, 2nd Sess., amendment substituted "Attorney General" for "Secretary of State" near the end of the first sentence of subsection

As subsection (b) was not changed by the amendment, it is not 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.

Coastal Area Management.

Part 2. Planning Processes.

113A-107. State guidelines for the coastal area.

Part 3. Areas of Environmental Concern.

Sec.

113A-114. Designation of interim areas of environmental concern; notice of developments within such areas.

Article 7. 113A-115. Designation of areas of environmental concern.

ARTICLE 4.

Sedimentation Pollution Control Act of 1973.

§ 113A-54. Powers and duties of the Commission.

(f) All rules and regulations of the Commission promulgated pursuant to this Article shall be incorporated either in the Secretary's official regulations or his rules of procedure. All such rules and regulations shall upon adoption be filed with the Attorney General as required by Chapter 150A of the General Statutes, and copies thereof shall be filed with the several clerks of court of the counties of the State. Copies shall at all times be kept at the office of the Secretary in sufficient numbers to satisfy all reasonable requests therefor. Except for those activities enumerated in G.S. 113A-56 over which the Commission has exclusive jurisdiction, the Commission shall in no event require approval prior to the commencement of land-disturbing activity. (1973, c. 392, s. 5; c. 1331, s. 3; c. 1417, s. 6; 1975, 2nd Sess., c. 983, s. 74.)

Editor's Note. -

The 1975, 2nd Sess., amendment rewrote the second sentence of subsection (f), which formerly required copies of the rules and regulations to be filed with the Secretary of State and the several clerks of court, and deleted the former fourth sentence of subsection (f), which required the Secretary to codify the regulations and rules and from time to time to revise and bring up to date the codifications.

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

ARTICLE 7.

Coastal Area Management.

Part 2. Planning Processes.

§ 113A-107. State guidelines for the coastal area.

(e) The Commission shall review and consider all such written comments and recommendations. Within 210 days after the effective date of this Article, the Commission shall by rule adopt State guidelines for the coastal area. Certified copies of such guidelines shall be filed with the Attorney General and the principal clerks of the Senate and House, and the guidelines shall be mailed to each city, county, and lead regional organization in the coastal area and to such other agencies or individuals as the Commission deems appropriate. Copies shall be made available to the public through the Department of Administration.

(f) The Commission may from time to time amend the State guidelines as it deems necessary. In addition, it shall review such guidelines each five years after July 1, 1974, in accordance with the procedures for adoption of the original guidelines, to determine whether further amendments are desirable. Any proposed amendments shall be submitted to all cities, counties, members of the General Assembly and lead regional organizations in the coastal area, and may be distributed to such other agencies and individuals as the Commission deems appropriate. All comments and recommendations of such governments, agencies, and individuals shall be submitted to the Commission in writing within 30 days of receipt of the proposed amendments. The Commission shall review and consider these written comments and thereupon may by rule reject or adopt the proposed amendments or modify and adopt the amendments. Certified copies of all amendments shall be filed with the Attorney General and the principal clerks of the Senate and House. Amendments shall thereupon be mailed to each city, county, members of the General Assembly and lead regional organization in the coastal area and to such other agencies and individuals as the Commission deems appropriate. Copies shall be made available to the public through the Department of Administration. (1973, c. 1284, s. 1; 1975, 2nd Sess., c. 983, ss. 75, 76.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "Attorney General" for "Secretary of State" in the third sentence of subsection (e) and in the sixth sentence of subsection (f).

The 1975, 2nd Sess., amendment directed that the change in subsection (f) be made in the eighth line of the subsection. The words

"Secretary of State" appear only in the thirteenth line of subsection (f) as set out in the 1975 Replacement Volume. Notwithstanding this discrepancy, the amendment has been given effect according to its obvious intent.

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

Part 3. Areas of Environmental Concern.

§ 113A-114. Designation of interim areas of environmental concern; notice of developments within such areas.

(b) Not earlier than 15 days nor later than 75 days after July 1, 1974, the Secretary of Natural and Economic Resources, or his designee or designees, shall hold a one-day public hearing, at which public and private parties shall have the opportunity to present views and comments concerning proposed interim areas, in each of the following cities: Elizabeth City, Jacksonville, Manteo, Morehead City, Washington and Wilmington. The following provisions shall apply for all such hearings:

(1) The hearing shall begin with a description of interim areas proposed by the Secretary.

(2) Notice of any such hearing shall be given not less than seven days before the date of such hearing and shall state the date, time and place of the hearing, the subject of the hearing and the action to be taken. The notice shall state that a copy of a description of interim areas proposed by the Secretary (including a map of such proposed areas) is available for public inspection at the county courthouse of each county affected.

(3) Any such notice shall be published one time in a newspaper of general circulation in the county or counties affected at least seven days before the date of the public hearing.

(4) Any person who desires to be heard at such public hearing shall give

notice thereof in writing to the Secretary on or before the date set for the hearing. The Secretary is authorized to set reasonable time limits for the oral presentation of views by any one persons at any such hearing. The Secretary shall permit anyone who so desires to file a written argument or other statement with him in relation to proposed interim areas within five days following the conclusion of any public hearing or within such additional time as he may allow

in his discretion.

(5) A record of each such hearing shall be presented to the Commission by the Secretary, together with the description of interim areas proposed by the Secretary (with such revisions as he deems appropriate in light of the hearings). Upon receipt of said hearing records and description, and consideration of submitted evidence and arguments with respect to any proposed action pursuant to this section, the Commission shall adopt its final action with respect thereto and shall file a duly certified copy thereof with the Attorney General and with the board of commissioners of each county affected thereby.

(1975, 2nd Sess., c. 983, s. 77.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "Attorney General" for "Secretary of State" in the second sentence of subdivision (5) of subsection (b).

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

§ 113A-115. Designation of areas of environmental concern. — (a) Prior to adopting any rule permanently designating any area of environmental concern the Secretary and the Commission shall hold a public hearing in each county in which lands to be affected are located, at which public and private parties shall have the opportunity to present comments and views. The following provisions shall apply for all such hearings:

(1) Notice of any such hearing shall be given not less than 30 days before the date of such hearing and shall state the date, time and place of the hearing, the subject of the hearing, and the action to be taken. The notice shall specify that a copy of the description of the area or areas of environmental concern proposed by the Secretary is available for public inspection at the county courthouse of each county affected.

public inspection at the county courthouse of each county affected.

(2) Any such notice shall be published at least once in one newspaper of general circulation in the county or counties affected at least 30 days before the date on which the public hearing is scheduled to begin.

(3) Any person who desires to be heard at such public hearing shall give notice thereof in writing to the Secretary on or before the first date set for the hearing. The Secretary is authorized to set reasonable time limits for the oral presentation of views by any one person at any such hearing. The Secretary shall permit anyone who so desires to file a written argument or other statement with him in relation to any proposed plan any time within 30 days following the conclusion of any public hearing or within such additional time as he may allow by notice given as prescribed in this section.

(4) Upon completion of the hearing and consideration of submitted evidence and arguments with respect to any proposed action pursuant to this section, the Commission shall adopt its final action with respect thereto

and shall file a duly certified copy thereof with the Attorney General and with the board of commissioners of each county affected thereby. (1975, 2nd Sess., c. 983, s. 78.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "Attorney General" for "Secretary of State" in subdivision (4) of subsection (a).

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

Part 4. Permit Letting and Enforcement.

§ 113A-120. Grant or denial of permits.

Editor's Note. — The reference to § 113A-113(4) in subdivision (a)(5) of this section should be to § 113A-113(b)(5).

Chapter 114.

Department of Justice.

Article 1.

Sec.

Attorney General.

attorneys to assist Department of Transportation. 114-7. Salary of Attorney General.

Sec.

114-4.2. Assistant attorneys general and other

ARTICLE 1.

Attorney General.

§ 114-4.2. Assistant attorneys general and other attorneys to assist Department of Transportation. — The Attorney General is authorized to appoint from among his staff such assistant attorneys general and such other staff attorneys as he shall deem advisable to provide all legal assistance for the State highway functions of the Department of Transportation, and such assistant attorneys general and other attorneys shall also perform such additional duties as may be assigned to them by the Attorney General, and shall otherwise be subject to all provisions of the statutes relating to assistant attorneys general and other staff attorneys. There shall be appropriated from the State Highway Fund such sum as may be necessary to pay the salaries of said assistant attorneys general and other attorneys and necessary secretaries. The Department of Transportation shall provide adequate office space, equipment and supplies. (1957, c. 65, s. 9; 1965, c. 55, s. 16; c. 408, s. 1; 1973, c. 702, s. 5; 1975, c. 716, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, substituted "Department of Transportation" for "Department of Transportation and Highway Safety" in two places.

§ 114-7. Salary of Attorney General. — The Attorney General shall receive a salary of thirty-six thousand seven hundred eight dollars (\$36,708) a year, payable monthly. (1929, c. 1, s. 2; 1947, c. 1043; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 3; 1967, c. 1130; c. 1237, s. 3; 1969, c. 1214, s. 3; 1971, c. 912, s. 3; 1973, c. 778, s. 3; 1975, 2nd Sess., c. 983, s. 18.)

Editor's Note. — July 1, 1976 The 1975, 2nd Sess., amendment, effective to \$36,708.

July 1, 1976, increased the salary from \$35,000 to \$36,708.

Chapter 115.

Elementary and Secondary Education.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

State Plan for Public Education.

Sec.

115-9. "Tax-levying authorities" defined.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION.

Article 3.

State Superintendent of Public Instruction.

115-13. Office and salary of State
Superintendent of Public
Instruction.

Article 4.

Powers and Duties of Controller.

115-17. Duties of controller defined.

Article 5.

County and City Boards of Education.

115-51. School food services provided by county and city boards of education.

Article 6.

Powers and Duties of Superintendents.

115-59. School organization statement and allocation of instructional personnel.

115-64. Teachers must be certified to be paid; contracts to be filed; how teachers paid.

115-66. When teachers' pay may be withheld.

SUBCHAPTER V. SPECIAL LOCAL TAX ELECTIONS FOR SCHOOL PURPOSES.

Article 14.

School Areas Authorized to Vote Local Taxes.

115-116. Purposes for which elections may be called.

Sec.

115-117. Maximum rate and frequency of elections.

115-124. Levy and collection of taxes.

SUBCHAPTER VI. SCHOOL PROPERTY.

Article 15.

School Sites and Property.

115-133.2. Power of boards of education to offer rewards for information leading to arrest, etc., of persons damaging school property.

SUBCHAPTER VII. EMPLOYEES.

Article 18.

Certification and Salaries of Employees; Workmen's Compensation.

115-155. Employing persons not holding nor qualified to hold certificate.

SUBCHAPTER VIII. PUPILS.

Article 21.

Assignment and Enrollment of Pupils.

115-179.1. Exceptional children; special program; dissatisfaction with assignment; right to appeal.

SUBCHAPTER X. INSTRUCTION.

Article 24A.

Kindergartens.

115-205.14. Maximum class size. 115-205.15 to 115-205.18 [Reserved.]

SUBCHAPTER XII. EXPERIMENTATION AND RESEARCH.

Article 44.

North Carolina Advancement School.

115-352 to 115-357. [Repealed.]

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

State Plan for Public Education.

§ 115-9. "Tax-levying authorities" defined. — As used in this Chapter, the term "tax-levying authorities" shall mean the board of county commissioners of the county or counties in which an administrative unit is located or such other

unit of local government as may be granted by local act authority to levy taxes on behalf of a school administrative unit. (1955, c. 1372, art. 1, s. 9; 1975, c. 437, s. 10.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION.

ARTICLE 2.

The State Board of Education.

§ 115-11. Powers and duties generally.

Editor's Note. — Session Laws 1975, 2nd Sess., c. 983, s. 44, provides: "The State Board of Education shall adopt a uniform, statewide policy concerning sick leave."

ARTICLE 3.

State Superintendent of Public Instruction.

§ 115-13. Office and salary of State Superintendent of Public Instruction. — The State Superintendent of Public Instruction shall keep his office in the Education Building in Raleigh, and his salary shall be thirty-five thousand one hundred forty-eight dollars (\$35,148) a year, payable monthly. (1955, c. 1372, art. 3, s. 2; c. 1374; 1963, c. 1178, s. 2; 1967, c. 1130; c. 1237, s. 2; 1969, c. 1214, s. 2; 1971, c. 912, s. 2; 1973, c. 778, s. 2; 1975, 2nd Sess., c. 983, s. 17.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective

July 1, 1976, rewrote this section, increasing the salary from \$33,500 to \$35,148.

ARTICLE 4.

Powers and Duties of Controller.

8 115-17. Duties of controller defined. — The controller, under the direction

of the Board, shall perform the following duties:

(7) He shall, in cooperation with the State Auditor, cause to be made an annual audit of the State school funds disbursed by county and city administrative units and all other funds which by law are committed to the administration of the Board.

(1975, c. 437, s. 15.1.)

Editor's Note. -

Session Laws 1975, c. 437, s. 15.1, effective July 1, 1976, substituted "cause to be made an annual audit of the State school funds disbursed by county and city administrative units and" for

"have jurisdiction in the auditing of all school funds, under the provisions of G.S. 115-97, and also in the auditing of" in subdivision (7).

Because of the postponed effective date of Session Laws 1975, c. 437, subdivision (7) as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended subdivision is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s.

18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

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

ARTICLE 5.

County and City Boards of Education.

§ 115-27. Board a body corporate.

Power to Acquire Land. — Section 115-126(d) does not give the board of education any additional power to acquire land for school purposes. This power is given by this section, and §§ 115-35(b) and 115-125. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Need for and Location of New School Buildings.—The board of education determines

whether new school buildings are needed and, if so, where they shall be located. Such decisions are vested in the sound discretion of the board, and its discretion with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

§ 115-28. Meetings of the board.

Stated in News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

§ 115-35. Powers and duties of county and city boards generally.

Power to Acquire Land. — Section 115-126(d) does not give the board of education any additional power to acquire land for school purposes. This power is given by §§ 115-27 and 115-125 and subsection (b) of this section. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Location, Transfer, etc. -

The board of education determines whether

new school buildings are needed and, if so, where they shall be located. Such decisions are vested in the sound discretion of the board, and its discretion with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

§ 115-51. School food services provided by county and city boards of education. — As a part of the function of the public school system, county and city boards of education shall provide to the extent practical school food services in the schools under their jurisdiction. All school food services made available under this authority shall be provided in accordance with standards and regulations recommended by the State Superintendent of Public Instruction and approved by the State Board of Education. In the operation of their public school food programs, the public schools shall participate in the National School Lunch Program established by the federal government. The program shall be under the jurisdiction of the Division of School Food Services of the Department of Public Instruction and in accordance with federal guidelines as established by the Child Nutrition Division of the United States Department of Agriculture.

earnings therefrom over and above the cost of operation as defined herein shall be used to reduce the cost of food, to serve better food, or to provide free or reduced-price lunches to indigent children and for no other purpose. The term "cost of operation" shall be defined as actual cost incurred in the purchase and preparation of food, the salaries of all personnel directly engaged in providing food services, and the cost of nonfood supplies as outlined under standards adopted by the State Board of Education. Personnel shall be defined as food service supervisors or directors, bookkeepers directly engaged in food service record keeping and those persons directly involved in preparing and serving food. Provided that food service personnel shall be paid from the funds of food services only for services rendered in behalf of lunchroom services. Any cost incurred in the provisions and maintenance of school food services over and beyond the "cost of operation" as defined in this section shall be included in the budget request filed annually by county and city boards of education with boards of county commissioners. It shall not be mandatory that the provisions of G.S. 115-52 and 143-129 be complied with in the purchase of supplies and food for such school food services. (1955, c. 1372, art. 5, s. 34; 1965, c. 912; 1967, c. 990; 1975, c. 384.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted "shall provide to the extent practical" for "may, in their discretion, provide" in the first sentence of the first paragraph and added the third and fourth sentences of the first paragraph.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

ARTICLE 6.

Powers and Duties of Superintendents.

§ 115-59. School organization statement and allocation of instructional personnel.

(b) The State Board of Education shall allocate teachers and instructional personnel to the various administrative units in the following separate categories: (i) general teachers, including classified principals, (ii) vocational teachers, (iii) special education teachers. Librarians authorized under the authority of G.S. 115-206.24 shall be in addition to the teachers and other instructional personnel allocated in these categories.

(1975, c. 965, s. 3.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, added the second sentence of subsection (b).

Because of the postponed effective date of the 1975 amendment, subsection (b) as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1976 Interim Supplement.

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

§ 115-64. Teachers must be certified to be paid; contracts to be filed; how teachers paid. — No teacher shall be placed on the payroll of an administrative unit unless he holds a certificate as required by law, and unless a copy of the teacher's contract has been filed with the superintendent. No teacher may be paid more than he is due under the salary schedule in force in the administrative unit or special taxing district. Substitute and interim teachers may be paid under

rules of the State Board of Education. (1955, c. 1372, art. 6, s. 11; 1975, c. 437, s. 8.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote this section, which formerly related to disbursement of local funds.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

§ 115-66. When teachers' pay may be withheld. — The board of education may withhold the salary of any supervisor, principal or teacher who delays or refuses to render such reports as are required by law. But whenever the reports are delivered in accordance with law, the salary shall be paid forthwith. (1955, c. 1372, art. 6, s. 13; 1975, c. 437, s. 9.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976

Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

SUBCHAPTER III. SCHOOL DISTRICT ORGANIZATION.

ARTICLE 8.

Creating and Consolidating School Districts and School Administrative Units.

§ 115-76. Consolidation of districts and discontinuance of schools.

Discretion as to Location, etc. — In accord with original. See Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

SUBCHAPTER V. SPECIAL LOCAL TAX ELECTIONS FOR SCHOOL PURPOSES.

ARTICLE 14.

School Areas Authorized to Vote Local Taxes.

§ 115-116. Purposes for which elections may be called. — (a) To Vote a Supplemental Tax. — Elections may be called by the local tax-levying authority to ascertain the will of the voters as to whether there shall be levied and collected a special tax in the several administrative units, districts, and other school areas, including districts formed from contiguous counties, to supplement the funds from State and county allotments and hereby [thereby] operate schools of a higher standard by supplementing any item of expenditure in the school budget. When supplementary funds are authorized by the carrying of such an election, such funds may be used to employ additional teachers, other than those allotted by the State, to teach any grades or subjects or for kindergarten instruction,

to establish and maintain approved summer schools, and for making the contribution to the Teachers' and State Employees' Retirement System of North Carolina for such teachers, or for any object of expenditure: Provided, that elections may be called to ascertain the will of the voters of an entire county, as to whether there shall be levied and collected a special tax on all the taxable property within the county for the purposes enumerated in this subsection. In such event, the supplemental tax shall be apportioned among the administrative

units in the county pursuant to G.S. 115-100.10.

(g) To Provide a Supplemental Tax on a Countywide Basis after Petition for Consolidation of City or County Administrative Units. — Elections may be called for an entire county on the question of a special tax to supplement the funds from State and county allotments and thereby operate schools of a higher standard by supplementing any item of expenditure in the school budget, where the boards of education of all the city administrative units in said county have petitioned the county board of education for a consolidation with the county administrative unit pursuant to the provisions of G.S. 115-74 and prior to the approval of said petitions by the county and State boards of education. In which event, and provided the petitions so specify, if said election for a countywide supplemental tax fails to carry, said petitions may be withdrawn and any existing supplemental tax theretofore voted in any of the city administrative units involved or in the county administrative unit shall not be affected. If the vote for the countywide supplemental tax carries, said tax shall not be levied unless and until the consolidation of the units involved shall be completed

according to the requirements of G.S. 115-74.

(h) To Annex or Consolidate Areas or Districts from Continguous Counties and to Provide a Supplemental School Tax in Such Annexed Areas or Consolidated Districts. — An election may be called in any district or districts or other school area or areas, from continguous counties, as to whether the district or districts in one county shall be enlarged by annexing or consolidating therewith any adjoining district or districts, or other school area or areas from an adjoining county, and if a special or supplemental school tax is levied and collected in the district or districts of the county to which the territory is to be annexed or consolidated, whether upon such annexation or consolidation there shall be levied and collected in the territory to be annexed or consolidated the same special or supplemental tax for schools as is levied and collected in the district or districts in the other county. If such election carries, the said special or supplemental tax shall be collected pursuant to G.S. 115-124 and remitted to the administrative unit on whose behalf such special and supplemental tax is already levied; provided, that notwithstanding the provisions of G.S. 115-122.1, if the notice of election clearly so states, and the election shall be held prior to August 1, the annexation or consolidation shall be effective and the tax so authorized shall be levied and collected beginning with the fiscal year commencing July 1 next preceding such elections. (1955, c. 1372, art. 14, s. 1; 1957, c. 1066; c. 1271, s. 1; 1959, c. 573, s. 9; 1961, c. 894, s. 2; c. 1019, s. 1; 1975, c. 437, ss. 2-4.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, inserted "by the local tax-levying authority" near the beginning of the first sentence of subsection (a), deleted "current expense" preceding "funds" in that sentence, substituted 'in the county pursuant to G.S. 115-100.10" for

"of the county on a per capita enrollment basis which shall be determined by the State Board of Education and certified to each administrative unit involved" at the end of subsection (a), deleted "current expense" preceding "funds" near the beginning of the first sentence of subsection (g), rewrote the part of the last sentence of subsection (h) that precedes the proviso, and substituted "elections" "election" at the end of subsection (h).

Because of the postponed effective date of the 1975 amendment, subsections (a), (g) and (h) as amended were not set out in the text in the 1975 Cumulative Supplement, but were carried in a note. The amended subsections are therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice.'

As the rest of the section was not changed by the amendment, only subsections (a), (g) and (h)

are set out.

§ 115-117. Maximum rate and frequency of elections. — (a) A tax for supplementing the public school budget shall not exceed fifty cents (50e) on the one-hundred-dollar (\$100.00) value of property subject to taxation by the administrative unit; provided, that in any school administrative unit, district, or other school area having a total population of not less than 100,000 said local annual tax that may be levied shall not exceed sixty cents (60¢) on

one-hundred-dollar (\$100.00) valuation of said property.

(b) If a majority of those who vote in any election called pursuant to the provisions of this Article do not vote in favor of the purpose for which such election is called, another election for the same purpose shall not be called for and held in the same unit, district, or area until the lapse of six months after the prior election. However, the foregoing time limitation shall not apply to any election held in a unit, district, or other school area which is larger or smaller than the unit, district, or area in which the prior election was held, or to any election held for a different purpose than the prior election. (1955, c. 1231; c. 1372, art. 14, s. 2; 1957, c. 1271, s. 2; 1959, c. 573, s. 10; 1975, c. 437, s. 5.)

Editor's Note. - The 1975 amendment, effective July 1, 1976, designated the first and second paragraphs of this section as subsections (a) and (b), rewrote the part of subsection (a) that precedes the proviso, substituted "dollar" for "dollars" near the end of the proviso to subsection (a), and made changes in form and wording in subsection (b).

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice.'

§ 115-124. Levy and collection of taxes. — (a) If an administrative unit or district has voted a tax to operate schools of a higher standard than that provided by State and county support, the board of county commissioners of each county in which the administrative unit is located is authorized to levy a tax on all property having a situs in the administrative unit for the purpose of supplementing the local current expense fund, the capital outlay fund, or both.

(b) Before April 15 of each year, the tax supervisor of each county in which the administrative unit is located shall certify to the superintendent of schools an estimate of the total assessed value of property in the county subject to taxation on behalf of the administrative unit and any districts therein pursuant to this Article. The board of education, in the budget it submits to the board of county commissioners, shall request the rate of ad valorem tax it wishes to have levied on its behalf as a school supplemental tax, not in excess of the rate approved by the voters. The board of county commissioners may approve or disapprove this request in whole or in part, and may levy such rate of supplemental tax as it may find to be in the best interests of the taxpayers and the public schools, not in excess of the rate requested by the board of education. Upon approving a supplemental tax levy pursuant to this section, the board of county commissioners shall cause the school supplemental tax to be computed for all property subject thereto. The taxes thus computed shall be shown separately on the county tax receipts for the fiscal year, and the county shall collect the school supplemental tax in the same manner that county taxes are collected. Collections shall be remitted to the administrative unit within 10 days after the close of each calendar month. Partial payments shall be proportionately divided between the county and the administrative unit. The board of county commissioners may, in its discretion, deduct from the proceeds of the school supplemental tax the actual additional cost to the county of levying, computing, billing, and collecting the tax.

(c) It shall be unlawful for any part of a tax levied pursuant to this Article to be used for any purpose other than those purposes authorized by the election in the unit or district. (1955, c. 1372, art. 14, s. 9; 1965, c. 584, s. 12; 1975, c. 437,

s. 6.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

SUBCHAPTER VI. SCHOOL PROPERTY.

ARTICLE 15.

School Sites and Property.

§ 115-125. Acquisition of sites.

Discretion, etc. -

The board of education determines whether new school buildings are needed and, if so, where they shall be located. Such decisions are vested in the sound discretion of the board, and its discretion with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Power to Acquire Land. — Section 115-126(d) does not give the board of education any additional power to acquire land for school purposes. This power is given by §§ 115-27, 115-35(b) and this section. Painter v. Wake

County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Effect of Restrictive Covenants. — A board of education which purchases property for a valid school purpose pursuant to this section cannot be enjoined to comply with restrictive covenants requiring that the property be used exclusively for residential purposes, the appropriate remedy for other landowners protected by the covenant being an action to recover damages for the taking of their property rights. Carolina Mills, Inc. v. Catawba County Bd. of Educ., 27 N.C. App. 524, 219 S.E.2d 509 (1975).

§ 115-126. Sale, exchange or lease of school property; easements and rights-of-way.

There is nothing in the Constitution which prohibits the board of education from exchanging land which it owns for other land for school purposes. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Power to Acquire Land. — Subsection (d)

does not give the board of education any additional power to acquire land for school purposes. This power is given by §§ 115-27, 115-35(b) and 115-125. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Subsection (d) only provides an alternate method of payment for land which the board in its discretion decides to purchase. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Subsection (d) does not limit an exchange to property of equal value. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

If a discrepancy in valuation exists it bears

only on the question of abuse of discretion, and any such discrepancy is only one of the factors to be considered in determining whether the board has abused its discretion. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Burden to Overcome Presumption. — The burden is on plaintiffs to overcome the presumption that the board of education, in proposing an exchange of property, was acting in good faith and in accord with the spirit and purpose of subsection (d). Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

§ 115-133.2. Power of boards of education to offer rewards for information leading to arrest, etc., of persons damaging school property. — County and city boards of education are authorized and empowered to offer and pay rewards in an amount not exceeding three hundred dollars (\$300.00) for information leading to the arrest and conviction of any person or persons who willfully deface, damage or destroy property, commit acts of vandalism or commit larceny of the property belonging to the public school system under the jurisdiction of and administered by any county or city board of education. (1967, c. 369; 1973, c. 1216; 1975, c. 437, s. 7.)

Editor's Note. -

The 1975 amendment, effective July 1, 1976, deleted the former second sentence, relating to budgeting and payment of rewards from the current expense fund.

Because of the postponed effective date of the 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

SUBCHAPTER VII. EMPLOYEES.

ARTICLE 17.

Principals' and Teachers' Employment and Contracts.

§ 115-142. System of employment for public school teachers.

The purpose of the private hearing provision is as much for the protection of the teacher involved as for the school officials. It is a provision that finds a counterpart in other types of proceedings, for the public hearing or trial concept, while embedded in the Sixth Amendment as a requirement of criminal trials, is not inflexibly applied in all civil proceedings. Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1975).

Certain Hearsay Not Violative of Due Process. — Certain hearsay testimony, at an informal hearing such as that conducted by the board under this section, does not violate due process. Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1975).

The minimal due process to which a teacher whose contract has been denied renewal or has been terminated is entitled is adequate notice, a specification of the charges against her, an opportunity to confront the witnesses against her and an opportunity to be heard in her own defense. Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1975).

No Hearing for Untenured Teachers. — That the omission of a right to a hearing in the case of a probationary teacher was not inadvertent but purposeful appears plain from the other provisions in the 1973 amendments which specifically require hearings on the nonrenewal of the contract of a "career teacher" (i.e., one with tenure). Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1975).

Right of Action under (m)(2). — Any claim of an arbitrary or capricious denial of renewal of a probationary teacher's contract under subsection (m)(2) gives rise to a right of action, which is to be resolved by a proper court and not by the board. Sigmon v. Poe, 528 F.2d 311 (4th Cir. 1975).

If there is a claim of "arbitrary or capricious"

nonrenewal, it is an independent right of action, triable, not by the school board, but by the court. Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1975).

Not to Be Resolved by Board. — Whether there has been a denial of renewal of plaintiff's contract for "arbitrary, capricious, discriminatory or for personal or political reasons" is not a question to be resolved by the board. Sigmon v. Poe, 528 F.2d 311 (4th Cir. 1975).

Applied in Thomas v. Ward, 529 F.2d 916 (4th Cir. 1975).

Stated in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

ARTICLE 18.

Certification and Salaries of Employees; Workmen's Compensation.

§ 115-153. Certifying and regulating the grade and salary of teachers; furnishing to county or city boards available personnel information.

Unconstitutionality. — This section, prior to and after the 1975 amendment, is invalid and unconstitutional to the extent that it mandates refusal of licensing to otherwise qualified applicants who fail to score as high as 950 on the combined tests, or 475 on the Weighted Common Examination. United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975).

Rights of State and of Teacher Applicant. — The right of the State to set standards for the purpose of improving the quality of instruction in the public schools is not separable from the right of the prospective teacher applicant to enter his chosen vocation. United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975).

It is for the State to determine the minimum

level of competence which shall be required of its teachers. It may require a higher level of competence than required by other states and it may administer tests designed to measure that competence and shown to be job-related. United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975).

The nature and extent of qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975).

§ 115-155. Employing persons not holding nor qualified to hold certificate. — It shall be unlawful for any board of education or school committee to employ or keep in service any teacher, supervisor, or professional person who neither holds nor is qualified to hold a certificate in compliance with the provision of the law or in accordance with the regulations of the State Board of Education. (1955, c. 1372, art. 18, s. 4; 1975, c. 437, s. 7; c. 731, s. 2.)

Cross Reference. — For requirement that teachers must be certified to be paid, see § 115-64.

Editor's Note. — The first 1975 amendment, effective July 1, 1976, deleted the former second paragraph, prohibiting payment of the salary of a person employed in violation of this section.

The second 1975 amendment rewrote the section.

Because of the postponed effective date of the first 1975 amendment, only the second 1975 amendment, which rewrote what was originally the first paragraph of this section, was set out in the 1975 Cumulative Supplement, and the

effect of the first 1975 amendment was stated in a note. The section as amended by both 1975 acts is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a

severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

SUBCHAPTER VIII. PUPILS.

ARTICLE 21.

Assignment and Enrollment of Pupils.

§ 115-179.1. Exceptional children; special program; dissatisfaction with assignment; right to appeal.

(f) The Superintendent and the Secretary shall make, amend or revise rules and regulations for the conduct of hearings authorized by this section and otherwise for the implementation of its purpose. Among other things, such rules and regulations shall allow the appointment of a hearing officer or board to hear such cases as may be appealed. Copies of such rules shall be filed in the office of the Attorney General as required by Chapter 150A.

(g) The determination of the appeal shall be subject to judicial review in the

manner provided for in Article 4, Chapter 150A of the General Statutes.

(1975, 2nd Sess., c. 983, ss. 79, 80.)

Editor's Note. -

The 1975, 2nd Sess., amendment substituted "Attorney General as required by Chapter 150A" for "Secretary of State as by law provided" at the end of subsection (f) and substituted "Article 4, Chapter 150A of the General Statutes" for "Article 33, Chapter 143 of the General Statutes" at the end of subsection (g)

The 1975, 2nd Sess., amendatory act directed that the reference to Chapter 150A at the end of subsection (g) be substituted for the words

"Article 31, Chapter 134 of the General Statutes." The reference to the Article in Chapter 134 had been replaced, by amendment in Session Laws 1975, c. 563, by a reference to Article 33 of Chapter 143. Notwithstanding this discrepancy, the amendment in the 1975 2nd Sess., act has been given effect according to its obvious intent.

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

SUBCHAPTER X. INSTRUCTION.

ARTICLE 24A.

Kindergartens.

§ 115-205.14. Maximum class size. — Funds are appropriated to the State Board of Education in section 1 of Chapter 983, Session Laws of 1975, for full implementation of the State's kindergarten program. The Board is directed to authorize the enrollment of a maximum of 28 students in average daily membership per kindergarten class, and the Board may permit temporary deviations from the maximum under the same rules and regulations provided by class size legislation for grades one through 12.

It is the intent of the 1975 General Assembly that within two years, or by the fall of 1978, that the maximum number of students will be reduced back to 26 students per class. In this two-year interim, the State Board of Education and Superintendent of Public Instruction shall take every action necessary to assure that the kindergarten program is not in any manner impaired. (1975, 2nd Sess.,

c. 983, s. 89.)

§§ 115-205.15 to 115-205.18: Reserved for future codification purposes.

SUBCHAPTER XII. EXPERIMENTATION AND RESEARCH. ARTICLE 44.

North Carolina Advancement School.

§§ 115-352 to 115-357: Repealed by Session Laws 1975, 2nd Sess., c. 983, s. 43, effective July 1, 1976.

Chapter 116.

Higher Education.

Article 1.

The University of North Carolina.

Part 5. Miscellaneous Provisions.

Sec.

116-43.1. Institute for Transportation Research and Education.

Article 25.

Disruption on Campuses of State-Owned Institutions of Higher Education.

116-214 to 116-218. [Reserved.]

Article 26.

Liability Insurance or Self-Insurance.

116-219. Authorization to secure insurance or provide self-insurance.

116-220. Establishment and administration of self-insurance trust funds; rules and regulations: defense of actions against covered persons: application of § 143-300.6.

116-221. Sovereign immunity.

116-222. Confidentiality of records.

ARTICLE 1.

The University of North Carolina.

Part 5. Miscellaneous Provisions.

§ 116-43.1. Institute for Transportation Research and Education. — The Board of Governors of the University of North Carolina is authorized to establish an Institute for Transportation Research and Education to facilitate the development of a broad program of transportation research and education involving other organizations and institutions which have related programs. The immediate purpose of the Institute shall be to create a management structure to coordinate and eventually merge the Highway Safety Programs of the National Driving Center and the North Carolina Highway Safety Research Center. The Board of Governors of the University of North Carolina is further authorized to establish a Council for Transportation Research and Education to represent all interests in transportation research and education, including but not limited to transportation safety. (1975, 2nd Sess., c. 983, s. 57.)

purposes, the Department of Transportation shall provide to the Board of Governors of the University of North Carolina, from the

Editor's Note. — Session Laws 1975, 2nd appropriation for the Governor's Highway Sess., c. 983, s. 57, provides: "For these Safety Program, up to the amount of one hundred sixty-eight thousand dollars (\$168,000) for fiscal year 1976-77, and this amount will not be a recurring appropriation."

ARTICLE 25.

Disruption on Campuses of State-Owned Institutions of Higher Education.

§§ 116-214 to 116-218: Reserved for future codification purposes.

ARTICLE 26.

Liability Insurance or Self-Insurance.

§ 116-219. Authorization to secure insurance or provide self-insurance. – The Board of Governors of the University of North Carolina (hereinafter referred to as "the Board") is authorized through the purchase of contracts of insurance or the creation of self-insurance trusts, or through combination of such insurance and self-insurance, to provide individual health-care practitioners with coverage against claims of personal tort liability based on conduct within the course and scope of health-care functions undertaken by such individuals as employees, agents, or officers of (i) the University of North Carolina, (ii) any constituent institution of the University of North Carolina, (iii) North Carolina Memorial Hospital, or (iv) any health-care institution, agency or entity which has an affiliation agreement with the University of North Carolina, with a constituent institution of the University of North Carolina, or with North Carolina Memorial Hospital. The types of health-care practitioners to which the provisions of this Article may apply include, but are not limited to, medical doctors, dentists, nurses, residents, interns, medical technologists, nurses' aides, and orderlies. Subject to all requirements and limitations of this Article, the coverage to be provided, through insurance or self-insurance or combination thereof, may include provision for the payment of expenses of litigation, the payment of civil judgments in courts of competent jurisdiction, and the payment of settlement amounts, in actions, suits or claims to which this Article applies. (1975, 2nd Sess., c. 976.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 976, s. 2, makes this Article effective July 1, 1976.

§ 116-220. Establishment and administration of self-insurance trust funds; rules and regulations; defense of actions against covered persons; application of § 143-300.6. — (a) In the event the Board elects to act as self-insurer of a program of liability insurance, it may establish one or more insurance trust accounts to be used only for the purposes authorized by this Article: Provided, however, said program of liability insurance shall not be subject to regulation by the Commissioner of Insurance. The Board is authorized to receive and accept any gift, donation, appropriation or transfer of funds made for the purposes of this section and to deposit such funds in the insurance trust accounts. All expenses incurred in collecting, receiving, and maintaining such funds and in otherwise administering the self-insured program of liability insurance shall be paid from such insurance trust accounts.

(b) Subject to all requirements and limitations of this Article, the Board is authorized to adopt rules and regulations for the establishment and administration of the self-insured program of liability insurance, including, but not limited to, rules and regulations concerning the eligibility for and terms and conditions of participation in the program, the assessment of charges against participants, the management of the insurance trust accounts, and the

negotiation, settlement, litigation, and payment of claims.

(c) The Board is authorized to create a Liability Insurance Trust Fund Council composed of not more than 12 members; one member each shall be appointed by the State Attorney General, the State Auditor, the State Insurance Commissioner, and the State Treasurer; the remaining members shall be appointed by the Board. Subject to all requirements and limitations of this Article and to any rules and regulations adopted by the Board under the terms of subsection (b) of this section, the Board may delegate to the Liability Insurance Trust Fund Council responsibility and authority for the administration of the self-insured liability insurance program and of the

insurance trust accounts established pursuant to such program.

(d) Defense of all suits or actions against an individual health-care practitioner who is covered by a self-insured program of liability insurance established by the Board under the provisions of this Article may be provided by the Attorney General in accordance with the provisions of G.S. 143-300.3 of Article 31A of Chapter 143; provided, that in the event it should be determined pursuant to G.S. 143-300.4 that defense of such a claim should not be provided by the State, or if it should be determined pursuant to G.S. 143-300.5 and G.S. 147-17 that counsel other than the Attorney General should be employed, or if the individual health-care practitioner is not an employee of the State as defined in G.S. 143-300.2, then private legal counsel may be employed by the Liability Insurance Trust Fund Council and paid for from funds in the insurance trust accounts

(e) For purposes of the requirements of G.S. 143-300.6, the coverage provided State employees by any self-insured program of liability insurance established by the Board pursuant to the provisions of this Article shall be deemed to be commercial liability insurance coverage within the meaning of G.S. 143-300.6(c).

- (f) By rules or regulations adopted by the Board in accordance with G.S. 116-220(b) of this Article, the Board may provide that funds maintained in insurance trust accounts under such a self-insured program of liability insurance may be used to pay any expenses, including damages ordered to be paid, which may be incurred by the University of North Carolina, a constituent institution of the University of North Carolina, or North Carolina Memorial Hospital with respect to any tort claim, based on alleged negligent acts in the provision of health-care services, which may be prosecuted under the provisions of Article 31 of Chapter 143 of the General Statutes. (1975, 2nd Sess., c. 976.)
- § 116-221. Sovereign immunity. Nothing in this Article shall be deemed to waive the sovereign immunity of the State. (1975, 2nd Sess., c. 976.)
- § 116-222. Confidentiality of records. Records held by the fund, including all information, correspondence, investigations, or interviews, concerning or pertaining to claims or potential claims against participants in the self-insurance program or to the program or applications for participation in the program shall not be considered public records under General Statutes Chapter 132 and shall not be subject to discovery under the Rules of Civil Procedure, General Statutes Chapter 1A. (1975, 2nd Sess., c. 976.)

Chapter 116A.

Escheats and Abandoned Property.

§ 116A-1. Escheats to Escheat Fund.

Chapter Is Applicable to State Chartered General to Mr. W.L. Cole, Administrator, Office Credit Unions. — See opinion of Attorney of Credit Unions, 45 N.C.A.G. 223 (1976).

Chapter 122.

Hospitals for the Mentally Disordered.

Article 1.

Organization and Management.

Sec. 122-16.1. Motor vehicle laws applicable to streets, alleys and driveways on the grounds of State mental institutions; traffic regulations; registration and regulation of motor vehicles.

Article 5A.

Involuntary Commitment.

Sec. 122-58.7A. Venue of district court hearing when respondent held at regional facility pending hearing.

ARTICLE 1.

Organization and Management.

§ 122-16. Department may make ordinances; penalties for violation.

Stated in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

§ 122-16.1. Motor vehicle laws applicable to streets, alleys and driveways on the grounds of State mental institutions; traffic regulations; registration and regulation of motor vehicles.

(b) Authority is hereby conferred upon the Commission for Mental Health Services to make such additional rules and regulations and adopt such additional ordinances, not inconsistent with the provisions of Chapter 20, General Statutes of North Carolina, as in its opinion may be necessary, with respect to the use of the streets, alleys, roads and driveways of facilities of the Department of Human Resources, and to establish parking areas on the grounds of such institutions. Provided, however, that, based upon a traffic and engineering investigation, the Department of Human Resources may determine and fix speed limits on streets, roads and highways subject to such rules, regulations and ordinances lower than those provided in G.S. 20-141, and the Department of Human Resources may make reasonable provisions for the towing or removal of unattended vehicles found to be in violation of other rules, regulations and ordinances. All regulations and ordinances adopted pursuant to the authority of this subsection shall be recorded in the proceedings of the Department and printed, and copies of such regulations and ordinances shall be filed in the office of the Attorney General as required by Chapter 150A of the General Statutes. Any person violating such regulations or ordinances shall, upon conviction thereof, be guilty of a misdemeanor, and shall be punishable by a fine of not exceeding fifty dollars (\$50.00) or imprisonment not exceeding 30 days.

(1975, 2nd Sess., c. 983, s. 85.)

Editor's Note.

The 1975, 2nd Sess., amendment substituted "Attorney General as required by Chapter 150A of the General Statutes" for "Secretary of State of North Carolina" at the end of the third sentence of subsection (b).

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

ARTICLE 2.

Officers and Employees.

§ 122-31. Salaries of administrator; chief of medical services, and employees.

Stated in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

ARTICLE 2C.

Establishment of Area Mental Health Programs.

§ 122-35.22. Clinical services.

"Clinical Services" Includes All Observation, Diagnosis, Therapy, and Treatment Rendered to the Patients Served by an Area Mental Health Program. — See opinion of

Attorney General to Mr. R.J. Bickel, Assistant Director for Administration, Division of Mental Health Services, 45 N.C.A.G. 199 (1976).

ARTICLE 5A.

Involuntary Commitment.

§ 122-58.1. Declaration of policy.

Applied in In re Neatherly, 28 N.C. App. 659, 222 S.E.2d 486 (1976).

§ 122-58.7. District court hearing.

Applied in In re Crouch, 28 N.C. App. 354, 221 S.E.2d 74 (1976); In re Neatherly, 28 N.C. App. 659, 222 S.E.2d 486 (1976).

§ 122-58.7A. Venue of district court hearing when respondent held at regional facility pending hearing. — (a) In all cases where the respondent is held at a regional mental health facility pending the district court hearing as provided in G.S. 122-58.6, unless the respondent through counsel objects to the venue, the hearing required by G.S. 122-58.7 shall be held in the county in which

the facility is located.

(b) An official of the facility shall immediately notify the clerk of superior court of the county in which the facility is located of a determination to hold the respondent pending hearing. That clerk shall request transmittal of all documents pertinent to the proceedings from the clerk of superior court with whom the proceedings were initiated. The requesting clerk shall assume all duties set forth in G.S. 122-58.5. The requesting clerk shall appoint as counsel for indigent respondents the counsel provided for in G.S. 122-58.12. (1975, 2nd Sess., c. 983, s. 133.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 983, s. 152, makes this section effective July 1, 1976.

§ 122-58.9. Appeal.

Applied in In re Crouch, 28 N.C. App. 354, 221 S.E.2d 74 (1976).

ARTICLE 11.

Mentally Ill Criminals.

§ 122-84.1. Acquittal of defendant on grounds of mental illness; procedure.

Trial Instructions. — While the circumstances of a particular case may justify, or require, that the trial court instruct the jury as to procedures for restraint in the event of a verdict of not guilty by reason of insanity,

instructions to that effect must be in proper form and must accurately describe the law governing these procedures for restraint. State v. McMillian, 28 N.C. App. 308, 220 S.E.2d 825 (1976).

local

Chapter 126.

State Personnel System.

Article 1.

State Personnel System Established.

Sec.

126-2. State Personnel Commission.

126-3. Office of State Personnel established; administration and supervision; appointment, compensation and tenure of Director.

126-4. Powers and duties of State Personnel Commission.

126-5. Employees subject to Chapter; exemptions.

Article 2.

Salaries and Leave of State Employees.

126-7. Automatic and merit salary increases for State employees.

126-8. Minimum leave granted State employees.

Article 3.

Local Discretion as to Local Government Employees.

Sec.

126-9. County or municipal employees may be made subject to rules adopted by local governing body.

126-10. Personnel services to governmental units.

126-11. Local personnel system may be established.

Article 7.

The Privacy of State Employee Personnel Records.

126-23. Certain records to be kept by State agencies open to inspection.

126-25. Remedies of employee objecting to material in file.

126-26. Rules and regulations.

ARTICLE 1.

State Personnel System Established.

§ 126-1. Purpose of Chapter; application to local employees.

The legislative intent to forbid all hiring except under this Chapter is clear. Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976).

Frustration of Purpose and Public Policy.— The purpose of this Chapter and thus public policy would be frustrated by enforcement of contracts made in violation of the valid rules established pursuant to § 126-4(3). Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976).

§ 126-2. State Personnel Commission. — (a) There is hereby established the State Personnel Commission (hereinafter referred to as "the Commission").

(b) The Commission shall consist of seven members who shall be appointed by the Governor on July 1, 1965, or as soon thereafter as is practicable. Two members of the Commission shall be chosen from employees of the State subject to the provisions of this Chapter; two members shall be appointed from a list of individuals nominated by the North Carolina association of county commissioners; two members shall be individuals actively engaged in the management of a private business or industry; and one member shall be appointed from the public at large. Of the initial members of the Commission, two shall be appointed to serve for terms of two years, two shall be appointed to serve for terms of six years. Their successors shall be appointed by the Governor for terms of six years. Any vacancy occurring prior to the expiration of a term shall be filled by appointment for the unexpired term.

(c) Members of the Commission appointed after February 1, 1976, shall be appointed subject to confirmation by the General Assembly of North Carolina. If the General Assembly is not in session when an appointment is made, the appointee shall temporarily exercise all of the powers of a confirmed member until the convening of the next legislative session. If the General Assembly does not act on confirmation of a proposed member within 30 legislative days of the submission of the name, the member shall be considered confirmed. If the Governor does not appoint a new member within 60 calendar days of the occurrence of a vacancy or the rejection of an appointment by the General Assembly, the remaining members of the Board shall have the authority to fill the vacancy.

(d) The Governor may at any time after notice and hearing remove any Commission member for gross inefficiency, neglect of duty, malfeasance,

misfeasance, or nonfeasance in office.

(e) Members of the Commission who are employees of the State subject to the provisions of this Article shall be entitled to administrative leave without loss of pay for all periods of time required to conduct the business of the Commission.

(f) Four members of the Commission shall constitute a quorum.

(g) The Governor shall designate one member of the Commission as chairman. (h) The Commission shall meet quarterly, and at other times at the call of the chairman. (1965, c. 640, s. 2; 1975, c. 667, ss. 2-4.)

Editor's Note. -

The 1975 amendment, effective Feb. 1, 1976, rewrote subsection (c), substituted "Four" for "Five" in subsection (f) and substituted "Commission" for "Board" throughout the section.

Because of the postponed effective date of the

1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

Cited in Nantz v. Employment Security Comm'n, 28 N.C. App. 626, 222 S.E.2d 474 (1976).

§ 126-3. Office of State Personnel established; administration and supervision; appointment, compensation and tenure of Director. — There is hereby established the Office of State Personnel (hereinafter referred to as "the Office") which shall be placed for organizational purposes within the Department of Administration. Notwithstanding the provisions of North Carolina State government reorganization as of January 1, 1975, and specifically notwithstanding the provisions of Chapter 864 of the 1971 North Carolina Session Laws [Chapter 143A], the Office of State Personnel shall exercise all of its statutory powers in this Chapter independent of control by the Secretary of Administration and shall be under the administration and supervision of a State Personnel Director (hereinafter referred to as "the Director") appointed by the Governor and subject to the supervision of the Commission for purposes of this Chapter. The salary of the Director shall be fixed by the Governor subject to the approval of the Advisory Budget Commission. The Director shall serve at the pleasure of the Governor. (1965, c. 640, s. 2; 1975, c. 667, s. 5.)

Editor's Note. — The 1975 amendment, effective Feb. 1, 1976, rewrote this section.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 126-4. Powers and duties of State Personnel Commission. — Subject to the approval of the Governor, the State Personnel Commission shall establish

policies and rules governing each of the following:

(9) The investigation of complaints and the hearing of appeals of applicants, employees, and former employees and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge. reinstatement in all cases as the Commission shall find justified.

(11) In cases where the Commission finds discrimination or orders reinstatement, the assessment of reasonable attorney fees and witness

fees against the State agency involved.

(12) The appointment of hearing officers to hear appeals at various locations around the State as provided for in Article 3 of Chapter 150A, and the relationship of the record made by such hearing officers to proceedings by the Commission.
(13) The employment of independent attorneys to represent the

Department when some conflict would result from using Department

of Justice attorneys. (1965, c. 640, s. 2; 1975, c. 667, ss. 6, 7.)

Editor's Note. - The 1975 amendment, Feb. 1, 1976, substituted "Commission" for "Board" in the introductory language, rewrote subdivision (9), and added subdivisions (11) through (13).

A literal compliance with the direction of the 1975 act would require the substitution of "Commission" for "Board" in subdivision (7) of

this section.

Because of the postponed effective date of the 1975 amendment, subdivisions (9), (11), (12) and (13) as amended were not set out in the text in the 1975 Cumulative Supplement, but were carried in a note. The amended subdivisions are therefore set out in this 1976 Interim Supplement.

As the rest of the section was not changed by the amendment, only the introductory language and the subdivisions added or changed by the amendment are set out.

Frustration of Purpose and Public Policy. -The purpose of this Chapter and thus public policy would be frustrated by enforcement of contracts made in violation of the valid rules established pursuant to subdivision (3). Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976).

If the State Personnel Commission or its officers had the power to enter into an enforceable contract with one not qualified under the rules contemplated by this section, this Chapter would be meaningless. Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976).

Applied in Grissom v. North Carolina Dep't of Revenue, 28 N.C. App. 277, 220 S.E.2d 872

(1976).

§ 126-5. Employees subject to Chapter; exemptions. — (a) The provisions of this Chapter shall apply to all State employees not herein exempt, and to employees of local social services departments, public health departments, mental health clinics, and local civil defense agencies which receive federal grant-in-aid funds; and the provisions of this Chapter may apply to such other county employees as the several boards of county commissioners may from time to time determine.

(b) The provisions of this Chapter shall not apply to public school superintendents, principals, teachers, and other public school employees. Except as to Articles 6 and 7, the provisions of this Chapter shall not apply to the following persons or employees: instructional and research staff, physicians and dentists of the University of North Carolina; employees whose salaries are fixed under the authority vested in the Board of Governors of the University of North Carolina by the provisions of G.S. 116-11(4), 116-11(5), and 116-14; community colleges' employees whose salaries are fixed in accordance with the provisions of G.S. 115A-5 and 115A-14; members of boards, committees, commissions,

councils, and advisory councils compensated on a per diem basis; officials or employees whose salaries are fixed by the Governor, or by the Governor and Council of State, or by the Governor subject to the approval of the Council of State or the Advisory Budget Commission; employees of the General Assembly and its agencies and temporary employees of activities ancillary to the General Assembly; employees of the Judicial Department; blind or visually handicapped employees of the Department of Human Resources, Division of Services for the Blind, Business Enterprise Section, vending stand employees; constitutional officers of the State and except as to salaries:

(1) The chief deputy or chief administrative assistant to the head of each State department who is designated either by statute or by the administrative head to act for and perform all of the duties of such administrative head during his absence or incapacity;

(2) One confidential assistant and two confidential secretaries for each elected or appointed department head and one confidential secretary

for each chief deputy or chief administrative assistant;

(3) Other deputies, administrative assistants, division or agency heads or other employees, by whatever title, that serve in policy-making positions, such positions to be designated by the Governor or by each elected department head in a letter to the State Personnel Director, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate by May 1 of the year in which the oath of office is administered to each governor;

(4) One confidential secretary to each position designated under the provisions of G.S. 126-5(b)(3);

(5) All employees of the offices of the Governor and Lieutenant Governor. (c) Any career employee who has occupied a position subject to the Personnel Act and who is replaced after the position is exempted as provided in G.S. 126-5(b) shall be provided with all possible assistance in being appropriately relocated in State government. Any person appointed to an exempt position shall not be considered a career employee in that position. If a career employee in a subject position transfers to an exempt position, the career employee may retain status in his former position as if on leave of absence for the term of his exempt

(d) In case of dispute as to whether an employee is subject to the provisions of this Chapter, the question shall be investigated by the State Personnel Office and decided by the State Personnel Commission, subject to the approval of the

Governor, and such decision shall be final.

(e) For the purposes of this section, a career employee is defined as one who has been employed by the State for five consecutive years. (1965, c. 640, s. 2; 1967, c. 24, s. 20; cc. 1038, 1143; 1969, c. 982; 1971, c. 1025, s. 2; 1973, c. 476, s. 143; 1975, c. 667, ss. 8, 9.)

Editor's Note. -

The 1975 amendment, effective Feb. 1, 1976, rewrote subsection (b) and added subsections (c)

Because of the postponed effective date of the

1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1976 Interim Supplement.

ARTICLE 2.

Salaries and Leave of State Employees.

§ 126-7. Automatic and merit salary increases for State employees. — It shall be considered a part of the personnel policy of this State that salary increases as provided in the compensation plan shall be granted in accordance with a standard of efficiency as established by the State Personnel Commission. Each employee whose performance merits his retention in service shall be granted a salary increase in an amount corresponding to the increments between steps of the applicable salary range at least once each year until he reaches the intermediate salary step nearest to, but not exceeding, the middle of the salary range established for the class to which his position is assigned. Prior to July 1, 1965, each agency, board, commission, department, or institution of State government subject to the provisions of this Article shall file with the State Personnel Director a written description of the plan or method it is currently following in awarding or allocating efficiency or merit salary increments. At the same time, each such agency, board, commission, department, or institution shall cause a copy thereof to be distributed to each employee. The State Personnel Director, with the approval of the State Personnel Commission, shall modify, alter or disapprove any such plan submitted to it which it deems not to be in accordance with the provisions of this Article. Within the limit of available funds, each employee meeting higher standards may be granted increases up to but not exceeding the maximum of the salary range established for the class to which his position is assigned. If, in addition to the salary ranges, the State Personnel Commission shall establish uniform provisions for a system of payments over and above the standard salary ranges on a basis combining longevity in service and merit in the performance of duties, that plan of payments shall not be considered in applying this policy governing annual salary increments. The head of each department, bureau, agency, or commission, when making his budget request for the ensuing biennium, shall anticipate the funds which will be required during the biennium for the purpose of paying salary increments and shall include those amounts in his budget request. In no case shall the amount estimated for increments above the step nearest but not exceeding the middle of the range exceed two thirds of the sum which would be required to grant increments to all the personnel of the agency then receiving or who will receive during the first year of the biennium a salary equal to or above the intermediate step of the salary range. With the approval of the State Personnel Commission, State departments, bureaus, agencies, or commissions with 25 or less employees subject to the provisions of this Chapter may exceed the two-thirds restriction herein provided. (1965, c. 640, s. 2; 1975, c. 667, s. 2.)

Editor's Note. — The 1975 amendment, effective Feb. 1, 1976, substituted "Commission" for "Board" throughout the section.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but the effect of the amendment was stated in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 126-8. Minimum leave granted State employees. — The amount of vacation leave granted to each full-time State employee subject to the provisions of this Chapter shall be determined in accordance with a graduated scale established by the State Personnel Commission which shall allow the equivalent rate of not less than two weeks' vacation per calendar year, prorated monthly,

cumulative to at least 30 days. Sick leave allowed as needed to such State employees shall be at a rate not less than 10 days for each calendar year, cumulative from year to year. Notwithstanding any other provisions of this section, no full-time State employee subject to the provisions of Chapter 126, as the same appears in the Cumulative Supplement to Volume 3B of the General Statutes, on May 23, 1973, shall be allowed less than the equivalent of three weeks' vacation per calendar year, cumulative to at least 30 days. (1965, c. 640, s. 2; 1973, c. 697, ss. 1, 2; 1975, c. 667, s. 2.)

Editor's Note. -

The 1975 amendment, effective Feb. 1, 1976, substituted "Commission" for "Board" near the middle of the first sentence.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but the effect of the amendment was stated in a note. The amended section is therefore set out in this 1976 Interim Supplement.

ARTICLE 3.

Local Discretion as to Local Government Employees.

§ 126-9. County or municipal employees may be made subject to rules adopted by local governing body. — (a) When a board of county commissioners adopts rules and regulations governing annual leave, sick leave, hours of work, holidays, and the administration of the pay plan for county employees generally and the county rules and regulations are filed with the State Personnel Director, the county rules will supersede the rules adopted by the State Personnel Commission as to the county employees otherwise subject to the provisions of

this Chapter.

(b) No county employees otherwise subject to the provisions of this Chapter may be paid a salary less than the minimum nor more than the maximum of the applicable salary range adopted in accordance with this Chapter without approval of the State Personnel Commission. Provided, however, that subject to the approval of the State Personnel Commission, a board of county commissioners may adjust the salary ranges applicable to employees who are otherwise subject to the provisions of this Chapter, in order to cause the level of pay to conform to local finencial ability and finest policy. The State Personnel of pay to conform to local financial ability and fiscal policy. The State Personnel Commission shall adopt policies and regulations to ensure that significant relationships within the schedule of salary ranges are maintained.

(1975, c. 667, s. 2.)

effective Feb. 1, 1976, substituted amendment was stated in a note. The amended "Commission" for "Board" throughout subsections are therefore set out in this 1976 subsections (a) and (b).

Because of the postponed effective date of the 1975 amendment, subsections (a) and (b) as amended were not set out in the text in the 1975

Editor's Note. - The 1975 amendment, Cumulative Supplement, but the effect of the Interim Supplement.

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

§ 126-10. Personnel services to local governmental units. — The State Personnel Commission may make the services and facilities of the Office of State Personnel available upon request to the political subdivisions of the State. The State Personnel Commission may establish reasonable charges for the service and facilities so provided, and all funds so derived shall be deposited in the State treasury to the credit of the general fund. (1965, c. 640, s. 2; 1975, c. 667, ss. 2. 12.)

effective Feb. 1, 1976, substituted "Commission" for "Board" throughout the section and substituted "Office of State Personnel" for "State Personnel Department." Because of the postponed effective date of the

Editor's Note. - The 1975 amendment, 1975 amendment, this section as amended was not set out in the text in the 1975 Cumulative Supplement, but the effect of the amendment was stated in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 126-11. Local personnel system may be established. — The board of county commissioners of any county which shall establish and maintain a personnel system for all employees of the county subject to its jurisdiction, which system is found from time to time by the State Personnel Commission to be substantially equivalent to the system established under Article 1 of this Chapter for employees of local welfare departments, public health departments, and mental health clinics, may include employees of these local agencies within the terms of such system. Employees covered by that system shall be exempt from the provisions of Article 1 of this Chapter. (1965, c. 640, s. 2; 1975, c. 667,

Editor's Note. - The 1975 amendment, effective Feb. 1, 1976, substituted "Commission" for "Board" near the middle of the first sentence.

Because of the postponed effective date of the 1975 amendment, this section as amended was

not set out in the text in the 1975 Cumulative Supplement, but the effect of the amendment was stated in a note. The amended section is therefore set out in this 1976 Interim Supplement.

ARTICLE 7.

The Privacy of State Employee Personnel Records.

§ 126-23. Certain records to be kept by State agencies open to inspection. - Each department, agency, institution, commission and bureau of the State shall maintain a record of each of its employees, showing the following information with respect to each such employee: name, age, date of original employment or appointment to the State service, current position, title, current salary, date and amount of most recent increase or decrease in salary, date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification, and the office or station to which the employee is currently assigned. Subject only to rules and regulations for the safekeeping of the records, adopted by the State Personnel Commission, every person having custody of such records shall permit them to be inspected and examined and copies thereof made by any person during regular business hours. Any person who is denied access to any such record for the purpose of inspecting, examining or copying the same shall have a right to compel compliance with the provisions of this section by application to a court of competent jurisdiction for a writ of mandamus or other appropriate relief. (1975, c. 257, s. 1; c. 667, s. 2.)

Editor's Note. — The 1975 amendment, effective Feb. 1, 1976, substituted "Commission" for "Board" in the second

Because of the postponed effective date of the

1975 amendment, it was not given effect in this section as set out in the text in the 1975 Cumulative Supplement, but was stated in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 126-25. Remedies of employee objecting to material in file. — An employee who objects to material in his file may place in his file a statement relating to the material he considers to be inaccurate or misleading. An employee who objects to material in his file because he considers it inaccurate or misleading may seek the removal of such material from his file in accordance with the grievance procedure of that department, including appeal to the State Personnel Commission. (1975, c. 257, s. 1; c. 667, s. 2.)

Editor's Note. — The 1975 amendment, effective Feb. 1, 1976, substituted "Commission" for "Board" in the second sentence.

Because of the postponed effective date of the

1975 amendment, it was not given effect in this section as set out in the text in the 1975 Cumulative Supplement, but was stated in a note. The amended section is therefore set out in this 1976 Interim Supplement.

§ 126-26. Rules and regulations. — The State Personnel Commission shall prescribe such rules and regulations as it deems necessary to implement the provisions of this Article. (1975, c. 257, s. 1; c. 667, s. 2.)

Editor's Note. — The 1975 amendment, effective Feb. 1, 1976, substituted "Commission" for "Board."

Because of the postponed effective date of the 1975 amendment, it was not given effect in this

section as set out in the text in the 1975 Cumulative Supplement, but was stated in a note. The amended section is therefore set out in this 1976 Interim Supplement.

Chapter 128.

Offices and Public Officers.

Article 3.

Retirement System for Counties, Cities and Towns.

Sec.
128-21. Definitions.
128-27. Benefits.
128-30. Method of financing.

ARTICLE 3.

Retirement System for Counties, Cities and Towns.

§ 128-21. Definitions. — The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(5) "Average final compensation" shall mean the average annual compensation of a member during the four consecutive calendar years of creditable service producing the highest such average.

(1975, 2nd Sess., c. 983, s. 125.)

Editor's note. -

The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "four" for "five" near the middle of subdivision (5).

As the rest of the section was not changed by

the amendment, only the introductory paragraph and subdivision (5) are set out.

Applied in Pritchett v. Clapp, 288 N.C. 329, 218 S.E.2d 406 (1975).

§ 128-27. Benefits.

(b4) Service Retirement Allowances of Members Retiring on or after July 1, 1973, but prior to July 1, 1976. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1973, but prior to July 1, 1976, 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 one-quarter percent (1½%) of the portion of his average final compensation not in excess of fifty-six hundred dollars (\$5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars (\$5,600), multiplied by the number of years of his analytically admired. by the number of years of his creditable service.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his service 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 competion 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, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b5) Service Retirement Allowances of Members Retiring on or after July 1, - Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1976, 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 one-half percent (11/2%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday and prior to his completion of 30 or more years of service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (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, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided

by G.S. 128-27(b).

(t) Increases in Benefits to Those Persons on Disability Retirement Who Were Retired prior to July 1, 1971. — From and after July 1, 1975, the monthly benefits to members who commenced receiving disability benefits prior to July 1, 1965, shall be increased one percent (1%) thereof for each year by which the member retired prior to age 65 years; the monthly benefits to members who commenced receiving disability benefits after June 30, 1965, and before July 1, 1971, shall be increased by five percent (5%) thereof. These increases shall be calculated before monthly retirement allowances as of June 30, 1975, have been increased to the extent provided in the preceding provisions of this Chapter. (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.)

Editor's note.

The 1975, 2nd Sess., amendment, effective July 1, 1976, inserted "but prior to July 1, 1976"

in the catchline and in the introductory paragraph to subsection (b4), added subsection (b5) and substituted "June 30, 1965" for "June 30, 1963" near the middle of subsection (t).

As the rest of the section was not changed by the amendment, only subsections (b4), (b5), and (t) are set out.

This Article specifically provides for both service retirement benefits and disability benefits which are not limited to disability resulting from injuries sustained in the performance of police duties. Pritchett v. Clapp, 288 N.C. 329, 218 S.E.2d 406 (1975).

For construction of act establishing city policemen's pension and disability fund, which incorporated this Article, see Pritchett v. Clapp, 288 N.C. 329, 218 S.E.2d 406 (1975).

§ 128-30. Method of financing.
(b) Annuity Savings Fund. — The annuity savings fund shall be a fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Contributions to and payments from the annuity

savings fund shall be made as follows:

(1) Prior to July 1, 1951, each participating employer shall cause to be deducted from the salary of each member of each and every payroll of such employer for each and every payroll period four per centum (4%) of his earnable compensation. On and after such date the rate so deducted shall be five per centum (5%) in the case of a Class A member or a Class C member, and four per centum (4%) in the case of a Class B member; provided, however, that with respect to any member who is covered under the Social Security Act in accordance with the agreement entered into during 1955 in accordance with the provisions of Article 2 of Chapter 135 of Volume 3B of the General Statutes, as amended, such deduction shall, commencing with the first day of the period of service with respect to which such agreement is effective, be at the rate of three per centum (3%) of the part of his actual compensation not in excess of the amount taxable to him under the Federal Insurance Contributions Act as from time to time in effect plus five per centum (5%) of the part of his actual compensation not so taxable; provided that in the case of any member so eligible and receiving compensation from two or more employers such deductions may be adjusted under such rules as the Board of Trustees may establish so as to be as nearly equivalent as practicable to the deductions which would have been made had the member received all of such compensation from one employer. Notwithstanding the foregoing, the Board of Trustees may in its discretion cause such portion as it may determine of deductions made between January 1, 1955, and December 1, 1955, to be transferred into the contribution fund established under G.S. 135-24, such amounts so transferred shall in that event be deemed to be taxes contributed by employees as required under Article 2 of Chapter 135 of Volume 3B of the General Statutes, as amended, and shall be in lieu of contributions otherwise payable in the same amount as so required. In determining the amount earned by a member whose compensation is derived partly or wholly from fees, such member shall submit a sworn statement to his employer monthly, or at least quarterly, each year as to the amount of fees received by such member as compensation during the period, and each month, or at least quarterly, such member shall pay to his employer the proper per centum of such compensation received from fees, which shall be considered as deductions by the employer as provided in subdivisions (1) and (2) of this subsection.

Notwithstanding the foregoing, effective July 1, 1965, with respect to the period of service commencing on July 1, 1965, and ending

December 31, 1965, the rates of such deductions shall be four per centum (4%) of the portion of compensation not in excess of forty-eight hundred dollars (\$4,800) and six per centum (6%) of the portion of compensation in excess of forty-eight hundred dollars (\$4,800); and with respect to the period of service commencing January 1, 1966, and ending June 30, 1967, the rate of such deduction shall be four per centum (4%) of the portion of compensation not in excess of fifty-six hundred dollars (\$5,600) and six per centum (6%) of the portion of compensation in excess of fifty-six hundred dollars (\$5,600); and with respect to the period of service commencing July 1, 1967, and ending June 30, 1976, the rate of such deductions shall be five per centum (5%) of the portion of compensation not in excess of five thousand six hundred dollars (\$5,600) and six per centum (6%) of the portion of compensation in excess of five thousand six hundred dollars (\$5,600). Such rates shall apply uniformly to all members of the Retirement System, irrespective of class.

Notwithstanding the foregoing, effective July 1, 1976, with respect to compensation paid on and after July 1, 1976, the rate of such deductions shall be six per centum (6%) of the compensation received by any member. Such rates shall apply uniformly to all members of the

retirement system, irrespective of class.

(2) The deductions provided for herein shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to the benefits provided under this Article. The employer shall certify to the Board of Trustees on each and every payroll or in such other manner as the Board of Trustees may prescribe, the amounts to be deducted; and each of said amounts shall deducted, and when deducted shall be paid into said annuity savings fund, and shall be credited, together with regular interest thereon to the individual account of the member from whose compensation said deduction was made.

(3) The accumulated contributions of a member drawn by him, or paid to his estate or to his designated beneficiary in event of his death as provided in this Article, shall be paid from the annuity savings fund. Upon the retirement of a member his accumulated contributions shall be transferred from the annuity savings fund to the annuity reserve

fund

(4) Subject to the approval of the Board of Trustees, any member who is granted by his employer a leave of absence for the sole purpose of acquiring knowledge, talents, or abilities which are, in the opinion of the employer, expected to increase the efficiency of the services of the member to his or her employer, may make monthly contributions to the Retirement System on the basis of the salary or wage such member was receiving at the time such leave of absence was granted.

(1975, 2nd Sess., c. 983, ss. 129, 130.)

Editor's note. -

Editor's note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, inserted "and ending June 30, 1976" near the end of the first sentence of the second paragraph of subdivision (b)(1) and added the third paragraph of that subdivision.

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

1976 INTERIM SUPPLEMENT

Chapter 131A. Health Care Facilities Finance Act.

Editor's Note. —
The amendment proposed by Session Laws
1975, c. 641, adding § 8 of Article V of the

Constitution of North Carolina, was adopted by vote of the people at the election held March 23, 1976.

Chapter 132.

Public Records.

§ 132-1. "Public records" defined.

Applications for Licensure as Speech and Language Pathologists and Audiologists Are Public Records. — See opinion of Attorney General to Mariana Newton, PhD., Chairman, Board of Examiners for Speech and Language Pathologists and Audiologists, 45 N.C.A.G. 188 (1976).

Chapter 134A. Youth Services.

Article 1.

Commission of Youth Services in Department of Human Resources.

Sec.

134A-5. Organization and meetings of Commission.

ARTICLE 1.

Commission of Youth Services in Department of Human Resources.

§ 134A-5. Organization and meetings of Commission. — The Commission shall have a chairman and a vice-chairman who shall be elected by and from the voting membership of the Commission by majority vote. The chairman and the vice-chairman shall serve at the pleasure of the Commission and a majority of the voting members of the Commission may call for a new election for either office. The first election of a chairman and vice-chairman shall be held as soon as possible after July 1, 1976, and the terms of the present chairman and vice-chairman shall end with the election of successors to their offices. A new election shall be held within 30 days after a majority of the voting members of the Commission have called for a new election.

The Commission shall meet quarterly and may hold special meetings at any time and place within the State on call of the chairman or upon written request

of a majority of the voting members.

A majority of the voting members of the Commission shall constitute a quorum for a meeting. (1975, c. 742, s. 1; 1975, 2nd Sess., c. 983, s. 41.)

Editor's Note. — The 1975, 2nd Sess., amendment, effective July 1, 1976, rewrote the first paragraph, which formerly provided for a chairman to be appointed by the Governor and a vice-chairman to be elected by the Commission

for a term of two years, inserted "voting" near the end of the second paragraph and substituted "voting members" for "Commission" in the third paragraph.

§ 134A-7. Powers and duties of Commission.

Editor's Note. — As to closing of the Richard T. Fountain School, see Session Laws 1975, 2nd Sess., c. 983, ss. 37 to 40.

Chapter 135.

Retirement System for Teachers and State Employees; Social Security.

Article 1.

Retirement System for Teachers and State Employees.

Sec.

135-4. Creditable service.

135-5. Benefits.

ARTICLE 1.

Retirement System for Teachers and State Employees.

§ 135-4. Creditable service.

(m) Repealed by Session Laws 1975, c. 875, s. 47, effective July 1, 1975. (1941, c. 25, s. 4; 1943, cc. 200, 783; 1945, c. 797; 1947, c. 575; 1949, c. 1056, ss. 2, 4; 1953, c. 1050, s. 3; 1959, c. 513, s. 1½; 1961, c. 516, s. 3; c. 779, s. 2; 1963, c. 1262; 1965, c. 780, s. 1; c. 924; 1967, c. 720, s. 3; 1969, c. 1223, ss. 3, 4; 1971, c. 117, ss. 9, 10; c. 993; 1973, c. 241, s. 2; c. 242, s. 1; c. 667, s. 2; c. 737, s. 1; c. 816, s. 1; c. 1063; c. 1311, ss. 1-5; 1975, c. 205, s. 2; c. 875, s. 47.)

Editor's Note. -

The second 1975 amendment, effective July 1, (k) and (l). 1975, repealed subsection (m), relating to payment of the employer portion of the annual

cost to fund the provisions of subsections (f)6,

As the other subsections were not changed by the amendment, they are not set out.

§ 135-5. Benefits. (u) Repealed by Session Laws 1975, c. 875, s. 47, effective July 1, 1975. (1975, c. 875, s. 47.)

Editor's Note. -

The fourth 1975 amendment, effective July 1, 1975, repealed subsection (u), relating to payment of the employer portion of the annual cost to fund the provisions of subsections (s) and

As the other subsections were not changed by the amendment, they are not set out.

Chapter 136.

Roads and Highways.

Article 1.

Organization of Board of Transportation.

136-14.2. Division engineer to manage Assembly. personnel.

committees of General

Article 2A.

Department of Transportation.

136-44.2A. Reports to appropriations

ARTICLE 1.

Organization of Board of Transportation.

§ 136-14.2. Division engineer to manage personnel. — Except for general departmental policy applicable to all of the State the division engineer shall have authority over all divisional personnel matters and over Department employees in his division making personnel decisions. (1975, 2nd Sess., c. 983, s. 92.)

Editor's Note. - Session Laws 1975, 2nd Sess., c. 983, s. 152, makes this section effective July 1, 1976.

ARTICLE 2.

Powers and Duties of Board of Transportation.

§ 136-18. Powers of Board of Transportation.

The Board of Transportation has the statutory authority to determine the nature and extent of the property required for its

purposes. Frink v. North Carolina Bd. of Transp., 27 N.C. App. 207, 218 S.E.2d 713 (1975).

§ 136-29. Adjustment of claims.

Recovery, if any, under the contract, etc. -In accord with 2nd paragraph in original. See Ray D. Lowder, Inc. v. North Carolina State Hwy. Comm'n, 26 N.C. App. 622, 217 S.E.2d 682

In accord with 3rd paragraph in original. See Blankenship Constr. Co. v. North Carolina State Hwy. Comm'n, 28 N.C. App. 593, 222 S.E.2d 452 (1976).

Strict compliance with contract provisions is vital prerequisite for recovery of additional compensation based on altered work, changed conditions or extra work. Blankenship Constr. Co. v. North Carolina State Hwy. Comm'n, 28 N.C. App. 593, 222 S.E.2d 452 (1976).

Failure to Comply with Notice and

Record-Keeping Requirements Is Bar to Recovery. - The State should not be obligated to pay a claim for additional compensation unless it is given a reasonable opportunity to insure that the claim is based on accurate determinations of work and cost, and contract notice and record-keeping requirements constitute reasonable protective measures, so that a contractor's failure to adhere to the requirements is necessarily a bar to recovery for additional compensation. Blankenship Constr. Co. v. North Carolina State Hwy. Comm'n 28 N.C. App. 593, 222 S.E.2d 452 (1976).

Stated in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

ARTICLE 2A.

Department of Transportation.

§ 136-44.2A. Reports to appropriations committees of General Assembly. — In each year that an appropriation bill is considered by the General Assembly, the Department of Transportation shall make a report to the appropriations committee of each House on all services provided by the Department to the public for which a fee is charged. The report shall include an analysis of the cost of each service and the fee charged for that service. (1975, c. 875, s. 8.)

Editor's Note. — Session Laws 1975, c. 875, s. 64, makes the act effective July 1, 1975.

ARTICLE 9.

Condemnation.

§ 136-111. Remedy where no declaration of taking filed; recording memorandum of action.

Legal Remedy When Injunction Unavailable. — Where plaintiffs fail to show substantial or irreparable harm which would entitle them to an injunction prohibiting the State Board of Transportation from removing the remaining portion of an old causeway which is plaintiffs' only means of vehicular ingress to

and egress from their property, plaintiffs may resort to their legal remedy under this section to recover just compensation for the taking of their property rights. Frink v. North Carolina Bd. of Transp., 27 N.C. App. 207, 218 S.E.2d 713 (1975).

§ 136-112. Measure of damages.

Applied in Board of Transp. v. Harvey, 28 N.C. App. 327, 220 S.E.2d 815 (1976).

Chapter 143.

State Departments, Institutions and Commissions.

Article 1.

Executive Budget Act.

Sec. 143-34.5. Budget transfers.

Article 21.

Water and Air Resources.

Part 2. Regulation of Use of Water Resources.

143-215.20. Rules and regulations.

Article 21A.

Oil Pollution Control.

Part 3. Oil Terminal Facilities.

143-215.97. Recommendations: regulations.

Article 22.

State Ports Authority.

143-224. Jurisdiction of the Authority;

Sec.

application of Chapter 20; appointment and authority of special police.

Article 52.

Pesticides Board.

Part 5. General Provisions.

143-463. Procedures for adoption of certain rules and regulations; publication of rules and regulations.

ARTICLE 1.

Executive Budget Act.

§ 143-34.5. Budget transfers. — Every State department, institution, and agency shall provide to the chairman of the legislative commission on governmental operations a copy of every approved budget transfer which permits the expenditure of funds for a purpose for which the General Assembly made no appropriation. (1975, 2nd Sess., c. 983, s. 124.)

Editor's Note. — Session Laws 1975, 2nd Sess., c. 983, s. 152, makes this section effective July 1, 1976.

ARTICLE 3.

Purchases and Contracts.

§ 143-48. Purpose and implementation.

Editor's Note. -

Session Laws 1975, 2nd Sess., c. 983, s. 122, provides: "Each State department, institution, or agency shall make every reasonable effort to assure that purchase orders will be limited to goods necessary to operate in the fiscal year in which the appropriation for such purchase is

authorized. Each State department, institution, or agency shall furnish the State Auditor and Department of Administration, by July 31 of each year, a statement of all obligations outstanding at the end of the previous fiscal year."

ARTICLE 7.

Inmates of State Institutions to Pay Costs.

§ 143-117. Institutions included.

This Article is applicable to the criminally insane as well as to the civilly committed. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C.

App. 479, 219 S.E.2d 660 (1975).

Policy. - The policy stated by the General Assembly is that all persons admitted to State hospitals must pay the actual cost of their care, treatment and maintenance. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

This Article Is Constitutional. — See State ex rel. Dorothea Dix. Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

Adequate Standards and No Impermissible

Delegation of Power. - This Article sets forth adequate standards from which the various boards of trustees or directors of the institutions can ascertain the charges against a patient and is not an impermissible delegation of power to the hospital board. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660

The cost charged by this Article is not characteristic of a tax at all. It is compensation for services rendered the respective inmates or patients by the hospital. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

§ 143-118. Governing board to fix cost and charges.

Policy. - The policy stated by the General Assembly is that all persons admitted to State hospitals must pay the actual cost of their care, treatment and maintenance. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

§ 143-119. Payments.

Equitable Enforcement Options. — It is clear from a complete reading of this section that dismissal from an institution for failure to pay is only one of the options created by the statute

to enforce payment as equitably as possible. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

§ 143-121. Action to recover costs.

Applied in State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

ARTICLE 8.

Public Building Contracts.

§ 143-135.3. Procedure for settling controversies arising from contracts; civil actions on disallowed claims.

Stated in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

ARTICLE 9.

Building Code Council and Building Code.

§ 143-138. North Carolina State Building Code.

National Electrical Code as Statutory, etc.— See Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E. 2d 73 (1975).

National Electrical Code Has Force, etc. — The National Electrical Code has the force and effect of law and criminal sanctions are provided for its violation. Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975).

And Violation Thereof, etc. -

In accord with 1st paragraph in original. See Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975).

ARTICLE 21.

Water and Air Resources.

Part 2. Regulation of Use of Water Resources.

§ 143-215.20. Rules and regulations. — The Environmental Management Commission may adopt and modify from time to time rules and regulations consistent with the provisions of this Part to implement the provisions of this Part. All such rules and regulations, and modifications thereof, shall be filed with the Attorney General as required by Chapter 150A of the General Statutes. (1967, c. 933, s. 10; 1973, c. 1262, s. 23; 1975, 2nd Sess., c. 983, s. 72.)

Editor's Note. —

The 1975, 2nd Sess., amendment substituted, in the second sentence, "Attorney General as required by Chapter 150A of the General

Statutes" for "Secretary of State as required by Article 18 of Chapter 143 of the General Statutes."

ARTICLE 21A.

Oil Pollution Control.

Part 3. Oil Terminal Facilities.

§ 143-215.97. Recommendations; regulations.

(b) The Secretary of Natural and Economic Resources may adopt and modify from time to time rules and regulations consistent with this Part to implement the provisions of this Part. All such rules and regulations and modifications thereof, shall be filed with the Attorney General as required by Chapter 150A of the General Statutes. (1973, c. 534, s. 1; 1975, 2nd Sess., c. 983, s. 82.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted, at the end of subsection (b), "Attorney General as required by Chapter 150A of the General Statutes" for "Secretary of

State as required by Article 18 of Chapter 143 of the General Statutes."

As subsection (a) was not changed by the amendment, it is not set out.

C. M. Levens

ARTICLE 22.

State Ports Authority.

§ 143-224. Jurisdiction of the Authority; application of Chapter 20; appointment and authority of special police.

(c) The North Carolina State Ports Authority is hereby authorized to make such reasonable rules, regulations, and adopt such additional ordinances with respect to the use of the streets, alleys, driveways and to the establishment of parking areas on the properties of the Authority and relating to the safety and welfare of persons using the property of the Authority. All rules, regulations and ordinances adopted pursuant to the authority of this subsection shall be recorded in the proceedings of the Authority and printed and copy of such rules, regulations and ordinances shall be filed in the office of the Attorney General of North Carolina and the Authority shall cause to be posted, at appropriate places on the properties of the Authority, notice to the public of applicable rules, regulations and ordinances as may be adopted under the authority of this subsection. Any person violating any such rules, regulations or ordinances shall, upon conviction thereof, be guilty of a misdemeanor and shall be punished by a fine of not exceeding fifty dollars (\$50.00) or imprisonment not to exceed 30 days.

(1975, 2nd Sess., c. 983, s. 83.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "Attorney General" for "Secretary of State" near the middle of the

second sentence of subsection (c).

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

ARTICLE 33B.

Meetings of Governmental Bodies.

§ 143-318.1. Public policy.

Exceptions to the open meetings law should be strictly construed. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Voting by secret ballot cannot be reconciled with "openly" under this section. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Voting for a person to fill a vacancy on a

board is "actions" under this section. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

29 N.C. App. 37, 223 S.E.2d 580 (1976).

Burden on Those Excepting. — Those seeking to come within the exceptions to the open meetings law should have the burden of justifying their action. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

§ 143-318.2. All official meetings open to the public.

Reasonable Public Notice. — In the absence of statutory provisions for notice, reasonable public notice of a board of education's meetings should be given, taking into consideration the

urgency of the matter necessitating the meeting. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

§ 143-318.4. Exceptions.

A board of education cannot evade the provisions of statutes requiring its meetings to

be open to the public merely by resolving itself into a committee of the whole. News & Observer

Publishing Co. v. Interim Bd. of Educ., 29 N.C.

App. 37, 223 S.E.2d 580 (1976).

Failure to come within Exception (7). — Defendants, members of a board of education, failed to show that their closed session came within the exception provided by subdivision (7) of this section, where, prior to the closed session, eight names were placed in nomination to fill a

vacant position on the board, and following the passage of a motion authorizing same, the members of the board were appointed a committee of the whole to study and investigate the names recommended. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

§ 143-318.6. Mandamus and injunctive relief.

Cited in News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

ARTICLE 52.

Pesticides Board.

Part 5. General Provisions.

§ 143-463. Procedures for adoption of certain rules and regulations;

publication of rules and regulations.

(e) All official acts of the Board which have or are intended to have general application effect shall be incorporated either in the Board's official regulations (applying and interpreting this Article), or in its rules of procedure. All such regulations and rules shall upon adoption thereof by the Board be printed (or otherwise duplicated), and a duly certified copy thereof shall immediately be filed with the Attorney General. One copy of each such action shall at the same time be mailed to all persons then on the mailing list, and additional copies shall at all times be kept at the office of the Board in sufficient numbers to satisfy all reasonable requests therefor. (1971, c. 832, s. 1; 1975, 2nd Sess., c. 983, s. 84.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "Attorney General" for "Secretary of State" at the end of the second sentence in subsection (e) and deleted the former last sentence of subsection (e), which required

the Board to codify its regulations and rules and from time to time to bring its codifications up to date.

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

Chapter 143B.

Executive Organization Act of 1973.

Article 3.

Department of Human Resources.

Part 1. General Provisions

143B-139.1. Department of Human Resources - head - to establish rules and regulations applicable to

local human resource agencies. 143B-139.2. Department of Human Resources head - requests for

grants-in-aid from non-State agencies.

ARTICLE 3.

Department of Human Resources.

Part 1. General Provisions.

§ 143B-137. Department of Human Resources — duties.

Applied in Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

§ 143B-139.1. Department of Human Resources — head — to establish rules and regulations applicable to local human resource agencies. — The Secretary of the Department of Human Resources is authorized to establish rules and regulations applicable to local human resource agencies for the purpose of program evaluation, fiscal audits, and collection of third-party payments. (1975, c. 875, s. 45.)

Editor's Note. — Session Laws 1975, c. 875, s. 64, makes the act effective July 1, 1975.

§ 143B-139.2. Department of Human Resources — head — requests for grants-in-aid from non-State agencies. — It is the intent of this General Assembly that non-State health and welfare agencies submit their appropriation requests for grants-in-aid through the Secretary of the Department of Human Resources for recommendations to the Governor and the Advisory Budget Commission and the General Assembly, and that agencies receiving these grants, at the request of the Secretary of the Department of Human Resources, provide a postaudit of their operations that has been done by a certified public accountant. (1975, c. 875, s. 16.)

Editor's Note. — Session Laws 1975, c. 875, s. 64, makes the act effective July 1, 1975.

Part 6. Social Services Commission.

§ 143B-153. Social Services Commission — creation, powers and duties.

Applied in Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

Chapter 146. State Lands.

SUBCHAPTER II. ALLOCATED STATE LANDS.

Article 7.

Dispositions.

Sec. 146-30. Application of net proceeds.

SUBCHAPTER II. ALLOCATED STATE LANDS.

ARTICLE 7.

Dispositions.

§ 146-30. Application of net proceeds. — The net proceeds of any disposition made in accordance with this Subchapter shall be handled in accordance with the following priority: First, in accordance with the provisions of any trust or other instrument of title whereby title to such real property was heretofore acquired or is hereafter acquired; second, as provided by any other act of the General Assembly; third, the net proceeds shall be deposited with the State

For the purposes of this Subchapter, the term "net proceeds" means the gross amount received from the sale, lease, rental, or other disposition of any State

lands, less

(1) Such expenses incurred incident to that sale, lease, rental, or other disposition as may be allowed under rules and regulations adopted by

the Governor and approved by the Council of State;

(2) Amounts paid pursuant to G. S. 105-296.1, if any; and

(3) A service charge to be paid into the State Land Fund.

The amount or rate of such service charge shall be fixed by rules and regulations adopted by the Governor and approved by the Council of State, but as to any particular sale, lease, rental, or other disposition, it shall not exceed ten percent (10%) of the gross amount received from such sale, lease, rental, or other disposition. Notwithstanding any other provision of this Subchapter, the net proceeds derived from the sale of land or products of land owned by or under the supervision and control of the Wildlife Resources Commission, or acquired or purchased with funds of that Commission, shall be paid into the Wildlife Resources Fund. Provided, however, the net proceeds derived from the sale of land or timber from land owned by or under the supervision and control of the Department of Agriculture shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Agriculture, to be used for such specific capital improvement projects or other purposes as are approved by the Director of the Budget and the Advisory Budget Commission. (1959, c. 683, s. 1; 1975, 2nd Sess., c. 983, s. 30.)

Editor's Note.

The 1975, 2nd Sess., amendment, effective July 1, 1976, deleted, at the end of the first paragraph, a provision directing the proceeds to

be deposited in a capital improvement account to the credit of the State agency at whose request the disposition was approved, to be used for purposes approved by the Director of the

Budget and the Advisory Budget Commission. The amendment also added the proviso at the end of the section.

Session Laws 1975, 2nd Sess., c. 983, s. 30, which amended this section, provides: "Nothing in this section shall limit present authorization in G.S. 146-30 for the Wildlife Resources Commission's use of the net proceeds derived

from the sale of land or products of land owned or under the supervision and control of the Commission. Also, nothing in the section shall limit the disposition of proceeds of sale under newly enacted section 11 of 1971 Session Laws Chapter 723 which is specifically exempt from the provisions of G.S. 146-30."

SUBCHAPTER IV. MISCELLANEOUS.

ARTICLE 17.

Title in State.

§ 146-79. Title presumed in the State: tax titles.

Defendants must carry the burden, etc. — In suits for land in which the State or a State agency is a party, the burden of proof is on the party seeking to prove title against the State. Taylor v. Johnston, 27 N.C. App. 186, 218 S.E.2d 500 (1975).

Chapter 147. State Officers.

Article 4.

State Officers

Treasurer.

Secretary of State.

147-35. Salary of Secretary of State. 147-45. Distribution of copies of State publications. Sec. 147-65. Salary of State Treasurer.

Article 5.

Auditor.

147-55. Salary of Auditor.

ARTICLE 4.

Secretary of State.

§ 147-35. Salary of Secretary of State. — The salary of the Secretary of State shall be thirty-two thousand five hundred forty-four dollars (\$32,544) a year, payable monthly. (1879, c. 240, s. 6; 1881, p. 632, res.; Code, s. 3724; Rev., s. 2741; 1907, c. 994; 1919, c. 247, s. 2; C. S., s. 3863; Ex. Sess. 1920, c. 49, s. 4; 1921, c. 11, s. 1; 1931, c. 277; 1933, c. 46; 1935, c. 304; 1941, c. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 1; 1967, c. 1130; c. 1237, s. 1; 1969, c. 1214, s. 1; 1971, c. 912, s. 1; 1973, c. 778, s. 1; 1975, 2nd Sess., c. 983, s. 14.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective

July 1, 1976, increased the salary from \$31,000 to \$32,544.

§ 147-45. Distribution of copies of State publications. — The Secretary of State (and the Administrative Officer of the Courts, with respect to Appellate Division Reports) shall, at the State's expense, as soon as possible after publication, distribute such number of copies of the Session Laws, and Senate and House Journals, to federal, State and local governmental officials, departments and agencies, and to educational institutions for instructional and exchange use, as is set out in the table below:

	Session Laws	House and Senate Journals	Appellate Division Reports
State Departments and Officials: Governor Lieutenant Governor	. 3	1 1	1 1
Auditor Treasurer Secretary of State Superintendent of Public Instruction	. 3	1 1 1	1 1 1
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Secretar	y of Revenu	ie	5	0	1
Commiss	sioner of Mo	tor Vehicles	1	0	0
Utilities	Commission		8	1	8
State Sc.	hool Commis	ssion	2	0	0
State Bo	ard of Elect	tions	2	0	0
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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.

One copy each of the Public Laws, the Public-Local Laws and the Appellate Division Reports shall be furnished the head of any department of State

government created in the future.

Five complete sets of the Public Laws, the Public-Local and Private Laws, the Senate and House Journals and the Appellate Division Reports heretofore published, insofar as the same are available and without necessitating reprinting, shall be furnished to the North Carolina College for Negroes.

One complete set of the Public Laws, Public-Local Laws, Private Laws, and the Senate and House Journals heretofore published, insofar as the same are available and without necessitating reprinting, shall be furnished to Elizabeth

City State University.

The Governor may delete from the above list, in his discretion, any

government official, department, agency or educational institution.

The office of the Attorney General shall receive from the Administrative Office of the Courts 11 copies of the Court of Appeals Reports and advance sheets of the Court of Appeals Reports at no cost to the Attorney General's office. (1941, c. 379, s. 1; 1943, c. 48, s. 4; 1945, c. 534; 1949, c. 1178; 1951, c. 287; 1953, cc. 245, 266; 1955, c. 505, s. 6; cc. 989, 990; 1957, c. 269, s. 1; cc. 1061, 1400; 1959, c. 215; c. 1028, s. 3; 1965, c. 503; 1967, c. 691, s. 54; cc. 695, 777, 1038, 1073, 1200; 1969, c. 355; c. 608, s. 1; c. 801, s. 2; c. 852, ss. 1, 2; c. 1190, s. 54; c. 1285; 1973, c. 476, ss. 48, 84, 128, 138, 143, 193; c. 507, s. 5; c. 731, s. 1; c. 762; c. 798, ss. 1, 2; c. 1262, ss. 10, 38; 1975, c. 19, s. 59; c. 879, s. 46; 1975, 2nd Sess., c. 983, s. 115.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective
July 1, 1976, increased the number of copies of

the Appellate Reports to be furnished to North Carolina Central University and inserted the provision as to Campbell College.

ARTICLE 5.

Auditor.

§ 147-55. Salary of Auditor. — The salary of the State Auditor shall be thirty-two thousand five hundred forty-four dollars (\$32,544) a year, payable monthly. (1879, c. 240, s. 7; 1881, c. 213; Code, s. 3726; 1885, c. 352; 1889, c. 433; 1891, c. 334, s. 5; Rev., s. 2744; 1907, c. 830, s. 5; c. 994, s. 2; 1911, c. 108, s. 1; c. 136, s. 1; 1913, c. 172; 1919, c. 149; c. 247, s. 7; C. S., s. 3867; Ex. Sess. 1920, c. 49, s. 3; 1921, c. 11, s. 1; 1935, c. 442; 1941, c. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 1; 1967, c. 1130; c. 1237, s. 1; 1969, c. 1214, s. 1; 1971, c. 912, s. 1; 1973, c. 778, s. 1; 1975, 2nd Sess., c. 983, s. 15.)

Editor's Note. — July 1, 1976 The 1975, 2nd Sess., amendment, effective to \$32,544.

July 1, 1976, increased the salary from \$31,000 to \$32,544.

ARTICLE 6.

Treasurer.

§ 147-65. Salary of State Treasurer. — The salary of the State Treasurer shall be thirty-two thousand five hundred forty-four dollars (\$32,544) a year, payable monthly. (Code, s. 3723; 1891, c. 505; Rev., s. 2739; 1907, c. 830, s. 3; c. 994, s. 2; 1917, c. 161; 1919, c. 233; c. 247, s. 3; C. S., s. 3868; Ex. Sess. 1920, c. 49, s. 2; 1921, c. 11, s. 1; 1935, c. 249; 1941, c. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 1; 1967, c. 1130; c. 1237, s. 1; 1969, c. 1214, s. 1; 1971, c. 912, s. 1; 1973, c. 778, s. 1; 1975, 2nd Sess., c. 983, s. 16.)

Editor's Note. —
The 1975, 2nd Sess., amendment, effective
July 1, 1976, increased the salary from \$31,000
to \$32,544.

Chapter 148.

State Prison System.

ARTICLE 1.

Organization and Management.

§ 148-4. Control and custody of prisoners; authorizing prisoner to leave place of confinement.

Evidence Sufficient to Support Finding of Escape. — The testimony of the State's witness, a sergeant with the North Carolina Department of Correction assigned to the prison camp in which defendant was confined, that on the day in question defendant "was given permission to leave the unit on a Community Volunteer Leave" was sufficient to support the jury's finding, and it was not necessary, as defendant contends, that the State present evidence to show that the

Secretary of Correction, after making a determination that there was reasonable cause to believe that defendant would honor his trust, had personally authorized defendant's release to participate in the community volunteer program and had personally prescribed the precise period of time during which the defendant was permitted to be absent from the prison unit. State v. Harris, 27 N.C. App. 15, 217 S.E.2d 729, cert. denied, 288 N.C. 512, 219 S.E.2d 347 (1975).

ARTICLE 3.

Labor of Prisoners.

§ 148-30. Sentencing to public roads.

Applied in State v. Pierce, 28 N.C. App. 191, 220 S.E.2d 639 (1975).

§ 148-42. Indeterminate sentences.

Stated in Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

Cited in State v. Scales, 28 N.C. App. 509, 221 S.E.2d 898 (1976).

ARTICLE 3A.

Facilities and Programs for Youthful Offenders.

§ 148-49.2. Definitions.

Applied in State v. Worthington, 27 N.C. App. 167, 218 S.E.2d 233 (1975).

§ 148-49.4. Sentencing a youthful offender.

Trial judge must, etc. -

Before sentencing a youthful offender under any other applicable penalty provision, the judge must expressly state that he finds the defendant will not derive benefit from commitment as a "committed youthful offender," but that finding need not be accompanied by supporting reasons. State v. Worthington, 27 N.C. App. 167, 218 S.E.2d 233 (1975).

Imposition of a minimum and maximum sentence appears inconsistent with this section and \$ 148-49.8. State v. Williams, 28 N.C. App. 320, 220 S.E.2d 856 (1976).

The imposition of a minimum and maximum

sentence under this section could conceivably be inconsistent with the provisions of § 148-49.8. State v. Satterfield, 27 N.C. App. 270, 218 S.E.2d 504 (1975).

So it is error to impose a minimum as well as a maximum sentence on a youthful offender

under this section. State v. West, 27 N.C. App. 247, 218 S.E.2d 494 (1975).

Applied in State v. Scales, 28 N.C. App. 509, 221 S.E.2d 898 (1976).

§ 148-49.8. Release of youthful offenders.

The imposition of a minimum and maximum sentence appears inconsistent with § 148-49.4 and this section. State v. Williams, 28 N.C. App. 320, 220 S.E.2d 856 (1976).

The imposition of a minimum and maximum sentence under § 148-49.4 could conceivably be

inconsistent with the provisions of this section. State v. Satterfield, 27 N.C. App. 270, 218 S.E.2d 504 (1975).

ARTICLE 4.

Paroles.

§ 148-57. Rules and regulations for parole consideration.

Cited in Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974).

§ 148-58. Time of eligibility of prisoners to have cases considered.

Due Process Applicable. — Prisoner's right to consideration for parole eligibility is, at least, an aspect of liberty to which the protection of the

due process clause extends. Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974).

Chapter 150A.

Administrative Procedure Act.

Article 1.

General Provisions.

Sec. 150A-2. Definitions.

150A-3. Special provisions on licensing.

Article 2.

Rule Making.

150A-11. Special requirements.

150A-12. Procedure for adoption of rules.

150A-14. Adoption by reference.

Article 3.

Administrative Hearings.

150A-23. Hearing required; notice; intervention.

150A-27. Subpoena.

150A-36. Final agency decision.

ARTICLE 1.

General Provisions.

§ 150A-1. Scope and policy.

Cited in Nantz v. Employment Security Comm'n, 28 N.C. App. 626, 222 S.E.2d 474 (1976).

§ 150A-2. Definitions. — As used in this Chapter,
(2) "Contested case" means any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Contested cases include, but are not limited to a proceeding in which the contest of the case include, but are not limited to a proceeding in which the case include, but are not limited to a proceeding in which the case include in the case includes the case include the case includes the ited to proceedings involving rate-making, price-fixing and licensing. Contested cases shall not be deemed to include rule making, declaratory rulings, or the award or denial of a scholarship or grant.

(4) "Licensing" means any administrative action issuing, failing to issue, suspending or revoking a license. "Licensing" does not include controversies over whether an examination was fair or whether the

applicant passed the examination.

(1975, 2nd Sess., c. 983, ss. 61, 62.)

Editor's Note. - The 1975, 2nd Sess., amendment substituted "means" for "is" near the beginning of the first sentence of subdivision (2), substituted "a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing" for "specific parties are to be determined" at the end of that sentence, and substituted "declaratory rulings, or the award or denial of a scholarship or grant" for "and declaratory rulings" at the end of the third sentence of subdivision (2). The amendment also added the second sentence of subdivision (4).

As only subdivisions (2) and (4) were changed by the amendment, the other subdivisions are not set out.

§ 150A-3. Special provisions on licensing.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license. (1973, c. 1331, s. 1.)

Editor's Note. — Subsection (c) of this section As subsections (a) and (b) were not affected, is set out to correct an error in the 1975 they are not set out. Cumulative Supplement.

ARTICLE 2.

Rule Making.

§ 150A-11. Special requirements. — In addition to other rule-making

requirements imposed by law, each agency shall:

(3) With respect to all final orders, decisions, and opinions made after February 1, 1976, make available for public inspection together with all materials that were before the deciding officers at the time that the final to the formula of th order, decision, or opinion was made, except materials properly for good cause held confidential. (1973, c. 1331, s. 1.)

Editor's Note. — The introductory language As subdivisions (1) and (2) were not affected, and subdivision (3) of this section are set out to correct an error in subdivision (3) in the 1975 Cumulative Supplement.

§ 150A-12. Procedure for adoption of rules.

(f) No rule-making hearing is required for the adoption, amendment or repeal of a rule which solely describes the organization of the agency or describes forms or instructions used by an agency. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63.)

changed by the amendment, they are not set out.

Notice Provisions of Other Statutes Control over This Section. - See Opinion of Attorney

Editor's Note. — The 1975, 2nd Sess., amendment added subsection (f).

As subsections (a) through (e) were not Resources, 45 N.C.A.G. 217 (1976).

§ 150A-14. Adoption by reference. — An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by any other agency of this State or any agency of the United States or by a generally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule, it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and the rules shall state where copies of the adopted matter can be obtained and any charge therefore as of the time the rule is adopted (1973, a 1921 of 1, 1975, 2nd Secret therefor as of the time the rule is adopted. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 64.)

amendment substituted "any other agency of this State or any agency of the United States"

Editor's Note. - The 1975, 2nd Sess., for "an agency of this State or of the United States" in the first sentence.

ARTICLE 3.

Administrative Hearings.

§ 150A-23. Hearing required: notice: intervention.

(c) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given as provided in G.S. 1A-1, Rule 4(j). (1975, 2nd Sess., c. 983, s. 65.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "certified mail" for "registered mail" in three places in subsection

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

§ 150A-27. Subpoena. — An agency is hereby authorized to issue subpoenas upon its own motion or upon a written request. When such written request is made by a party in a contested case, an agency shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence, and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if, upon a hearing the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 66.)

Editor's Note. - The 1975, 2nd Sess., amendment added the last two sentences.

§ 150A-36. Final agency decision. — A final decision or order of an agency in a contested case shall be made, after review of the official record as defined in G.S. 150A-37(a), in writing and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and shall be supported by substantial evidence admissible under G.S. 150A-29(a) or 150A-30 or 150A-31. A copy of the decision or order shall be served upon each party personally or by certified mail and a

copy furnished to his attorney of record. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 67.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "certified mail" for "registered mail" in the last sentence.

ARTICLE 4.

Judicial Review.

§ 150A-45. Manner of seeking review; time for filing petition; waiver.

Hearing under § 20-25 Precluded. — A petitioner seeking judicial review of a decision of the North Carolina Driver License Medical Review Board must file such petition in the Superior Court of Wake County pursuant to this

section and may not obtain a hearing under § 20-25 in the superior court of the county in which he resides. Cox v. Miller, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

ARTICLE 5.

Publication of Administrative Rules.

§ 150A-59. Filing of rules.

Rules Effective Before January 31, 1976, Are Not Enforceable until Filed. — See Opinion of Attorney General to Mr. Sam H. Long, III, Legal Counsel to the Governor, 45 N.C.A.G. 207 (1976).

Chapter 153A.

Counties.

ARTICLE 2.

Corporate Powers.

§ 153A-11. Corporate powers.

Stated in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

ARTICLE 4.

Form of Government.

Part 3. Organization and Procedures of the Board of Commissioners.

§ 153A-40. Regular and special meetings.

Stated in News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

ARTICLE 10.

Law Enforcement and Confinement Facilities.

Part 2. Local Confinement Facilities.

§ 153A-221. Minimum standards.

Applied in State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

§ 153A-225. Medical care of prisoners.

Applied in State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

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.

159-7. Short title; definitions; local act superseded; application to school administrative units.

Sec.

159-13. The budget ordinance; form, adoption, limitations, tax levy, filing.

Part 3. Fiscal Control.

159-26. Accounting system.

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 act superseded; application to school

administrative units.

(d) Except as expressly provided herein, this Article does not apply to school administrative units. The adoption and administration of budgets for the public school system and the management of the fiscal affairs of school administrative units are governed by the School Budget and Fiscal Control Act, Chapter 115, Article 9. However, this Article and the School Budget and Fiscal Control Act shall be construed together to the end that the administration of the fiscal affairs of counties and school administrative units may be most effectively and efficiently administered. (1927, c. 146, ss. 1, 2; 1955, c. 724; 1971, c. 780, s. 1; 1973, c. 474, ss. 3, 4; 1975, c. 437, s. 12; c. 514, s. 2.)

Editor's Note. -

Session Laws 1975, c. 437, s. 2, effective July

1, 1976, added subsection (d).

Because of the postponed effective date of Session Laws 1975, c. 437, subsection (d) as added by that act was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The new subsection is therefore set out in this 1976 Interim Supplement.

Session Laws 1975, c. 437, s. 18(a), contains a severability clause. Session Laws 1975, c. 437, s. 18(b), provides: "This act shall apply to pending litigation where such application is feasible and would not work an injustice."

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

§ 159-13. The budget ordinance; form, adoption, limitations, tax levy, filing.

- (b) The following directions and limitations shall bind the governing board in adopting the budget ordinance:
 - (1) The full amount estimated by the finance officer to be required for debt service during the budget year shall be appropriated.
 - (2) The full amount of any deficit in each fund shall be appropriated.

(3) A contingency appropriation shall not exceed five percent (5%) of the total of all other appropriations in the same fund, except there is no limit on contingency appropriations for public assistance programs required by Chapter 108. Each expenditure to be charged against a contingency appropriation shall be authorized by resolution of the governing board, which resolution shall be deemed an amendment to the budget ordinance setting up an appropriation for the object of expenditure authorized. The governing board may authorize the budget officer to authorize expenditures from contingency appropriations subject to such limitations and procedures as it may prescribe. Any such expenditures shall be reported to the board at its next regular meeting and recorded in the minutes.

(4) No appropriation may be made that would require the levy of a tax in excess of any constitutional or statutory limitation, or expenditures of revenues for purposes not permitted by law.

(5) The total of all appropriations for purposes which require voter approval for expenditure of property tax funds under Article V, Sec. 2(5), of the Constitution shall not exceed the total of all estimated revenues other than the property tax (not including such revenues required by law to be spent for specific purposes) and property taxes levied for such purposes pursuant to a vote of the people.

purposes pursuant to a vote of the people.

(6) The estimated percentage of collection of property taxes shall not be greater than the percentage of the levy actually realized in cash as of June 30 during the preceding fiscal year.

(7) Amounts to be realized from collection of taxes levied in prior fiscal years shall be included in estimated revenues.

(8) Repealed by Session Laws 1975, c. 514, s. 6.

(9) Appropriations made to a school administrative unit by a county may not be reduced after the budget ordinance is adopted, unless the board of education of the administrative unit agrees by resolution to a reduction, or unless a general reduction in county expenditures is required because of prevailing economic conditions.

required because of prevailing economic conditions.

(10) Appropriations made to another fund from a fund established to account for property taxes levied pursuant to a vote of the people may not exceed the amount of revenues other than the property tax available to the fund, except for appropriations from such a fund to an appropriate account in a capital reserve fund.

(11) Repealed by Session Laws 1975, c. 514, s. 6.

(12) No appropriation may be made from a public assistance fund or a separate category of expenditure maintained in accordance with Chapter 108 to any other fund or category of expenditure, as the case

may be, except in accordance with G.S. 108-57.

(13) No appropriation of the proceeds of a bond issue may be made from the capital project fund account established to account for the proceeds of the bond issue except (i) for the purpose for which the bonds were issued, (ii) to the appropriate debt service fund, or (iii) to an account within a capital reserve fund consistent with the purposes for which the bonds were issued. The total of other appropriations made to another fund from such a capital project fund account may not exceed the amount of revenues other than bond proceeds available to the account.

(14) No appropriation may be made from a utility or public service enterprise fund to any other fund than the appropriate debt service

fund unless the total of all other appropriations in the fund equal or exceed the amount that will be required during the fiscal year, as shown by the budget ordinance, to meet operating expenses, capital outlay, and debt service on outstanding utility or enterprise bonds or notes.

(15) Sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into shall be

appropriated.

(16) The sum of estimated net revenues and appropriated fund balance in each fund shall be equal to appropriations in that fund. Appropriated fund balance in a fund shall not exceed the sum of cash and investments minus the sum of liabilities, encumbrances, and deferred revenues, as those figures stand at the close of the fiscal year next preceding the budget year.

(17) No appropriations may be made from a county reappraisal reserve fund except for the purposes for which the fund was established.

(18) No appropriation may be made from a service district fund to any other fund except (i) to the appropriate debt service fund or (ii) to an appropriate account in a capital reserve fund unless the district has been abolished.

Notwithstanding subdivisions (9), (10), (12), (14), (17), or (18) of this subsection, any fund may contain an appropriation to another fund to cover the cost of (i) levying and collecting the taxes and other revenues allocated to the fund, and (ii) building maintenance and other general overhead and administrative expenses properly allocable to functions or activities financed from the fund. (1975, c. 437, ss. 13, 14; c. 514, ss. 5, 6.)

Editor's Note. -

Session Laws 1975, c. 437, s. 13, effective July 1, 1976, rewrote the last paragraph of subsection (a) of this section as enacted by Session Laws 1971, c. 780. Session Laws 1975, c. 437, s. 14, effective July 1, 1976, rewrote subdivision (9) of subsection (b) to read as set out in the text above.

Because of the postponed effective date of Session Laws 1975, c. 437, and the amendment of this section by Session Laws 1975, c. 514, the amendments in c. 437 were not given effect in

the 1975 Cumulative Supplement, but were stated in a note. Subsection (a) as amended by c. 437 is not set out in the text above, because the paragraph rewritten by c. 437 was eliminated when the subsection was rewritten by c. 514. Subsection (b) as set out above incorporates the changes made by both 1975 acts. Subdivision (9) of subsection (b) was incorrectly designated (11) in the note in the 1975 Cumulative Supplement.

Only subsection (b) is set out.

Part 3. Fiscal Control.

§ 159-26. Accounting system.

- (b) Funds Required. Each local government or public authority shall establish and maintain in its accounting system such of the following funds and ledgers as are applicable to it. The generic meaning of each type of fund or ledger listed below is that fixed by generally accepted accounting principles.
 - (1) General fund.
 - (2) Special Revenue Funds. Such funds shall be established for each function or activity financed in whole or in part by property taxes voted by the people, and for each service district established pursuant to the Municipal or County Service District Acts.
 - (3) Debt service funds.
 - (4) A Fund for Each Utility or Enterprise Owned or Operated by the Unit or Public Authority. If a water system and a sanitary sewerage

system are operated as a consolidated system, one fund may be established and maintained for the consolidated system.

- (5) Intragovernmental service funds.
 (6) Capital Project Funds. Such a fund shall be established to account for the proceeds of each bond order and for all other resources used for the capital projects financed by the bond proceeds. A unit or public authority may account for two or more bond orders in one capital projects fund, but the proceeds of each such bond order and the other revenues associated with that bond order shall be separately accounted for in the fund.
- (7) Trust and agency funds, including a fund for each special district, public authority, or school administrative unit whose taxes or special assessments are collected by the unit.

 (8) A ledger or group of accounts in which to record the details relating to the general fixed assets of the unit or public authority.

 (9) A ledger or group of accounts in which to record the details relating to

the general obligation bonds and notes and other long-term obligations

In addition, each unit or public authority may establish and maintain any other funds it considers advisable and shall establish and maintain any other funds required by other statutes or by State or federal regulations.

(1975, c. 514, s. 16.)

Editor's Note. -

Session Laws 1975, c. 514, s. 16, amended subsection (b) of this section as rewritten by Session Laws 1975, c. 514, s. 11. The amendment inserted "and" preceding "for each service" in subdivision (2), deleted "and as required by Chapter 115" at the end of subdivision (2), deleted "A unit may combine the school debt service fund required by Chapter 115 with the units general debt service fund" in subdivision (3) and substituted "public authority, or school administrative unit" for "or public authority" in subdivision (7).

Session Laws 1975, c. 514, s. 16, was made effective at the same time as the amendments made by Session Laws 1975, c. 437, to Chapter 115. Chapter 437 was made effective July 1, 1976.

Because of the postponed effective date of the amendment in Session Laws 1975, c. 514, s. 16, subsection (b) as amended was not set out in the text in the 1975 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1976 Interim Supplement.

Only subsection (b) is set out.

1976 INTERIM SUPPLEMENT

Chapter 159A.

Pollution Abatement and Industrial Facilities Financing Act.

Editor's Note. —
The amendment proposed by Session Laws
1975, c. 826, was adopted by vote of the people

at the election held March 23, 1976. See N.C. Const., Art. V, § 9.

GENERAL STATUTES OF NORTH CAROLINA

Chapter 159C.

Industrial and Pollution Control Facilities Financing Act.

Editor's Note. —
The amendment proposed by Session Laws
1975, c. 826, was adopted by vote of the people

at the election held March 23, 1976. See N.C. Const., Art. V, § 9.

Chapter 160A.

Cities and Towns.

ARTICLE 8.

Delegation and Exercise of the General Police Power.

§ 160A-174. General ordinance-making power.

Stricter Local Dog Ordinance. — A town ordinance dealing with dogs running at large was not inconsistent with § 106-381. The statute is designed to provide minimum protection against vicious dogs in all parts of the State — rural, urban, small villages and large cities. It stands to reason that with more concentrated population, cities are justified in adopting stricter regulations for dogs, and a city is authorized to require "a higher standard of conduct or condition" with respect to the keeping of dogs within its corporate limits than

is required by § 106-381 for the State generally. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Federal Court Abstention. — In the absence of any showing that the obvious method, detailed in this section, for testing preemption and securing a definitive ruling in the State courts cannot be pursued with full protection to the plaintiffs' claim, the federal court will stay its hand. Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

ARTICLE 10.

Special Assessments.

§ 160A-233. Enforcement of assessments; interests; foreclosure; limitations.

Applied in City of Greensboro v. Harris, 27 N.C. App. 585, 219 S.E.2d 537 (1975).

ARTICLE 13.

Law Enforcement.

§ 160A-288. Law-enforcement officers of one political subdivision to assist officers of another political subdivision upon request.

"Emergency" May Include Presidential Visit, Parade or Fair. — See opinion of Attorney General to Mr. Larry D. Jones, Legal Advisor, Department of Public Safety, 45 N.C.A.G. 219 (1976).

ARTICLE 19.

Planning and Regulation of Development.

Part 3A. Historic Districts.

§ 160A-395. Exercise of powers under this Part by counties as well as cities; designation of historic districts.

Historic District Zoning Is Inapplicable to State Property. — See opinion of Attorney General to The Honorable James C. Green, Speaker, House of Representatives, and The Honorable John T. Henley, President Pro Tempore, Senate, General Assembly of North Carolina, 45 N.C.A.G. 191 (1976). Part 3B. Historic Properties Commissions.

§ 160A-399.2. Appointment or designation of historic properties commission.

Historic District Zoning Is Inapplicable to State Property. — See opinion of Attorney General to The Honorable James C. Green, Speaker, House of Representatives, and The Honorable John T. Henley, President Pro Tempore, Senate, General Assembly of North Carolina, 45 N.C.A.G. 191 (1976).

Chapter 163.

Elections and Election Laws.

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

ARTICLE 18A.

Presidential Preference Primary Act.

§ 163-213.3. Conduct of election.

Seventeen Year Olds Whose 18th Birthdays Will Be Reached Prior to the Presidential General Election in November, 1976, May Vote in the N.C. Presidential Preference Primary Election. — See opinion of Attorney General to The Honorable Patricia S. Hunt, Member, House of Representatives, N.C. General Assembly, 45 N.C.A.G. 205 (1976).

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SUBCRAPTER VI. CONDUCT OF PRIMARIES AND relegious

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8 163-213.3. Conduct of election.

Sevention Year Olds Whose Id'h Birthdays Will Be Reached Prior to the Presidential General Election in November, 1976 May Vote in the M.C. Praddential Preference Primary Flection — See opinion of Attorney General to

Anna Marche Patricie S. Hant, Member, House Boroccale Representatives, N.C. General Assembly, 45 M.C.A.U. 205 (1978).

Constitution of North Carolina

Article V. Finance.

Sec.

8. Health care facilities.

9. Capital projects for industry.

ARTICLE I

DECLARATION OF RIGHTS

Sec. 2. Sovereignty of the people.

All power which is not limited by the Constitution inheres in the people. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Acts Legal Unless Prohibited. — An act of the General Assembly is legal when the Constitution contains no prohibition against it. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Sec. 6. Separation of powers.

Legislative Change of Court Jurisdiction. — The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Sec. 8. Representation and taxation.

Cited in In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

Exchange of Land by Board of Education.

— There is nothing in the Constitution which prohibits the board of education from exchanging land which it owns for other land for school purposes. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Sec. 19. Law of the land; equal protection of the laws.

I. GENERAL CONSIDERATION.

"Due process" has a dual significance, etc. —

In accord with original. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

In substantive law, due process, etc. -

In accord with original. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

"Law of the Land" Has Same Meaning, etc. —

The term "law of the land" as used in this section is synonymous with "due process of law" as used in the Fourteenth Amendment to the federal Constitution. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Scope of Police Power of State, etc. -

The State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety and general welfare of society. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Validity Depends upon Reasonable Relation, etc. —

In accord with 3rd paragraph in 1975 Cum. Supp. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The equal protection clause of both the United States and the North Carolina Constitutions imposes upon law-making bodies the requirement that legislative classifications be based on differences that are reasonably related to the purposes of the act in which such are found and are not purely arbitrary. Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

Legislative classifications will be upheld provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination and has some reasonable relation to the public peace, welfare and safety. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

When a special class of persons is singled out by the legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The traditional substantive due process test

has been that a statute must have a rational relation to a valid State objective. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real or substantial relation to the public health, morals, order or safety or the general welfare. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Notice and Opportunity to be Heard Required. —

In accord with 4th paragraph in original. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

If a statute is so loosely and obscurely drawn as to be incapable of enforcement, it must be held void. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sovereign immunity is not a defense to action against the State for breach of contract entered into by the State's authorized officers and agencies, since to deny the party who has performed his obligation under a contract the right to sue the State when it defaults is to take his property without compensation and thus to deny him due process. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Where a motion for continuance is based on a right guaranteed by the constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

Applied in State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Putman, 28 N.C. App. 70, 220 S.E.2d 176 (1975).

Cited in Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976); In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

II. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

Burden upon Defendant to Establish Exclusion. —

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded people of defendant's race from jury which is not supported by the record fails to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Representation on juries in proportion to racial population, etc. —

In accord with 2nd paragraph in 1975 Cum. Supp. See State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

But Indictment and Trial, etc. -

In accord with 3rd paragraph in 1975 Cum. Supp. See State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

When Jeopardy Attaches. -

In accord with 1975 Cum. Supp. See State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Right of Cross-Examination. -

Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

In-Court Identification Held Competent. —

Where nothing in the record indicates that the out-of-court photographic identification, which identified the defendant as the perpetrator of the crime, was unlawful and impermissibly suggestive, the in-court identification was not tainted by the out-of-court identification. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Mandatory Death Penalty For First-Degree Murder, etc. —

In a trial for first-degree murder judgment may not be arrested because of defendant's contention that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975)

Imposition of the death penalty upon conviction of rape is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments of the Constitution of the United States and by N.C. Const., Art. I, § 24 and this section. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Defendant's contention in a trial for first-degree murder that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected in many decisions. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Defendant's contention in a prosecution for first-degree rape and kidnapping that the court erred in sentencing him to death, saying this was cruel and unusual punishment, has been consistently rejected. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

Defendant's contention that capital punishment under § 14-17 would violate the federal and State Constitutions has been rejected several times. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Discretion to Prosecute for Capital Offense or Not. — Defendant's argument that he was denied due process because the district attorney had the absolute discretion to charge and prosecute for a capital offense or to bring an accused to trial upon a lesser included offense has been considered and rejected in a number of cases. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Scope of Cross-Examination. — In cross-examination the witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been arrested for, indicted for or accused of an unrelated criminal offense. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Instruction Informing Jury of Death Penalty. — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by N.C. Const., Art. I, §§ 23, 36 and this section, since the record revealed that each juror knew that the sentence of death would be

imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Statements that Defense Counsel Was from Another Part of State. — Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Right to Reject Prejudicial Juror. — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in his favor. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

A defendant has no vested right to a particular juror. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Objection to Death Penalty by Jurors. — As to exclusion of jurors who voiced objections to death penalty, see State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Temporary Interruption of Trial. — Defendant was not subjected to double jeopardy and he was subjected to only one trial where there was a temporary interruption of the trial based upon the unexpected inability of a scheduled witness to be present due to his physical condition. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Punishment When Person Is Without Knowledge of Facts Making Act Criminal. — It is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal, and this is particularly so when the controlling statute does not require the act to have been done knowingly or willfully. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

V. ILLUSTRATIVE CASES.

Chapter 143, Article 7 Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

The sterilization of mentally ill or retarded persons under \$\\$ 35-36 through 35-50, inclusive, is a valid and reasonable exercise of the police power. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sections 35-36 through 35-50, inclusive, provide a sufficient judicial standard and are not unconstitutionally vague or arbitrary. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Since the North Carolina law applies equally to all those named, §§ 35-36 through 35-50, inclusive, do not violate the equal protection clauses of the United States or North Carolina Constitutions. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sections 35-36 and 35-37 do not violate the equal protection clauses of the United States or North Carolina Constitutions since they provide for the sterilization of all mentally ill or retarded persons inside or outside an institution who meet the requirements of these statutes. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization under § 35-36 is not a criminal proceeding. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

State interests in the sterilization of mentally ill or retarded persons rise to the level of a compelling State interest. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

iolations of Motor Vehicle Laws as Crimes. The bases for the inclusion of violations of motor vehicle and traffic laws within the scope of the due process rule permitting punishment of persons for certain crimes related to public welfare or safety, even when such persons are without knowledge of the facts making an act criminal, are that (1) the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon the roads and (2) the punishments for such violations are usually a small fine. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

The due process rule permitting punishment for certain crimes related to public welfare or safety, even when persons convicted of these crimes are without knowledge of the facts making the act criminal, is not to be extended beyond petty offenses involving light punishment nor to any crime involving moral delinquency. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

The notice requirement of § 105-375 is not compelled by due process. Furthermore, due process having been satisfied by notice to the listing taxpayer as provided by § 105-375, the county is not required to shoulder the intolerable burden of directly notifying the heirs of a listing taxpayer who died prior to issuance of execution.

Sec. 20. General warrants.

Search Defined. — A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

Fact of Search Must First Be Established. — Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

It does not prohibit seizure, etc. -

The constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant

Sec. 22. Modes of prosecution.

Use of Statutory Language. — An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it

Sec. 23. Rights of accused.

I. GENERAL CONSIDERATION.

Prejudicial Statements to Jurors. —

Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

The notice requirement of § 105-375 is not constitutionally compelled. Due process of law imports notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Due process was satisfied when the listing taxpayer was notified, at least two weeks prior to docketing a tax judgment, "that the judgment will be docketed and that execution will issue thereon in the manner provided by law." Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

when no search is required. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

Items in Plain View. -

By being lawfully on the premises officers are entitled to seize such evidentiary objects connected with defendants as are in plain view. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

When the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of N.C. Const., Art. I, § 23 and this section for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976).

Instruction Informing Jury of Death Sentence. — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed

by this Court" did not deny him his constitutional right of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by N.C. Const., Art. I, §§ 19, 36 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Applied in State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

II. RIGHT TO BE INFORMED OF ACCUSATION.

Sufficiency of Charging Offense, etc. -

An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of N.C. Const., Art. I, § 22 and this section for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

III. RIGHT OF CONFRONTATION.

In-Court Identification. -

If there is objection to an in-court identification by a witness who participated in an illegal lineup procedure, such evidence must be excluded unless it be determined on voir dire that the in-court identification is of independent origin and therefore not tainted by the illegal lineup. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Where nothing in the record indicates that the out-of-court photographic identification, which identified the defendant as the perpetrator of the crime, was unlawful and impermissibly suggestive, the in-court identification was not tainted by the out-of-court identification. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Out-of-Court Declarations. -

Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Right of Cross-Examination Jealously Guarded. — One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

Refusal to Allow Cross-Examination. — Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

A criminal defendant is entitled to offer evidence in defense at trial, either through her own testimony or through the testimony of other witnesses. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

IV. RIGHT TO COUNSEL.

Best Available Counsel, etc. —

In accord with 1975 Cum. Supp. See State v. Fuller, 27 N.C. App. 249, 218 S.E.2d 515 (1975).

Counsel Must Have Opportunity, etc. —

In accord with 2nd paragraph in 1975 Cum. Supp. See State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

Waiver of Right. -

When the voir dire evidence is conflicting and contradictory on the question of whether a defendant waived his right to counsel, it is incumbent upon the trial judge to weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

Failure to ask for a lawyer does not constitute a waiver of a defendant's right to counsel. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

When the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

Accused is constitutionally guaranteed, etc.—Accused must be warned of his right to counsel during a lineup. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

When counsel is not present at the lineup, etc. —

Unless presence of counsel at a lineup is understandingly waived by the accused, testimony concerning the lineup must be excluded in absence of counsel's attendance. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Out-of-Court Examination of Photographs.— Right to counsel's presence is not extended to out-of-court examinations of photographs which include a suspect, whether he is in custody or at liberty. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Determining Indigency. — The theory that right to counsel has been denied because of absence of definite standards for determining indigency has been rejected by the Court of Appeals. State v. Smith, 27 N.C. App. 379, 219 S.E.2d 277 (1975).

Viewing Photographs. — An accused has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether the suspect is at liberty or in custody at the time. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

V. SELF-INCRIMINATION.

Defendant Testifying May Be Cross-Examined, etc. —

Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant had not voluntarily turned himself in to the police, and defendant had already testified to the contrary. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Confessions. -

In accord with 1st paragraph in 1975 Cum. Supp. See State v. Williams, 289 N.C. 439, 222 S.E.2d 242 (1976).

When there is no conflict in the evidence on voir dire, it is not error to admit a confession without making specific findings. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

If the State offers a part of a confession, the accused may require the whole confession to be

admitted into evidence. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

In-Custody Statements. —

In a prosecution for armed robbery, the testimony of a witness employed as a dispatcher by the police department relating defendant's in-custody confession of guilt was admissible notwithstanding the dispatcher's failure to advise defendant of his constitutional rights, where the dispatcher questioned defendant while visiting a relative who shared defendant's cell, dispatcher was not in any way acting as a police officer and was not, in fact, a police officer. State v. Johnson, 29 N.C. App. 141, 223 S.E.2d 400 (1976).

When a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a voir dire hearing to determine whether the confession was voluntarily made and whether the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) have been met. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

Where defendant contended that his lack of sleep and food and his heavy use of drugs and alcohol shortly before his periods of interrogation rendered any in-custody statement involuntary, but where after an extensive voir dire hearing, the trial court found that defendant was not interrogated on the evening of his arrest because he was drunk, that defendant was not under the influence of intoxicating liquors or drugs and was furnished food and coffee when interrogated on the following day, that defendant was read his rights before questioning began, and that defendant signed a waiver of his rights, the in-custody statement was freely, understandingly and voluntarily made and was therefor properly admitted into evidence. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Admissibility of In-Custody Silence for Purpose of Impeachment. — See State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

Sec. 24. Right of jury trial in criminal cases.

Challenge of Jurors for Opposition, etc. -

As to exclusion of jurors who voiced objections to death penalty, see State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Right to Reject Prejudiced Jurors. — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in

his favor. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Presence of an alternate in the jury room during the jury's deliberations violates this section and § 9-18 and constitutes reversible error per se. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

If the judge, from his trial experience and knowledge of the circumstances of the

particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been any discussion of the case. If the answer is "no," the alternate will be excused and the jury returned to consider its verdict. If the answer is "yes," there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 520 (1975).

If alternate juror's presence in jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity, then the rule of per se reversible error is not applicable. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

A defendant has no vested right to a particular juror. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case.

State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Evidence of Racial Exclusion Insufficient.

— Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded people of defendant's race from jury which is not supported by the record fails to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Death Penalty Not Cruel and Unusual Punishment. — In a trial for first-degree murder judgment may not be arrested because of defendant's contention that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Imposition of the death penalty upon conviction of rape is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments of the Constitution of the United States and by N.C. Const., Art. I, § 19 and this section. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Sec. 25. Right of jury trial in civil cases.

Right to a jury trial is guaranteed, etc. — In accord with 2nd paragraph in original. See Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

How Jury Trial May Be Waived. -

It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

There can be no presumption of a waiver of trial by jury where such a trial is provided for by law. Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

The credibility of testimony is for the jury, etc. —

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Shearin v. National Indem. Co., 27 N.C. App. 88, 218 S.E.2d 207 (1975).

Sec. 27. Bail, fines, and punishments.

Punishment within Limits Fixed, etc. -

In accord with 1st paragraph in original. See State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

When the sentence imposed is within statutory limits it cannot be considered excessive, cruel or unreasonable. State v. Harris, 27 N.C. App. 385, 217 S.E.2d 306 (1975).

Mandatory death penalty for murder, etc.-

In a trial for first-degree murder judgment may not be arrested because of defendant's contention that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975).

Defendants' contention that capital punishment under § 14-17 would violate the federal and State Constitutions has been rejected several times. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Defendant's contention in a trial for first-degree murder that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected in many decisions. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

Death Penalty for Rape. -

Defendant's contention in a prosecution for

first-degree rape and kidnapping that the court erred in sentencing him to death, saying this was cruel and unusual punishment, has been consistently rejected. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975).

The contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization under this section is not a criminal proceeding. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sec. 35. Recurrence to fundamental principles.

Cited in Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Sec. 36. Other rights of the people.

Instruction Informing Jury of Death Penalty. — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by the Fifth and Fourteenth

Amendments to the Constitution of the United States and by N.C. Const., Art. I, §§ 19, 23 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

ARTICLE II LEGISLATIVE

Section 1. Legislative power.

It Must Declare Policy, Fix Legal Principles, etc. —

In accord with original. See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

Chapter 143, Article 7 Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975). Exchange of Land by Board of Education. — There is nothing in the Constitution which prohibits a board of education from exchanging land which it owns for other land for school purposes. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Quoted in Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

ARTICLE IV JUDICIAL

Section 1. Judicial power.

Review of Acts of General Assembly. — The courts of this State have no inherent power to review acts of the General Assembly and to declare invalid those which the courts

disapprove or, upon their own initiative, find to be in conflict with the Constitution. Green v. Eure, 27 N.C. App. 605, 220 S.E.2d 102 (1975).

The Supreme Court has no original

jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Appeal from Administrative Decisions. — The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Cited in In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

Sec. 12. Jurisdiction of the General Court of Justice.

I. GENERAL CONSIDERATION.

Appeal from Administrative Decisions Generally. — The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

II. SUPREME COURT.

A. In General.

The jurisdiction of the Supreme Court, etc.—

In accord with original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

It Relates Solely to Appeals from Courts. -

In accord with 1st paragraph in original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

And Does Not Include Direct Appeals from Agencies. —

In accord with original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court is strictly an appellate court, its jurisdiction limited "to review upon appeal any decision of the courts below upon any matter of law or legal inference." Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

B. Claims against State.

Issues of Fact. -

The Supreme Court's jurisdiction with respect to "issues" or "questions of fact" is exercised only in actions which are equitable in their nature, and in which relief is sought upon equitable principles. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Subsection (1) of this section, retaining the jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" as it had existed prior to the 1971 revision, has no relation to the court's prior original jurisdiction over claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Repeal and Unconstitutionality of § 7A-25. — Even if the General Assembly did not intend to repeal § 7A-25 by ratification of the 1971 revision of N.C. Const., Art. IV, § 7A-25 is unconstitutional. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Section 7A-25 was rendered null and void

when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Constitution no longer gives the Supreme Court original jurisdiction over claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court's jurisdiction over claims against the State is the same as its jurisdiction over all other claims. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Trial Court to Adjudicate Claims against State. — The appropriate trial court of the General Court of Justice now has original jurisdiction to adjudicate claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Sec. 13. Forms of action; rules of procedure.

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Sec. 14. Waiver of jury trial.

Trial judge's findings of fact found to be based upon a misapprehension of applicable law will be set aside on the theory that the evidence should be considered in its true legal light. Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976).

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Whitaker v. Earnhardt, 26 N.C. App. 736, 217 S.E.2d 125 (1975).

Sec. 17. Removal of Judges, Magistrates and Clerks.

Tests of Misconduct. — The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being prejudicial to the administration of justice and that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Whether a judge receives any personal benefit from his conduct is wholly irrelevant to an inquiry into the conduct of a judicial officer. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The disposition of cases for reasons other than an honest appraisal of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Judge's execution judgments allowing limited driving privileges under § 20-179 upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Codes of judicial conduct may usefully be consulted to give meaning to the constitutional standards. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

ARTICLE V FINANCE

Section 1. No capitation tax to be levied.

Chapter 143, Article 7, Is Not Section. — See State ex rel. Dorothea Dix Hosp. Unconstitutional in Contravention of This v. Davis, 27 N.C. App. 479, 219 S.E. 2d 660 (1975).

Sec. 2. State and local taxation.

I. POWER OF TAXATION GENERALLY; CLASSIFICATION.

B. Illustrative Cases.

Chapter 143, Article 7, Is Not Unconstitutional in Contravention of This

Sec. 8. Health care facilities.

Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975).

Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State, counties, cities or towns, and other State and local governmental entities to issue revenue bonds to finance or refinance for any such governmental entity or any nonprofit private corporation, regardless of any church or religious relationship, the cost of acquiring, constructing, and financing health care facility projects to be operated to serve and benefit the public; provided, no cost incurred earlier than two years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from the revenues, gross or net, of any such projects and any other health care facilities of any such governmental entity or nonprofit private corporation pledged therefor; shall not be secured by a pledge of the full faith and credit, or deemed to create an indebtedness requiring voter approval of any governmental entity; and may be secured by an agreement which may provide for the conveyance of title of, with or without consideration, any such project or facilities to the governmental entity or nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto for nonprofit private corporations. (1975, c. 641, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

Session Laws 1975, c. 641, s. 4, provides: "Sec. 4. This act shall be deemed to provide an alternative method for the doing of the things authorized hereby, shall be regarded as supplemental and additional to powers conferred

by other laws and shall not be regarded as in derogation of any powers now existing, and this act shall not be construed as a limitation or restriction on the power of the General Assembly to enact laws authorizing governmental entities to issue revenue bonds for health care purposes."

Sec. 9. Capital projects for industry.

Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to authorize counties to create authorities to issue revenue bonds to finance, but not to refinance, the cost of capital projects consisting of industrial, manufacturing and pollution control facilities for industry and pollution control facilities for public utilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property

for any such capital project. (1975, c. 826, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

ARTICLE VI SUFFRAGE AND ELIGIBILITY TO OFFICE

Sec. 8. Disqualifications for office.

Cited in Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974).

ARTICLE IX EDUCATION

Sec. 7. County school fund.

Applied in State v. Walker, 27 N.C. App. 295, 219 S.E.2d 76 (1975).

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Appendix I. Rules of Practice in the General Court of Justice

(2A) NORTH CAROLINA RULES OF APPELLATE PROCEDURE

(Adopted June 13, 1975.)

Article VI. General Provisions

Rule

30. Oral Argument.

(f) Pre-Argument Review; Decision of Appeal Without Oral Argument.

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 9

The Record on Appeal — Function, Composition, and Form

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by § 1-180. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Objection When Ruling Made. — Errors based on rulings made during the trial must

ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Applied in Johnson v. Hooks, 27 N.C. App. 584, 219 S.E.2d 664 (1975).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

Evidence Incompetent by Statute. — Failure of the trial judge to exclude evidence rendered incompetent by statute is reversible error, whether objection is interposed and exception noted or not. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

An objection to testimony not taken in apt time is waived. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the admission of incompetent evidence, must be made in apt time or else be lost. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

While, ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission not assignable as error, this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

A broadside exception presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

A broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Capital Cases. — In every case where a death sentence has been pronounced, it is the practice of the Supreme Court to carefully review the entire record to determine if prejudicial error appears. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be

taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

If after careful review of the entire record in capital cases error does appear, even though not assigned by defendant, the Supreme Court will take cognizance of the error ex mero motu. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

If, upon an examination of the record for the ascertainment of reversible error in capital cases, error is found, it then becomes the duty of the Supreme Court upon its own motion to recognize and act upon the error so found. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

Discretion of Trial Judge. — A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716 (1976).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by § 1-180. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT: DISCRETIONARY REVIEW.

Rule 16

Scope of Review of Decisions of Court of Appeals

Applied in State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

ARTICLE VI. GENERAL PROVISIONS

Rule 28

Briefs: Function and Content

Codefendant Deemed to Have Abandoned Assignment. — Where codefendants object to the introduction of evidence, but the assignment of error based on this exception is brought forward and discussed in the brief of only one of the codefendants, the assignment is deemed abandoned by the other codefendants. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

Questions raised by assignments of error but not presented in party's brief are deemed abandoned. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Under former Rule 28 (Rules of Practice in Court of Appeals), assignments of error not brought forward and argued in the brief are deemed abandoned. State v. Robinson, 26 N.C. App. 620, 216 S.E.2d 497 (1975).

Cited in State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976); State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Rule 30

Oral Argument

(f) Pre-Argument Review; Decision of Appeal Without Oral Argument.

(1) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule.

(2) If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

Editor's Note. — The amendment adopted May 3, 1976, added subsection (f).

As the other subsections were not changed by the amendment, they are not set out.

(5) GENERAL RULES OF PRACTICE FO¹ THE SUPERIOR AND DISTRICT COURTS

1. Philosophy of General Rules of Practice.

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

3. Continuances.

The granting of a continuance is within the discretion of the trial court, and its exercise will not be reviewed in the absence of manifest abuse of discretion. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Where a motion for continuance is based on a right guaranteed by the Constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

Error and Prejudice Must Be Shown. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that

the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976).

Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or

prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

6. Motions in Civil Actions.

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976).

10. Opening and Concluding Arguments.

When there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because

he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Appendix II. Rules of Practice in United **States District Courts**

United States District Court for the Middle District of North Carolina

Table of Rules

RULE

50. Jurisdiction and Duties of Full-Time United States Magistrates

(a) Authority; General Provisions

(b) Proceedings in Forma Pauperis; Frivolous Petitions

(c) State Prisoner Petitions and Civil Rights

(e) Pre-Trial; Discovery; Motions Appearance

(1) Civil Actions

RULE

- (2) Criminal Actions
- (f) Additional Duties
- (g) Special Master References
- (h) Record of Proceedings
- (i) Appeals
 - (1) Civil Actions
 - (2) Criminal Actions
- (d) Proceedings Under 28 U.S.C. § 2255 52. Forfeiture of Collateral Security in Lieu of

V. United States Magistrates.

Rule 50.

JURISDICTION AND DUTIES OF FULL-TIME UNITED STATES MAGISTRATES

(a) Authority; General Provisions.

Pursuant to Rule 83, Federal Rules of Civil Procedure, Rule 57, Federal Rules of Criminal Procedure, Rule 11, Federal Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, and 28 U.S.C. § 636(b), this rule is established delegating powers and assigning duties to full-time United States magistrates.

Unless otherwise specifically indicated, powers and duties are delegated and assigned by this rule only to full-time United States magistrates. Part-time United States magistrates shall have and exercise the jurisdiction and powers

set forth in their respective orders of appointment.

It is the intention of the court to delegate to full-time United States magistrates all the power and authority permitted by 28 U.S.C. § 636 and any other applicable statute or rule, not inconsistent with the Constitution and laws of the United States. Therefore, as the jurisdiction of full-time United States magistrates is enlarged or modified by Acts of Congress or Federal Rules of Procedure, this rule will be deemed modified to conform to such acts or rules. Assignment of duties to magistrates will be made by the court as provided in this rule.

(b) Proceedings in Forma Pauperis; Frivolous Petitions.

Magistrates are authorized to grant leave to file petitions for writs of habeas corpus and complaints in civil actions in forma pauperis; to consider and recommend to the court denial of leave to file any such petition or action; and to consider and recommend appropriate disposition of a motion for leave to

appeal in forma pauperis from any court order or judgment of the court. If a magistrate finds any petition or complaint frivolous or otherwise inappropriate for filing, he shall report, verbally or in writing as directed by the judge, who shall determine and order the appropriate action.

(c) State Prisoner Petitions and Civil Rights Actions.

All petitions for writs of habeas corpus, actions seeking relief under 42 U.S.C. § 1983, and other similar civil rights proceedings by State prisoners shall be submitted for filing to the clerk of court in Greensboro [Local Rule 3(a)]. The clerk shall forthwith assign these cases in rotation to the judges regularly serving in the district. In the event of a judge's unavailability or inability to serve or act in any case, the chief judge or the senior active judge may modify this procedure for the duration of the judge's unavailability or disability.

After a petition or complaint has been assigned to a judge, the clerk shall

deliver it to a magistrate for disposition in accordance with this rule.

The magistrate shall review such habeas corpus petition or complaint and report to the judge if in his opinion a plenary hearing is appropriate. If a magistrate is of the opinion that no plenary hearing is required, he shall submit to the judge in writing his recommendation with respect to an appropriate order or judgment and a statement of the facts and conclusions in support thereof. The findings, conclusions and the recommendation of the magistrate may be adopted, modified, or rejected by the judge or used merely as an aid for making independent findings and conclusions. All orders denying or dismissing petitions or complaints shall be signed by a judge. In appropriate actions, the magistrate may take on-site depositions, gather evidence and serve as a mediator at the holding facility in connection with actions filed by prisoners.

(d) Proceedings Under 28 U.S.C. § 2255.

Federal prisoner motions and complaints relating to treatment in jails and penitentiaries accorded to federal prisoners, shall be assigned to the trial judge or, if the trial judge is not available, to any other judge. In the discretion of the chief judge, such actions may be referred to a magistrate for proceedings substantially as prescribed in paragraph (c).

(e) Pre-Trial; Discovery; Motions.

- (1) Civil Actions. Actions ready for initial pre-trial conference or hearings on discovery motions, shall be noticed for conference or hearing by the clerk before a magistrate or one of the judges as directed by the chief judge. Authority is hereby given the magistrate to conduct initial, interim, and final pre-trial conferences; to determine discovery and procedural motions; refine the issues; approve stipulations of facts; schedule dates for completion of various stages of the proceedings; and generally to resolve any pre-trial issue or motion not dispositive of the action, in the interest of expediting litigation or assisting the parties in settlement negotiations. By way of illustration, the magistrate may conduct settlement conferences, enter default judgments, review motions to set aside default judgments; and may hear and determine motions and appeals relating to security for costs, motions to extend time for filing or amending pleadings, motions for substitution of counsel or parties or to add parties, to intervene, or to file third-party complaints, and motions to sever or to consolidate.
- (2) Criminal Actions. The magistrate will process complaints, issue summonses or warrants of arrest for named defendants, issue search warrants upon a determination that probable cause exists, conduct initial appearance proceedings and comply with Rule 5, Federal Rules of Criminal Procedure, admit defendants to bail or specify conditions of release; and may appoint counsel for those eligible for such appointment under the Criminal Justice Act consistent

with this court's plan for the appointment of counsel, and approve vouchers for payment of compensation for service. The magistrate will conduct full preliminary examinations and removal hearings for defendants charged in other districts. He is authorized to issue warrants of removal for such defendants. He may administer oaths; take acknowledgements, affidavits and depositions; and set bail for material witnesses. The magistrate is hereby specifically authorized to conduct extradition proceedings, hold to security of the peace and for good behavior, discharge indigent prisoners or persons imprisoned for debt under process or execution issued by a federal court, issue attachment orders to enforce obedience to an Internal Revenue Service summons to produce records or give testimony, institute proceedings against persons violating Civil Rights Statutes as provided in 42 U.S.C. § 1987, and try and sentence defendants for minor offenses as provided in 18 U.S.C. § 3401.

The approval of the United States attorney or one of his designated assistants shall be secured by all United States magistrates prior to the issuance of

warrants on complaints of local police officers or private individuals.

Additionally, the magistrate is authorized and may be assigned by the court to hear and determine motions relating to: procedure or discovery, depositions, inspection, subpoenaes, mental or other examinations, appointment of interpreters or expert witnesses, bills of particulars, release or substitution of counsel, or to expedite or postpone the trial of an action.

(f) Additional Duties.

A magistrate may be assigned by a judge additional duties, not inconsistent with the Constitution and laws of the United States, including:

Civil Proceedings

(1) The trial of any civil action and the entry of judgment thereon with the

consent of the parties;

(2) Review of the record of administrative proceedings in suits seeking judicial review of final decisions of administrative agencies, and submission of a report and recommendation to the district judge; and

(3) Acceptance of jury returns in the absence or disability of the trial judge.

Criminal Proceedings

(1) Hearing and determining, or recommending to the court for determination, motions to suppress evidence;

(2) Receiving grand jury returns;

(3) Conducting preliminary hearings leading to the revocation of probation and conducting final probation revocation hearings for the submission of a report and recommendation to the judge;

(4) Conducting post-indictment arraignments, accepting pleas of not guilty, and reporting to the court statements or indications by defendants of their desire

or intention to plead guilty; and

(5) After consultation with counsel for the defendant and the attorney for the government, setting cases in which defendants have plead not guilty for trial, and setting cases in which defendants have indicated an intention or desire to plead guilty for arraignment and sentencing.

(g) Special Master References.
Actions may, in the discretion of the judge, be referred to the magistrate as special master pursuant to the Federal Rules of Civil Procedure. Such references

may include, but are not limited to, the supervision of pre-trial and discovery procedures in multidistrict litigation, and multiple disaster and class actions where there are numerous claimants and diverse claims; the hearing of testimony and making findings with respect to complicated issues in jury actions; calculating matters of account involving difficult computations of damages and other exceptional conditions in non-jury actions; supervising discovery in connection with special aspects of patent or antitrust actions, especially where there are a great many issues, claims and documents; serving as a commissioner to determine compensation and assess damages in land condemnation actions; and conducting evidentiary hearings and preparing findings in employment discrimination actions under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000(e) - 5(f).

No fees shall be taxed to litigants for the service of a magistrate serving under appointment as a special master, however, other necessary costs incident to the

reference may be taxed as costs.

(h) Record of Proceedings.

(1) A magistrate disposing of an action involving a petty offense, as defined in 18 U.S.C. § 1, or a minor offense, as defined in 18 U.S.C. § 3401, shall file with the clerk a record of the proceedings prepared on forms and dockets to be furnished by the Administrative Office of the United States Courts. The record of proceedings, including the court reporter's notes, transcript, tape or other recording of the proceedings, with the original papers, shall be filed with the clerk not later than 20 days following the date of final disposition.

(2) All fines collected or collateral forfeited shall be transmitted immediately

to the clerk.

(3) In all other actions, as soon as a defendant is discharged or, after having been bound over, is either confined on final commitment or released on bail, the magistrate is required within 20 days thereafter to transmit to the clerk of court his entire file of the action, including, if issued or received by him, the original complaint, warrant of arrest with the officer's returns thereon and his completed transcript reflecting the entire record of the proceedings before the magistrate.

(i) Appeals.

- (1) Civil Actions. An appeal of right from an order of a United States magistrate entered in a civil action shall lie to a judge of this court. An appeal shall be taken by filing with the clerk of court a written notice of appeal within 7 days after entry of the order appealed from, and serving a copy of the notice upon opposing counsel. A notice of appeal shall be accompanied by a brief, unless prior leave (grantable by the clerk) is obtained for a reasonable extension of time to file a brief. The appellee may file a brief in support of the magistrate's order within 7 days from the date of filing of appellant's brief. Issues raised by an appeal from a magistrate's order will be considered by a judge on the record. Additional evidence may be submitted only with leave of the court upon a showing of necessity to avoid injustice. No hearing on such an appeal will be scheduled unless ordered by the court. Applications for leave to submit additional evidence or for oral argument must be made in writing at the time briefs are filed.
- (2) Criminal Actions. Upon appeal from a judgment of the magistrate as provided in 18 U.S.C. § 3402 and Rules 8 and 11, Federal Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, the appellant shall, within 10 days, serve and file a brief. The United States attorney shall serve and file a brief within 10 days after receipt of a copy of the appellant's brief. The appellant may serve and submit a reply brief within 5 days after receipt of the appellee's brief. Not later than 30 days after the filing of the

magistrate's certificate, the appeal shall be placed by the clerk upon the court calendar for disposition.

Editor's Note. —

The amendment adopted June 10, 1976, rewrote this rule.

Rule 52.

FORFEITURE OF COLLATERAL SECURITY IN LIEU OF APPEARANCE

Pursuant to Rule 9, Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, and in the interest of justice, good court administration and sound law enforcement, collateral may be posted in lieu of the appearance of the offender for certain petty offenses under federal statutes and regulations or state statutes made applicable by the Assimilative Crimes Statute (18 U.S.C. § 13), occurring within the jurisdiction of the United States magistrate, unless: (1) the offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

There shall be maintained in the office of the clerk and in the office of each United States magistrate, current lists of the petty offenses and fines applicable thereto, for which collateral may be posted in lieu of appearance. These lists are not included in the court's printed rules because of their length, but shall be

available to the public in the clerk's office upon request.

Upon the failure of the person charged with such offense or offenses to appear before the United States magistrate for trial, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any forfeitures of collateral for a traffic

violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses arising out of the same facts or sequence of events resulting in the original offense or offenses.

Editor's Note. -

The amendment adopted July 26, 1976, rewrote the first paragraph, substituting a reference to Rule 9, Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates for a reference to Rule 8, Rules of Procedure, United States magistrates, and making other changes, rewrote the former last paragraph as the present second paragraph, substituting "lists" for "list" near the middle of the first sentence and "collateral may be posted in lieu of appearance" for "forfeiture of collateral security may be accepted" at the end of the first sentence and adding the language

beginning "but shall be available" at the end of the second sentence. The amendment also substituted "such" for "an" preceding "offense" near the beginning of the first sentence of the present third paragraph, substituted "magistrate" for "magistrates" and deleted "of the offense or offenses listed below" following "trial" near the middle of that sentence, substituted "forfeitures" for "forfeiture" near the middle of the present fourth paragraph and deleted "not" preceding "arising" near the middle of the present last paragraph.

The United States District Court for the Eastern District of North Carolina

Rules of Court

I. General Rules

Rule

1. Attorneys.

D. Procedure for Admission.

19. United States Magistrates.

4. Pre-trial and Discovery.

6. Forfeiture of Collateral in Lieu of Appearance.

10. Additional Duties assigned to the

Full-Time Magistrate(s).

(a) Criminal Procedure.

(b) Civil Proceedings.

(c) Special Master References.

(d) Judicial Review of Administrative Proceedings.

(e) Miscellaneous Duties.

I. General Rules

Rule 1. Attorneys

D. Procedure for Admission. Every person making application for admission to practice in this court shall, prior to being presented in open court for taking the required oath or affirmation, file a written application certified to by two attorneys who are members in good standing of the bar of this court, stating that the applicant is of good moral character and professional reputation and that he meets the requirements of these rules for admission to the bar of this court. Thereafter, eligible attorneys may be admitted to practice in this court by the court or by the fulltime United States Magistrate upon oral motion made by a member of the bar of this court.

Unless the court otherwise orders, all motions for admission will be considered on the opening of court on the first Monday morning in each month on which a session of court is to begin. 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.

Upon the filing of a properly certified application as aforesaid and the payment to the clerk of an admission fee of \$10.00 the clerk may accept for filing papers signed by the applicant, but the applicant shall not be allowed to make appearances on behalf of clients in open court until the prescribed oath has been taken.

Editor's Note. — The amendment adopted May 7, 1976, reworte the former first sentence of the second paragraph of section D as the present second sentence of the first paragraph, deleted the former second sentence of the second paragraph of section D, which provided that if required, the applicant should offer

satisfactory evidence of his moral and professional character, substituted "If" for "After" and "is" for "has been" in the second sentence of the second paragraph of section D and rewrote the last paragraph of section D.

As only section D was changed by the amendment, the rest of this rule is not set out.

Rule 19. United States Magistrates

4. Pre-trial and Discovery

(a) In civil actions authority is given to the magistrates specially designated for that purpose to conduct pre-trial conferences, and to enter such orders thereon as would have otherwise been entered by the judge with respect to discovery, simplification of issues, stipulation of facts, scheduling of prescribed dates for various stages of proceedings, and other matters pertaining thereto, as prescribed by the Federal Rules of Civil Procedure and Civ. Rule 7, U.S.Dist.Ct., E.D.N.C. The magistrate shall not enter any order granting a continuance of any case pending before a district judge, but may grant continuances of matters pending before the magistrate. The action taken hereunder shall be upon the written authority of the judge to whom the case is assigned.

(b) In criminal actions authority is given to the magistrates specially designated for that purpose to hear and determine all motions relating solely to pre-trial discovery. Motions to suppress shall be heard by the judge. The action taken hereunder shall be upon the written authority of the judge to whom the

case is assigned.

(c) Warrant of Removal. The magistrates are specially designated and authorized to issue a warrant of removal under Rule 40(b) (3). Federal Rules of Criminal Procedure.

(d) Each part-time magistrate is specially designated and assigned to conduct post-indictment and criminal information arraignments, accept not guilty pleas, and may order a presentence report on a defendant who signifies the desire to plead guilty.

6. Forfeiture of Collateral in Lieu of Appearance

Pursuant to Rule 9, Rules of Procedure, United States magistrates, in the interest of justice, good court administration and sound law enforcement, for the petty offenses listed below, whether originating under the applicable federal statute or regulations or applicable state statute by virtue of the Assimilated Crimes Act, 18 U.S.C. § 13, occurring within the territorial jurisdiction of the United States magistrate, collateral may be posted in lieu of the appearance of the offender unless (1) the offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States magistrate for trial of the offense or offenses listed below, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively

forfeited.

The clerk shall certify the record of any forfeiture of collateral for a traffic

violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

There shall be maintained in the office of the clerk and with each United States magistrate a current list of the petty offenses and fines applicable thereto for

which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may

be posted in lieu of appearance by the person charged with the said offense are:

I. NATIONAL PARK SERVICE VIOLATIONS

Title 36, Chapter I, Code of Federal Regulations

Section		
Number	Offense	Collateral
2.1	Abandoned or unattended property	. \$ 25.00
2.2	Aircraft	
2.3	Audio devices	0 = 00
2.4	Begging, hitchhiking, or soliciting	25.00
2.5	Camping; violation of camping regulations	25.00
2.6	Violation of alogad arous	25.00
	Violation of closed areas	25.00
2.8(a) (b) (c)	Failure to restrain dogs, cats, or other pets	. 25.00
2.9(b)	Explosives or fireworks	15.00
2.10	False report	25.00
2.11	Unauthorized possession of firearms, traps, or	97.00
0.10(-) (-)	other weapons	. 25.00
2.12(a) (c)	Fires; leaving fires unattended	. 25.00
2.13(a)	Violation of fishing laws	. 25.00
2.13(b)	Use of bait on fishing stream	. 50.00
2.14	Fraudulently obtaining accommodations	. 25.00
2.16(c)	Possession of intoxicants by minors	. 25.00
2.17	Lost and found articles	. 15.00
2.18	Picnicking	. 15.00
2.19	Operation of portable engines and motors	25.00
2.20	Minor violations (such as flower picking) of	
	regulations for preservation of public property	
	natural features, and resources	. 15.00
2.21	Holding public meetings, assemblies, or	the petty
	demonstrations without permit or in violation	Statuteur
	thereof	. 50.00
2.22	Report of injury or damage	. 25.00
2.23	Saddle or pack animals	. 25.00
2.24	Sanitation regulations	. 25.00
2.25	Scientific specimens	. 25.00
2.26	Use of skates or skateboards	. 25.00
2.27	Conducting sports events, entertainment, or other	
Jon Luit " Borte La	public attractions without permit	
2.28	Swimming, bathing, or use of certain water sports	
Home Investment to	equipment where prohibited	25.00
2.29	Tampering with personal property not under one's	
2.23	lawful control without theft or damage	50.00
2.30	Travel on National Scenic Trails by use of	6
2.50		
2.31	prohibited vehicles	25.00
	Water skiing where prohibited	25.00
2.32(a) (2)	Feeding or molesting wildlife	
2.33	Winter sports	. 25.00
4.1	State laws regulating traffic and use of vehicles	(Coo out
	unless covered by sections 4.2-4.21	
		section
		III)

Rule 19	APPENDIX II — EASTERN DISTRICT COURT RULES	Rule 19
Section		
Number	Offense	ollateral
4.3	Bicycles	\$ 25.00
4.4	Failure to give notice of commercial towing services	25.00
4.5	Driving or permitting another to drive vehicle without license, and failure to display license	40.00
4.7	upon request	25.00
4.18(a)	established places	15.00
4.18(b)	Failure to comply with other traffic control	10.00
lance	signs	25.00
4.18(c)	Failure to obey authorized personnel directing	
4.19	traffic	50.00
4.21	Travel on roads	$25.00 \\ 25.00$
5.1	Operation of vehicle with unsafe brakes Advertising within park area	75.00
5.2	Sale of alcoholic beverages or intoxicants	75.00
5.3	Soliciting; engaging in business	25.00
5.4	Commercial passenger-carrying motor vehicles .	25.00
5.5	Commercial photography, motion picture filming,	20.00
7/17 2/2	and television production	100.00
5.6	Commercial vehicles on park area roads	
	a. pick-up trucks, vans, and cars	25.00
	b. trucks over one and one-half tons and semi-	
	trailers	100.00
5.7	Construction of buildings or facilities without permit	50.00
5.8	Discrimination in employment practices	50.00
	Discrimination in furnishing public accommodations and transportation services	50.00
5.10	Violations in eating, drinking, and lodging	50.00
5.10	establishments	50.00
5.11	Impounding of animals	50.00
5.12	Installation of monument in park area	25.00
5.13	Creation or maintenance of nuisance	25.00
5.14	Prospecting, mining, locating mining claims, and	
	leasing, except as authorized by law	50.00
5.15	Residing in park areas without permit	50.00
5.16	Unauthorized use of land for agricultural purposes	50.00
ng	or for grazing or herding animals	50.00
6.5	Wrongful entry without paying fee	10.00
7.14(b) (1)	Possession of beer or alcoholic beverage in open or	25.00
7.14(1) (0)	unsealed container	25.00
7.14(b) (2)	unsealed container in a motor vehicle	50.00
7.76(b)	Wright Brothers National Memorial Airstrip;	50.00
1.10(b)	use of airstrip	75.00
	MANDATORY APPEARANCE VIOLATIONS	
Section		
Number	Offense	
2.7	Disorderly conduct	
	977	

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GENERAL STATUTES OF NORTH CAROLINA

Rule 19	GENERAL STATUTES OF NORTH CAROLINA	Rule 19
Section		
Number	Offense	
2.9(a) 2.11	Unauthorized use or possession of explosives Unauthorized use of firearms, traps, and other	
2.11		
2 12(b) (d) (a) (f)	weapons for destroying animal life Unauthorized or unsafe kindling of fires	
2.12(b) (d) (e) (f) 2.14	Fraudently obtaining accommodations	
2.15	Gambling; operation of gambling devices	
2.16(a)	Intoxication in park area	
2.16(a) 2.16(b)	Sale of intoxicants to minors	
2.20	Major violations of regulations for preservation of	
2.20	public property, natural features, and resources	100/0000
2.29	Tampering with or unlawful possession of personal	, manage
2.20	property not under one's lawful control with the	
	result of theft or damage	
2.32	Hunting, trapping, capturing, or killing wildlife:	
2.02	Small game	
	Bear, boar or deer hunting	
2.37(b) (1) (2)	Delivery or possession of controlled substance	
II. N	VATIONAL FOREST SERVICE VIOLATIONS	
	e 36, Chapter II, Code of Federal Regulations	
Section		. 11. 4 1
Number		ollateral
212.7(3)	Unauthorized use of vehicle upon a closed road .	25.00
212.7(4) 212.20(c) (4)	Damaging any road or road segment	25.00
212.20(C) (4)	Unauthorized use of National Forest Development trails	25.00
212.20(d)	Prohibited acts on National Forest	20.00
212.20(d)	Development trails (Minor violations) 25.00	
	1. Willfully tearing down, removing, or defacing	
	any sign or notice	
	2. Mutilating, defacing, disturbing, removing, or	
	destroying objects of natural beauty or scenic	
	value	
	3. Destruction of, damage to, or removal of any	
	living tree or plant	
	4. Creating an unsanitary condition by leaving	
	refuse, debris, or wastes exposed or permitting	
	discharge of harmful pollutants or wastes into	
	water resources	
	5. Blocking, restricting, or otherwise impeding	
	use of trail	
261.4(i)	Use of prohibited vehicles for cross-country	D GORDA
	travel	25.00
261.6	Unauthorized cutting, damaging, marking, or	
	removing timber or other forest products	0.00
001 0()	(minor violations)	25.00
261.8(a)	Exceeding the fishing creel limit	25.00
001 0/1)	Each fish in excess of limit	10.00
261.8(b)	Simple possession of firearms or equipment	05.00
001 11/L)	used for hunting, fishing, or trapping	25.00
261.11(b)	Construction of any work, structure, or fence;	50.00
	conducting any work, or business	50.00

Rule 19	APPENDIX II — EASTERN DISTRICT COURT RULES	ule 19
Section		
Number	Offense	lateral
261.11(d)		\$ 25.00
261.11(h)	Operation of motorboats on bodies of water in violation of regulations (excessive speed, unnecessary noise)	50.00
261.11(i)	Entry upon a permanently closed area	25.00
261.11(j)	Occupancy or use of land violations	25.00
261.11(k)	Entry upon closed areas	25.00
261.11(l)	Placing a vehicle or other object upon land in a	
	manner causing impediment or hazard	25.00
261.11(m)	Entering a wilderness area without a permit	25.00
291.4	Failure to comply with sanitary regulations in a	
10	recreation area	25.00
291.5(d)	Selling or offering merchandise for sale	25.00
291.5(e)	Distribution of advertising material	25.00
291.6	Use of audio devices in recreation area	25.00
291.7	Failure to comply with occupancy and use	07.00
004.0(1)	regulations on recreation sites	25.00
291.8(b)	Driving or parking vehicle or trailer except in	05.00
001 0(4)	places provided	25.00
291.8(d)	Driving bicycles, motorbikes, or motorcycles	25.00
291.8(e)	on trails at recreation sites	25.00
291.0(e)	roads in recreation sites for other than ingress	
	or egress	25.00
291.9	Failure to pay entrance or recreation fees	10.00
293.17	Violation of any National Forest Primative Area	10.00
200.11	regulations	50.00
295.6	Operating conditions for off-road vehicles on areas	00.00
01 9	or trails of National Forest System lands:	25.00
	(a) Operation without a valid operator's	
	license or learner's permit	
	(b) Operation by unlicensed person under 18	
	years of age unless accompanied by adult	
	with valid license	
	(d) Operation in excess of speed limits	
	(g) Operation not in conformance with applicable state laws	
	(h) Operation with defective muffler	
	(i) Operation of vehicle not equipped with prop-	
	erly installed spark (j) Operation with defective brakes	
	(k) Operation with defective brakes (k) Operation without working headlights or	
	taillights	
	(l) Operation of vehicle emitting excessive noise	
295.7	Use of off-road vehicle as prohibited	25.00
295.8	Use of off-road vehicle as prohibited without	
200.0	permit	25.00
25.00	MANDATORY APPEARANCE VIOLATIONS	
Continu	MANDATURI AFFEARANCE VIOLATIONS	
Section Number	Offense	
	Damaging or leaving in a damaged condition any	
212.7(4)	road or road segment	
	Toda of Toda boginoity	

Section Number	Offman
212.20(d)	Offense Destruction of government property — all major
	offenses
261.1	Interfering with Forest Officer
261.2	Setting fires; building campfires in a dangerous place; failure to extinguish campfire; violations of other similar forest fire safety regulations
261.4(a-g)	Damaging, defacing, destroying, or removing government property or objects of natural beauty; entering or using Forest Service build-
261.6	ing except in emergency
201.0	Unauthorized cutting, damaging, marking, or removing timber or other forest products (Major offenses)
261.7	Unauthorized livestock use
261.8(a)	Hunting, trapping, or fishing out of season; taking or having in possession any wild animal, bird, or fish (except creel limit), spotlighting violations
261.8(b)	Trespass with firearms
261.11(a)	Squatting or making settlement on Forest Service land
261.11(c)	Placing stock within enclosure
261.11(e)	Discharging firearms
261.11(f)	Unauthorized grazing of animals
261.17	Unauthorized use of pesticides
291.5(a)	Indecent conduct
295.6(f)	Operation of any off-road vehicle in a manner creating excessive damage or disturbance to the land, wildlife, or vegetative resources

III. TRAFFIC OFFENSES

(Including those to which N.C. laws are applicable)
Title 36, Chapter I, Code of Federal Regulations

	2.0.0 00	, chapter 1, code of 1 coordinates guidance		
Section				
Number	Off	ense	Coll	ateral
	A.	Speeding		
		1. 0-5 mph over applicable limit	\$	15.00
		2. 6-10 mph over applicable limit		20.00
		3. 11-15 mph over applicable limit		25.00
		4. 16-20 mph over applicable limit		35.00
	В.	Other violations		
		Driving without a valid operator's license.		40.00
4.8		Excessive acceleration		25.00
4.9		False report		25.00
		Following too closely		25.00
		Load, length, height, and width limitations.	3	25.00
4.13		Obstructing traffic		25.00
4.16		Right-of-way	100	25.00
		Driving wrong way on dual-lane highway .	See.	40.00
		Driving wrong way on one-way city street.		15.00
		Improper passing		25.00
		Litterbugging		30.00
		Failure to dim lights		25.00
		380		

Section Number

066	
	ollateral
Illegal transportation of one quart or less of	
taxpaid liquor with seal broken in passenge	er
area	\$25.00
Parking violations	15.00
Exceeding a safe speed	15.00
Violation of vehicle inspection law	15.00
Failure to stop for a red light or stop sign	15.00
Improper turn or signal	15.00
Improper vehicle equipment	15.00
Violation of vehicle registration law, except	
involving stolen or altered registration	15.00
Any other violation for which court appearance	
is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

All pleas of not guilty

All felonies

Any violation resulting in personal injury

Driving under the influence (G.S. 20-138; G.S. 20-139) Careless or reckless driving (G.S. 20-140; G.S. 20-140.1) Exceeding the applicable speed limit by over 21 mph

Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged races) (G.S. 20-141.3)

Passing stopped school, school activities, or church bus Failure to yield right-of-way to emergency vehicles

Failure to obey directions of a traffic officer, or of a fireman at the scene of

Illegal transportation of more than 1 quart of liquor

Leaving the scene of an accident in which involved, or failing to report such an accident (G.S. 20-166; G.S. 20-166.1)

Driving while license suspended or revoked, or permitting an owned vehicle to be so operated (G.S. 20-28; G.S. 20-34)

Driving with false, forged, or altered driver's license, or permitting an owned vehicle to be so operated

Any violation of the Financial Responsibility laws (Chapter 20, Articles 9A and

Any violation of vehicle registration laws involving stolen or altered registration plates or certificates

Any violation involving a false affidavit, or false statement under oath, or perjury (G.S. 20-17(5); G.S. 20-31; G.S. 20-313.1)

Any violation charged in the same warrant or summons with a mandatory

appearance violation

IV. NATIONAL FISH AND WILDLIFE VIOLATIONS

Title 50, Chapter I, Code of Federal Regulations and Title 16, United States Code

Section Number

Offense

Collateral

THE MIGRATORY BIRD TREATY ACT:

Take or possess migratory nongame birds \$ 50.00 16 U.S.C. 703

Rule 19	GENERAL STATUTES OF NORTH CAROLINA Rule 19
Section Number	OffenseCollateralEach bird so possessed\$ 10.00Sell, barter, or trade nongame birds
MIGRATORY GAME	E BIRDS:
20.21(a) 20.21(b) 20.21(c-h) 20.21(i) 20.24 20.33	Take with aid of bait
20.34	Each bird in excess of limit
20.35 26.5 20.25 20.31	Hunting along or in National Wildlife Refuge 100.00 Failure to retrieve killed or crippled birds 100.00 Each bird not retrieved 25.00 Possession of birds taken in violation of sections 20.21-20.25 100.00
20.22	20.21-20.25
20.32	Careless or reckies driving (C.S. 20100 L.S. 20100.
20.36 20.27	Each bird so possessed
20.81 20.38 20.61	Possessing or transporting live game birds
20.62	Miscellaneous regulations adopted for special areas or conditions
MIGRATORY BIRD	HINTING STAMP ACT:
16 U.S.C. 718	Take migratory birds without duck stamp 25.00
MIGRATORY BIRD	Conservation Act — National Wildlife Refuge:
16 U.S.C. 715 Title 50, Subcha	National Wildlife System — pter C, Part 26, Code of Federal Regulations
Section Number 26.2	Offense Trespassing on any wildlife refuge area\$ 25.00
26.3	Unauthorized entering, occupying, using or being upon wildlife area
26.4	Unlawfully permitting domestic animals to enter upon or roam at large in wildlife areas 25.00
26.5	Hunting, killing, or taking, or attempting to hunt, kill,
26.6	or take any animal in wildlife refuge area200.00 Fishing, taking, seining, or attempting to fish, take, or seine any fish or aquatic animal in wildlife refuge area
	382

Section		
Number	Offense Collateral	
26.7	Trapping of, or attempting to trap, animals on wildlife	
20.1	refuge area\$ 200.00	
26.8	refuge area\$ 200.00 Molesting, disturbing, damaging, or destroying plant	
WEIGHT Sharms	or animal life on wildlife refuge area (minor	
	violations)	
26.11	Spotlighting in wildlife refuge area 25.00	
26.12	Unauthorized carrying of, possessing, or discharging	
To usua sunt	firearms or explosives	
26.13	Use or possession of crossbows, bow and arrow, air	
0014	guns, or other weapons on wildlife refuge area 25.00	
26.14	Travel in or use of motorized land, air, or water	
	vehicle on specific routes in designated areas	
26.15	posted for public use	
26.16	Unauthorized use of boats in wildlife area 15.00 Unauthorized conducting of field trials on wildlife	
20.10	refuge area	
26.17(b-f)	Building campfires; leaving fires unattended;	
20.11(01)	discarding burning cigarettes; other similar acts 25.00	
26.19	Littering and disposing of wastes 25.00	
26.22	Abandonment of personal property 25.00	
26.23	Distributing advertising material	
26.24	Soliciting business or conducting other commer-	
	cial enterprises	
26.26	Begging	
26.27	Unauthorized making of motion or sound pictures 100.00	
26.30	Operation of electrical sound equipment in a dis-	
00 91	turbing manner	
26.31	machinery	
27.1	machinery	
21.1	thorized officer	
28.1	thorized officer	
-0.2	notices	
28.6	Entrance, travel, or exit from wildlife area via routes	
	not designated for public use 25.00	
28.7(a) (b) (d-j)	Violations of motor vehicle regulations	
28.8	Possession, transportation, or use of firearms 100.00	
28.21(a-g) (i)	Operation of boat in wildlife refuge area without	
	permit when required or in violation of permit	
00.00	regulations	
28.22	Water skiing violations	
28.25 32.2(a-d)	Violation of general hunting regulations applicable to	
32.2(e)	lawful hunting on wildlife refuge area 25.00	
33.2(a-c)	Turney or manage areas and a second	
53.E(W 0)	Failure to comply with terms or conditions of access	
	or use of wildlife refuge area	
33.2(d)		
32.2(f)	Violation of special terms and conditions and special	
33.2(e)	regulations governing hunting on wildlife refuge	
	area 50.00	

Management of Fisheries Conservation Areas — National Fish HATCHERIES:

16 U.S.C. 742a et seg.

70.4(b)	Unlawful taking of fish or other aquatic animals	100.00
70.4(c)	Hunting, taking, or attempting to take or hunt any animal	100.00
70.4(d)	Disturbing spawning fish	100.00
71.2(d)	Violation of applicable State laws governing area of	230.10
an words	National Fish Hatchery	25.00
71.2(e)	Failure to comply with terms and conditions of access	
71.12(d)	to National Fish Hatchery	25.00
71.2(f) 71.12(d)	Failure to comply with special notices governing hunting and fishing on National Fish Hatchery	
95,00	areas	25.00
71.12(c)	Failure to comply with applicable provisions of Federal law and other regulations on National	
	Fish Hatchery areas	25.00

MANDATORY APPEARANCE VIOLATIONS

Note: Whoever, in violation of the Migratory Bird Treaty Act, shall:

"(1) Take by any manner whatsoever any migratory bird with intent to

sell, offer for sale, barter or offer to barter such bird, or
(2) Sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both." (16 U.S.C. 707(b)) Since this violation is a felony, forfeiture of collateral is not permissible.

S	e	C	ti	0	n	
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Offense

MIGRATORY GAME BIRDS:

10.4(a)	Possess freshly killed birds, closed season
10.41-53	Take more than one hour before or after hours
	Take during closed season
16.2	Take, sell, import, export, transport, possess or dispose of
	without permit

BLACK BASS ACT:

16 U.S.C. 851 Unlawful interstate transportation of fish

LACEY ACT:

16 U.S.C. 667(e) Unlawful interstate transportation of game Unlawful importation of prohibited species of fish, 13

game, or birds

Unlawful possession or transportation of prohibited species of fish, game, or birds

BALD EAGLE ACT:

16 U.S.C. 668

Unlawfully sell or take

Unlawful possession or transportation

MIGRATORY BIRD CONSERVATION ACT — NATIONAL WILDLIFE REFUGES:

28.8

Unlawful trespassing with firearms

V. CORPS OF ENGINEERS VIOLATIONS

Title 36, Chapter III, Code of Federal Regulations

Section		
Number	Offense	Collateral
327.1(c)	Discrimination by lessee, licensee, or concessionare.	\$ 25.00
327.2(a)	Operation or parking of vehicles on roadways	and the same of the same of
	designated by signs	25.00
327.2(b)	Operation of off-road vehicle except in area and	
007.0()	at time designated by sign	
327.3(a)	Operation of vessel for fee	25.00
327.3(b)	Operation of vessel in prohibited area	15.00
327.3(c)	Operation of vessel in careless or reckless manner	25.00
327.3(d)	Unauthorized construction or habitation of mooring facilities	25.00
327.3(e)	Failure to remove or securely moor vessel not in	
021.0(C)	use	
327.5	Swimming violation	
327.6	Picnicking violation	15.00
327.7(a)	Camping in area not designated for camping	25.00
327.7(b)	Camping at fee site without paying designated	
'00= =/ \	fee	
327.7(c)	Exceeding 14-day campgrounds limit	25.00
327.7(d)	Leaving camping equipment unattended at camp-	97.00
327.7(e)	site to hold for future use	25.00
321.1(e)	of facilities — damage not exceeding \$25.00	25.00
327.7(f)	Failure to remove camping equipment or to clear	25.00
02111(1)	campsites	25.00
327.8	Hunting, fishing, or trapping in restricted areas	25.00
327.9(a)	Dumping or disposing of refuse, garbage,	
007.0(1)	litter, etc., except in designated places	25.00
327.9(b)	Bringing refuse, garbage, etc., onto developed	111
207 10(0)	area for purpose of dumping	
327.10(a) 327.10(b)	Storage of gasoline and other fuels	00
021.10(b)	facilities	25.00
327.10(c)	Gathering of wood for use as fuel	
327.11(a)	Bringing or having horses in prohibited areas	15.00
327.11(b)	Bringing uncontrolled dogs, cats, or pets into	
TOTAL TOTAL	recreational areas	15.00

Rule 19	GENERAL STATUTES OF NORTH CAROLINA	Rule 19
Section Number	Offense	Collateral
327.12(a) 327.12(b)	Failure to observe posted visiting hours Making excessive or disturbing noise during quiet hours	07.00
327.12(c) 327.13(b) 327.14	Operation of disturbing audio devices Possession or use of fireworks Destruction of public property—damage not exceeding \$25.00	25.00
327.15(a) 327.17 327.18 327.19(a)	Abandonment of personal property Unauthorized advertising Unauthorized business or commercial activities Refusing to comply with terms or conditions of permit	25.00 25.00
327.20	Unauthorized placing of structures within project area	50.00
327.21	Unauthorized conducting of special events or as-	25.00
327.22(b)	Unauthorized ranging, grazing, or watering live- stock	25.00
327.22(c)	Unauthorized use of land or water for agricultural purposes	50.00
327.23	Violation of State or local law applicable to outgranted lands	
	MANDATORY APPEARANCE VIOLATIONS	
327.2(c) 327.4(a)	Careless or reckless operation of vehicles Operation of aircraft on land or water at other than at landing areas	
327.4(b)	Unauthorized delivery by air of any person or thing	
327.7(e)	Unauthorized digging of ground or construction of facilities—damage \$25.00 or more	
327.13(a)	Possession of loaded firearms, explosives, and other certain weapons	
327.14	Destruction of public property — damage \$25.00 or more	
327.22(a)	Unauthorized occupation of land or facilities as residence	
327.26	Interference with government employee in conduct of official duties	
VI.	GENERAL SERVICES ADMINISTRATION VIOLATION	NS
	Title 41, Chapter 101, Code of Federal Regulations	
Section Number	Offense	Collateral
20.301	Recording presence on Federal property outside normal working hours and/or displaying identification upon request	. \$ 25.00

Rule 19	APPENDIX II—EASTERN DISTRICT COURT RULES Rule	e 19
Section		
Number	Offense Collate	eral
20.302 20.302	Littering or disposing of rubbish	5.00
20.304	Disorderly conduct; obstructing use of facilities or	5.00
20.305		5.00
20.307	Gambling; conducting lottery pool	00.0
20.308	Soliciting; commercial advertising and vending 25	00.0
20.309	Distribution of handbills, pamphlets, etc 15	
20.310	Bringing animals (except seeing-eye dogs) on prem-	5.00
20.311	ises	.00
		5.00
	MANDATORY APPEARANCE VIOLATIONS	
20.302	Willful destruction, damage, or removal of Federal property or creating hazard to persons thereon	
20.306	Operating a motor vehicle while under the influence of alcohol or drugs; entering upon Federal prop-	
	erty under the influence of alcohol or drugs; use of drugs or alcoholic beverage	
20.312	Carrying firearms, dangerous or deadly weapons or explosives, openly or concealed	
20.313	Discrimination by segregation or otherwise on the basis of race, creed, color, sex, or national origin in furnishing or refusing facilities of a public nature	
	Any violation charged in the same warrant or summons with a mandatory appearance violation All pleas of not guilty All felonies	
	TERANS ADMINISTRATION FACILITIES VIOLATIONS	
Title 38, 1	Part I, Sections 1.218 and 1.219, Code of Federal Regulations	
Section Number	Offense Collate	eral
1.218(b)	Entry upon or failure to leave closed premises \$ 5	.00
1.218(c)	Littering, willful damage or destruction of	
Berline land	Government property from VA premises or national cemeteries causing loss to Government not exceed-	
1.218(d)	Refusal to comply with signs or directions of officials	0.00
1.218(e)		5.00
1.218(e)	Failure to leave premises when so ordered as a result of creating disturbances	
1.218(f)	Gambling, selling lottery tickets, conducting lot-	
1.218(h) 1.218(i)	tery	.00

Section Number	Offense Colla	teral
1.218(j)	Photography; photography for commercial purposes	5.00
1.218(k)	Bringing animals (except seeing-eye dogs) onto	5.00
1.218(1)	Parking in or blocking emergency vehicle spaces;	0.00
	blocking access to fire hydrant or spaces reserved	
1 010(1)		5.00
1.218(l)	Parking in reserved locations, parking time limit vio- lations.	5.00
1.218(1)	Failure to comply with traffic signs or directions;	0.00
18040371	blocking drives, entrances, loading zones, etc 1	0.00
1.218(n)	Conducting services, ceremonies, or demonstra-	- 00
	tions	5.00
	MANDATORY APPEARANCE VIOLATIONS	
1.218(c)	Willful destruction of Government property on VA	
	premises or national cemetery causing damage	
1 919(~) (1)	of more than \$50.00	
1.218(g) (l)	Careless or reckless driving; driving under the influence of alcohol or drugs; possession of alcohol	
	or drugs	
1.218(m)	Possession of firearms, deadly or dangerous weapons	
1 010()	or explosives	
1.218(o)	Unauthorized opening of or attempting to open locks or card-operated barrier systems, or possession	
	of such keys or cards without authorization	
1.218(p)	Prostitution, solicitation, and sexual misconduct	
The state of	All felonies	
	All pleas of not guilty	
	Any violation charged in the same warrant or summons with a mandatory appearance violation	
10 Add	itional Duties Assigned to the Full-Time Magistrate(s)	
	ninal Procedure.	
1. Ger	neral supervision of the criminal calendar, including calendar calls	and
motions to	expedite or postpone the trial of cases.	+
proceeding	nduct pre-trial conferences, omnibus hearings, and rela	itea
	ar procedural and discovery motions, including motions for	the
suppressio	on of evidence, and the conduct of necessary hearings thereon.	
4. Cor	nduct post-indictment arraignments, acceptance of not guilty pl	eas,
and may o plead guilt	order a presentence report on a defendant who signifies the desir	e to
5. Cor	nduct preliminary hearings leading to the revocation of probatio	n.

GENERAL STATUTES OF NORTH CAROLINA

Rule 19

6. Submit written reports with recommendations to the court on all actions taken pursuant to this subsection (a) of paragraph 10. Prisoner Petitions

Rule 19

7. Review habeas corpus petitions filed by state prisoners under 28 U.S.C. § 2254, issue orders to show cause and other necessary orders to obtain a complete record, and prepare a report and recommendation as to (1) the need for an evidentiary hearing and (2) the disposition of the petition.

8. Review habeas corpus petitions filed by federal prisoners for the correction or reduction of sentences under 28 U.S.C. § 2255 and prepare a report and recommendation to the district judge as to the disposition of the case. A petition of a federal prisoner shall not be referred to a magistrate if resolution

of the issues requires a knowledge of the original trial proceedings or might

result in overruling a prior determination of a district judge.

9. Review civil suits for the deprivation of rights under 42 U.S.C. § 1983 and prepare a report and recommendation to a district judge as to the defendant's eligibility to proceed *in forma pauperis* and the need for evidentiary proceedings; and submit a report recommending a disposition of the case.

10. Take on-site depositions, gather evidence, and serve as a mediator at the holding facility in connection with civil rights suits filed by prisoners

contesting conditions of confinement under 42 U.S.C. § 1983.

11. Review prisoner correspondence.

(b) Civil Proceedings.

1. General supervision of the civil calendar, including the handling of

calendar calls and motions to expedite or postpone the trial of cases.

2. Conduct preliminary and final pre-trial conferences, status calls and settlement conferences, and prepare a pre-trial order following the conclusion of the final pre-trial conference.

3. Hear and determine procedural and discovery motions, and conduct

necessary hearings thereon.

- 4. Consider and make recommendations to the district court concerning motions for summary judgment and dismissal.
 - 5. Accept jury returns in the absence or disability of the trial judge.6. Conduct trials in civil cases by consent of all the parties. The stipulation
- of the parties in such cases should provide for the entry of judgment.

 7. Enter default judgments in appropriate cases and the review of motions to set aside default judgments. Rule 55, F.R.Civ.P.

(c) Special Master References.

1. Hear testimony and submit a report and findings on complicated issues in jury cases or in matters of account difficult computations of damages and

exceptional conditions in nonjury cases.

2. Supervise discovery in connection with special aspects of patent antitrust cases, especially where there are a great many issues, claims and documents, or in multiple disaster and class action cases where there are numerous claimants and diverse claims.

3. Serve as a commissioner to determine compensation and assess damages

in land condemnation cases under Rule 71A(h), F.R.Civ.P.

4. Serve as a master for the assessment of damages in admiralty cases.
5. Conduct evidentiary hearings and prepare findings in employment discrimination cases under Title VII of the Civil Rights Act of 1964.

(d) Judicial Review of Administrative Proceedings.

1. In suits for judicial review of final decisions of administrative agencies,

reviewing the record of administrative proceedings.

A magistrate is authorized to submit a report to the district judge summarizing the administrative record and concluding (1) whether there are defects in the agency proceedings which rise to the level of a deprivation of due process; (2) whether there should be a remand to the agency for additional factual determinations to complete the record; and (3) whether there is substantial evidence in the record to support the ultimate decision of the agency.

(e) Miscellaneous Duties.

- 1. Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act and submit recommendations to the court.
- Narcotic Addict Rehabilitation Act and submit recommendations to the court.

 2. Prepare subpoenas and writs of habeas corpus ad testificandum and habeas corpus ad prosequendum for issuance by the court.

3. Examine judgment debtors.

4. Coordinate the court's efforts in such fields as the promulgation of local

rules and procedures and the administration of the forfeiture of collateral system.

5. Impose civil fines and penalties under the Federal Boat Safety Act.

6. Issue orders prior to ratification of sale in mortgage foreclosure proceedings on properties financed through government loans (Veterans Administration and Federal Housing Administration).

7. Supervise proceedings on requests for letters rogatory in civil and

criminal cases, upon special designation by the district court.

8. Conduct inquests on damages in cases involving default judgments. 9. Process complaints and issue appropriate summonses or arrest warrants for the named defendants. Rule 4, F.R.Crim.P.

10. Issue search warrants upon a determination that probable cause for the

warrant exists. Rule 41, F.R.Crim.P.

11. Conduct initial appearance proceedings for defendants, informing them of their rights, admitting them to bail and imposing conditions of release. Rule 5, F.R.Crim.P., and 18 U.S.C. § 3146.

12. Appoint attorneys for indigent defendants, together with the administration of the court's Criminal Justice Act plan, the maintenance of a register of eligible attorneys, and the approval of attorneys' expense vouchers. 18 U.S.C. § 3006A.

13. Conduct full preliminary examinations. Rule 5.1, F.R.Crim.P., and 18

U.S.C. § 3060.

14. Conduct removal hearings for defendants charged in other districts; and are specially designated and authorized to issue a warrant of removal under Rule

15. Administer oaths and take bail, acknowledgments, affidavits and

depositions. 28 U.S.C. § 636(a)(2).

16. Set bail for material witnesses. 18 U.S.C. § 3149.

- 17. Upon special designation by the district court, conduct extradition proceedings. 18 U.S.C. § 3184.
- 18. Hold to security of the peace and for good behavior. 18 U.S.C. § 3043. 19. Discharge indigent prisoners or persons imprisoned for debt under process or execution issued by a federal court. 18 U.S.C. § 3569 and 28 U.S.C.
- 20. Issue an attachment or order to enforce obedience to an Internal Revenue Service summons to produce records or give testimony. 26 U.S.C. § 7604(b).
 - 21. Institute proceedings against persons violating certain civil rights

statutes. 42 U.S.C. § 1987.

22. Settle or certify the nonpayment of seamen's wages. 46 U.S.C. § 603. 23. Enforce awards of foreign consuls in differences between captains and crews of vessels of the consul's nation. 22 U.S.C. § 258(a).

24. Try and sentence defendants in minor offense cases by consent of the

defendants. 18 U.S.C. § 3401.

Any party aggrieved by a magistrate's ruling or determination made pursuant to these amendments to Rule 19 shall be entitled to a hearing before a district judge to the same extent as if the district judge were hearing the matter initially.

Editor's Note. -

The amendment effective Feb. 16, 1976, added subsection (d) to subdivision 4.

The amendment effective Aug. 1, 1976, adopted July 20, 1976, rewrote the schedule in subdivision 6.

The amendment adopted March 18, 1976,

inserted "and make recommendations to the district court concerning" in subsection (b)4 of subdivision 10.

As only subdivisions 4, 6 and 10 were changed by the amendments, the rest of this rule is not set out.

Appendix V-A. Rules for Supreme Court Review of Recommendations of the **Judicial Standards Commission**

Editor's Note. — These rules were adopted Sept. 25, 1975.

Rule

1. Definitions

2. Petition for Hearing

(d) Briefs
(e) Oral Argument

2. Petition for Hearing

(a) Notice to Judge

(b) Petition for Hearing

(c) Failure to File Petition

(e) Oral Argument

3. Decision by the Court

4. Reproduction of Record and Briefs

5. Costs

Rule 1

In these rules, unless the context or subject matter otherwise requires:

(a) Commission means the Judicial Standards Commission.

(b) Judge or respondent means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).

(c) Court means the Supreme Court of North Carolina. Clerk means the Clerk

of the Supreme Court.

(d) Commission's attorney means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.

(e) The masculine gender includes the feminine gender.

(f) Service of a document required to be served means either mailing the document by U.S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N.C. Rules of Civil Procedure.

Rule 2

Petition for Hearing

(a) Notice to Judge. When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U.S. certified mail, return receipt requested, to the respondent named therein.

(b) Petition for Hearing. The respondent may petition the Court for a hearing

upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return

receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate showing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and, upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) Failure to File Petition. If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the recommendation on the record filed by the Commission. Failure to file a petition

waives the right to file a brief and to be heard on oral argument.

(d) Briefs. Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) Oral Argument. After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has

not filed a brief will not be heard upon oral argument.

Rule 3

Decision by the Court

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk and published in the Advance Sheets and bound volumes of the Supreme Court Reports.

Editor's Note. — The amendment adopted Supreme Court Reports" for "as a part of the April 14, 1976, substituted "and published in the record of the proceeding" in the last sentence. Advance Sheets and bound volumes of the

Rule 4

Reproduction of Record and Briefs

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

Rule 5

Costs

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

Appendix VII. Code of Professional Responsibility of the North Carolina State Bar

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

DISCIPLINARY RULES

DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

Testifying on Behalf of Clients. — The Supreme Court of North Carolina has historically discouraged the practice of attorneys' testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered his right to participate in the litigation. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

If it becomes obvious that an attorney ought to testify on behalf of his client it is clear that he may do so, but he or any member of his firm shall not continue representation in the trial unless he can come under the exceptions listed in paragraphs (B)(1) through (B)(4). Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

The weight of authority in this country is that while it is a breach of professional ethics for an attorney for a party to testify as to matters other than formal matters without withdrawing from the litigation, he is not incompetent so testify. The testimony is admissible if otherwise competent. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

While the Disciplinary Rules set forth in the Code of Professional Conduct do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State, and it should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

There is no inconsistency in the Code of Professional Conduct and the uniform practice that has existed in North Carolina with respect to attorneys testifying on behalf of clients. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions whereby attorneys may testify on behalf of clients. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

DR5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

Testifying on Behalf of Clients. — The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered his right to participate in the litigation. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

The weight of authority in this country is that while it is a breach of professional ethics for an attorney for a party to testify as to matters other than formal matters without withdrawing from the litigation, he is not incompetent so to

testify. The testimony is admissible if otherwise competent. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

While the Disciplinary Rules set forth in the Code of Professional Conduct do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State, and it should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions whereby attorneys may testify on behalf of clients. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Appendix VII-A. Code of Judicial Conduct

Canon

Canon

 A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities. 7. A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The failure of a judge to make due inquiry into the facts and law upon which his judgments were based and his execution of them upon a

mere ex parte application of counsel for defendants violates this Canon. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the

following restrictions:

C. Public Reports. A judge shall report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. No report is required if no such compensation or reimbursement of expenses is received. The word "activity" as used in Canon 6 does not include the receipt of rents, dividends or interest or profits realized from capital gains. Any required report should be made annually and filed as a public document as follows: The members of the Supreme Court should file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals should file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, should file such report with the Clerk of the Superior Court of the county in which he resides. For each calendar year, such report should be filed during the month of January of the following year.

Editor's Note. — The amendment adopted Dec. 30, 1974, substituted "shall" for "should" in the first sentence of subdivision C and rewrote

all of subdivision C following the first sentence.
As subdivisions A and B were not changed by the amendment, they are not set out.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or candidate for election to judicial office should not:

(a) Act as a leader or hold any office in a political organization. For example, he may not attend a political convention on any level as a delegate; nor may he preside or serve as an officer at any precinct meeting,

convention, or other political convocation. He may attend a precinct meeting, convention or other political convocation provided he does not

violate any other Canon, particularly 7A(1)(b) or (c).

(b) Make speeches for a political organization or candidate or publicly endorse a candidate for public office; provided, a judge or candidate for judicial office may endorse, as between contestants for a judicial office, the candidate he considers best qualified and may contribute to a campaign fund in behalf of such candidate, but may not solicit funds in behalf of such candidate.

(c) Solicit funds for a political organization or candidate.

(d) Make financial contributions to any candidate for political office, except as expressly provided in subsection (b) hereinabove, unless the candidate is a member of the judge's or judicial candidate's family.

(2) A judge holding an office filled by public election between competing

candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) The foregoing provisions of Canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge himself.

Editor's Note. - The amendment adopted Dec. 30, 1974, added the proviso to subdivision (1)(b) of subsection A.

The amendment adopted March 16, 1976, added the last two sentences in subdivision (1)(a) of subsection A, substituted "or candidate for judicial office" for "who is not at that time a candidate for election to judicial office" in the proviso to subdivision (1)(b) of subsection A, added subdivisions (1)(d) and (4) to subsection A and deleted "only insofar as permitted by law" in subdivision (2) of subsection A.

As subsection B was not changed by the amendment, it is not set out.

Appendix IX. Rules Governing Admission to Practice of Law

(Effective February 1, 1976.)

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 21

OCCUPATIONAL LICENSING BOARDS

	CHAP'	TER 3			
	BOARD OF LA	W EX	AMINERS		
Section .0100. Organization			Section .0700. Educational Requirements		
.0101 .0102 .0103	ADDRESS PURPOSE MEMBERSHIP	.0701 .0702	GENERAL EDUCATION LEGAL EDUCATION		
98192	sentiment to note remainded and this		Section .0800. Protest		
	Section .0200. General Provisions	.0801	NATURE OF PROTEST		
.0201 .0202 .0203	COMPLIANCE NECESSARY DEFINITIONS APPLICANTS	.0802	FORMAT NOTIFICATION; RIGHT TO WITH- DRAW		
.0204	LIST	.0804	HEARING		
.0205	HEARINGS	.0805	WITHHOLDING LICENSE		
	Section .0300. Registration		Section .0900. Examinations		
.0301 .0302 .0303	WHO MUST REGISTER REGISTRATION FORMS FILING DATE	.0901 .0902 .0903	WRITTEN EXAMINATION DATES SUBJECT MATTER		
.0304	FEES; LATE REGISTRATION	.0904	PASSING SCORE		
Se	ection .0400. Applications of General Applicants	S	ection .1000. Review of Written Bar Examination		
.0401	HOW TO APPLY	.1001	REVIEW		
.0402	APPLICATION FORM		FEES		
.0403	FILING DEADLINE	.1003	MULTISTATE BAR EXAMINATION		
.0404	FEES REFUND OF FEES	.1004	SCORES BOARD REPRESENTATIVE		
.0406	BAD CHECK POLICY				
	Carlo Street Control of Carlo service to		Section .1100. Rulemaking Procedures		
	Section .0500. Requirements for Applicants	.1101	PETITIONS NOTICE		
.0501	REQUIREMENTS FOR GENERAL	.1102	HEARINGS		
.0001	APPLICANTS	.1104	DECLARATORY RULINGS		
.0502	REQUIREMENTS FOR COMITY APPLICANTS		Section .1200. Contested Cases		
	Section .0600. Moral Character	.1201	REQUEST FOR HEARING		
.0601		.1202	NOTICE OF HEARING EXAMINATION REVIEW HEARING		
.0602	BURDEN OF PROOF INFORMATION	.1203	WHO SHALL HEAR CONTESTED		
.0602	FAILURE TO DISCLOSE	.1204	CASES CASES		
.0604	BAR CANDIDATE COMMITTEE		and the case meeting		

.0605 DENIAL; RE-APPLICATION

.1205	INTERVENTION CONTINUANCES; MOTIONS FOR	.1302	LICENSES FOR GENERAL APPLICANTS
.1207	SUCH SUBPOENAS		Section .1400. Judicial Review
.1208	DEPOSITIONS AND DISCOVERY	.1401	APPEALS
.1209	REOPENING OF A CASE	.1402	NOTICE
Section .1300. Licenses			RECORD TO BE FILED WAKE COUNTY SUPERIOR COURT
.1301	INTERIM PERMIT FOR COMITY APPLICANTS		NORTH CAROLINA SUPREME COURT

SECTION .0100. ORGANIZATION

.0101 Address

The offices of the Board of Law Examiners of the State of North Carolina are located in the Law Building at 107 Fayetteville Street, Raleigh, N. C. The mailing address is P. O. Box 25427, Raleigh, N. C. 27611. The offices are open from 9:00 a.m. to 5:00 p.m., Monday through Friday.

History Note: Statutory Authority G.S. 84-24; 150A-60; Eff. February 1, 1976.

.0102 Purpose

The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0103 Membership

The Board of Law Examiners of the State of North Carolina consists of nine members of the N. C. Bar elected by the Council of the North Carolina State Bar. One member of said board is elected by the board to serve as chairman for such period as the board may determine. The board also employs an executive secretary to enable the board to perform its duties promptly and properly. The executive secretary, in addition to performing the administrative functions of the position, may act as attorney for the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0200. GENERAL PROVISIONS

.0201 Compliance Necessary

No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the state.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0202 Definitions

(a) The term "Board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina."

(b) The term "Secretary" as used in this chapter refers to the "Executive Secretary of the Board of Law Examiners of the State of North Carolina."

(c) Every word importing the masculine gender only shall extend and be applied to females as well as to males.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0203 Applicants

For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0204 List

As soon as possible after the filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0205 Hearings

Every applicant may be required to appear before the board to be examined about any matters pertaining to his or her moral character, educational background or any other matters set out in Section .0500 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0300. REGISTRATION

.0301 Who Must Register

Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the secretary at the offices of the board a properly completed registration form prescribed and supplied by the board. The registration form may be obtained by writing or calling the offices of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0302 Registration Forms

Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the board. The registration form requires a person to supply information relating to his background, including family, education, employment, whether he has been a party to any disciplinary or legal proceedings, character references and a certification to be completed by the applicant's dean.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0303 Filing Date

Registrations shall be filed with the secretary at the offices of the board at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0304 Fees; Late Registration

Each registration by a resident of the State of North Carolina must be accompanied by a fee of \$25.00 and each registration by a non-resident shall be accompanied by a fee of \$40.00. An additional fee of \$50.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the board. No part of a registration fee shall be refunded for any reason whatsoever.

History Note: Statutory Authority G.S. 84-24, 25; Eff. February 1, 1976.

SECTION .0400. APPLICATIONS OF GENERAL APPLICANTS

.0401 How to Apply

After complying with the registration provisions of Section .0300 of this Chapter, applications for admission to an examination must be made upon forms supplied by the board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or calling the board's offices.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0402 Application Form

The application form requires an applicant to supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar. In addition, all applicants must submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a birth certificate. The application must be filed in duplicate. The duplicate may be a photocopy of the original.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0403 Filing Deadline

Applications must be filed with and received by the secretary at the offices of the board not later than 12:00 noon, Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0404 Fees

Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of \$130.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of \$130.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident. All said fees shall be payable to the board.

History Note: Statutory Authority G.S. 84-24; 25; Eff. February 1, 1976.

.0405 Refund of Fees

No part of the fee required by Rule .0404 of this chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half (½) of the fee may be refunded to the applicant in the discretion of the board; provided, however, no part of any fee paid to the National Conference of Bar Examiners or its successor shall be refunded.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0406 Bad Check Policy

All checks payable to the board for any fees which are not honored upon presentment shall be returned to the applicant who shall, within 10 days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order any fees payable to the board. Failure of the applicant to pay the fees as required by this section shall result in a denial of his application to take the North Carolina Bar Examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0500. REQUIREMENTS FOR APPLICANTS

.0501 Requirements for General Applicants

Before being licensed by the board to practice law in the state of North Carolina, a general applicant shall:

(1) be of good moral character and have satisfied the requirements of

Section .0600 of this Chapter;

(2) have registered as a general applicant in accordance with the provisions of Section .0300 of this Chapter;

(3) possess the legal educational qualifications as prescribed in Section

.0700 of this Chapter;

(4) be a citizen of the United States;

(5) be of the age of at least eighteen (18) years;(6) be and continuously have been a bona fide citizen and resident of the state of North Carolina on and from the 15th day of June of the year in which the applicant applies to take the written bar examination;

(7) have filed formal application as a general applicant in accordance with

Section .0400 of this Chapter;

(8) stand and pass a written bar examination as prescribed in Section .0900 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0502 Requirements for Comity Applicants

Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application may be licensed by the board to

practice law in the state of North Carolina, without written examination, in the discretion of the board, provided each such applicant shall:

(1) be a citizen of the United States;

(2) file written application with the secretary, upon such form supplied by the board, not less than six (6) months before the application shall be

considered by the board; the application requires:

(a) that an applicant supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, a statement of the applicant's practice of law, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar;

(b) that all applicants submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a certification of the court of last resort from

the jurisdiction the applicant is applying;

(c) that it must be filed in duplicate and the duplicate may be a photocopy

of the original.

(3) pay to the board with each written application a fee of \$400.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident, no part of which may be refunded to the applicant whose application is denied;

(4) be and continuously have been a bona fide citizen and resident of the state of North Carolina for a period of at least sixty (60) days immediately prior to the consideration of his application to practice law

in the state of North Carolina;

(5) prove to the satisfaction of the board:

(a) that the applicant is licensed to practice law in a state having comity

with North Carolina;

(b) that the applicant has been actively and substantially engaged for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary in:

(i) the practice of law as defined by G.S. 84-2.1, or

(ii) activities which would constitute the practice of law if done for the general public, or

(iii) serving as a judge of a court of record, or

(iv) serving as a full-time teacher in a law school approved by the Council of the North Carolina State Bar, or as full-time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to in subsection (b) above;

(6) satisfy the board that the state in which the applicant is licensed and from which he seeks comity will admit attorneys licensed to practice in the state of North Carolina to the practice of law in such state without written examination;

(7) be in good professional standing in the state from which he seeks comity;

(8) furnish to the board such evidence as may be required to satisfy the

board of his good moral character;

(9) applicants must meet the educational requirements of section .0900 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0600, MORAL CHARACTER

.0601 Burden of Proof

Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0602 Information

All information furnished to the board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the board.

History Note: Statutory Authority G.S. 84-24: Eff. February 1, 1976.

.0603 Failure to Disclose

No one shall be licensed to practice law in this state by examination or comity:

(1) who fails to disclose fully to the board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or (2) who fails to disclose fully to the board, whether requested to do so or

not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

History Note: Statutory Authority G.S. 84-24; ff. February 1, 1976. Eff. February 1, 1976.

.0604 Bar Candidate Committee

Every applicant shall appear before a bar candidate committee, appointed by the chairman of the board, in the judicial district in which he resides, or in such

other judicial district as the board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the committee as may be required on such forms as may be provided by the board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised of the time and place of his appearance before the bar candidate committee.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0605 Denial; Re-application

No new application or petition for reconsideration of a previous application from an applicant who has been denied permission to take the bar examination by the board on the grounds of failure to prove good moral character shall be considered by the board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0700. EDUCATIONAL REQUIREMENTS

.0701 General Education

Each applicant to take the examination, prior to beginning the study of law, must have completed, at an accredited college or university an amount of academic work equal to ¾ of the work required for a bachelor's degree at the university of the state in which the college or university is located. With his application he shall file an affidavit from such college or university furnishing all information that the board shall require.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0702 Legal Education

Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law shall file with the secretary a certificate from the president, dean or other proper official of the law school approved by the Council of the North Carolina State Bar, a list of which is available in the office of the secretary, or shall otherwise show to the satisfaction of the board that the applicant has or will receive a law degree within sixty (60) days after the date of the written examination or for all general applicants who apply for admission to practice law in the State of North Carolina in or before the month of January, 1978, but not thereafter, that the applicant has successfully completed the courses required by the Council of the North

Carolina State Bar, or will complete such courses within sixty (60) days after the date of the written examination provided in Section .0900 of this chapter being the same courses as those set out in Rule .0903 of this chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0800. PROTEST

.0801 Nature of Protest

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0802 Format

A protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0803 Notification; Right to Withdraw

The secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0804 Hearing

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the board at a time and place to be designated by the board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no license to practice law shall be issued to him as provided by Rule .1302 of this chapter until final disposition of the protest in favor of the applicant.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0805 Withholding License

Nothing herein contained shall prevent the board on its own motion from withholding its license to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Section .0600 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0900. EXAMINATIONS

.0901 Written Examination

One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0902 Dates

The examination shall be held in the City of Raleigh between July 1 and August 31 on such dates as the board may set from year to year.

History Note: Statutory Authority G.S. 84-24; February 1, 1976.

.0903 Subject Matter

The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0904 Passing Score

The board shall determine what shall constitute the passing of an examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1000. REVIEW OF WRITTEN BAR EXAMINATION

.1001 Review

An unsuccessful applicant to the bar examination may examine the test booklets containing his essay examination along with the model answers and the essay examination in the board's offices.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

.1002 Fees

The board will furnish an unsuccessful applicant a copy of his essay examination at a cost to be determined by the secretary not to exceed \$20.00. No copies of the board's model answers will be made or furnished to any applicant.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1003 Multistate Bar Examination

There is no provision for review of the Multistate Bar Examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

.1004 Scores

The Board will not release to applicants the scores on bar examinations. Only upon written request of an applicant will the board furnish the Multistate Bar Examination score of said applicant to another board of bar examiners or like organization that administers the admission of attorneys into that jurisdiction.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1005 Board Representative

The secretary of the board serves as the representative of the board during this review of the written bar examination by an unsuccessful applicant. The secretary is not authorized to discuss any specific questions and answers on the bar examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

July 3

SECTION .1100. RULEMAKING PROCEDURES

.1101 Petitions

(a) Any person wishing to submit a petition requesting the adoption, amendment or repeal of a rule by the Board of Law Examiners shall address a petition to:

Executive Secretary

Board of Law Examiners

P. O. Box 25427

107 Fayetteville Street

Raleigh, North Carolina 27611

(b) Ten (10) copies of the petition must be filed and include the following information:

(1) name(s) and address(es) of petitioner(s);

(2) a draft of the proposed rule; (3) reason for proposal or change;

(4) effect of existing rule;

(5) any data supporting proposal;

(6) effect of the proposed rule, including cost factors;

(7) names of those most likely to be affected by the proposed rule, with addresses if reasonably known.

(c) Within thirty (30) days of submission of the petition, the board will render a final decision. If the decision is to deny the petition, the secretary will notify the petitioner in writing, stating the reasons therefor. If the decision is to grant the petition, the board, within thirty (30) days of submission, will initiate a rulemaking proceeding by issuing a rulemaking notice, as provided in the rules in this Chapter.

History Note: Statutory Authority G.S. 150A-12; 16; Eff. February 1, 1976.

.1102 Notice

(a) Upon a determination to hold a rulemaking proceeding, either in response to a petition or otherwise, the board will give at least ten (10) days notice of a public hearing on the proposed rule.

(b) Any person or agency desiring to be placed on the mailing list for the Board of Law Examiners' rulemaking notices may file such request in writing,

furnishing their name and mailing address to:

Executive Secretary Board of Law Examiners P. O. Box 25427

107 Favetteville Street

Raleigh, North Carolina 27611

(c) Notice of a public hearing on the rulemaking proceedings will be by written notice to all of the law schools in North Carolina and by publication as a display advertisement in at least three (3) newspapers of general circulation in different parts of the state.

(d) Persons desiring information in addition to that provided in a particular

rulemaking notice may contact by letter:

Executive Secretary
Post Office Box 25427
107 Fayetteville Street Raleigh, North Carolina 27611
Telephone: 919/828-4886

History Note: Statutory Authority G.S. 150A-12; Eff. February 1, 1976.

.1103 Hearings

(a) Unless otherwise stated in a particular rulemaking notice, hearings before the Board of Law Examiners will be held on the 3rd floor of the Law Building located at 107 Fayetteville Street at regular scheduled meetings of the board.

(b) Any person desiring to present oral data, views or arguments on the proposed rule must, at least five (5) days before the hearing, file notice with:

Executive Secretary Post Office Box 25427 107 Favetteville Street

Raleigh, North Carolina 27611 Telephone: 919/828-4886

Notice may be waived or a failure to give notice may be excused, by the chairman, for good cause shown. Any person permitted to make an oral presentation is encouraged to submit a written copy of the presentation to the above-named person prior to or at the hearing.

(c) A request to make an oral presentation should contain a brief summary of the individual's views with respect thereto, and a statement of the length of time the individual desires to speak. Presentations may not exceed ten (10) minutes unless, upon request, either before or at the hearing, the board grants an extension of time, for good cause shown.

(d) Upon receipt of a request to make an oral presentation, the secretary will acknowledge receipt of the request and inform the person requesting the presentation of the imposition of any limitations deemed necessary to the end

of a full and effective public hearing on the proposed rule.

(e) Any person may file a written submission containing data, comments or arguments, after publication of a rulemaking notice up to and including the day of the hearing. Written submissions, except when otherwise stated in the particular rulemaking notice, should be sent to:

Post Office Box 25427
107 Fayetteville Street
Raleigh, North Carolina 27611
h submissions should clearly state the Such submissions should clearly state the rule(s) or proposed rule(s) to which the comments are addressed.

(f) Upon receipt of such written comments, prompt acknowledgment will be made including a statement that the comments therein will be considered fully

(g) The presiding officer at the hearing shall have complete control of the proceedings, including: extensions of any time requirements, recognition of speakers, time allotments for presentations, direction of the flow of the discussion and the management of the hearing. The presiding officer, at all times, shall take care that each person participating in the hearing is given a fair opportunity to present views, data and comments.

(h) Any interested person desiring a concise statement of the principal reasons for and against the adoption of a rule by the board and the factors that led to overruling the considerations urged against its adoption, may submit a written request addressed to: ten request addressed to: Chairman, Board of Law Examiners

Post Office Box 25427

Raleigh, North Carolina 27611

(i) For purposes of subsection (h) of this rule, an "interested person" shall be any person whose rights, duties or privileges might be affected by the adoption

of the rule in question.

(j) A record of all rulemaking proceedings will be maintained for as long as the rule is in effect following filing with the Attorney General. This record will contain: the original petition, the notice, all written memoranda and information submitted, and a record or summary of oral presentations, if any. It will be maintained in a file at the board's offices.

History Note: Statutory Authority G.S.
150A-12; 16; Eff. February 1, 1976.

.1104 Declaratory Rulings

(a) Any person substantially affected by a statute administered or rule promulgated by the Board of Law Examiners may request a declaratory ruling as to either: whether or how the rule applies to a given factual situation or whether a particular board rule is valid.

(b) The board will have the power to make such declaratory rulings. All requests for declaratory rulings shall be written and mailed to:

Executive Secretary
Board of Law Examiners
Post Office Box 25427
Raleigh, North Carolina 27611

- (c) All requests for a declaratory ruling must include the following rmation:
 (1) name and address of petitioner; information:
 - (2) rule to which petition relates;
 - (3) concise statement of the manner in which petitioner is aggrieved by the rule or its potential application to him;

(4) a statement of whether an oral hearing is desired, and if so, the reasons

for such an oral hearing.

(d) The board may refuse to issue a declaratory ruling whenever for good cause it deems issuance of such ruling undesirable. Petitioner will be notified in writing, stating reasons for the denial of a declaratory ruling.

(e) Where a declaratory ruling is deemed appropriate, the board will issue the

ruling within sixty (60) days of receipt of the petition.

(f) A declaratory ruling procedure may consist of written submission, oral hearing, or such other procedure as may be appropriate in a particular case.

(g) A declaratory ruling will not be issued based on a petition as to whether an individual possesses good moral character. Such a decision is made only after a hearing pursuant to Section .1200 of this Chapter. a hearing pursuant to section .1200 of this chapter.

History Note: Statutory Authority G.S. 150A-17; Eff. February 1, 1976.

SECTION .1200. CONTESTED CASES

.1201 Request for Hearing

(a) Any party to a contested case, as defined by G.S. 150A-2(2), who believes his rights, duties or privileges have been adversely affected by rule or action of the board and who has not been notified of the right to a hearing may request a hearing by the board without undue delay.

(b) Before making a request for a hearing, the person aggrieved should first exhaust all efforts to seek a solution to the adverse ruling by informally

contacting the secretary of the board.

History Note: Statutory Authority G.S. 150A-11; 23; Eff. February 1, 1976.

.1202 Notice of Hearing

(a) Upon receipt of request for a hearing by any party to a contested case, the secretary will promptly acknowledge said request and schedule a hearing by the board.

(b) A hearing by the board will be scheduled by the issuance of a notice of

hearing as provided by G.S. 150A-23(b).

History Note: Statutory Authority G.S. 150A-23; Eff. February 1, 1976.

.1203 Examination Review Hearing

(a) Before any person can request a formal hearing in connection with a review of the written portion of his bar examination, he must have reviewed his examination under the procedures set out in Section .1000 of this chapter.

(b) Petitioner must bear the cost of reproducing his written bar examination

for each board member.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976.

.1204 Who Shall Hear Contested Cases

All administrative hearings resulting from actions of the board shall be heard by a majority of the board.

History Note: Statutory Authority G.S. 150A-24; Eff. February 1, 1976.

.1205 Intervention

(a) A petition to intervene of right as provided in the N. C. Rules of Civil Procedure, Rule 24, will be granted, if timely, and the petitioner meets the criteria of that rule. If a grant would cause substantial prejudice to the rights of other parties, substantial added expense or compelling serious inconvenience to the party or to the board, the petition to intervene will be deemed untimely.

(b) A petition to intervene permissively as provided in N. C. Rules of Civil Procedure, Rule 24, will be granted, if timely, under paragraph (a) of this rule, when the petitioner meets the criteria of that rule and the board determines that:

(1) there is sufficient legal or factual similarity between the petitioner's intended rights, privileges or duties and those of the parties to the hearing; and

(2) permitting intervention by the petitioner as a party would aid the

purpose of a hearing.

(c) A person desiring to intervene in a contested case must file a written petition with the secretary of the board at the address stated in Section .0100 of this Chapter.

(d) Ten (10) copies of the petition must be filed and include the following

(1) name and address; (2) business occupation;

(3) either statutory or non-statutory grounds for intervention;
(4) any claim or defense in respect of which intervention is sought;

(5) full identification of the hearing in which petitioner is seeking to intervene:

(6) summary of the arguments or evidence petitioner seeks to present. (e) If the board determines to allow intervention, notification of that decision

will be issued promptly to all parties and to petitioner.

(f) If the board's decision is to deny intervention, the petitioner will be notified promptly. Such notice will be in writing and state all reasons for the decision and will be issued to the petitioner and to all parties.

History Note: Statutory Authority G.S. 150A-23; Eff. February 1, 1976.

.1206 Continuances: Motions For Such

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the board and will be granted or denied by the chairman of the board.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976.

.1207 Subpoenas

(a) The board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of

books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The secretary of the board is delegated the power to issue subpoenas in

the board's name.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1208 Depositions and Discovery

(a) A deposition may be used in lieu of other evidence when taken in compliance with the N. C. Rules of Civil Procedure, G.S. 1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N. C. Rules of Civil Procedure.

(b) A party may submit sworn affidavits as evidence to be considered by the board in a contested case. The board will take under consideration sworn affidavits presented to the board by persons desiring to protest an applicant's

admission to the North Carolina bar.

History Note: Statutory Authority G.S. 150A-28; Eff. February 1, 1976.

.1209 Reopening of a Case

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner and made a part of the record of the contested case.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976.

SECTION .1300. LICENSES

.1301 Interim Permit for Comity Applicants

No license shall be issued to any comity applicant for admission under Rule .0502 of this Chapter except at the time of the annual licensing of the general applicants; provided, the board may at any other time, in its discretion, grant an interim permission to such comity applicants to practice law until license shall be issued.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1302 Licenses for General Applicants

Upon compliance with the rules of the board, and all orders of the board, the secretary, upon order of the board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the board in the form and manner as may be prescribed by the board, and at such times as prescribed by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1400. JUDICIAL REVIEW

.1401 Appeals

Any person may appeal from an adverse ruling by the Board of Law Examiners. A general applicant may appeal from an adverse ruling or determination by the board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Law Examiners denying his application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1402 Notice

Notice of appeal shall be given, in writing, within twenty (20) days after notice of such ruling or determination and written exceptions to the ruling or determination filed with the secretary, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the board becoming final.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1403 Record to Be Filed

Within sixty days after receipt of the notice of appeal, the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County, at the expense of the appellant, the record of the case, comprising:

(1) the application and supporting documents or papers filed by the

applicant with the board;

(2) a complete transcript of the testimony when taken at the hearing; (3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1404 Wake County Superior Court

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1405 North Carolina Supreme Court

Any party to the review proceeding, including the board, may appeal to the Supreme Court from the decision of the superior court. No appeal bond shall be required of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE
Raleigh, North Carolina

August 1, 1976

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1976 Interim Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN

Attorney General of North Carolina

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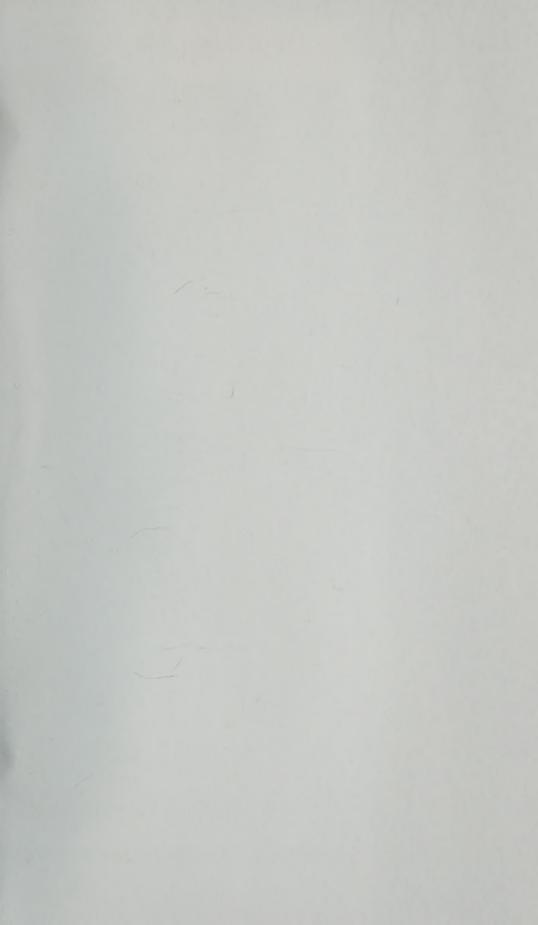
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